



Policy Questions for Development of Matrimonial Real Property Law

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Provided by the Centre of Excellence for Matrimonial Real Property

Answers to these questions by the First Nation/community¹ will assist the lawyer in drafting the MRP Law, before the lawyer begins drafting. The answers to some of these questions will also help the lawyer understand and explain the extent to which MRP Law provisions will not apply to everyone on reserve. The lawyer may of course have additional questions, and communities may have additional information that they deem relevant to the preparation of their Law.

Laws Governing Possession of Reserve (or Community)² Land

- Is possession of land in your community governed by the *Indian Act*, a *Land Code* under the *First Nation's Land Management Act*, or a modern treaty?

Questions about home ownership on Reserve/Community Land

- To what extent is land held by individual First Nation members formally allocated and recognized? For example, if the management of reserve lands is subject to the *Indian Act*, do members hold allotments under s. 20(1) of the *Indian Act*? If the First Nation operates under a *Land Code*, do members hold formal and registered allotments in accordance with the *Land Code*?
 - If some members hold lots by customary ownership rather than pursuant to a formal allotment under the *Indian Act* or *Land Code*, is possession of those lands potentially controversial within the community, or is there a general consensus as to who possesses which lots?
 - Do you want the MRP Law to apply to customary land holdings? (This may or may not be possible depending on the level of certainty surrounding customary ownership).
- Where members are repaying a mortgage/loan on their home, do they hold their allotment during the loan/mortgage term or does the Nation hold the allotment until the loan/mortgage is paid off?

¹ The term "First Nation" is used on its own at some points in the document, for the sake of simplicity and clarity. We recognize and respect that some communities use and prefer other terms.

² In most cases this Question Sheet will apply for communities who have reserves, so the term "reserve" will be used throughout for simplicity. These questions though are generally relevant for Nations that do not have reserves, such as British Columbia Nations with modern treaties.

- Are there situations where there is more than one home on a lot, with a different family in each home?
- How much rental housing is there on reserve?
- Are there any members renting a home on a private allotment from another member (i.e. renting a home on privately held reserve lands)?
- Any mobile home housing on reserve occupied by members?
- Do they sit on formal or customary allotments, or on communal land?
- Any non-member couples renting on reserve? (i.e. where neither spouse is a member of the First Nation)?
- Approximate percentage of couples living on reserve where both spouses are members of the First Nation?
- Do any members who hold land lease out their land to members or non-members?
- Are any members operating businesses, including farms, on reserve lands?
 - If yes, do they all hold the underlying land?
 - Do some members operate a business or farm on reserve land pursuant to a lease with another member or, in the case of communal lands, a lease with the First Nation?
 - Are there any members operating businesses or farms on communal land, i.e. not allocated to them or any other individual by law or custom?

Domestic Contracts

- Do you generally agree with the principle of upholding any domestic contracts between spouses and ex-spouses regarding real property on reserve? In other words, if the spouses or ex-spouses have an agreement concerning real property on reserve, is that agreement generally enforceable and does it take priority over the default rules in the MRP Law?
- If you agree with the general rule of upholding domestic contracts, the common law has certain exceptions where private agreements are not enforceable, such as grossly unfair contracts (“unconscionability”), contracts involving deceit or intimidation, contracts that

contain illegal provisions (e.g. member spouse granting reserve land to a non-member spouse). Do you agree that domestic contracts should not be enforceable when one of those exceptions applies?

- If your MRP Law will recognize the principle that domestic contracts are enforceable, will this apply to just married couples or common law couples as well?

Division of Real Property/ Compensation upon Relationship Breakdown

This is the core purpose of the MRP Law.

Non members cannot own property on reserve, but can be financially compensated for their contribution to the couple's property. Deciding how to strike the balance between compensating non-members and ensuring that members retain possession of their allotment (which may be the family's only significant asset) and remain able to continue living on reserve may be the hardest policy choice in developing an MRP Law.

- Will division of property/compensation rules apply just to married or also common law spouses, and if common law, how many years of cohabitation required to count as common law?
- What property should be available for division/compensation?
 - family home in all cases, no matter when acquired or whether acquired by one spouse only through gift or inheritance?
 - leases and other interests in land that fall short of allotments?
 - any other real property acquired during relationship other than by way of gift or inheritance?
 - any increase in value of real property during the relationship, no matter when the real property was acquired?
- If both spouses are members, do you want to provide for the possibility of a court order transferring reserve land/home to one spouse?
- What about providing for possibility of a court-ordered lease from owner spouse to the other spouse?
- Are you supportive of the potential for financial compensation in lieu of real property division, especially for non-member spouses, who cannot own real property on reserve?

- Are you comfortable with starting presumption of compensation amounting to $\frac{1}{2}$ the interest in the on-reserve matrimonial property, from which adjudicator can deviate based on relevant considerations?

Under this approach, the MRP Law would set out the principle of equal interests, and then identify relevant considerations whereby an adjudicator might decide that the claimant spouse is entitled to less than $\frac{1}{2}$ interest, and would ultimately leave adjudicator with discretion to set compensation share on a case by case basis (e.g. length of marriage or common law relationship, debts associated with the real property, ability of each spouse to become self-sufficient post-relationship, any existing court orders between the spouses relating to their relationship breakdown, such as spousal support orders).

- Which objective should the MRP Law prioritize, as between compensating non-owner spouse and protecting the right of possession of reserve lands by the owner-spouse, and how strongly should it prioritize that objective?

The objectives of compensating non-owner spouse and allowing owner spouse to retain their reserve lands will conflict where the only asset available for compensation is the family home. In such cases, ordering the owner spouse to sell or rent the real property to provide compensation to the non-owner spouse will deprive the owner of the opportunity to keep or live on his or her property on reserve. This may be an unacceptable outcome for the membership. On the other hand, members might also be troubled by the possibility of the non-owner spouse ended up with no compensation, particularly where the relationship was long-term and the non-owner spouse made significant contributions to the property. Each community must decide for itself how to strike the most appropriate balance between these objectives where they conflict.

Exclusive Occupation Orders

- Are you interested in the potential for a court to make orders whereby one spouse or ex-spouse gets the exclusive right to occupy the matrimonial home for a fixed period of time, normally to raise the children (“exclusive occupation orders”)?
 - If yes, will this order potentially be available to common law spouses?
 - If yes, should such orders be potentially available to non-member spouses and if so, in what circumstances?

- If you want your MRP Law to provide for the possibility of Exclusive Occupation Orders, are you comfortable with the MRP Law stating that the court can include terms in exclusive occupation orders relating to
 - compensation to the spouse who loses right to live in home;
 - contents of house (what needs to stay in the house);
 - opportunities for either spouse to apply to vary the order?

Emergency Protection Orders

- Are you interested in the potential for a court to make orders to provide short term exclusive occupation rights to a spouse or ex-spouse who is facing domestic violence (“emergency protection orders”)?
- If so, do you want this part of the MRP Law to apply to all on-reserve housing, including band owned?
- Do you want emergency protection orders to be available even where neither spouse is a member (may not have such couples there now but what if you do down the road)?
- What would be the maximum length of such an order?

Estates

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* provides that MRP Laws can contain some provisions to address the rights of a spouse to the on-reserve real property interests of their member spouse who passes away. Are you interested in adopting such provisions?

Dispute Resolution

- Will the MRP Law encourage spouses or ex-spouses to have recourse to alternative dispute resolution before heading to adjudication?
 - If so, what alternative dispute resolution methods will be encouraged?
 - Will the First Nation or a larger Aboriginal entity offer dispute resolution services for spousal disputes?

- Where will spouses and ex-spouses have to go for formal dispute resolution if alternative dispute resolution does not work? (Notes that options here may be constrained by law)
- Do you want the First Nation's elected government to have a right of notice of litigation and the right to participate in litigation to raise any community concerns and provide any relevant evidence?
- Do you want to set time limits on the claims that spouses or ex spouses might want to litigate and if so, what time limits seem reasonable to you?

Miscellaneous

- What will be procedure for amending the MRP Law once it is adopted (Options may be constrained by existing laws.)
- Do you want to create any offences and penalties under the MRP Law? (Options will be constrained to some degree by existing laws; precedents will provide some examples.)
- Do you want a preamble to your MRP Law or a provision stating the purpose of the legislation, and if so, what do you want to say in those provisions about why your Nation is adopting this MRP Law?
- Does your First Nation have any laws or by-laws in force that might overlap or conflict in any way with this MRP Law?
- What would you like the Law's title to be?

MRP Law Development Process: Community Input on draft MRP Law

- If you have a *Land Code*, does it require that the membership approve the MRP Law by referendum before it is enacted?
- If you have a *Land Code* that does not require a referendum, do you have any other internal laws or customs that make it necessary to hold a community vote on the MRP Law and if so, what are the procedural requirements for that vote?
- How do you plan to provide an opportunity for community input into the MRP Law?
- How do you plan to keep the community updated about the MRP Law?