



## Matrimonial Real Property

### NWAC Issue Paper

## **Background**

The *Indian Act* does not contain provisions governing on reserve ‘matrimonial real property’ which is a term that describes a couple’s home or land that they live on, or benefit from, during their marriage or marital relationship. In 1986, the Supreme Court of Canada ruled that provincial and territorial laws on matrimonial real property (MRP) do not apply to reserve land. These decisions created a gap in the law which has had serious consequences, especially for Aboriginal women.

Couples who agree on how to deal with their matrimonial real property do not have a comprehensive legal framework within which they can give effect to their intentions. Where couples do not agree, there is no mechanism for resolving their disputes. Without legal protection, women experiencing the breakdown of their marital relationship, experiencing violence at home, or dealing with the death of their partner often lose their homes on reserve. Women and children who have to move away from the reserve lose the support and assistance of their families, friends, and community. They also lose their access to benefits and programs that are only available to people living on reserve. The reserve also loses the valuable contributions of these women and their children to the well-being of their community, now and in the future.

The Native Women’s Association of Canada (NWAC) has long realized that the lack of matrimonial real property law has negative consequences for Aboriginal women and children. NWAC has been advocating since the 1990s for a solution to this problem. In the fall of 2006, NWAC entered into a process with the Assembly of First Nations (AFN) and Indian and Northern Affairs Canada (INAC) to identify solutions for MRP on reserves.

NWAC is in full support of good governance, and supports a balance of collective and individual rights of people in the communities where they live and belong. Throughout this process, NWAC has been committed to ensuring that solutions come from the individuals who have been affected by the current legislative gap. NWAC worked hard to make it possible for individuals to participate and share their ideas for solutions in a safe and accessible way. These solutions came from their personal experiences, knowledge and culture.

## **Challenges and courage**

There were difficulties implementing the process of gathering information and ideas. The short time frame that was available for activities to be completed was a serious constraint on the initiative. This especially made it difficult for participants to arrange to attend sessions on very short notice. Women found it difficult to arrange for the care of their families, to schedule time away from their jobs, and to make appropriate travel plans, which resulted in many being unable to participate in the sessions. It was especially difficult for women who lived in northern or more remote communities to attend sessions.

There was tension evident between the desire of women to provide information and opinions to this national consultation effort, and their concerns for their personal safety or security that could be negatively impacted through such participation. NWAC made every effort to enable women to participate safely and for their personal information to be held in confidence. Even so, the act of attending a session could in itself place some women at risk, due to the potentially contentious nature of this topic. The small size of some communities, combined with the limited number of options available for transportation meant that the decision to participate in the MRP Solutions initiative could not be guaranteed to be kept a private matter. Some women feared that their safety would be compromised through participating; therefore they did not do so.

The solutions that NWAC brought forward during the MRP Solutions initiative came from the women, men, youth and Elders who shared their experiences and ideas. The proposed solutions may be grouped into six broad themes:

- Intergenerational impacts of colonization
- Violence
- Justice
- Accessibility of supports
- Communication and education
- Legislative change

Each of these themes contained short, medium and long-term solutions. The solutions that were recommended included both legislative and non-legislative actions. The full list of proposed solutions can be found in the appendix.

### **Timeline and Activities**

On June 20, 2006, the Minister of INAC appointed Wendy Grant John as his Ministerial Representative.

On September 29, 2006, NWAC, AFN, and INAC jointly announced the beginning of their separate Canada-wide consultation or dialogue processes. Each organization was responsible for working with their constituents to identify solutions.

NWAC conducted the information gathering activities that form the basis for this report between September 29, 2006 and January 29, 2007. These activities included holding 17 consultation sessions, 12 public hearings, a dozen focus groups, and numerous on-line surveys, telephone interviews and written submissions. NWAC's Provincial and Territorial Member Associations (PTMAs) also conducted regional workshops and consultation activities and their findings were captured in summary reports.

NWAC participated in consensus-building meetings with AFN and INAC between February 6, 2007 and March 8, 2007. Following the completion of these meetings, the Ministerial Representative submitted her report, which included recommendations for further action, to the minister on March 9, 2007.

### **Current Status**

Although NWAC and AFN were committed to continuing to work with INAC on

developing and implementing solutions to MRP, we were increasingly excluded from the process following the submission of the Ministerial Representative's report. The three parties met several times in March 2007, but the inability of INAC to share documents and information about their activities effectively brought the consensus building process to a halt.

### **Recommendations**

1. The federal government must renew the MRP initiative to re-engage NWAC and the AFN in the process of identifying solutions to MRP on reserves. The process should return to the point at which the Ministerial Representative's report was submitted to the Minister. This marks the stage at which NWAC and the AFN began to be excluded from the process.
2. Interim measures must be put into place to assist Aboriginal women who are experiencing MRP issues prior to solutions being put into place. These measures may be preventative, such as establishing a moratorium on further evictions until MRP solutions are identified and implemented, or ameliorative, such as providing financial resources to hire family law lawyers to assist Aboriginal women who are currently being negatively affected by the current legislative gap.
3. MRP solutions must be identified and implemented. These may be legislative and/or non legislative in nature. The recommendations made in the Ministerial Representative's report to the Minister should be used as the minimum standard or baseline for action.
4. Proposed solutions must be reviewed using a culturally relevant Gender Based Analysis process to ensure that these solutions do not result in inequitable impacts on Aboriginal women. Plans for future reviews and evaluation of implemented solutions must also be developed, so that outcomes and unintended consequences of the actions taken may be identified and measured.

## Appendix: Summary of MRP Solutions

### Intergenerational impacts of colonization

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Short term solutions	<ul style="list-style-type: none"><li>• Federal legislation must include a retroactive clause to financially compensate Aboriginal women and their descendents who suffered a loss as a result of the <i>Indian Act</i> legislation</li><li>• Membership and citizenship legislation and policies must be revised to provide choice for women and their descendents regarding band membership</li><li>• The Aboriginal Healing Foundation and all Aboriginal healing and wellness programs must be expanded and adequately resourced to better address intergenerational impacts of colonization</li></ul>
Medium term solutions	<ul style="list-style-type: none"><li>• A mechanism is developed to implement compensation for the lack of protections for women and their descendants including disenfranchisement from First Nation communities and loss of languages, culture and identities as a result of MRP</li><li>• Gender based impact analysis of the Aboriginal Healing Foundation and healing and wellness programs be resourced for improved effectiveness for Aboriginal women, children and families</li><li>• Repatriation programs are developed and resourced for communities to embrace their members</li></ul>
Long term solutions	<ul style="list-style-type: none"><li>• Break the cycle of intergenerational impacts of colonization and create the space to re-instill pride in Aboriginal identity and improve self-esteem</li><li>• Women and their descendants will gain redress for the lack of protections of their rights that they experienced under the <i>Indian Act</i></li></ul>

## **Violence**

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### Short term solutions

- NWAC is provided with resources to develop an effective national strategy to stop violence against Aboriginal women, children and families that contributes to matrimonial breakdown
  - Implement enforcement orders
  - Increased transitional housing for women, children and families
  - Formalize and recognize the role of Aboriginal women's organizations as an official stakeholder in policy and program design and initiatives.
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### Medium term solutions

- Subsidized and affordable housing be provided in safe and healthy communities
  - Impact assessment to evaluate the impacts and gaps of existing programs and services which address violence, including shelters and transition houses and to provide additional resources where needed.
  - Investigate promising practices for developing healthy communities
  - Provide transitional housing for men
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### Long term solutions

- Violence is unacceptable
- Communities utilize a collective culturally-relevant approach to resolving conflict
- Implement or expand the application of promising practices for developing healthy communities

## **Justice**

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Short term solutions	<ul style="list-style-type: none"><li>• Improve access for Aboriginal women to judicial processes which should take into consideration the unique needs of semi-remote, remote and isolated communities</li><li>• The justice system must enforce court orders, Band bylaws, etc.</li><li>• Development of multi-staged systems of Aboriginal mediation or other appropriate Aboriginal system and practices for justice / decision making under MRP</li><li>• Assessment and evaluation of the impact of MRP measures implemented under <i>First Nations Land Management Act</i> (FNLMA)</li></ul>
Medium term solutions	<ul style="list-style-type: none"><li>• That legal professionals and the justice system receive training regarding on reserve Aboriginal rights issues</li></ul>
Long term solutions	<ul style="list-style-type: none"><li>• Implementation of a community-based, culturally appropriate Aboriginal conflict or dispute resolution by First Nation communities</li></ul>

## **Accessibility of supports**

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Short term solutions	<ul style="list-style-type: none"><li>• Increase the funding of programs to support Aboriginal women and children to prepare them for healthy relationships and to support them during the breakdown of matrimonial relationships</li><li>• Ensure that Aboriginal women can access programs and supports both on and off reserve, including those living in semi-remote, remote, and isolated communities</li></ul>
Medium term solutions	<ul style="list-style-type: none"><li>• Develop a mechanism to provide a continuum of services for transitional ongoing support for Aboriginal women and children</li></ul>
Long term solutions	<ul style="list-style-type: none"><li>• Aboriginal women and children are able to access their benefits under the <i>Indian Act</i> regardless of their residency.</li></ul>

## **Communication and education**

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Short term solutions	<ul style="list-style-type: none"><li>• Develop, implement, and resource an ongoing facilitation and communication process to increase the understanding of Aboriginal women and communities on MRP rights, policies, and processes.</li></ul>
Medium term solutions	<ul style="list-style-type: none"><li>• Establish mandatory federal / provincial / territorial policies for funding and implementation of Aboriginal Studies curriculum</li><li>• Provide additional resources for education and upgrading training to increase employability of Aboriginal women to enable them to rebuild their families, communities and nations including the need to change eligibility requirements such as restrictive funding age limits.</li><li>• Create a special fund / program specifically for women following marriage breakdown for education, training, economic development, and small business development with no eligibility barriers</li></ul>
Long term solutions	<ul style="list-style-type: none"><li>• Individuals, families, communities, and nations will have resources and rights based knowledge to build healthy, viable and sustainable communities</li></ul>

## **Legislative change**

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Short term solutions	<ul style="list-style-type: none"><li>• Implement overarching substantive federal legislation to protect the rights of women and children living on reserve in the interim until First Nation communities can develop their own laws: this legislation should include opt-out and compensation clauses.</li></ul>
Medium term solutions	<ul style="list-style-type: none"><li>• An enabling body consisting of Aboriginal women and First Nations representatives should facilitate a consultation and development process based on Indigenous law approaches for the resolution of MRP that is appropriate to each First Nation.</li></ul>
Long term solutions	<ul style="list-style-type: none"><li>• Communities utilize Indigenous law, which includes equal participation of women, to resolve MRP issues.</li><li>• Communities will use this expertise to approach all decision making in the community</li></ul>