

# Matrimonial Real Property Solutions

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*Le ministère des Affaires indiennes et du Nord Canada a invité l'Association des femmes autochtones du Canada et l'Assemblée des Premières Nations à participer à une rencontre dans le but de développer un consensus sur le problème de la propriété matrimoniale sur les réserves. Il n'y eut aucune entente sur un langage spécifique ni sur l'inclusion de solutions non légales. Ce processus a dérapé quand le gouvernement a ajourné la loi C47 sans même penser aux multiples questions qui rendaient les solutions contenues dans la loi inaccessibles aux autochtones.*

Matrimonial real property (MRP) refers to the house or land that a couple occupies or benefits from while they are married or living in a common-law relationship. Provincial and territorial family law sets out standards and processes for the disposition of matrimonial real property following the breakdown of a marriage or common-law relationship. The Supreme Court of Canada ruled in *Derrickson v. Derrickson*, [1986] that these provincial and territorial family laws do not apply to land located on First Nations reserves. The federal *Indian Act* also does not contain any direction that applies to MRP on these lands. This gap in the law has had serious consequences, especially for Indigenous women who experience the breakdown of their marriage or

common-law relationship.

The Native Women's Association of Canada (NWAC) has advocated for a resolution to the matrimonial real property situation for over twenty years. During this time extensive research on MRP has been published, including reports by the Standing Senate Committee on Human Rights (Government of Canada 2003), the Standing Committee on the Status of Women (Government of Canada 2006), and the Royal Commission on Aboriginal Peoples. Unfortunately, the extent of the federal government's activity on this issue was limited to the publication of research. Other interested parties took action: NWAC filed a lawsuit against Canada alleging that the legislative gap on MRP violates the human rights of Aboriginal women that are guaranteed by the *Canadian Charter of Rights and Freedoms*. As well, some First Nations addressed the issue of matrimonial real property through various mechanisms including Band Administration Housing Policies or Band Council By-Laws,<sup>1</sup> Land Codes and/or Matrimonial Real Property Codes under the *First Nations Land Management Act* (INAC 2004) or under Self-Government Agreements.<sup>2</sup> The number of communities that enacted such policies, codes, or by-laws has been limited, and the federal government has not recognized the authority of actions

that do not fall within the purview of the *Indian Act* or other legislation (INAC 2006b).

In 2006, the federal government worked with stakeholders to design and implement a process to develop consensus on solutions to the MRP issue in First Nations communities. On September 29, 2006, the Department of Indian and Northern Affairs Canada (INAC), NWAC, and the Assembly of First Nations (AFN) jointly announced an initiative to develop MRP solutions. This announcement marked the beginning of a series of consultation and dialogue sessions on MRP conducted by each of the three parties across Canada. The Minister of Indian and Northern Affairs appointed a Ministerial Representative to be responsible for facilitating the process of developing solutions based on the findings of the consultation and dialogue sessions, and for preparing and submitting a report with recommendations to the Minister. These recommendations were to indicate the consensus reached by NWAC, the AFN, and INAC if possible: if consensus could not be reached, then the Ministerial Representative was responsible for making recommendations to the Minister on the best way forward. Although INAC stated that the goal of the process was "identifying and implementing a mutually acceptable solution" (INAC 2006a)

the federal government also noted in a media backgrounder document prepared for the launch that their objective was “to introduce a legislative solution in the House of Commons in the spring of 2007” (INAC 2006a). This focus on one particular approach by the federal government at the start of the consultation and dialogue process provided an early forewarning of an already deter-

came from women who had personal experience with MRP, and reflected their experiences, knowledge, and culture. While many women were interested in contributing their views, various factors prevented their full participation. The limited timeframe for the sessions to be conducted—only four months between October 2006 and January 2007—combined with winter weather con-

themes: the intergenerational impacts of colonization; violence; justice and access to legal services; accessibility of supports for women and children, especially those who move away from the reserve; communication and education; and legislation, but not as a stand-alone tool (NWAC 2007). NWAC clearly and consistently heard from the women that solutions must address

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mined outcome, and perhaps makes it less surprising that the consensus process eventually failed.

NWAC, the AFN, and INAC received submissions and conducted meetings, interviews, and sessions with their respective constituents from October 2006 to January 2007. A Working Group consisting of representatives from each organization met on a regular basis throughout this period to investigate in greater depth specific issues associated with MRP. The Ministerial Representative also convened expert panels on topics including land management systems and family law, which the Working Group representatives were invited to attend. It should be noted that the sessions, focus groups, and workshops organized by NWAC and the AFN were attended by a representative from INAC; however, the organizations funded by INAC to hold independent sessions or workshops were not required to invite NWAC or the AFN representatives to those meetings, although a record of their findings was provided to NWAC in the first quarter of 2007.<sup>3</sup>

NWAC used its funding to meet with Aboriginal women across Canada to hear first-hand their voices and experiences. NWAC was careful to ensure that the ideas for solutions

made travel and attendance difficult. Women living in remote or isolated communities found it costly to make travel arrangements on short notice, and women who needed to arrange childcare or an absence from work also experienced difficulties due to the short timeframes. Many women expressed frustration with the limited window available to them to become familiar with the options under consideration: they advised NWAC that they needed more time to reflect, discuss, and consider the implications before providing an opinion. Some women feared that engaging in the discussion process would jeopardize their personal safety or security, or their job tenure. NWAC made every effort to help women to participate safely and ensure that their privacy was respected. Even so, attending a session may have placed some women at risk, and the decision to participate could not be guaranteed to be a private matter. The women who did manage to participate told NWAC that they saw value in the process, but were concerned that the voices of many other women were not being heard (NWAC 2007).

The issues and concerns that women reported to NWAC around MRP were grouped into six key

both the lack of legislation that directly affected women’s ability to remain in the family home and the lack of non-legislative supports for women facing MRP issues. Women expressed concern about losing their opportunities and rights that residence on-reserve made possible for the individual, and identified specific circumstances that negatively affected their ability to access legal or other remedies. Women who could only find housing off-reserve after the end of their marriage or relationship spoke of their loss of access to Band administered programs and services, as well as their loss of access to family, culture, language, and community. These difficulties were especially acute for women who lived in remote, northern, or isolated communities, where the cost of transportation, seasonal limitations on travel, and the limited availability of programs and services provided additional barriers. NWAC found that women generally expressed only muted support for the use of federal legislation to address MRP in the short term, until the First Nations were able to put their own legislation into place.

NWAC developed a series of short, medium, and long-term solutions to address each of these six key areas

of concern identified by Aboriginal women. The intergenerational impacts of colonization require solutions that address membership and citizenship issues, the use of a culturally relevant gender-based analysis, and repatriation programs and redress for the lack of protections women and their families experienced under the *Indian Act*. Solutions for issues associated with violence against women include measures such as increased transitional, affordable, and emergency housing, and the use of collective, culturally relevant approaches to resolving conflict. Improvements in access to justice include an assessment of the impact of MRP measures implemented under the *First Nations Land Management Act*, training for legal professionals, and the implementation of alternative dispute resolution practices where appropriate. Increasing communication and education for Aboriginal women and their communities about MRP was also identified as a key area for improvement, as was ensuring that Aboriginal women could access programs and supports, both on- and off-reserve, including those women who live in remote, rural, or isolated communities. It was entirely clear to NWAC after talking to Aboriginal women across Canada that MRP, and by extension the opportunities and rights that living in the family home made possible, encompassed a wider set of issues than simple possession or compensation for investments.

NWAC brought these messages from Aboriginal women forward to the Working Group meetings that continued throughout the spring of 2007. Following these meetings the Ministerial Representative submitted her report to the Minister of Indian and Northern Affairs in March 2007: it contained comprehensive recommendations for action but also reflected the lack of consensus on key points between the three stakeholder organizations. Despite this initial lack of consensus, the three

organizations indicated that they were willing to continue working on MRP issues, so a series of meetings continued for the balance of 2007. It later became evident that the rationale for continued participation was not based on the same premise for all three organizations. NWAC and the AFN reviewed draft legislation put forward by INAC and continued to advocate for non-legislative solutions and changes to the approach that would reflect the concerns of their constituents and respect traditional First Nations practices, laws, and governance. INAC, however, was solely interested in moving forward draft federal legislation on MRP. Considerable effort was expended on reviewing draft materials put forward by INAC in an attempt to ensure the content met standards that included the duty to consult, respecting Aboriginal rights, the equality of women and men, international law, the *Canadian Human Rights Act*, First Nations sovereignty, and First Nations laws. NWAC raised concerns about the provision of resources and capacity for First Nations to enact their own legislation, and further suggested that federal legislation should include an opt-out clause for First Nations who developed their own MRP laws.

At the same time, NWAC continued to press for non-legislative solutions. Legal rights do not exist in a vacuum, and a solely legislative solution would not be sufficient to assist Aboriginal women who could not access justice because of poverty, the effects of systemic oppression, or geographic isolation. Despite the ongoing insistence of NWAC and the AFN that the proposed draft legislation was not adequate as a stand-alone solution, the federal government continued to focus on this to the exclusion of other options. INAC representatives were unable to discuss in any concrete terms implementation options or other solutions that would assist Aboriginal women, although they acknowledged that implementation measures were be-

ing designed by the federal government, in isolation from the Working Group process.

This failure of the policy development process to achieve agreement could perhaps have been foreseen, given the short timeframe and other limitations placed on the initiative as well as the stated objective of the federal government at the time the initiative was announced. At a meeting in January 2008, the INAC representatives advised the other parties at the table that the federal government would soon introduce a federal bill on MRP. The INAC representatives stated that any further input provided by NWAC and the AFN would not influence the federal bill: given this check on their effectiveness NWAC representatives declined to be involved any further in a process that they no longer saw as viable or effective. On March 4, 2008, the federal government tabled Bill C-47: *An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves* (Government of Canada 2007).

What began as a joint policy initiative ended as a unilateral announcement by the federal government of new legislation. In stark contrast to the tripartite announcement at the beginning of the MRP initiative in September 2006, the Minister of Indian and Northern Affairs announced the introduction of MRP legislation in March 2008 without the presence or support of any of the other stakeholders. This clearly demonstrated how INAC's decision to move ahead with one specific action despite recommendations to the contrary by the two other parties in the process caused the loss of support for the initiative by NWAC and the AFN. An analysis of the overall process and the impacts and outcomes of engaging in it for each organization will have to wait until it is known whether Bill C-47 will be passed, what the full extent of the government imple-

mentation plans associated with the legislation will be, and how the participating organizations and First Nations react to the end results. At this point in time, it appears that NWAC and the AFN may have overestimated how much influence and input into the process they could achieve, as well as the extent to which the federal government intended to use their input to develop and shape the policy outcomes. In turn, the federal government may have underestimated the extent to which NWAC and the AFN would engage in the process, as well as the extent to which they were able to identify shared goals and principles. The INAC representatives may also not have expected to face such a unified opposition, nor one that was so well-informed.

NWAC continues to recommend that the implementation of MRP legislation must be accompanied by non-legislative solutions that address the intergenerational effects of colonization, access to justice, reduction of violence, communication and education about MRP, and the accessibility of supports for Aboriginal women both on- and off-reserve. Despite the lessons learned while participating in this process over the past year, NWAC believes that the potential benefits that could be achieved for Aboriginal women require the organization to continue to work at improving the federal government's approach to MRP. NWAC suggests that the federal government re-engage all those involved in the initial process to complete further consultations with First Nations communities that includes women, elders, youth, and leaders in those communities. In addition, an appropriate implementation plan that includes non-legislative options, adequate resources, and a capacity building process that will support and enhance the proposed MRP legislation must also be created, in order to fulfill the promise of the initial announcement of a tripartite process to devise solutions

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<sup>1</sup>For example, the Squamish Nation *Housing Policy* (2001, revised 2003).

<sup>2</sup>For example, the Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation.

<sup>3</sup>The organizations that conducted sessions included the Advisory Council of Treaty 6 Women, the Assembly of Manitoba Chiefs, the National Association of Friendship Centres, the Nishnawbe Aski Nation Women's Council and the Congress of Aboriginal Peoples.

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