First Nations

Matrimonial Real Property Laws

Final Report

February 3, 2015

Centre of Excellence for Matrimonial Real Property

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EXECUTIVE SUMMARY

The Centre of Excellence for Matrimonial Real Property (the Centre) supports First Nations with the implementation of, and transition to, the *Family Homes on Reserves and Matrimonial Interests or Rights Act*[1]. Accordingly, the Centre determined that it required a research report comparing existing First Nations matrimonial real property laws across Canada and identifying common topics and themes shared among these laws. This report consists of research into and reading of twenty-six First Nations laws pertaining to matrimonial real property rights on reserve, created pursuant to several different authorities: the *Family Homes on Reserves and Matrimonial Interests or Rights Act*; the *First Nations Land Management Act*[2]; inherent right; comprehensive self - governance arrangements; and model First Nations matrimonial real property laws. These First Nations laws were analyzed first, for common topics and approaches, and second, for overarching umbrella themes.

A topic or approach identified as being a commonality is present in some form in at least one third of the laws examined (nine laws out of a total of twenty-six), though many commonalities were present in all or almost all, the laws. Common topics and approaches have been identified in the following areas:

1. Land and cultural values;
2. Non-discrimination / fairness;
3. Source of jurisdiction / authority;
4. Scope of First Nations matrimonial property laws;
5. Best interests of the children;
6. Non – members' rights and interests;
7. Three step process;
8. Inter spousal agreements;
9. Mediation;
10. Court of competent jurisdiction; and
11. Matrimonial property.

[1] S.C. 2013, c. 20.
[2] S.C. 1999, c. 24.

Arising from these topics and approaches, the common umbrella themes overarching the majority of the First Nations matrimonial property laws have been identified as:

- First Nations autonomy;
- Harmonization; and
- Balancing individual rights and interests with First Nations community integrity and collective rights.

Throughout the laws examined, there is a clear imperative for First Nations autonomy, regardless of the legal framework under which they were created, reflective of the exercise of jurisdiction / authority by the First Nations. All of the laws examined made it clear that when it comes to interests in First Nations land, the First Nations matrimonial real property law is paramount, with federal and provincial laws limited to the extent that they deal with interests in First Nations land. The majority of the laws make it clear that no power can create, award or acknowledge an allotment interest in First Nations lands in favour of a non-member, also creating limitations on any possession interest in a matrimonial home granted to a non-member. These provisions clearly indicate a desire for First Nations autonomy over First Nations land. There is also a strong preference indicated in the First Nations laws for resolution of matrimonial real property issues within the community, either through agreement by the parties or by mediation, rather than resorting to the courts.

Nonetheless, the rights of parties to avail themselves of courts of competent jurisdiction, subject to the First Nation's laws, are preserved in almost all cases. This brings us to the second over-riding theme: harmonization of the First Nations matrimonial real property law with the mainstream system. In addition to making extensive orders pertaining to matrimonial real property under the First Nations laws, courts of competent jurisdiction are generally also empowered to review inter spousal agreements and to set aside the requirement of mandatory

mediation based on certain conditions. Courts are also mandated to collect fines where there has been a breach of a court order pursuant to a First Nations matrimonial property law, and to remit that fine to the First Nation.

Perhaps the greatest overall theme in the laws can be described as balancing individual rights and interests with First Nations community integrity and collective rights**.** A non-discrimination on the basis of sex provision is almost universal in the First Nations laws examined; approximately half of the laws make reference to equitable dealings or principles of fairness in dispositions of First Nations land. Examples of principles of fairness reflected in the majority of laws include provisions that inter spousal agreements are reviewable by a court on certain grounds including failure to disclose by a spouse; lack of understanding by a spouse; and unconscionability. Similarly, courts may set aside a requirement for mandatory mediation where the matter involves the matrimonial home and mediation is not feasible; due to urgency; and / or where mediation might result in injustice. This can be seen as striking a balance between favouring interpersonal resolution in the First Nations community and the requirements of fairness.

All of the First Nations laws contain provisions dealing with the law's applicability to non-members as well as delineating their rights and interests. The majority of the laws provide that both spouses share an equal right to possession in the matrimonial home and that a non-member spouse can be awarded possession of the matrimonial home. Almost all the laws provide that in determining possession of the matrimonial home, there is a preference for a custodial parent. These provisions can be seen as striking a balance between non-member's interests, the best interests of the children and the desire to maintain First Nations' community integrity.

First Nations seek to ensure the use and benefit of the land for members for all time as reflected in the paramountcy of the matrimonial real property laws. Nonetheless, a legal balancing act between the protection of First Nations autonomy, community integrity and communal rights with the interests of harmonization, fairness, gender equality and the best interests of the child, is evident in the majority of the First Nations matrimonial real property laws examined.

I. INTRODUCTION

The Centre of Excellence for Matrimonial Real Property is committed to supporting First Nations with the implementation of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. As communities adjust and transition into this relatively new legislation, the Centre provides guidance and support to First Nations who choose to undertake the development of their own matrimonial real property laws, while also facilitating understanding of the provisional federal rules. The Centre also provides information on the protections and rights available to individuals and families living on reserve and provides research on alternative dispute resolution mechanisms.

The Centre determined that it requires a research report that compares existing First Nations matrimonial real property laws across Canada and identifies common topics and themes that are shared among these laws. Accordingly, this report consists of research into and reading of twenty-six First Nations laws pertaining to matrimonial real property rights on reserve, created pursuant to several different authorities as discussed below. These laws were analyzed first, for common topics and approaches, as discussed in the section under that name, and second, for overarching umbrella type themes discussed in the conclusions section.

II. THE LAWS

1. *Family Homes on Reserves and Matrimonial Interests or Rights Act*[3]

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* is divided into two parts, currently both in force. The first part of the *Act* (in force as of December 16, 2013) provides for the enactment of First Nation laws respecting on-reserve matrimonial real property;

[3] S.C. 2013, c. 20.

the second part of the Act (in force as of December 16, 2014) provides for provisional federal rules to fill the legislative gap in the absence of a First Nation's own laws. This legislation is intended to address a long-standing legislative gap arising from the fact that the *Indian Act*[4], does not address the issue of matrimonial real property rights and as a result of the Supreme Court of Canada decision in *Derrickson* v. *Derrickson*[5], elements of provincial / territorial laws relating to this issue cannot be applied on reserves.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* provides basic rights and protections to individuals on reserves during a relationship, in the event of a relationship breakdown, and on the death of a spouse or common-law partner, regarding the family home and other matrimonial interests or rights. Priorities of the legislation include balancing individual rights and the collective rights of First Nation communities, and the development of matrimonial real property laws by First Nations. As of December 16, 2014, the provisional federal rules provided in the *Act* apply to First Nations who have not enacted their own matrimonial real property laws under this legislation – with the exception of First Nations under the *First Nations Land Management Act* or with comprehensive self-government agreements with land management. The federal rules fill the legislative gap on reserves where there are no First Nation laws in place and will apply until First Nations enact their own laws on matrimonial real property under the *Act* or other federal legislation.

There appears to be only one law that has been passed pursuant to this legislation to date; that of the Algonquins of Pikwàkanagàn First Nation, in Ontario. It is included in this report.

[4] R.S.C. 1985, c. I-5.
[5] [1986] 1 SCR 285.

2. *First Nations Land Management Act*[6]

The preponderance of the First Nations matrimonial real property laws considered in this report (approximately twenty) were passed under the auspices of the *First Nations Land Management Act;* a federal law pertaining to the signatory First Nations' authority to make laws in relation to reserve lands, resources and the environment. This *Act* ratifies the Framework Agreement on First Nation Land Management; signing the Framework Agreement is the first step for a First Nation to assume control pursuant to the *First Nations Land Management Act*.

First Nations signatories have the authority to deal with matrimonial real property interests or rights under the *First Nations Land Management Act*. They have twelve months from the date their land code takes effect to enact rules and procedures dealing with matrimonial rights or interests in reserve land in their land code or a First Nation law. First Nations who are operating under their own land code at the time the *Family Homes on Reserves and Matrimonial Interests or Rights Act* came into effect will not be subject to the provisional federal rules regardless of whether those First Nations have laws to address matrimonial real property rights or interests in place. First Nations who have signed onto the Framework Agreement on First Nation Land Management, but have not enacted land codes or laws to address matrimonial real property rights or interests, will have a three-year time frame within which to enact either their land codes or laws addressing matrimonial real property rights or interests under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* or under the *First Nations Land Management Act.* Following this three-year time frame, the provisional federal rules of the

[6] S.C. 1999, c. 24.

Family Homes on Reserves and Matrimonial Interests or Rights Act will apply to these First Nations unless and until their respective land codes or matrimonial real property laws are in place. First Nations who sign onto the Framework Agreement on First Nation Land Management at any point after the *Family Homes on Reserves and Matrimonial Interests or Rights Act* came into force will be subject to the provisional federal rules unless and until the respective First Nations have their matrimonial real property laws in place.

3. Inherent Right

Several First Nations communities have passed laws dealing with matrimonial real property rights on reserve pursuant to inherent authority or inherent rights of self-government of which passing matrimonial real property laws on reserve is considered a component. Inherent rights are rights that exist by virtue of an Aboriginal community existing before the arrival of the European state, rather than a contingent right – one that has been granted by the state. As such, inherent rights pre-exist the Constitutions; arise from First Nations occupation of North America as sovereign nations before the coming of Europeans; and are held communally. Inherent rights are said to be, among other descriptors: unique; rooted in indigenous peoples living for thousands of years in what has become Canada, with their own societies, ways of life and governments; and reflective of the special relationship that Aboriginal peoples have with the land, defining their identities, rights and responsibilities.

First Nations matrimonial real property laws enacted pursuant to inherent right considered in this paper include those of the Six Nations of Grand River; the Sawridge First Nation and the Kahnawà:ke First Nation.

4. Comprehensive Self - Governance Arrangements

Two of the First Nations matrimonial real property laws examined were passed pursuant to comprehensive self-governance arrangements. These are agreements between federal, provincial and First Nations governments that resolve comprehensive land claims (based on the assertion of continuing Aboriginal rights and/or title to lands and natural resources) and also address components of self-government. Under the Government of Canada's 1995 Inherent Right Policy, self-government arrangements may be negotiated simultaneously with lands and resources as part of comprehensive claims agreements. These agreements attract constitutional protection as treaties pursuant to section 35 of *The Constitution Act, 1982*[7]. Self-government agreements set out arrangements for First Nations to govern their internal affairs and assume greater responsibility and control over the decision-making that affects their communities, and can include matrimonial real property.

The two First Nations who have passed matrimonial real property laws pursuant to comprehensive self - governance arrangements that are considered in this paper are the Sechelt First Nation and the Westbank First Nation.

5. Model First Nations Matrimonial Real Property Laws

Finally, both the Assembly of First Nations and the Centre of Excellence for Matrimonial Property have provided model First Nations matrimonial real property laws that are considered in this paper. The two draft laws provided by the Centre are subsequent to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and thus generally contain the same elements as the provisional federal rules.

[7] Being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

III. COMMON TOPICS AND APPROACHES

Generally, a topic or approach is identified as being common among First Nations matrimonial real property laws where it is present in some form in at least one third of the laws examined (nine laws out of a total of twenty-six). Where a minority of laws offers a significantly different approach to the same topic this is also indicated. In the conclusion section which follows, these common topics and approaches are generalized into even broader over-arching themes that have been identified arising from the laws. Some topics and approaches were prevalent in either or both the preamble and the body of the law.

1. Land and Cultural Values

Approximately one third of the First Nations laws examined make reference to the cultural significance of land to the First Nation and the connections between land and spiritual values in the First Nations community. Numerous laws reference the First Nation as the guardian / protector of the lands for future generations and / or provide that the First Nation seeks to ensure the use and benefit of the land for members for all time. Some laws reference that the land is held in common for all, the collective nature of land interests in the First Nations community and that there are no permanent interests in land. Some clauses provide that the matrimonial property law must demonstrate respect for and be appropriate to, the history, culture, traditional laws, practices and customs of the enacting First Nation. Respect for the land itself has been identified as a guiding principle.

2. Non-Discrimination / Fairness

A no discrimination on the basis of sex provision is almost universal in the First Nations laws examined, usually contained in the preamble, but often also in the body of the law. A fairly standard clause provides that the First Nation intends to provide rights and remedies without

discrimination on the basis of sex with respect to spouses who have or claim interests in First Nation land upon the breakdown of their marriage.

Most of the First Nations laws specify that common law married couples are included in the definition of spouse; though a few appear to limit the definition to only those couples that are married, while even fewer appear to define spouses as being a man and a woman. However, the number of years of cohabitation required for the First Nations' definitions of common law spouse ranges from two years to ten.

Approximately half of the First Nations laws make reference to equitable dealings or principles of fairness in dispositions of First Nations land, subject to the First Nations law. These clauses are contained in either or both the preambles and the body of the law.

3. Source of Jurisdiction / Authority

Typically, the source of jurisdiction / authority for passing the First Nations matrimonial property law is found in the preamble. The majority of the laws examined (approximately two thirds) were passed pursuant to the *First Nations Lands Management Act*. Thus, the majority contained clauses referencing the Framework Agreement on First Nation Land Management and the individual First Nation's land code as sources of authority and / or jurisdiction or simply as requiring the First Nation to pass a matrimonial property law.

Approximately one third of the laws surveyed contained inherent right language, either in the preamble, the body of the law or both. Typically, these provisions made reference to section thirty- five (35) of the *Constitution Act, 1982* as protecting an already existing Aboriginal right to self-government emanating from the people, culture, language and land. The First Nations laws also clarify that the inherent jurisdiction to pass laws on matrimonial real property in the case of the breakdown of a marriage or common law relationship, is a component

of the inherent right to self-government, and has not been extinguished. The majority of the matrimonial property laws utilizing inherent right language also fell under the auspices of the *First Nations Lands Management Act* and contained additional clauses referencing this legislation, the individual agreement with the community and the First Nation's land code. A few contained a recognition and non-derogation clause providing that the First Nations law shall be construed as upholding existing First Nation, Aboriginal and treaty rights and freedoms and as not abrogating or derogating from them. As noted earlier, one law was passed pursuant to the *Family Homes on Reserves and Matrimonial Interests or Rights Act.*

4. Scope of First Nations Matrimonial Real Property Laws

Almost all the laws contain a clause, usually in the body, that the First Nations matrimonial real property law applies only to an interest in, or claimed in, the relevant First Nations land. Many of the laws clarify as well that they apply only to First Nations reserve lands, and not to traditional territories of the individual First Nation. There are a few laws that identify the applicability of the First Nations law as being only to matrimonial homes and not to interests in or on First Nations lands, but this is not common. A few of the laws provide that family property does not include an interest in community land that is used for a business or commercial purpose.

The vast majority of the First Nations laws examined contain clauses clarifying that the law does not limit rights and remedies otherwise available to parties pursuant to laws applicable on the breakdown of marriage with respect to any property other than those interests in First Nations land dealt with by the First Nations law. This reflects the practical reality that while the First Nations matrimonial real property law applies only to an interest in, or claimed in, the relevant First Nations land, other matters will likely also be determined pursuant to provincial law in the case of marriage breakdown. The majority of First Nations laws also provide that a

court of competent jurisdiction may deal with interests in First Nation land held by either spouse, or both spouses, in a manner consistent with the provisions of the provincial family law legislation so long as it does not conflict with the First Nations law. In other words, federal and provincial laws are limited only to the extent they deal with interests in First Nations land.

The vast majority of the laws provide that the law does not apply where neither spouse is a member. However, at least two laws provide that the law applies where neither spouse is a member. Several of the laws provide that the matrimonial real property law is subject to other laws of the First Nation including laws and bylaws under the land code.

5. Best Interests of the Children

All First Nations laws considered make it clear that children are a priority when marriage breakdown occurs. This is usually accomplished in various provisions throughout the law. Often, reference to the best interests and welfare of the children as an important factor in the resolution of matrimonial real property disputes is made in the preamble. The laws contain definitions of "child" that invariably include a child by traditional adoption / band custom.

Almost all the laws provide that in determining possession of the matrimonial home, there is a preference for a custodial parent. This is to respect what are usually the child's preferences to continue living in the home as well as to ensure less disruption to their lives. The majority of the laws provide that the custodial parent should have exclusive possession of the family home until the youngest child reaches the age of majority (and has the opportunity to complete their education) so long as this is consistent with the best interests of the child. If the child or children spend equal amounts of time with both parents (joint custody) then this principle is neutral in determining possession of the matrimonial home. However, most of the laws also provide that in applying these two principles, courts may have regard to the fact that

one or more of the minor children are not members. A few laws clearly indicate that a non-member spouse, not usually allowed an interest in community land, can have occupation of a matrimonial home only if they are the custodial parent of a member child (up to age 18 for the child). Other laws clearly state that a non-member spouse and non-member children have no rights to occupy or possess the matrimonial home, and are only entitled to compensation for a share in the equity of the home and any improvements made. This is discussed further in the following section on non-member rights and interests.

6. Non-Members Rights and Interests

All of the First Nations laws considered contain provisions dealing with the law's applicability to non-members as well as delineating their rights and interests. The vast majority of the laws provide that the First Nations law does not apply where neither spouse is a member. However, in the minority, there are several laws that provide that the law does apply where neither spouse is a member.

It is a standard provision in the majority of the laws that a court cannot issue an order that results in the transfer of a certificate of possession / allocation or the creation of an allotment interest in First Nations lands in favour of a spouse who is not a member. Thus, in the majority, courts may make an order dealing with the disposition of interests in First Nations land but subject to the law's caveat that an interest cannot be transferred absolutely to a non-member spouse. No power can create, award or acknowledge an allotment interest in First Nations lands in favour of a spouse who is not a member. It is also a standard clause that any possession interest in a matrimonial home granted to a non-member by agreement, mediation or court order, cannot be greater than a life estate, measured by the life of the person meant to enjoy it. Any possession of an interest in a matrimonial home under the First Nations laws by a person who is

not a member is not assignable and shall be deemed to terminate when that person ceases to use or occupy that interest personally.

Laws that do not follow these general directives pertaining to non-members and possession / occupation interests in the matrimonial home are in the minority. A couple of the laws provide that the non-member spouse is entitled to an equal share of the value of the spousal property / matrimonial home and any improvements made. A few state that where a matrimonial home possession interest is granted to a non-member spouse, that spouse must still obtain council permission and a residency permit or band membership to reside on the reserve pursuant to a residency by-law.

Finally, as previously noted, most of the laws provide that while primacy should be given to the custodial spouse for possession of the matrimonial home where children are involved, courts "may" have regard to the fact that one or more of the minor children are not members. A few other laws go further than the majority, stating that a non-member spouse is not allowed possession of the matrimonial home based on child custody, unless they are the custodial parent of a member child.

7. Three Step Process

Almost universally, the First Nations laws provide for a three step process for resolving matrimonial real property matters related to First Nations land: agreement, mediation and access to a court of competent jurisdiction. Many First Nations spell out this three step process clearly in the preamble to their law, while for others, it is apparent only on a thorough reading. The emphasis is on resolution without the intervention of courts, first through attempted agreement among the parties, then by mediation. Nonetheless, the rights of parties to avail themselves of

courts of competent jurisdiction, subject to the First Nation's laws, were preserved in almost all First Nations laws.

A standard clause in the preamble provides firstly, for the right of the parties to a marriage to make their own agreement as to the disposition of interests in First Nation land in the event that their marriage breaks, or has broken down; secondly, for the value of mediation where the parties have not or are unable to reach their own agreement; and thirdly, for the right of the parties to have access to court of competent jurisdiction. It is important to note the qualifier provided by the First Nations laws that any court determination dealing with property rights, entitlements and obligations on the breakdown of marriage is subject to the First Nation law where the property includes an interest in First Nations land.

8. Inter Spousal Agreements

The First Nations matrimonial real property laws stress the importance and value of parties reaching inter spousal agreements on their own accord, and that such agreements are to be respected and enforced. The First Nations laws respect the agreement of the parties to a marriage as it pertains to the use, possession, occupancy, disposition or partition of an interest in First Nations land, including an interest that is a matrimonial home. (For a few, the law pertains only to an interest in a matrimonial home.) Inter spousal agreements are generally defined to include a marriage contract and separation agreement, including where the spouses are common-law. However, the contents of the agreements are constrained by the limitations of the First Nations law, particularly with respect to the interests granted to non-members as discussed above. No agreement can award, acknowledge or create an allotment interest in First Nations lands in favour of a spouse who is not a member for longer than a life estate, including in the matrimonial home.

The laws generally provide that while such agreements are enforceable they are also reviewable by a court of competent jurisdiction. Many of the laws provide provisions for set aside of the agreement by a court, particularly where:

- A party has failed to disclose interests in land;
- One spouse did not understand the agreement;
- The agreement is unconscionable; and
- The agreement is not in accordance with the law of contract.

Some laws provide additional provisions for set aside by a court, such as the agreement is not binding where it pertains to the matrimonial home and a child is involved or where there has been abuse or coercion in reaching the agreement. However, the clauses enumerated above are the consistent grounds provided by the majority of First Nations laws examined that include a clause on agreement reviewability by the court. Several of the laws provide for registration of the agreement / registration of a spousal interest in a registry maintained by the First Nation in order for the agreement to be valid.

9. Mediation

Almost all of the First Nations matrimonial real property laws contain clauses promoting the use of mediation. For many, mediation is a compulsory step if spouses cannot reach agreement on their own. For others, while the importance of mediation prior to going to court is stressed, it remains optional. The majority provide that council will prescribe the rules, regulations, and practices of mediation and compile a list of approved mediators. A few make reference to utilizing external mediator resources (for example, the B.C. mediator roster). Others provide for implementing traditional First Nations processes (for example, the traditional Sto:lo dispute mechanism process: Qwi:quelstom) or an Elder's commission to assist with mediation. Many provide detailed clauses dealing with the notice of request for mediation, mediation services,

appointments, costs, etc. The result of all these mediation processes is a separation agreement, though it may deal only with land interests.

Six of the First Nations laws provide that independent legal advice is required at some stage of the mediation process – either in advance, during or pertaining to the outcome separation agreement. Others, again a minority, provide that the mediator is to screen for a safe mediation forum for both spouses. Many more of the laws provide that an agreement reached by mediation shall expressly provide that each party waives all rights to challenge its provisions pursuant to the law.

Approximately half of the First Nations laws reviewed also provide that other alternative dispute resolution processes are acceptable for resolving issues pertaining to First Nation lands so long as the resulting separation agreement meets the requirements of the First Nations matrimonial real property law. Where mediation has been unsuccessful, many of the laws provide for the provision of a confidential mediator's report, and a certificate of compliance or waiver with the law's mediation requirements.

As discussed in the section immediately below, over a third of the laws provide that a court of competent jurisdiction can send a matrimonial property dispute to mediation where none has occurred. However, these laws also generally provide that the requirement of mandatory mediation may be set aside by the court where it is a matter involving the matrimonial home and mediation is not feasible; due to urgency; and / or where mediation might result in injustice.

10. Court of Competent Jurisdiction

Most of the laws examined provide that a court of competent jurisdiction may deal with the disposition of First Nation land, subject always to the provisions of the First Nations law. This includes the disposition of the matrimonial home, though an interest in First Nations land cannot

be transferred absolutely to a non-member spouse. Courts are also to have no jurisdiction over future or contingent interests on First Nations land. A few laws offered recourse to a First Nations tribunal or First Nations court, while fewer still appear to completely oust any external court jurisdiction. Examples of the types of orders that courts of competent jurisdiction may make are elucidated in the majority of the First Nations laws, and are canvassed in the following section entitled matrimonial property.

Six of the First Nations laws provide that the First Nation is to have standing in court proceedings under the law and the court is to consider evidence concerning First Nations laws and customs. Almost all of the laws create an offence on summary conviction for violating a court order made pursuant to the matrimonial real property law and pertaining to First Nation land. The standard penalty across laws is a fine of not more than $5 000.00 and / or three months imprisonment. These laws generally provide for the fine to be paid to the First Nation after reasonable court costs have been deducted.

11. Matrimonial Property

Many of the laws do not define or use the language of "matrimonial property" in the body, but rather an "interest in First Nation land" which includes any legal or equitable interest held in possession by either spouse, or both spouses, in First Nation land. This is generally elaborated upon as including any certificate of possession, allotment, lease, permit or any other equivalent instrument that is recognized under the First Nations land code. Where matrimonial property is defined in a First Nations law, it is said to include an interest in First Nations land held by one or both spouses that was acquired during the relationship; any increased value that has accrued during the relationship in an interest in First Nations land held by one or both spouses that was acquired prior to the relationship; and a matrimonial home.

Approximately half of the laws state that matrimonial / family property does not include First Nations lands that are used for business or commercial purposes and that no court order shall be made requiring the sale of a business or a farm on First Nations land, unless there is no other method of achieving an equitable result. Approximately two - thirds of the laws provide that an interest in First Nations land received as a gift or inheritance held within a family is exempt from a spousal claim. However, they also generally provide that the matrimonial home is not exempt from net family property even when received by way of gift or inheritance.

It should be noted that while only a few laws purport to apply exclusively to the matrimonial home, in substance, the matrimonial home is the main property focus of the First Nations matrimonial real property laws. Most of the First Nations laws provide that both spouses have an equal right to possession of the matrimonial home. The majority provide that a non-member spouse can be awarded possession of the matrimonial home while the minority provide for potential compensation for a share of the equity in the matrimonial home earned during the relationship.

In a few of the laws, leasehold or possession interests in the matrimonial home are not available for spouses who cannot hold certificates of possession and occupation. A few state that where a matrimonial home possession interest is granted to a non-member spouse, that spouse must still obtain council / housing commission permission and a permit or Band membership to reside on the reserve pursuant to a residency by-law. Where available under the First Nations law, possession of the matrimonial home by a non-member does not extend beyond a potential life estate in any law, and this interest is not assignable, ending when the interest holder ceases to occupy personally.

Numerous laws provide that where a matrimonial home on First Nations lands is used for more than the matrimonial home – for other than residential purposes– then only the component used as family residential is considered part of the matrimonial home. Some laws make it clear that the matrimonial or family home excludes the certificate of possession or allotment on which the home is situated, while others state that the law itself only applies to matrimonial homes and not to interests in or on First Nations lands.

Courts have detailed powers in respect of matrimonial property pertaining to possession, dispossession and encumbrance, as detailed in most of the First Nations laws. In the majority of the laws, the court may in relation to First Nations land:

- Authorize a disposition / encumbrance of First Nations land as authorized under First Nations law and in certain conditions;
- Order that an interest in First Nation land held by both spouses be partitioned or partitioned and sold;
- Make an order declaring the right of possession to the interest in First Nation land;
- Make a declaration as to the ownership of any interest in First Nations land or in a matrimonial home;
- Make an order for compensatory payment to the non-member spouse to recognize the contribution to the matrimonial property;
- Make any appropriate, equitable order where there has been fraudulent / intentional / reckless depletion of net family property including an interest in First Nation land;
- Make an order that an interest in First Nation land be subject to lease by one spouse to the other for term of years subject to such conditions as the court deems just in all the circumstances;
- Declare that the interest is / is not a matrimonial home;
- Order a delivering up / exclusive possession / disposition / encumbrance of the matrimonial home; and
- Make an order releasing First Nations land from the application of the law on terms that are equitable and just.

Factors for a court to consider in determining a spousal interest in matrimonial property are enumerated in many of the laws and generally include the contribution of a spouse who does not hold the registered interest in First Nations land, to the improvement / acquisition of family property by household management / child rearing. A significant minority of the laws provide

that the band council is to direct any partition of an interest in First Nation land and any sale of an interest in First Nation land resulting from a court order.

A few laws reference a court power to issue an emergency exclusive occupation order for the matrimonial home whether or not the spouse is a member where family violence has occurred and the order should be made to ensure the immediate protection of a spouse or child who resides in the matrimonial home. Among the factors to be considered by a court in making a determination of possession of the matrimonial home is violence committed against a spouse or children. However, a few of the laws constrain the court power by providing that the court may not make an order for possession of the matrimonial home if it is likely to force a member spouse out of the home, unless the court concludes such an order is unlikely to cause the member spouse undue hardship.

The laws generally contain requirements for a spouse to dispose of or encumber an interest in First Nations land that is a matrimonial home as well as provisions for setting aside an encumbrance / execution against a spousal interest in First Nation lands that is a matrimonial home.

As recalled from the earlier discussion, in the majority of the laws, the custodial parent is intended to have exclusive possession of the matrimonial home until the youngest child reaches the age of majority and has the opportunity to complete their education, so long as this is consistent with the best interests of the child. If the child or children spend equal amounts of time with both parents (joint custody) then this principle is neutral in determining possession of the matrimonial home.

The majority of the First Nations laws contain a clause to the effect that interests after the death of a spouse are to be determined by the will / administration of the estate. A surviving spouse cannot elect under the First Nations matrimonial property law, to claim, take or pursue an interest in First Nation land held by the other spouse under this law. However, most laws also provide that where a spouse dies after proceedings under the matrimonial property law have already commenced and interests in the First Nations land have not been resolved, a spouse may continue against the estate of the deceased spouse.

IV. CONCLUSIONS

Arising from the general topics and approaches identified above, the common umbrella themes over-arching the majority of First Nations matrimonial real property laws have been identified as: First Nations autonomy; harmonization; and balancing individual rights and interests with First Nations community integrity and collective rights.

There is a clear imperative for First Nations autonomy as expressed in the various First Nations laws, regardless of the legal framework under which they exercise jurisdiction / authority. This of course, reflects the premise upon which these laws were passed – jurisdiction and/or authority being exercised by the First Nations. This perhaps is most clear in the minority of laws that reference an inherent right to self - government, with the passage of matrimonial real property laws being an exercise of that right. All of the laws examined make it clear that when it comes to interests in First Nations land, the First Nations matrimonial real property law is paramount, trumping all other laws. Where there is an interest in, or claimed in, the relevant First Nations (reserve) land, the First Nations law takes precedence over any other. Federal and provincial laws are limited to the extent they deal with interests in First Nations land. First Nations laws provide that any court determination dealing with real property rights, entitlements

and obligations on the breakdown of marriage is subject to the First Nation law where the property includes an interest in First Nations land.

Further, the majority of the laws make it clear that no power (including the court) can create, award or acknowledge an allotment interest in First Nations lands in favour of a spouse who is not a member. The majority of the laws also make clear that any possession interest in a matrimonial home granted to a non-member by agreement, mediation or court order, cannot be greater than a life estate, measured by the life of the person meant to enjoy it. These provisions clearly indicate a desire for First Nations autonomy over First Nations land. Equally, for the vast majority of First Nations who have passed matrimonial property laws, the desire for autonomy does not extend to application of the law where neither spouse is a member.

The exercise of autonomy is also evident in the significant minority of laws that reflect the cultural significance of land to the First Nation. Numerous laws provide that the First Nation seeks to ensure the use and benefit of the land for members for all time. Again, a significant minority also provide that the First Nation is to have standing in court proceedings under the law and the court is to consider evidence concerning First Nations laws and customs.

The First Nations matrimonial real property laws also overwhelmingly encourage members to resolve matrimonial property matters internally, with the assistance of family and other community members or individuals, prior to turning to the courts. Indeed, the court is the last resort for the majority of First Nations who provide for access to a court of competent jurisdiction. The three step process contained in almost every law, places an emphasis on resolution without the intervention of courts, first through attempted agreement among the parties, then by mediation. The First Nations matrimonial real property laws stress the importance and value of parties reaching inter spousal agreements on their own accord, and that

such agreements are to be respected and enforced, within certain limitations as prescribed by the law. Almost all of the First Nations matrimonial real property laws contain clauses promoting the use of mediation; for many, mediation is a compulsory step if spouses cannot reach agreement on their own.

Nonetheless, the rights of parties to avail themselves of courts of competent jurisdiction, subject to the First Nation's laws, were preserved in almost all cases. This brings us to the second over-riding theme in the majority of First Nations matrimonial property laws: some degree of harmonization of the First Nations matrimonial real property law with the mainstream system. Generally, mainstream courts have fairly extensive powers with respect to issuing orders pertaining to First Nations matrimonial real property, subject to the parameters of the First Nations law. The laws generally also provide that inter spousal agreements are reviewable by a court of competent jurisdiction; the court can also set aside the requirement of mandatory mediation based on certain conditions as discussed below. Further, most of the laws create an offence for breaching a court order made pursuant to the First Nations matrimonial real property law. The fine is payable to the First Nation after administration by the courts, clearly harmonizing implementation of the First Nations law with mainstream court processes.

Perhaps the greatest overall thematic area in the laws can be described as balancing individual rights and interests with First Nations collective rights**.** Generally, the First Nations matrimonial real property laws examined strike a balance among different factors including equality rights; fairness; best interests of the children; non-members' interests and First Nations community integrity and control.

A non-discrimination on the basis of sex provision is almost universal in the First Nations laws examined; approximately half of the laws make reference to equitable dealings or principles

of fairness in dispositions of First Nations land, subject to the First Nations law. Principles of fairness can be seen to be reflected in provisions in the majority of laws providing that while inter spousal agreements are enforceable, they are also reviewable by a court of competent jurisdiction on certain grounds including failure to disclose by a spouse; lack of understanding by a spouse; and unconscionability. With respect to mediation processes, the court may similarly set aside a requirement for mandatory mediation where the matter involves the matrimonial home and mediation is not feasible; due to urgency; and / or where mediation might result in injustice. This can be seen as striking a balance between favouring interpersonal resolution in the First Nations community and the requirements of fairness.

All of the First Nations laws contain provisions dealing with the law's applicability to non-members as well as delineating their rights and interests. It is a standard provision in the majority of the laws that no authority can award, acknowledge or create an allotment interest in First Nations lands in favour of a spouse who is not a member for longer than a life estate, including in the matrimonial home. However, the majority provide that both spouses share an equal right to possession in the matrimonial home and a non-member spouse can be awarded possession of the matrimonial home. The minority provide for potential compensation for a share of the equity in the matrimonial home earned during the relationship. Most of the laws provide that in determining possession of the matrimonial home, there is a preference for a custodial parent; where the custodial parent is not a member, the courts "may" take into consideration whether the children are members or not. These provisions can be seen as striking a balance between non-member's interests, the best interests of the children and the desire to maintain First Nations community integrity.

The goal of maintaining First Nations community integrity with respect to land, balanced with the interests of fairness, is also evidenced in provisions stating that no court order shall be made requiring the sale of a business or a farm on First Nations land, unless there is no other method of achieving an equitable result. Additionally, approximately two- thirds of the laws provide that an interest in First Nations land received as a gift or inheritance held within a family is exempt from a spousal claim, unless it is the matrimonial home.

This paper has identified eleven key commonalities among the First Nations matrimonial real property laws examined and ascertained overarching themes of concern to the majority of First Nations in the passage of these laws. All of the laws examined made it clear that when it comes to interests in First Nations land, the First Nations matrimonial real property law is paramount. As stated in some of the laws, First Nations seek to ensure the use and benefit of the land for members for all time. Nonetheless, a legislative balancing act between the protection of First Nations autonomy, community integrity and communal rights with the interests of harmonization, fairness, gender equality and the best interests of the child, is evident in the majority of the First Nations matrimonial property laws examined.

Appendix

First Nations Matrimonial Real Property Laws

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