



# **Steps Involved in Preparing a Matrimonial Real Property Law**

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Provided by the Centre of Excellence for Matrimonial Real Property

*Please note that the title “Matrimonial Real Property Law” (“MRP Law”) is used throughout this document for the sake of simplicity only. Communities developing these laws may give them other titles.*

*Please note as well that for the sake of simplicity, this document often uses the term “First Nation”. This term is shorthand only and we recognize and respect that the most appropriate terminology will vary from community to community.*

## **Step 1: First Nation retains an appropriately knowledgeable lawyer to draft MRP Law**

- Although non-lawyer consultants often draft policies for First Nations, laws should always be drafted by lawyers. This is because drafting a law unavoidably requires giving the First Nation legal advice.
- Although it may seem like a cost-saver to prepare a draft law in-house and limit the lawyer’s job to reviewing the draft, this approach tends to be problematic. It is likely to result in a less clear and comprehensive law (if the lawyer’s budget is limited and he or she cannot recommend major structural changes to the law) or else in a complete re-writing of the law by the lawyer, which might be even more expensive than if the lawyer had been responsible for drafting from the beginning. That said, if you have seen one or more MRP Laws that you like, you should share these with your lawyer at the very beginning of the process, to help guide their work.
- Find a lawyer who is appropriately knowledgeable to draft an MRP Law. Drafting laws is a unique type of legal task that differs from litigating in court or drafting contracts or agreements.

- The lawyer selected to draft an MRP Law will ideally have prior experience drafting MRP laws for First Nations or at least other types of laws (e.g. Land Codes, Membership Laws, or laws for the provincial or federal government).
- The lawyer should also be very familiar with the *Indian Act* and/or the *First Nations Land Management Act* and or your modern treaty, depending on which, applies to your lands.
- A lawyer who already knows the community is ideal, but if no such person with the above legal experience is available, a lawyer who is willing to meet with you in your community and spend time learning about how things work in your community is a must.

## Step 2: First Nation chooses a committee to steer the MRP Law Project

- It is essential that the MRP Law be drafted with community input since the community and members will need to live under the Law.
- The lawyer will need ongoing feedback from your community to draft your MRP Law. Realistically, this direction and feedback must be provided by a group of a manageable size, with members who consistently attend the meetings with the lawyer. A committee of 5-20 community members is suggested.
- Committee members should be interested in the MRP Law Project and dedicated to attending all meetings, have a good sense of what the community might like and not like, and reflect the diversity of your community, so as to ensure that a range of views are shared in the meetings.
- Committee members could include: First Nation elected representatives (e.g. band council members), representatives from the Housing, Lands, and Social Services Departments, elders, youth, and members at large.

## Step 3: First Committee meeting with Lawyer

- Lawyer explains the general scope of the MRP Law (i.e. what it does and doesn't normally cover).
- Community explains to the lawyer what laws govern possession of land and homes in the community (i.e. *Indian Act*, *Land Code*, modern treaty legislation, customary laws), and provides a general overview of the situation on possession of land on reserve. For a detailed list of questions that are worth discussing, see related document, **Questions for First Nations to Guide Drafting of MRP Law**.
- Provide the lawyer with preliminary views on key policy issues to guide the lawyer's drafting. This guidance is essential, otherwise the first draft of the MRP Law risks being inappropriate or incomplete. The lawyer should not begin drafting until he or she has sufficient preliminary guidance on key issues.

### Relevant issues include:

- which "optional" topics the First Nation wants covered in the law
- application of MRP law to common law couples
- the right of non-member spouses to compensation

For a detailed list of issues to canvass, see related document, **Questions for First Nations to Guide Drafting of MRP Law**.

- Share with the lawyer any MRP Law precedents that you have found and like.
- Discuss the process by which MRP Law will be finalized and enacted. Note that a referendum is required under section 8 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and under a *First Nation Land Management Act* (FNLMA) *Community Land Code*.

**Questions to consider:**

- Are there any mandatory processes for adopting the MRP Law, either under federal law, *Land Code*, other laws, or the First Nation's custom?
- If there are no clear process requirements already in place, will there be a community vote before the First Nation government decides whether to approve the Law and if so, what will that vote look like? (e.g. secret ballot, show of hands at community meeting)
- Will early drafts of the MRP law be circulated to the membership or be available for review at the administration office? Will updates be provided on the community's webpage or in its newsletter?
- Will there be one or more community meetings before the MRP Law is finalized and will the Committee consider revising the draft MRP Law based on feedback from the membership at any of those meetings, or will the meeting simply serve to present and explain the final draft of the MRP Law?

**Step 4: Lawyer prepares first draft of MRP Law**

**Step 5: Lawyer and Committee meet to discuss first draft of MRP Law**

- Lawyer ensures that Committee understands content of first draft
- Committee raises any concerns and discusses with lawyer any changes or additions required

**Step 6: Lawyer prepares second draft of MRP Law**

**Step 7: Lawyer and Committee meet to discuss second draft of MRP Law**

- Lawyer ensures that Committee understands content of second draft
- Committee raises any concerns and discusses with lawyer any changes or additions required

**Step 8: Lawyer prepares third draft of MRP Law**

- Lawyer also prepares an Executive Summary of the draft MRP Law

**Step 9: Community meeting to present third draft of MRP Law**

- If all of the First Nation's elected government (e.g. band council) is not sitting on the Committee, they might want to meet with lawyer before the community meeting for their own presentation on the draft MRP Law before the community meeting
- Community meeting should be advertised well in advance, including to off-reserve members
- Draft MRP Law and Executive Summary should be provided in advance to all members
- Council, Committee representatives and lawyer must attend this meeting
- Community meeting should provide members with opportunity to ask questions and provide feedback
- After meeting, the Committee and/or Council may direct lawyer to make additional changes to the draft MRP Law, based on feedback received at community meeting

**Step 10: Lawyer makes final revisions to MRP Law**

**Step 11: First Nation Enacts Law**

- Adoption will include a referendum where required by law or custom