The Centre of Excellence for Real Matrimonial Property and the University of Victoria Indigenous Law Research Unit introduce:

A TOOLKIT FOR ON-RESERVE MATRIMONIAL REAL PROPERTY DISPUTE RESOLUTION
How to use the toolkit: This toolkit provides tools for starting or deepening conversations about dispute resolution in your community. You are the expert on your own community values, principles, needs, strengths and goals. You may have already begun developing your community process. Use the information in this Toolkit that is relevant to you.
Part 1: Background

In the interpretation section of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, there is a clause that talks about “traditional” dispute resolution. It reads:

```text
s.2 (3) For greater certainty, for the purposes of this Act, and agreement between spouses and common-law partners includes an agreement reached through traditional dispute resolution.
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This means that First Nations can go further than drafting their own laws. You can revitalize or develop your own Indigenous dispute resolution processes, to interpret and apply the provisional rules or your own laws. This toolkit is designed to support this work.
Part 1: Background

A Lesson from the US Tribal Court Experience:

- When tribal groups have both laws for settling matrimonial real property questions AND dispute resolution forums, they have far fewer problems. In contrast, those tribal groups that only have either matrimonial real property laws OR dispute resolution forums, have ongoing problems and conflicts.

- In other words, to effectively deal with matrimonial real property issues, Indigenous communities need both: clear **Matrimonial Real Property laws** and **Dispute Resolution forums**.
Part 1: Background

Starting Assumptions:

• There’s no ‘one size fits all’ or ‘right’ answer to choosing, developing or implementing the best Dispute Resolution process for your community.

• Matrimonial Real Property disputes can be volatile, messy, complicated, and uncomfortable. They are also an unavoidable aspect of family and community life.

• Where people have a process that they trust, they will use it. Where they don’t, problems grow, and/or they use less productive means to solve them.
Part 1: Background

Where there are Indigenous Peoples Resolving Disputes, there is Indigenous Dispute Resolution.
Part 2: Dispute Resolution Models and Options

- Courts
- Problem-solving/Integrated Courts
- Tribunals
- Typical ADR Mechanisms
- General or Pan-Indigenous Processes
- Processes from Indigenous Legal Traditions
Part 2: Dispute Resolution Models and Options

Formal Court or Court-like Processes – Courts, Problem-solving/Therapeutic Courts and Tribunals:

• Overview
• Advantages
• Disadvantages
• When and why you might want to use these dispute resolution options
Courts – Overview (Page 8)

• Canadian court system
• Disputes are resolved by a judge trained in Canadian law
• The Superior Court in each Province has the jurisdiction to hear these disputes
• Each court has a different name in each Province – i.e. Ontario (Superior Court of Justice), Manitoba (Court of Queen’s Bench)
Courts (Pages 9-10)

Advantages
• Clear rules
• Impartial judges
• Binding decisions
• Decisions can be appealed

Disadvantages
• Adversarial
• Expensive
• Complicated rules and procedures
• Time consuming
• Generally not familiar with FN communities
When might you use the Canadian court process? (Page 11)

• Where there is high conflict
• When you want to create a precedent
• To ensure compliance
• Want a third party decision-maker
• Complicated disputes
Part 2: Dispute Resolution Models and Options

Typical ADR Mechanisms – Negotiation, Mediation, Med-Arb, Arbitration, Collaborative Law:
- Overview
- Advantages
- Disadvantages
- When and why you might want to use these dispute resolution options
Mediation - Overview (Page 18)

• Non-court processes
• Co-operative resolution of disputes
• Neutral third party / no decision-making
• Identify issues and opening communication
• Facilitate a resolution
• Non-Indigenous
• Professionals with special training
Advantages (Page 18)

- Informal and flexible
- Less time and cost
- Lawyers are not necessary
- Participants control the process
- Room for family, kin or community members
- Preserving the relationship between the parties (no winner and loser)
- Compliance is more likely if both satisfied with process
Disadvantages (Page 18-19)

• Due to assumption re: equal participants – it can hide gender and power imbalances
• Potential to negatively affect decisions of one party
• May not work where a great deal of conflict between parties
• Agreement may be hard to enforce
When might you want to use mediation? (Page 20)

• When you want to include other voices
• When preserving a relationship is important
• When you want community members to resolve a dispute
• Where the parties prefer a more informal and private process.
• Where there is no power imbalances, safety concerns or high conflict
Part 2: Dispute Resolution Models and Options

Community-based General or Pan-Indigenous Processes – Community-based Tribunals, panels and committees, Circle processes and Mediation:

• Overview
• Examples from different communities
• Common steps in processes
• Common issues and solutions
Tribunals, Panels, Committees – Overview (Page 29)

• May be organized by one community, a tribal council, or partnership between several communities
• Work with other models i.e. mediation or peacemaking
• Formal and transparent structures, polices and procedures
• Elders and other respected people (knowledge and expertise) sit on tribunal / panel / committee
• Panels might do the following: advisory, adjudicative, appeals
Examples from Different Communities (Pages 32-33)

- Tsuu T’ina Office of the Peace Maker
- Qwi:qwelstom – Sto:lo Healing and Peacemaking Circles
- Meenoostahtan Minisiwin Family Justice Program
- Siksika - Aiskapimohkiiks Program
- Anishinabek Nation Tribunal and Commission
- Treaty Four Administrative Tribunal
- Iroquois Dispute Resolution Tribunal
Circle Processes (Page 34)

Sentencing / Healing Peacemaking / Family Group Conferencing

• Decision-making and dispute resolution
• Issues involve harm or safety concerns
• Criminal or child protection issues
• Parties consent to be involved
• Led by a trained facilitator
• Private
• Family, community members and professionals may be invited to participate
• Pre-process evaluation and preparation of participants
• Holistic and restorative approaches (issues and people)
• Usually lead to a written agreement or plan
Common Steps in Circle Processes (Page 35-36)

- Referral – participant may be referred to process
- Preparation – discussions with all involved
- Opening – ceremony/smudge and rules outlined
- Introduction / Role Identification – round of intros
- Issue identification – facilitated sharing session
- Teaching – cultural or spiritual teachings /advice
- Development of a plan – participants develop a plan
- Acceptance of plan – review / amend and acceptance by someone with authority (i.e. social worker)
- Closing – a last check-up with participants and closing prayer
- Follow-up – is agreement / plan being carried out? Deliver assistance or support - Report to authority (i.e. court)
Part 2: Dispute Resolution Models and Options

Dispute Resolution Processes from Indigenous Legal Traditions:

• Examples of Indigenous laws being identified and used in different communities

• Resources for how to begin researching your own Indigenous laws for dispute resolution
Examples (Pages 47-50)

• Found in stories, teachings and ceremony
• Guiding participants in identifying and practicing important values and principles, roles and responsibilities
• T’suu T’ina Peacemaking Circle – “resolve the conflict, heal the offender and the victim, and restore relationships.”
• Anishinabek Nation Tribunal and Commission respects the seven Anishinabek grandfather teachings
• Sto:lo Qwi:qwelstom Program – translation “they are teaching you, moving you toward the good.” No word for Justice
• Meenoostahtan Minisiwin Family Justice Program – translation “let’s all set our families right.”
Resources for researching Indigenous law (Page 56)

• Elders
• Families and clans
• Societies
• Stories, legends and songs
• Dances, dreams and art
• Practices and customs
• Language
• Rituals and conventions
• Published anthropological and historical reports
• Written works by community members
Part 3: Major Issues

• The section provides an understanding of three of the most common and difficult issues when developing your own dispute resolution process. These are:

  1. Common Colonial Beliefs (Page 66-70),
  2. Gender and Sexuality (Pages 71-75), and
  3. Violence versus Conflict (Page 76)

• These issues can become major stumbling blocks, conversation stoppers, or worse, if not examined and addressed when developing and implementing your own dispute resolution processes.
Part 4: Community, Participant and Governance Considerations

- Participant Considerations
- Community Considerations
- Governance Considerations

Dispute Resolution Process
Part 4: Community, Participant and Governance Considerations

Governance Considerations (Pages 78-86): Practical, political, and aspirational issues that community leaders, such as Chief and Council, are likely to find important.

- Community Aspirations
- Who Interprets The Law and Makes Final Decisions?
- Is There a Public Record and Precedents?
- What Remedies Does Your Process Offer?
- Is There An Appeal Process?
- What is the Level of Certainty and Finality?
- What is the Process for Enforcement?
- Is There Room for a Voice and Role for Extended Families, Kinship Groups, and Community?
- What is the Space for Indigenous Legal Traditions?
Examples of specific questions (Pages 110-111)

- What are your main community aspirations at this time?
- What dispute resolutions processes are consistent with your community’s values, principles, and laws?
- Who will be the decision-makers in your process?
- What are the negative and positive consequences of locating decision-makers outside of communities? Inside of communities?
- What knowledge, training and experience will decision-makers need?
- How will you communicate rules and procedures to participants?
- What remedies do you want your process to have available to participants?
- What are the strengths and weaknesses of providing a voice for family, kinship groups, and community?
- Does your community want to revitalize or use Indigenous legal traditions?
Part 4: Community, Participant and Governance Considerations

COMMUNITY CONSIDERATIONS (Pages 87-99): Practical issues that are part of the reality of any community, such as social, economic, geographical and historical elements.

• Community history and dynamics
• Sustainability and Efficiency
• Time
• Including the Community in Designing Your Process
• Education and Skill Development
• Population Composition and Size
• Relative Geographic Isolation
• Types of Conflicts
Specific questions for community considerations (Pages 112-115)

- What are the community strengths? How have leaders, elders, and community members tried to created better lives?
- What will your dispute resolution process cost?
- Where will you get operational funding?
- Who will develop, implement and administer your dispute resolution process? How many staff will you need? Will they be paid staff?
- What skills, education and training will people need to administer, implement and evaluate your process?
- What is the composition of your community (who - age, genders, sexual orientation, citizenship, membership, status, educational level etc.)?
- How many matrimonial property disputes might arise in a year?
PARTICIPANT CONSIDERATIONS (Pages 100-108):

Issues of high importance to those participants most affected by the outcomes of the dispute resolution process:

- Transparency *versus* Privacy
- Fairness and the Appearance of Fairness
- Access and Accessibility
- How Does Your Process Affect Gender and Power Imbalances Between the Participants?
- How Might This Connect With Participants’ Broader Family, Kinship Group or Community Relationships?
Specific questions on Participant Considerations (Pages 115-117)

- Who should have access to the personal information and records of those who participate in the dispute resolution? Who should not?
- What will happen if this personal information is shared – intentionally or accidently?
- What concerns might members in your community have about privacy and confidentiality?
- Starting at the “get go”: How will people participate in choosing a dispute resolution option?
- Once your dispute resolution process is established, what laws, policies, and guidelines do people need to know about? How will you let them know these?
- Where will people get information about the dispute resolution process? How easily might they get what they need?
- How and why is fairness a part of your legal traditions?
- How will you ensure fairness is a part of your dispute resolution?
Part 5: Guiding Questions and Building Blocks

The final section of the toolkit includes ‘worksheets’ you can refer to or photocopy and use if you like, with Guiding Questions and Building Blocks for Dispute Resolution Processes (Pages 109-120):

- **Guiding Questions** are questions taken from the information in the previous sections that you can use to guide vital community conversations about developing, implementing and evaluating your own dispute resolution processes.

- **Building Blocks** are important components to identify and/or include in any dispute resolution process, whether it is court, ADR, circle processes or revitalizing legal processes from your own Indigenous legal traditions.
Purpose: When it comes to dispute resolution, *one size does not fit all*. This toolkit is designed to assist you to decide what best fits and makes sense for *your* community when *developing, implementing and evaluating* dispute resolution processes for matrimonial real property on reserve.