Dispute Resolution and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

- The Act, contains a clause about “traditional” dispute resolution. It reads:

  s.2 (3) For greater certainty, for the purposes of this Act, an agreement between spouses and common-law partners includes an agreement reached through traditional dispute resolution.
Dispute Resolution and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

- This means that First Nations can go further than drafting their own laws.

- They can revitalize or develop their own dispute resolution processes, to interpret and apply the provisional rules or their own laws.
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.
A Lesson from the US Tribal Court Experience:

• 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.

• One size doesn’t fit all when choosing and developing dispute resolution mechanism.
Start where you are at.
A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution

- The Toolkit provides communities and individuals with:
  - basic information about dispute resolution options,
  - major issues that can impact the discussion
  - important community, participants and governance questions
  - A starting point for conversations or ways to renew or deepen conversations already in progress.
A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution

- A range of dispute resolution options is provided for Indigenous communities to explore and consider, including:
  - courts,
  - problem-solving or integrated courts,
  - tribunals,
  - typical dispute resolution processes,
  - community based justice and dispute resolution models, and
  - Indigenous legal processes.
Dispute Resolution Models and Options

- This graph demonstrates the range of dispute resolution models that exist.
- They range from the most formal option, the court, to community-based justice and dispute resolution models based on indigenous traditions.
Courts

- Disputes are resolved by an impartial judge trained in Canadian law.
- Each Province has the jurisdiction to hear matrimonial real property issues.
- Each provincial court has a different name—e.g., Ontario (Superior Court of Justice), Manitoba (Court of Queen’s Bench).
- Each court has its own forms and processes governed by their own rules of practice.
- Decisions are binding but can be appealed to a higher court.

However:
Courts

• The court process is often:

  o Adversarial
  o Expensive
  o Complicated rules and procedures
  o Time consuming
  o Unfamiliar with FN communities and traditions
Dispute Resolution Models and Options

Typical DR Mechanisms:

- Negotiation,
- Mediation,
- Med-Arb,
- Arbitration,
- Collaborative Law
Negotiation

- Participants work together to come to an agreement about how to resolve their dispute.
- They can negotiate a resolution on their own, but usually use representatives or lawyers to do so.
- Sometimes a neutral third party will help the participants negotiate.
- Unlike mediation or more formal processes, a negotiation does not have to take place in person, at a specific location or over a set period of time.
Mediation

• In mediation, a neutral third party works with the participants to voluntarily resolve their dispute. The mediator is not the decision-maker.

• The mediator is a facilitator who helps participants resolve their dispute.

• The mediator's role is to help the participants identify what needs to be resolved and communicate with each other.
Arbitration

• Arbitrations are similar to court hearings.
• There is a decision-maker, usually called an adjudicator.
• Decision-makers are experts in an area of law and are normally from outside the community.
• Participants need the help of a representative (usually a lawyer) to speak for them during an arbitration.
• The decision-maker listens to the dispute and then goes away and makes a decision.
• Adjudicators often rely on past decisions, or precedent, to come to their decisions.
• Participants are legally required to comply with the final decision.
Mediation-Arbitration

• Mediation-arbitration (med-arb) is a Canadian legal processes of mediation and

• ants try to reach an
h a mediator.

• the dispute cannot be tion, the process switches to
Collaborative Law

• In a collaborative law process, participants sign an agreement that they will not go to court to resolve their dispute.

• Work together with their lawyers to

• Collaborative law and also agree not to

• If either party decide to go to court, they have

• Information from the collaborative law process against other participants if they go to court.
Community-Based General or Pan-Indigenous Processes:

and Committees,
These processes can be organized by one community, a tribal council, or by a partnership between several communities.

They often work together with other models, like mediation or peacemaking, or even with courts.

These models have formal and transparent structures, policies, and procedures. There are clear rules and a process with clearly defined steps.

Elders and other respected people with relevant knowledge and expertise are selected to sit on a tribunal, panel, or committee.

See pg 30 of DR Toolkit for First Nation examples.
Circle Processes

• These typically address issues involving harm or safety concerns and are most commonly connected to criminal justice or child protection systems.

• Different things, but tend to follow a similar format, with certain elements in common.

• All participants have to consent to participating.

• They are facilitated by a trained facilitator.

• They are usually private with only the participants and invited others being aware of what happens.

• Family, community members, and professionals may be invited to participate and there is a focus on involving extended family and community where possible.
Circle Process

• Common circle processes in use include:

  • **Sentencing Circles** – usually connected to the criminal justice system may conclude by advising a judge as to the appropriate sentencing plan.

  • **Healing/Peacemaking Circles** – usually connected to the criminal justice system but may extend to other harms and disputes. May happen over a period of time, and include or connect people to therapeutic, cultural, and other resources.

  • **Family Group Conferencing** – started in New Zealand now widely used in Canada. Usually child-focused and invite family and extended family members to come together and share perspectives and brainstorm solutions.

• See pg 35 of DR Toolkit for common steps and 38-39 for First Nation examples
# Common Steps in Circle Processes

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>1. Referral:</td>
<td>Participants may be referred through the court system, the child welfare system, or, in some cases, they can self-refer or be referred through Chief and Council or other community-based helpers or service-providers.</td>
</tr>
<tr>
<td>2. Preparation:</td>
<td>A trained and paid facilitator talks to the referred individuals and identifies family, extended family and community members, elders, supporters and professionals who should be present. The facilitator usually talks privately and individually to all possible participants, to gauge the dynamics, risks, and likelihood of success. In some processes, an elder or spiritual leader may also be involved. In some processes, there may be behavioural or spiritual preparation required.</td>
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## Common Steps in Circle Processes

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>3. Opening:</strong></td>
<td>Facilitator welcomes participants. Elder or spiritual leader may open with a prayer, a smudge or a brief ceremony. <strong>Rules and expectations are clearly outlined for safety.</strong></td>
</tr>
<tr>
<td><strong>4. Introductions/ Role Identification:</strong></td>
<td>Most begin with a round of introductions, with all people identifying their roles and why they are present.</td>
</tr>
<tr>
<td><strong>5. Issue Identification</strong></td>
<td>Participants talk about how they view the issue. May include sharing impacts or taking responsibility, as well as discussing worries, strengths, priorities, interests, and hopes. Participants may feel and share strong emotions. This step may be more or less structured but it is <strong>always facilitated by a trained facilitator.</strong></td>
</tr>
<tr>
<td><strong>6. Teaching/ Expanding Understanding:</strong></td>
<td>Often a teaching component to circle processes. Elders, spiritual leaders, or other knowledgeable and respected people may give cultural or spiritual teachings, advice or words of hope and encouragement. Where professionals are involved, they may discuss rules, expectations, and resources available to help.</td>
</tr>
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</table>
# Common Steps in Circle Processes

<table>
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<tbody>
<tr>
<td>7. Development of a plan or resolution:</td>
<td>Facilitator may assist or may leave while participants develop an action plan or proposed resolution. This plan or resolution is usually put into writing. It may or may not follow a pre-made form.</td>
</tr>
<tr>
<td>8. Acceptance of the plan or resolution:</td>
<td>The facilitator or someone else (e.g., a social worker in child welfare matters) reviews the proposed plan or resolution and suggests modifications as required and accepts or approves it. Participants sign this agreement, it is given to participants, and kept on file.</td>
</tr>
<tr>
<td>9. Closing:</td>
<td>The facilitator brings the circle to a close. Usually participants are given a chance to say something and check in about how they feel. Elders or spiritual leaders may end with a prayer, smudge, or brief ceremony.</td>
</tr>
<tr>
<td>10. Follow-up:</td>
<td>Facilitator should follow up to see if the agreement or plan is being carried out. This may include assistance to connect to resources, or the provision of support and problem-solving. There may be specific timelines and dates to check in about progress, as well as consequences or alternate resolutions when a plan is not being followed. There may be an additional closing ceremony or celebration when the plan is complete, or a positive report to an authority like a court or government department involved.</td>
</tr>
</tbody>
</table>
When circle processes may not work.....

- A circle approach may not be appropriate in some circumstances.
- It may be difficult to have open and honest meetings if there is a power imbalance or a history of domestic violence.
- It may be easier for a participant to negatively influence the others' decisions when a power imbalance exists.
Mediation Circle Exercise

https://www.youtube.com/watch?v=d3NadTh4yco
What did we learn from that exercise?

Can you see this as a way to resolve family issues in your community?

Do you have practices that you can revive?
Developing A Dispute Resolution Process

Issues To Be Aware of:

• There are three major issues that can become examined and addressed implementing your own processes.
Developing A Dispute Resolution Process

Issues To Be Aware of:

1. Common Colonial Beliefs (Page 66-70),

   - Indigenous societies were lawless. Indigenous societies had evolved enough to have law.
   - Indigenous laws are custom. Indigenous peoples were only real ways of governing through law.
   - Indigenous law is not about dealing with real issues or problems, so it is not useful today. It is only about spiritual beliefs.
Developing A Dispute Resolution Process

Issues To Be Aware of:

• How can one counter and challenge these commonly held beliefs that were created by Indigenous peoples push them back to non-colonial beliefs?

• How do Indigenous peoples create new commonly
Developing A Dispute Resolution Process

Issues To Be Aware of:

2. Gender and Sexuality (Pages 69-74),

If there are negative or limiting norms about women or
sexual minorities in the community or in any society, then
shape the law and our legal
so use law to reshape or work to
ms so that they are not
Developing A Dispute Resolution Process
Issues To Be Aware of:

3. Violence versus Conflict (Page 74)

• Conflict is more than a disagreement and it tends to fester when it is ignored.

• We all respond to conflicts based on our perceptions about scarcity, attitudes, or whatever the cause, and this can trigger strong emotions and create stressful situations.

• While there are common causes of conflict, our responses to it differ. One response is violence.

• Conflict is not the same as violence and not all conflict results in violence.
Developing A Dispute Resolution Process Governance, Community and Participant Considerations:

• **Governance Considerations** – these are practical, political, and aspirational issues that community leaders, such as Chief and Council, are likely to find important. Pg. 76

• **Community Considerations** – these are practical issues that are part of the reality of any community, such as social, economic, geographical, and historical elements. Pg. 85

• **Participant Considerations** – these are practical and personal issues that participants and individuals most directly affected by dispute resolution processes are likely to care about deeply. Pg. 98
Developing A Dispute Resolution Process

Guiding Questions and Building Blocks:

**Guiding Questions** are:

- community and participant considerations from the previous section (pg. 108)
- can be used to guide vital community conversations about developing, implementing, and evaluating your own processes.
Developing A Dispute Resolution Process

Guiding Questions and Building Blocks:

**Building Blocks** are:
- Identify and/or include in your evaluating your dispute

Questions” and “building blocks” considerations that will guide your process that reflects
Using this toolkit

- This Toolkit provides communities and individuals with basic information about dispute resolution options, major issues and important community, participants and governance questions to consider when developing matrimonial real property laws.
- It provides starting points for conversations on dispute resolution for matrimonial real property, or ways to renew or deepen conversations already in progress.
- Start where you are at. Take what you need. You are the expert on your own community.