

Matrimonial Real Property Policy & Law-Making Guide



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Introduction

About this Guide

This Guide has been prepared by the Centre of Excellence for Matrimonial Real Property (COEMRP) to assist those persons most responsible for the drafting and passing of an MRP law in their community. This includes the Chief and Council, senior administrative staff, community leaders, lawyers and other advisors.

The COEMRP was established, under the umbrella of the National Aboriginal Land Managers Association, to assist all First Nations in matters related to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* including the development and enactment of their own MRP law.

The COEMRP does not provide legal advice but it does produce and provide a variety of helpful guides, toolkits, and courses related to Matrimonial Real Property on Reserves.

Please visit the COEMRP website at: www.coemrp.ca

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Benefits of an MRP Law

- Allows First Nations to exercise jurisdiction over matrimonial real property matters.
- Protects/ensures the interests of children as a priority.
- Aids in resolving property disputes through community-based solutions (e.g., as a result of marital breakdown).
- Promotes fairness, rights and remedies, without discrimination on the basis of sex.
- Preserves and protects the well-being of all parties involved and helps to prevent further conflict from arising.
- Protects the human rights of members while balancing individual and collective rights.
- Complements the First Nation traditional laws, customs, practices, and policies.
- Complements dispute resolution mechanisms to assist couples in resolving disputes relating to family law matters.
- Clarifies the mechanism for the disposition of matrimonial real property on reserves following a marital breakdown.
- May support the safety of all First Nation members and residents.

Chapter 1 - Matrimonial Real Property Law on Reserves, Current Situation



On June 19, 2013, the Federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the *Act*) received Royal Assent. The First Nation law-making provisions of the *Act* went into force December 16, 2013. The remaining provisions, collectively referred to as the Provisional Federal Rules, went into effect December 16, 2014.

The term “provisional” is used to indicate that the rules now in effect under the *Act* are only in effect (with some exceptions)

until such time as a First Nation adopts its own MRP law. If a First Nation does not adopt its own law, the provisional rules apply and last indefinitely.

The *Act* applies to married couples and common-law partners living on reserve, where at least one of them is a First Nation member or an Indian.

The *Act* applies to all First Nations with reserve land, with the following exceptions:

- First Nations that have enacted their own matrimonial real property laws under this *Act*.
- First Nations with reserve lands and a Self Government Agreement in effect who have jurisdiction over land management. (Self-governing First Nations may ask the Minister to make a declaration that the legislation will apply to them).
- Operational First Nations with land codes in place under the *First Nations Land Management Act* (FNLMA).
- Developmental First Nations without land codes that were on the schedule to the *First Nations Land Management Act* on the date of Royal Assent (June 19, 2013) will be exempted for a period of three years (until June 19, 2016).

Once First Nations enact their own MRP law under the *Act*, the Provisional Federal Rules will no longer apply to their reserve land.

There is no requirement that First Nations pass their own MRP law. They may simply continue under the Provisional Federal Rules for as long as it suits them.

As of July 2015, the great majority (over 90%) of First Nations have not yet enacted their own MRP law, although a number are in the process of developing such laws.

This Guide has been prepared to assist those First Nations who currently do not have their own MRP law, and who wish to explore the option of drafting and passing an MRP law specifically for their own reserve. This undertaking is a major endeavour.

There are two major components to enacting an MRP law, namely the Law-Making Process and the Ratification Process. Each of these two processes is comprised of many steps that can be grouped broadly into three phases as listed and shown in the summary charts below.

The **Law-Making Process** has three phases, namely

- Phase 1 – Preparation,
- Phase 2 – First Nation Engagement, and
- Phase 3 – Drafting the MRP Law.

Law-Making Process

<u>Phase 1</u>	<u>Phase 2</u>	<u>Phase 3</u>
Preparation	FN Engagement	Drafting the MRP Law

The **Ratification Process** also has three phases, namely:

- Phase 1 – Preparation,
- Phase 2 – The Vote, and
- Phase 3 – Follow-through.

Ratification Process

<u>Phase 1</u>	<u>Phase 2</u>	<u>Phase 3</u>
Preparation	The Vote	Follow-through

The Law-Making Process is described in detail in Chapter 3, and the Ratification Process is covered in Chapter 4.

Before getting into the specifics of the processes, the phases, and the steps involved, it will be necessary to consider the many administrative and policy issues surrounding the development and enactment of an MRP law. These issues are discussed in the following chapter.

NOTE

First Nations who wish to develop their own MRP law must do so at their own expense.

No additional funds have been made available to assist First Nations in the development and implementation of their community MRP law.

Chapter 2 - Policy Issues Related to the Development of an MRP Law

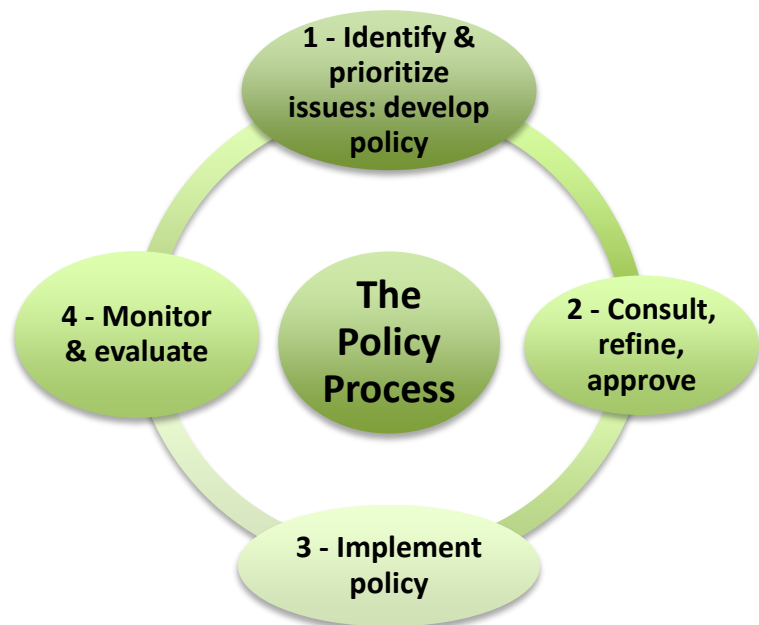
Good laws meet the needs of individuals and at the same time respect the customs and well-being of the whole community. Family law and matrimonial property laws affect the most personal aspects of people's lives during times of great stress, due to family breakdown or death. Consequently these laws must be drafted with extra care and in accordance with the principles by which a community wants to live.



The Policy Development

In a general sense, laws are a formal expression of policy decisions taken by a community of citizens on how they are going to conduct their lives together. Policy development seems simple enough: identify the issues and prioritize them; consult with stakeholders, refine the list of issues, and obtain approval; implement the policies; and monitor and evaluate.

Of course, in real life it is never that simple. Just as family life itself is often a complex affair, so too is creating the policies and laws to address Matrimonial Real Property issues. It is important to begin by examining the fundamental principles that will underlie the laws.



Basic Principles

Principle: a moral rule or belief, that helps you know what is right and wrong and that influences your actions.

Some of the governing principles that need to be taken into account when forming a First Nation MRP law might include:

- 1) That individuals are not the permanent owners of reserve lands but that the lands are held in trust for future generations and the collective well-being.
- 2) That there are intrinsic responsibilities in relation to the lands and all living creatures on it.
- 3) When spouses separate or divorce, the best interests and welfare of the children is most important.
- 4) When spouses are ending their relationship, their children should have the right to reside in the matrimonial home until they reach the age of majority, or until other suitable arrangements have been made in their best interests.
- 5) Spouses can make arrangements to manage their real property when they separate or divorce. Spouses have the right to determine their affairs by agreement, with the support of their families if necessary, as long as the agreement respects the laws of the First Nation.
- 6) Community dispute resolution processes should be used as much possible in cases where an agreement between spouses cannot be reached. Whenever possible, disputes between spouses should be resolved amicably through mediation.
- 7) Spouses will have access to a court of competent jurisdiction to determine their property rights, entitlements and obligations upon the breakdown of their marriage or common-law relationship, subject to the First Nation laws where their property rights include an interest in First Nation land.
- 8) Chief and Council may play a role in the enforcement of:
 - any agreement reached between the spouses,
 - the decision of a court, or
 - the recommendation of a dispute resolution committee.

When it comes to drafting new laws that affect people's private lives, it is best not to assume that everyone agrees on such principles as stated above. The community should be given ample opportunity to consider, discuss and provide their points of view on these important points.

MRP Policy Questions

Some of the policy questions and issues that will have to be addressed by any new MRP law may include:

- 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?
- To what extent is land held by individual First Nation members formally allocated and widely recognized? If some members hold land by custom, rather than pursuant to a formal allotment under the *Indian Act* or *Land Code*, is the system of custom allotment generally accepted and understood in the community?
- Are there situations where there is more than one home on a lot, with a different family in each home?
- Are any members renting a home on a private allotment from another member?
- Do any members lease out their land to other members or non-members?
- **What percentage of couples living on the reserve are both members of the First Nation?**
- Will the provisions of the MRP law apply just to married couples or also to common-law couples? If it will apply to common-law couples, how many years of cohabitation are required to count as common-law?
- If spouses have a domestic contract concerning real property on reserve, is it generally enforceable?
- Can the terms of a domestic contract between spouses override the provisions of the First Nation MRP law?
- If you agree with the general rule of upholding domestic contracts, the common law has certain exceptions where private contracts are not enforceable, such as grossly unfair contracts, contracts involving deceit or intimidation, and contracts that contain illegal provisions.
- 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?



Questions Related to Division of Real Property / Compensation upon Relationship Breakdown

- This may be an important aspect of a First Nation's MRP law. While non-members cannot own property on reserve, they 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 may be the hardest policy choice in developing an MRP law.
- What property should be available for division/compensation? The family home in all cases, including gift or inheritance? Any increase in value of real property during the relationship, no matter when the property was acquired? Other real property acquired during the relationship?
- If both spouses are members, do you want to provide for the possibility of a court order to transfer land to one spouse?
- Is there potential for financial compensation in lieu of real property division, especially for non-member spouses?
- Should the starting amount for compensation be equal to one half of the interest in on-reserve matrimonial property, from which an adjudicator can deviate based on relevant considerations?
- How will your community strike the most appropriate balance between compensating a non-owner spouse and the right of the owner spouse to retain and use reserve lands when the family home is the only asset available for compensation?



Questions Related to Exclusive Occupation Orders and Emergency Protection Orders

- Will your law include Exclusive Occupation Orders, whereby a court can order that one spouse gets the exclusive right to occupy the matrimonial home for a fixed period of time? Will this order be available to common-law spouses? For what length of time? (E.g., until the children reach the age of majority.)
- Will your law include Emergency Protection Orders to provide short-term exclusive occupation rights to a spouse who is facing domestic violence? What would be the maximum length of time for such orders?

Estates

The *Act* provides that an MRP law can contain provisions to address the rights of a spouse to the on-reserve real property interests of the deceased spouse. Will your law include such provisions?

Note: For FNLM bands, the *Indian Act* (sections 45 to 48) continues to address the wills and estates of FNLMA First Nations.

Dispute Resolution and Litigation

- Will the MRP law encourage spouses to have recourse to community or alternative dispute resolution services before heading to adjudication or court? If so, what dispute resolution methods will be encouraged?
- Do you want the First Nation's elected government to have a right of notice of court proceedings regarding on-reserve matrimonial real property? If yes, do you want the First Nation to have the right to make representation in those proceedings to raise community concerns and provide relevant evidence?



Miscellaneous Questions

- How will the law be enforced?
- Will there be any offences or penalties under the MRP law?
- How will the MRP law be amended once it is adopted (if necessary)?
- Does your First Nation have any existing laws or by-laws in force that might overlap or conflict with the MRP law?
- If you have a *Land Code*, does it require that the membership approve the MRP law by referendum?
- How do you plan to provide an opportunity for community input into the MRP law?

Summary

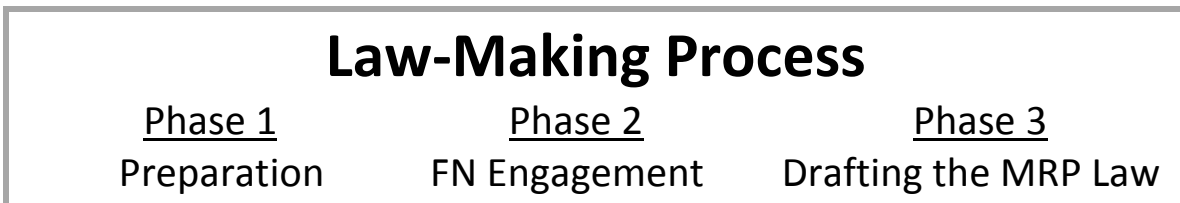
These are just some of the many questions that should to be addressed during the policy discussions while drafting an MRP law. They are important questions, not only in terms of drafting a clear law, but also in reflecting the culture and traditions of the community.

Chapter 3 - The MRP Law-Making Process

The Law-Making Process is the first component of the project. The Law-Making Process has three phases as shown below in the graphic below. Each of the three phases will be described in detail in this chapter.

The steps within each phase in the charts are colour coded to match the area of responsibility according to the Legend provided in each section.

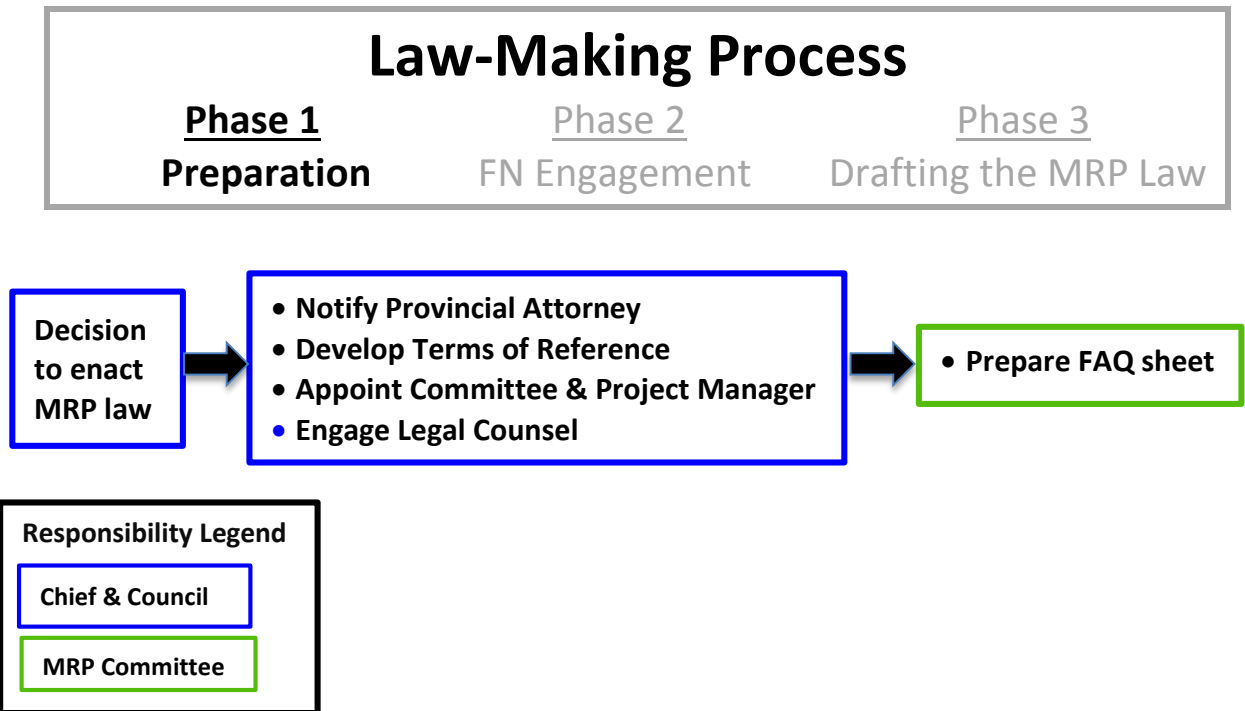
When the First Nation decides that it wishes to enact its own MRP law, we suggest that the First Nation considers using the process described in this chapter.



Note that the approach in describing the process in this chapter takes the “big-picture” view, and is intended for senior management. Thus it covers the broader aspects of the process and responsibilities. For a more detailed view of the process, with descriptions of all the steps at the working level, please refer to the Matrimonial Real Property (MRP) Toolkit, available from the COEMRP.

Law-Making Process: Phase 1 - Preparation

The initial phase assumes that a decision is being considered to undertake the task of enacting a Matrimonial Real Property law for the First Nation, having taken into consideration the many policy issues that are involved. There are three main groupings of steps in this phase as shown in the summary graphics here:



Decision to Draft an MRP Law

A major commitment is required, in terms of time and money to complete a law-drafting project. Therefore an initiating Band Council Resolution (BCR) should be passed to formally begin the task. A sample BCR wording is provided in Appendix B.

The C&C should appoint a Project Manager, ideally someone with land management experience, knowledge of MRP issues, and experienced in project management. A Project Committee must be appointed and provided with clear Terms of Reference.

Notification to Provincial Attorney General

Once the decision to proceed has been made, the C&C must send a notification to the Attorney General of any province in which the reserve is situated. This advance notification provides a “heads up” to the province whose administration and courts may have a role in implementing the First Nation MRP law.

Develop Terms of Reference

Early on, the Chief and Council will have to develop a Terms of Reference under which the Committee operates. As well, Legal Counsel will want to know the nature and extent of its involvement in the project, so Terms of Reference will also have to be developed for Legal Counsel.

Appoint MRP Committee

Community input is essential, so the C&C should seek representation on the Committee from a wide spectrum of qualified members. Those appointed should have a strong interest in the area and be prepared to attend all meetings and actively participate in all discussions. The lawyer will need ongoing feedback from the community to draft the MRP law. Realistically, this direction and feedback must be provided by a group of manageable size, likely between 5 and 15 members. Committee members could include First Nations elected representatives, representatives from Housing, Lands, Social Services, elders and youth. A Project Manager or Committee Chair must be appointed to lead this group.

Appoint Legal Counsel

Drafting a law that is comprehensive, acceptable, fair, and mindful of the First Nation's principles, is a complex task that requires special skills. The Committee will have to select a lawyer to do this work. The ideal lawyer will have experience in First Nations affairs generally, family law, and legislative drafting. The lawyer should be very familiar with the *Indian Act* and the *First Nations Land Management Act* (where applicable). Choose carefully because the Committee will be working closely with this lawyer over many months.

Each First Nation will be expected to engage its own lawyer at its own expense to draft the law that the First Nation will put to its membership for a vote.

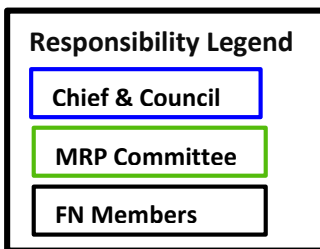
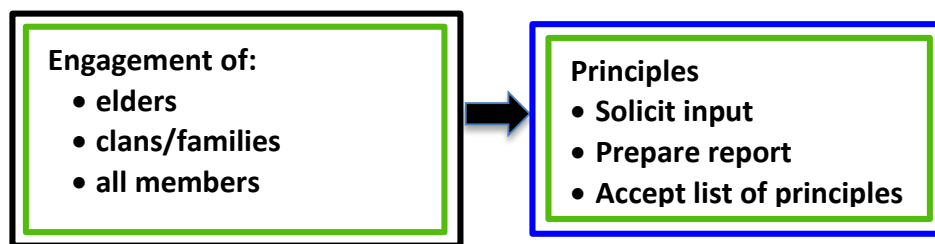
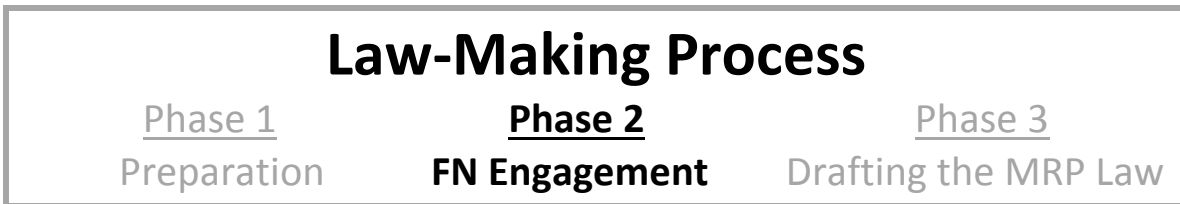
Preliminary Information to Membership

Early on, the Committee should prepare a basic information package for the general membership. This information package should include some background information on the proposed law, current practices of the First Nation related to MRP issues, the Provisional Federal Rules defined by the *Act*, a document answering frequently asked questions (FAQ sheet), the importance and need for having a well-defined law, and some starting principles on which to base the new law. This information should be posted on the Band website and the membership should be invited to review it. A contact should also be identified to whom the members may direct any questions or concerns.

In addition, provide ongoing information on the website to keep the members fully informed and encourage them to participate in any information meetings.

Law-Making Process: Phase 2 – Engagement

The second phase is critical. In this phase, the community becomes involved in the development and listing of the principles that will form the basis of the MRP law.



Engaging the Membership

To gain support from the members of the First Nation, they must be involved from the beginning. The committee must engage the members in a variety of ways in order to build support for the new law and to be a source of information to confirm the cultural and social values of the Nation.



Engaging the membership may help to foster a strong sense of ownership. There are proven ways to engage the membership at various stages. Before any meetings, prepare your ideas, and anticipate possible objections and questions. Prepare a reasonable response to foreseeable objections and have answers for anticipated questions. If new questions arise, make note of them and follow up as soon as you can.

Meet with elders who have a life's worth of knowledge and experience within the community. Record their ideas, suggestions, and objections. Smaller meetings with

family groups may also provide additional perspectives on the proposed aspects of the new law.

Residents within the community and off-reserve members should feel that their voices have been heard and that their views have been taken into consideration.

The MRP Committee should have a Recording Secretary who takes good notes of all meetings and suggestions received.

The List of Principles

As discussed in the Policy Chapter, laws should be based on and reflect basic principles that a community believes in and supports. The MRP Committee will compile the list of principles that have been gathered through the community engagement sessions. These should be posted on the website and at appropriate locations where the membership can review them.

The Committee will then prepare a report with recommendations for the Chief and Council. Note that the Committee, at its discretion and on the advice of legal counsel, may remove items that may result in legal challenges. The rationale for the removal of any items on this basis should be included in the report.

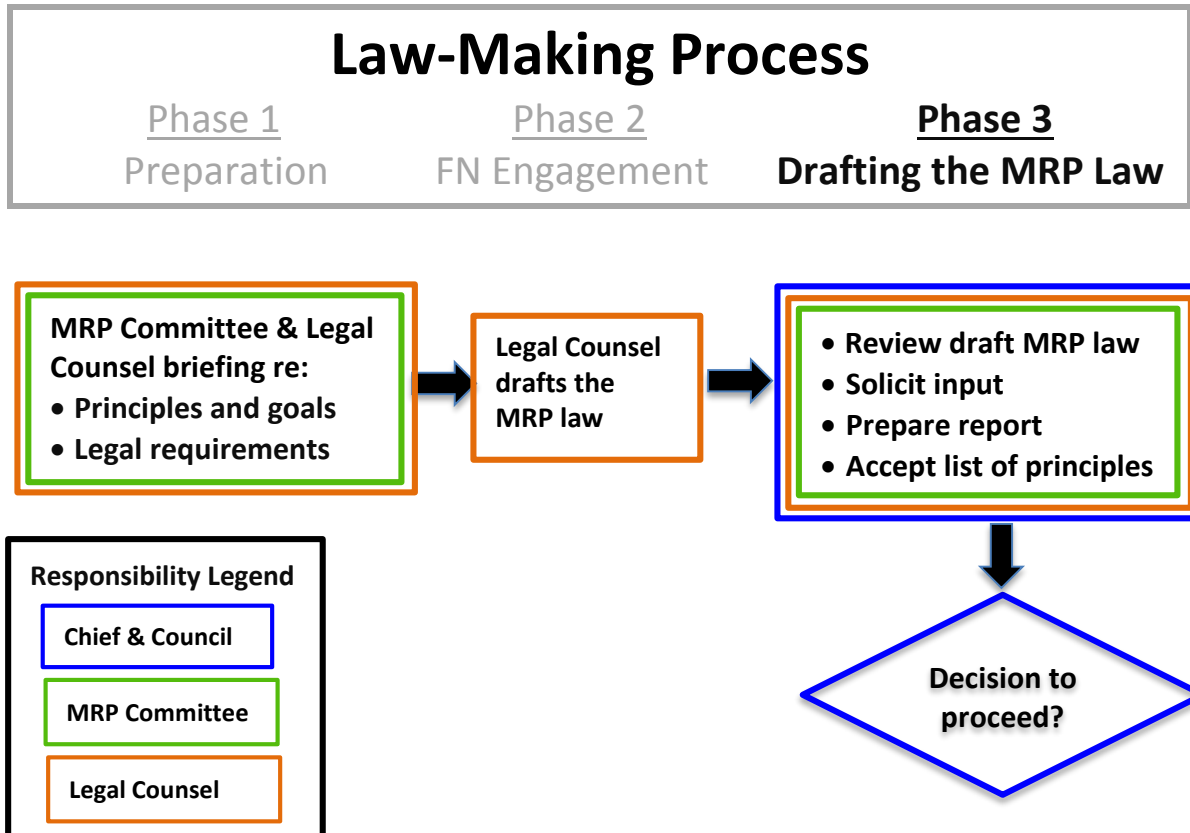


Acceptance of List of Principles

The Chief and Council will then review, and amend if necessary, the list of principles or send it back to the Committee for further work. This process may go through several cycles. Once satisfied with the list of principles, the Chief and Council will approve the list and provide it to legal counsel with a directive to begin drafting the MRP law.

Law-Making Process: Phase 3 - Drafting the Law

This third phase of the Law-Making Process encompasses the main objective of the project, which is the development of an MRP law that meets the needs of the First Nation and that will ultimately receive the approval of the membership. The main steps involved in this phase are illustrated in the chart below.



Any MRP law should achieve the following goals:

- Strike a balance between individual and collective rights.
- Respect the inalienability of reserve lands.
- Take into account the best interests of children.
- Address family violence and abuse.
- Result in greater certainty for spouses and common-law partners on reserve concerning the family home and other matrimonial rights or interests.
- Be consistent with the Canadian Charter of Rights and Freedoms.
- Be enforceable.

First Meeting of Committee and Lawyer

The first meeting is a two-way information session. The lawyer will explain the general scope of the MRP law and what it can and cannot cover. The First Nation Committee, with input from the membership, will have prepared a list of goals and principles that frame the basic values of the First Nation community, as well as defining what it hopes and expects from the law. The Committee will inform the lawyer about:

- the specifics of the laws that currently affect real property on the reserve,
- how real property is allotted on this reserve, and
- the land regime under which this First Nation manages real property.

If the First Nation has a sample MRP law that might serve the community, it should share this information with the lawyer. A comparison of existing MRP laws can be found on the COEMRP website:

<http://www.coemrp.ca/file/report-on-existing-first-nation-matrimonial-real-property-laws.pdf>

The enactment of laws within a community requires a well-defined process. At this meeting, the Committee and the lawyer should ensure a mutual understanding of the legislation under which this law is being enacted. (E.g., the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, a land code as enacted under FNLM, etc.)

Draft the MRP Law

The normal outline for a law is shown in the graphic provided on the right.

Using the list of principles, the lawyer must now set about the task of preparing the first draft of a comprehensive MRP law that suits this particular First Nation. It may address any of the following:

- Effects of death of a spouse for either a surviving FN member or non-member.
- Effects of separation where one or both spouses are FN members.
- Emergency protection orders requested by either spouse, whether an FN member or not.
- An exclusive occupation order.
- Division of matrimonial real property.

- 1. Title**
(Short and Descriptive)
- 2. Definitions**
·
·
- 3. Main Provisions**
·
·
- 4. Administrative/Procedural Provisions**
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·
- 5. Sanctions**
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·
- 6. Transitional**
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·
- 7. Coming into force**
·
·

Important Note

All legislation in Canada, whether federal, provincial or local, must conform to the Canadian Charter of Rights and Freedoms (the Charter). The Charter limits the authority of all legislatures, including First Nation Councils.

A law that does not conform to the Charter rules may be vulnerable to a court challenge and may be struck down. It is therefore important for First Nations to understand the Charter when drafting an MRP law.

Review and Further Draft Versions of the MRP Law

The drafted law will be reviewed by the MRP Committee step-by-step with the lawyer to ensure that the contents of the drafted law are fully understood. Consistency is important and a critical review is essential. The Committee may request clarifications or changes.

The lawyer will then prepare an updated version of the draft to satisfy the concerns of the Committee and to implement changes agreed upon. This drafting cycle may be repeated until everyone is satisfied that the drafted law meets the needs of the First Nation.

Once the draft is finalized, the Committee will prepare a report with recommendations for the Chief and Council.

Chief and Council Review the Draft Law

The Chief and Council now have the opportunity to review the drafted law. They may seek clarification, provide suggestions, or request changes. The draft is then sent back to legal counsel. This process repeats until the Chief and Council are satisfied that the drafted MRP law meets the needs of their First Nation community and respects the community's principles.

Upon agreement by the Chief and Council, they approve the draft in a Band Council Resolution and present it to the First Nation community at large via email, website publication, and posting on reserve. The members will have a last chance to make their views known.



Decision

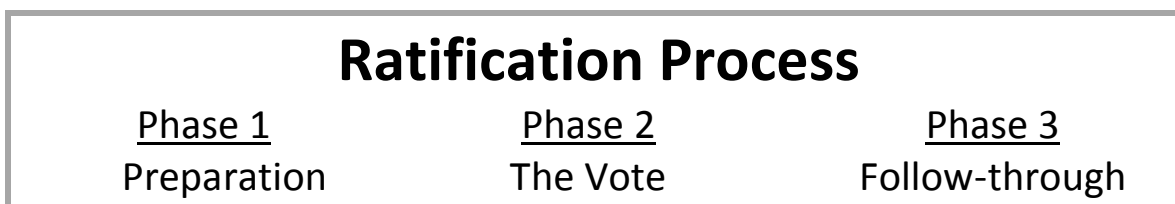
At this point the Chief and Council must make a decision whether or not the proposed law is acceptable, and if so, the project moves to the Ratification Process.

If there is strong objection to the proposed MRP law as drafted, the Chief and Council have the option of sending it back to the draft stage with recommendations. They might also decide to delay enacting their own MRP law while they consider any controversial aspects of the law. The Provisional Federal Rules as described in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* apply until such time as the First Nation's own MRP law is enacted.

Chapter 4 – The Ratification Process

If, after completing the Law-making Process, the Chief and Council have decided to proceed, then the proposed law must be ratified by the membership. The Ratification Process is the second component of the project. The Ratification Process also contains three phases as shown below. Each phase will be described in detail in this chapter.

The Ratification Process as described here is only a suggested methodology. First Nations may use an alternate process if they choose, however a vote must take place regardless of the methodology or process used.



Note that the approach in describing the process in this chapter takes the “big-picture” view, and is intended for senior management. Thus it covers the broader aspects of the process and responsibilities. For a more detailed view of the process, with descriptions of all the steps at the working level, please refer to the Matrimonial Real Property (MRP) Toolkit, available from the COEMRP.

Ratification Metrics

If a First Nation intends to enact its own MRP law under the *FHRMIRA*, section 8 of the *Act* requires the Council of the First Nation to submit the proposed First Nation MRP law to the members for their approval. FNLMA First Nations enacting an MRP law under their land code should follow the lawmaking provisions contained therein.

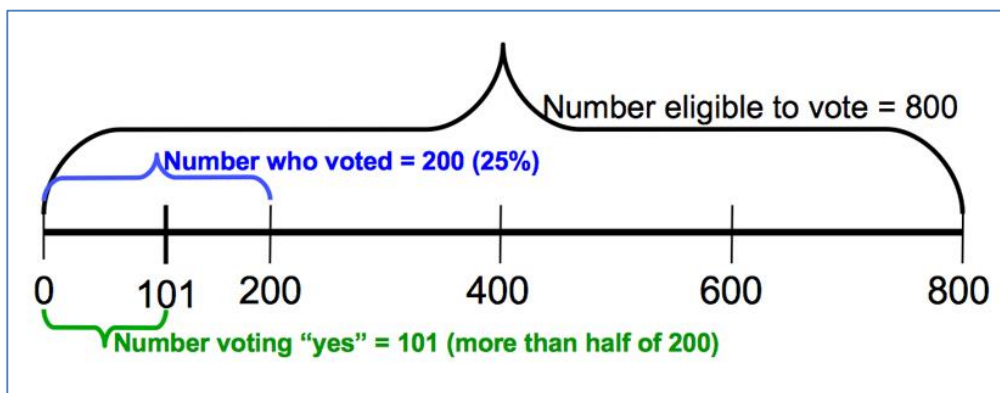
Under the *Act*, two requirements must be met. At least 25 percent of the eligible voters must participate in the vote **and** a majority of those voting must vote in favour. A law will only be registered by AANDC if **both** of these requirements are met.

A First Nation may, by resolution, raise the participation threshold to a higher percentage than the minimum of 25%.

All persons who are 18 years of age and over and members of the First Nation, whether or not they are resident on reserve, are eligible to vote in the community approval process.



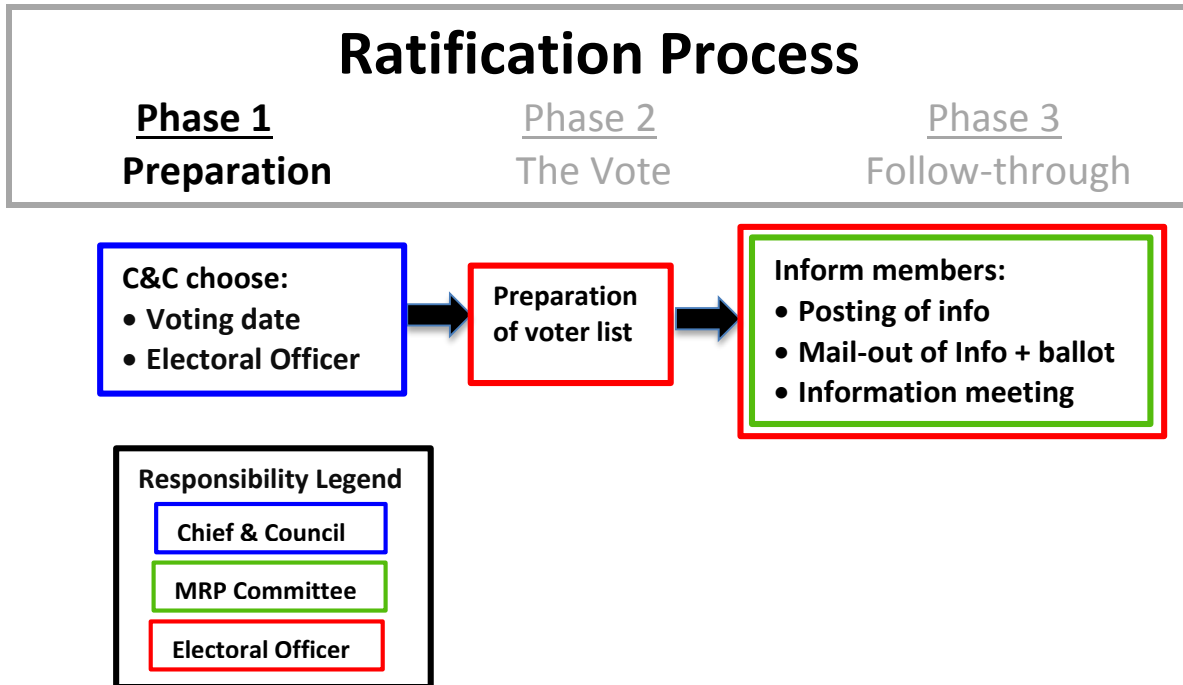
To illustrate the requirements described above, consider the following example. Assume that there are 800 electors, some of whom live off reserve. Only 200 of the 800 cast a vote, thus meeting the 25% threshold required. Of the 200 voting, at least 101 vote in favour of the proposal resulting in a majority. The vote for the acceptance of the proposed MRP law passes!



Note:

FNLMA bands follow the Ratification Process and the notification requirements as described in their land code.

Ratification Process: Phase 1 - Preparation



Most of the work described in this phase will be completed by the Electoral Officer. However, Chief and Council, the Project Manager, and the MRP Committee must have a clear understanding of the process in order to support the ratification activities.

Voting Date

There are many time-consuming tasks to complete before the voting date: the Chief and Council, in selecting this date, should allow ten to twelve weeks at a minimum.

In order to accommodate the electorate, the Chief and Council may wish to have multiple voting dates and to consider other means of casting a ballot, such as electronic voting.

Electoral Officer

The second important task at this point is to select an Electoral Officer (EO). Conducting a vote is a complex process. Chief and Council should appoint an EO who has experience in such matters since the EO maintains primary responsibility for the Ratification Process.

The first duty of the EO is to appoint a Deputy Electoral Officer (DEO). Other responsibilities include:

- Preparing the voter lists.
- Assembling the Ratification Package.

- Posting the Notice of Ratification.
- Mailing out the Ratification Package.
- Attending community information meetings.
- Arranging the poll logistics.
- Managing the polling stations.
- Counting and certifying the ballots.
- Reporting the results.
- Posting the voting results for membership viewing.

The Voters List

Preparation of the Voter Lists should get under way as soon as the First Nation decides that it will enact its own MRP law. To ensure that all eligible voters are on the list, it is important to start with an up-to-date membership list.

Note about Voter Lists

Section 10 Bands have control of their own membership list.

Section 11 Bands are maintained by AANDC. These bands may have to request the latest version of the list from AANDC.

The Master Voters List provided to the EO should include the following information for all eligible voters 18 years of age or older, whether or not they live on reserve:

- Registration number
- Date of birth
- Band Member first and last name
- Address

Additionally, a subset list, the Posted Voters List, is prepared using the Master Voters List. The **Posted Voters List contains only the names** of eligible voters and is posted in a location where members can review it to ensure that their name is on it.

(Note: the Master Voters List is never posted as it contains private information.)

Some First Nations require that Voter Lists be certified by the Chief, or by a Councilor, or by an appointee of the Chief and Council.

Informing the Members

The Council, in order to obtain community approval, will have to take reasonable measures in accordance with the First Nation's practices, to locate voters and inform them of their right to vote, the means of exercising that right, and the content of the proposed laws. The EO, on the direction of the Council, must publish a notice of the date, time, place and counting of the vote.

Information must be posted so that members can make an informed decision. The posting includes the final draft of the proposed MRP law and the Notice of Ratification Vote. This information can be posted at various places, such as the Band Office, the Post Office, the Health Centre, etc.

On the day of posting, the information package prepared in advance should be mailed out to all off-reserve members. This will ensure that the electorate has all the information required to make an informed decision.

The Council, in consultation with the Electoral Officer, will decide if packages will be mailed to on-reserve members, or simply made available at the Band Office. The on-reserve package will not contain a mail-in ballot. However, on-reserve members can request a ballot if they expect to be absent on voting day.

The timing for the mail-out and the posting should be at least six weeks before the Vote Date to allow time for the package to arrive, for the member to review it, and for the mail-in ballot to be returned.

Information Package Documents	Mailed to off-reserve members	Posted for on-reserve members
Final draft of proposed MRP law	Yes	Yes
Notice of Ratification Vote	Yes	Yes
Cover letter – one page *	Yes	Yes
Voting instructions	Yes	No
Official Ballot	Yes	No
Statutory Declaration	Yes	No
Ballot envelope	Yes	No
Return mail-in envelope (pre-addressed, post paid)	Yes	No
Voter list (names only)	No	Yes

*** Best Practice**
The Chief should write the cover letter to show support for the proposed MRP law and the process.

Important Note
The Chief and Council have an obligation to ensure that all voters have the opportunity to be fully informed about the content of the proposed MRP law before the ratification is held.

Information Meeting

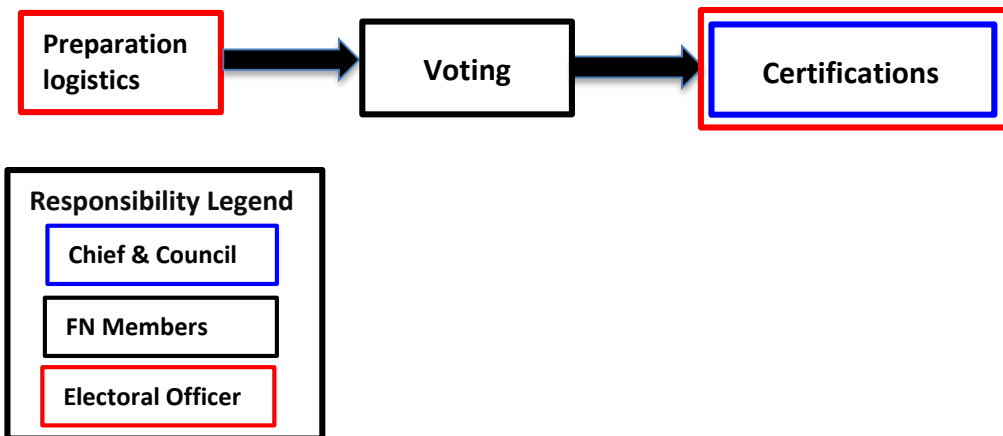
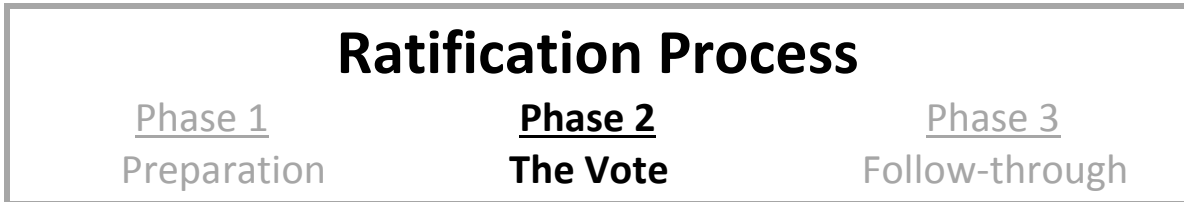
Well in advance of the voting day, the First Nation should host a public information meeting to explain the purpose and features of their proposed MRP law to their community members. Although several meetings may have already been held during the drafting of the law, this Ratification Information meeting can serve to inform on the following:

- The principles on which the law is based.
- The proposed MRP law.
- The importance and need for such a law.
- Information on voting regulations and procedures.

The Chief and Council, the legal counsel, the Electoral Officer and the Committee Leader must attend this meeting. In some cases, holding a second meeting off-reserve may be advisable.

Ratification Process: Phase 2 - The Vote

A good rule of thumb is to allow six weeks between mailing out the voter's package and voting day. Time must be allowed for all off-reserve members to receive their information package, cast their vote, and **return the ballot package** (which includes the ballot and the Declaration of Elector's Vote).



Preparation Logistics

In advance of the voting day, First Nation staff has provided logistical support to the voting officer. Rooms have been booked; chairs, tables, and supplies are ready and in place the day before the vote. The only items NOT set up the day before are the ballots, the ballot boxes, and the voter lists.

After months of hard work, voting day arrives! The posting will have identified the location of the polls and those locations are staffed and ready to receive voters. The Electoral Officer is responsible for ensuring that the vote is conducted by secret ballot.



The Voting

Normal voting hours are recommended as 9:00 a.m. to 8:00 p.m., to ensure that all members have an opportunity to vote. Again, a First Nation may wish to consider multiple voting days to accommodate the electorate and to ensure the greatest potential for reaching the 25 percent voting threshold.

The Membership Clerk should be present to confirm the eligibility of any person wanting to vote who is not on the Voters List.

While it is important to have as many of the eligible members cast a ballot as possible, no incentives may be offered. On the other hand, offering assistance, such as transportation to the poll, is acceptable.

Voter apathy is common in many elections and referendums. Obtaining a majority from a large number of voters will help ensure community support. The only way to ensure this outcome is with a strong campaign and communication plan. These efforts will inform the electorate about the importance of each individual vote in advance of voting day.

During the polling hours, each polling station should receive occasional visits by as many of the C&C, elders, and leaders as possible. While they cannot try to encourage voting in any particular way, their presence should signify their support for the project.

Voting Certifications

Once the polls close, the votes must be counted, preferably that evening or first thing the next day. All ballots, including the mail-in ballots, must be counted and tallies recorded by the Electoral Officer. Spoiled ballots are also counted to determine the number of electors who actually voted. A spoiled ballot must not be counted as either a vote in favour of, or against the proposed MRP law, but it does count in the calculation of the 25 percent threshold.

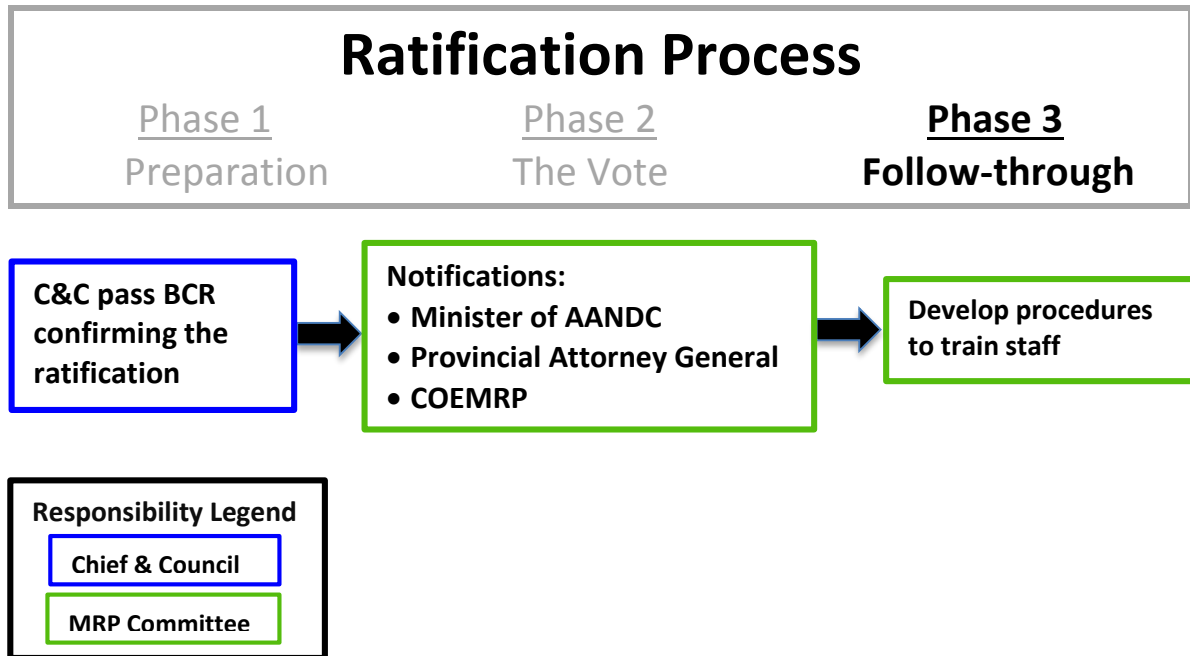
Under sections 7-11 of the *Act*, a majority voting in favour of the proposed MRP law will be deemed to constitute consent by a majority of the electors of the First Nation as long as at least 25 percent of electors voted.

At the end of the voting, a Polling Statement (one for each polling station) should be signed by the Chief, or a Councillor, and the Electoral Officer.

After the counting of all the ballots, the Statement As To Voting Results should be signed by the Electoral Officer and the Chief or a Council member of the First Nation.

Samples of these forms are provided in the Matrimonial Real property (MRP) Toolkit.

Ratification Process: Phase 3 - Follow-Through



Acceptance by BCR

Once there has been a successful ratification of the proposed MRP law, it is a best practice for the Chief and Council to pass a Band Council Resolution accepting the results of the majority achieved, and so inform the First Nation members.

Chief and Council may also set a date at which the MRP law will take effect.

Notifications

After accepting the MRP law, the First Nation Council must make several notifications in writing (except First Nations under FNLM), along with a copy of the newly ratified MRP law, and the BCR if one was passed. These notifications must be sent to:

- the Minister of AANDC,
- the Attorney General of any province(s) in which a reserve of that First Nation is situated,
- the Centre of Excellence for Matrimonial Real Property (COEMRP), as the organization designated by the Minister

Note: a sample BCR and a sample Statement as to Voting Results are available in the MRP Toolkit, available at:

<http://www.coemrp.ca/resources/matrimonial-real-property-mrp-toolkit>

Once submitted to the Minister, a review will take place to ensure that the ratification requirements have been met. If 25 percent of the electors participated in the vote and a majority of those who voted, voted in favour, AANDC will add the First Nation to their list of First Nations who have enacted MRP laws under the *Act*.

Once the law has been added to the list, it may be beneficial to take a copy of the new MRP law to the local Court and to the AANDC Regional Office so they are aware that you have enacted an MRP law.

Make the voting results available for members on your website, bulletin boards, newsletters, and at any location mentioned in your cover letter in the Ratification package.

Procedures and Training

Once the new MRP law is in effect, there will be administrative procedures, guidelines, and filing systems required to support the new law when applications are submitted.

Procedures will be needed to define the handling of the applications dealing with such items as:

- What happens when an application is received?
- Who handles the file, interacts with applicant, drafts response?
- Where are the files stored?
- How are the files managed and kept secure and confidential? Who is informed?
- How is the applicant kept apprised of information concerning the file, and when and where are meetings or input required?

Once these procedures are defined, staff will have to be trained to follow them and on how to maintain the privacy of the applicant.

A filing system specifically for such applications will have to be put in place where the applications are secure and only available on a “need-to-know” basis by designated staff members.

In addition, guidelines will be required to handle situations where court proceedings may occur. Policy must be developed to define what type of case will require representation by the First Nation at any court hearings. The following questions should be addressed when developing this policy:

- Under what circumstances will the First Nation want representation at the court proceedings? Who makes this determination?
- What constitutes “conflict of interest”?
- Who responds to the court?
- How is fairness maintained?
- How is transparency vs. privacy maintained?

On-going Monitoring

Monitor the case history under the new law and report to C&C on a regular basis to ensure that the new law is going into effect as intended and not being abused or misunderstood.

Review annually with legal counsel and consider amendments if required.

Ensure that Band staff receives proper training in the new MRP law and its administration.

The new law will be a success if it helps build a stronger community while protecting those who need it most.



Appendix A - Suggestions for Drafting a First Nation MRP Law

This section provides a number of general principles meant to be helpful when drafting laws, including Matrimonial Real Property laws.

Timeline and Budget

A realistic timeline should be established and agreed upon, as well as the necessary budget to undertake the work to completion.

Project Lead

It should be very clear who at the First Nation is the lead contact for the legal counsel involved in drafting the proposed law and for communication with the First Nation.

The lead person (usually the Project Manager, or the Chair of the MRP Law-Making Committee) should have sufficient authority to make decisions on drafts.

Legal Counsel

While Terms of Reference should be written out for the drafting project, it is also necessary to have face-to-face meetings with legal counsel. The common objective is to ensure that the proposal actually solves the problems of the community with respect to MRP matters.

The lawyer should know what other Acts govern the land regime of the First Nation. The Centre Of Excellence for Matrimonial Real Property should be contacted early in the process to take advantage of its knowledge in this legislative area. Copies of other First Nation MRP laws may be obtained for reference and comparison purposes. . The Centre has developed a report on existing First Nation MRP laws, which is available for download on the website.

Law Drafting Considerations

Will the proposed new law affect or conflict with other existing First Nation laws? It is wise to consult with the staff involved in other departments to see if problems may arise and if other laws may have to be modified to accommodate the new MRP law.

When drafting the law, it is best to **make it as understandable as possible!** The draft must address the following challenges:

- Is there a logical sequence?
- Is it systematic?



- Does it flow?
- Does it provide an efficient organization of the elements?
- Does it avoid repetition?
- Can one find the provisions easily?

Drafting and Writing Tips

The title of the law should be concise and descriptive of the contents of the law.

A poorly organized draft can confuse the reader and lead to misunderstanding, even if the individual provisions are well defined.

A preamble is an introduction that gives context to the law. Keep preambles to a bare minimum.



The challenge throughout the document is to make it as clear and understandable as possible. To that end, the best practice is to use a “plain language” drafting style. Use familiar words instead of obscure ones. Omit unnecessary words. Use concrete words not abstractions. For example: use “decide” rather than “make decisions”.

Use the “active voice” rather than the “passive voice”. The active voice clarifies that there is a duty or a power, and it identifies who is obliged or entitled to do it. The passive voice can be avoided by using the sentence structure of subject-verb-object. For example: “The officer will issue the certificate.” is better than “The certificate shall be issued by the officer.”

Try to keep sentence structure as uncomplicated as possible. Keep it simple! The law is “always speaking”. In practice this means that the law can normally be phrased in the present tense. The drafter need only use a tense other than the present tense when it is necessary to understand the sentence. Avoid long-winded pompous sounding sentences. Keep sentences short and simple. Use non-sexist drafting style, for example, “Police Officer’ rather than “Policeman”.

Definitions

Avoid creating the definition of a term inside the first sentence in which the term appears. This style often makes it difficult to locate a definition. Definitions that apply to the whole law are placed at the beginning, after the title.



A word or expression should only be defined

- when it is used to clarify its ordinary meaning;
- when it is not being used in its ordinary meaning;
- to limit or extend its ordinary meaning; or
- when it is used as an abbreviation of a lengthy expression.

Word Usage

A law must be internally consistent. The same word or expression that is used to describe a particular thing should be used the same way each time. The risk of using more than one word or expression for the same thing is that they may be misinterpreted.

Example: If you are using the word spouse to define married couples or common-law partners, use spouse throughout the entire law. Do not use husband, wife, or partner.

Jargon must be avoided. Avoid “lawyerisms”. These words are often useless and give a false sense of precision. Words like “aforementioned”, “whatsoever”, “heretofore” only confuse, not clarify.

The expressions “notwithstanding” or “despite” and “subject to” are used where there is a conflict between provisions of a Law. These expressions should be limited to those situations where there is a serious risk that the conflict will not be resolved in a way intended by the law.

A duty is an obligation that is imposed on a person by the law. Breach of duty may or may not result in an offence.

A right is discretionary for the person who is given it. It may or may not be exercised depending on the degree of discretion that the person is given.

Powers are “exercised” and duties are “performed”.

Final Edit

Check to see that...

- the draft is complete;
- a spellcheck is done;
- the draft has been proofread (since a spellcheck won’t flag all errors);
- the draft has been properly edited for correct grammar;
- the sections and subsections are numbered properly; and
- all references to other Acts or regulations are accurate.

**A successful MRP law is good for the individual, the family,
and the community.**



It is worth the effort to develop the best law possible!

Appendix B – BCR Sample Wording

BAND COUNCIL RESOLUTION Re: (Name of Law)

WHEREAS [name of the First Nation] has from time immemorial used and occupied its lands;

WHEREAS [name of the First Nation] has the inherent right to govern itself, its members and its lands;

WHEREAS [name of the First Nation] has [pursuant to Treaty #] reserved certain lands for the exclusive use and benefit of its members;

WHEREAS [name of the First Nation] desires to protect its members living on its reserve lands in accordance with its culture and traditions;

WHEREAS [name of the First Nation] does not wish to be bound by the default provisions of the federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Canada);

WHEREAS provincial laws respecting real property do not apply to reserve lands;

WHEREAS [name of the First Nation] desires to provide a law appropriate to our culture and traditions respecting the use, enjoyment and occupation of family homes on its reserve lands and the division of real property rights or interests held by spouses or common-law partners on reserve lands;

WHEREAS Section 7(3) of the *Family Homes on Reserves and Matrimonial Interests or rights Act* requires a First Nation to notify the Provincial Attorney General of its intention to enact a Law under the Act;

THEREFORE BE IT RESOLVED that the [name of the First Nation] affirms its intent to commence development of the [name of the First Nation] Matrimonial Real Property Law.

Dated at _____ this (DAY) day of (MONTH) OF 20(YEAR).

Name of Chief of First Nation

Signature

Name of Councillor

Signature

Name of Councillor

Signature

Name of Councillor

Signature

Name of Councillor

Signature

Name of Councillor

Signature

Appendix C – Additional Reference Material

Role of Chief and Council, a booklet published by COEMRP

- Outlines and defines the responsibilities of Chief and Council under the PFRs as contained in *FHRMIRA*

On-Reserve Matrimonial Real Property Rights, a booklet published by COEMRP

- Outlines the rights and protections available under the PFRs as contained in *FHRMIRA*

Understanding Estates Management on Reserve, a booklet published by COEMRP

- Outlines the survivorship rights under the PFRs as contained in *FHRMIRA*

MRP Toolkit, published by COEMRP

- A comprehensive toolkit that guides First Nations professionals in MRP matters and in the development of their own MRP law.

MRP Desk Manual, published by COEMRP

- A manual intended to help First Nations staff and members manage forms and procedures required for registration in ILRS.

MRP Training Courses provided by COEMRP

- The Centre provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the Centre, at
Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Land Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0

Email: info@coemrp.ca

Phone: 1-855-657-9992 or 1-705-657-9992

COEMRP Website <http://www.coemrp.ca>

NALMA Website <http://www.nalma.ca>

AANDC Website <https://www.aadnc-aandc.gc.ca/>

“The Centre of Excellence for Matrimonial Real Property would like to acknowledge Dominique Nouvet, lawyer at Woodward and Company and Patrick Orr, Legislative Drafter for their contributions to this publication.”