

Aamjiwnaang First Nation

Matrimonial Real Property Law

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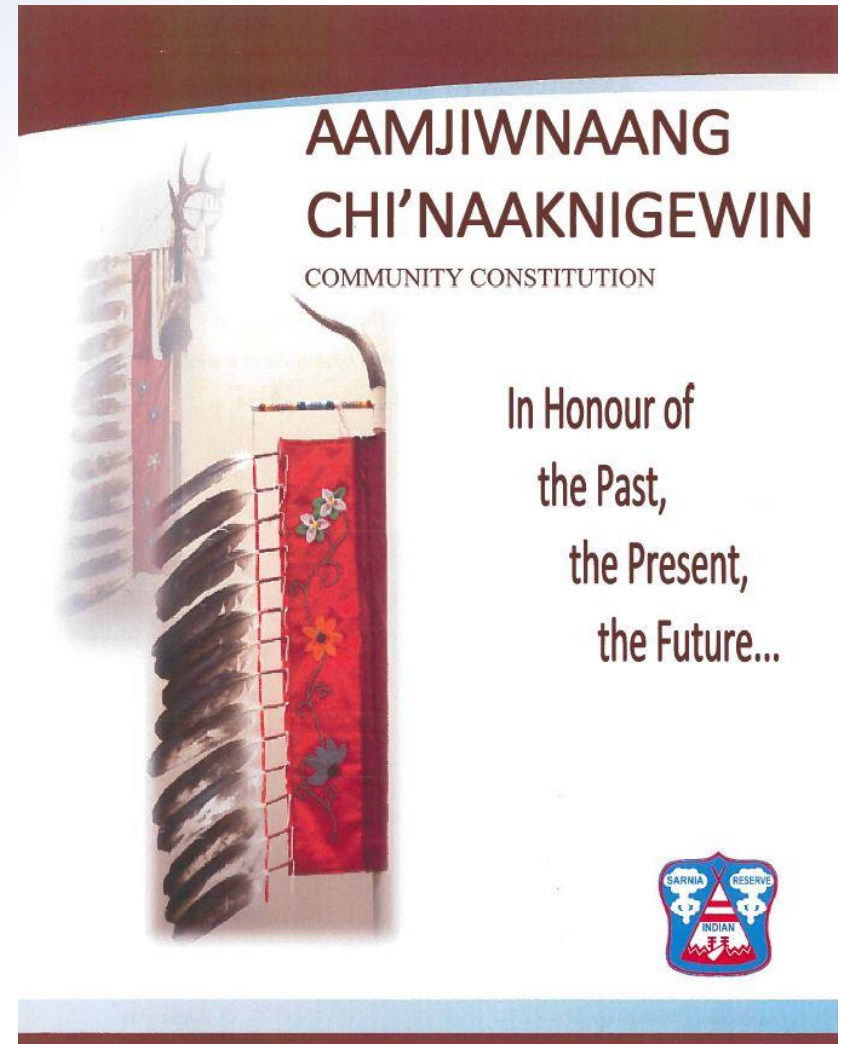


OVERVIEW:

- As of **December 16, 2014**, Aamjiwnaang's matrimonial real property matters have been governed on a provisional basis under new federal legislation.
- However, Aamjiwnaang wishes to develop its own Matrimonial Real Property Law ("**MRP Law**") in order to exercise its inherent jurisdiction over land and family law matters and to protect the rights and interests of present and future generations.

OVERVIEW:

- On **October 27, 2016**, the citizens of Aamjiwnaang (the Bendaazijig) ratified ***Aamjiwnaang Chi'naaknigewin*** (the Community Constitution)
- On **April 11, 2017**, Aamjiwnaang Chief & Council signed the Community Constitution into law.



OVERVIEW:



- **Chi'naaknigewin** means “the great law; ruling or agreement; and [Aamjiwnaang’s] Constitution.”
 - *Chi'naaknigewin Chapter 1, Article 1(F)*
- As the supreme law of Aamjiwnaang, the Constitution provides that in the event of a conflict or inconsistency between the Constitution and any other Aamjiwnaang law or regulation, by-law, code, policy or procedure – the Constitution shall prevail to the extent of the conflict.
 - *Chi'naaknigewin Chapter 3, Article 7*

OVERVIEW:

- Therefore, Aamjiwnaang's MRP Law must be consistent with the terms and principles contained in its Community Constitution.
- If so desired by the community, it is also important to incorporate as many of Aamjiwnaang's customs, traditions and practices as possible into its MRP Law in order to ensure that the law properly reflects Aamjiwnaang's values and needs.



CURRENT STATE OF THE LAW:



Addressing a “Legislative Gap”

- Most Canadians going through a breakdown of their conjugal relationship or the death of a spouse or common-law partner enjoy legal protections to ensure that their matrimonial real property is dealt with fairly and equitably.
- However, before the *Act* came into effect in 2013-14, Canadian laws (provincial and federal) did not apply to Matrimonial Real Property issues on-reserve.
- As a result, many of the legal rights and protections that were afforded to individuals living off-reserve were not available to individuals living on-reserves (a “legislative gap”).
- To address this “legislative gap” – in 2013 the federal government passed the ***Family Homes on Reserves and Matrimonial Rights or Interest Act***.

What is the *Family Homes on Reserves and Matrimonial Rights or Interest Act* (the “Act”)?

- It is a federal statute that applies to matrimonial real property on-reserve (i.e. land and buildings erected on land):
 - i. during a conjugal relationship;
 - ii. when that relationship breaks down; or
 - iii. On the death of a spouse or common-law partner...

...provided that at least one of the spouses is a First Nation member or an Indian.

In contrast – provincial family laws related to matrimonial personal property (such as money in bank accounts and cars) already apply on-reserve.





What is the *Family Homes on Reserves and Matrimonial Rights or Interest Act* (the “Act”)?

- The *Act* came into force on **December 16, 2013**.
- After it came into force in 2013, the *Act* provided for a 12-month transition period wherein First Nations could pass their own custom MRP Laws before the “provisional federal rules” came into effect.



What is the *Family Homes on Reserves and Matrimonial Rights or Interest Act* (the “Act”)?

- After the 12-month period expired, the “provisional federal rules” then came into effect on **December 16, 2014**.
- Therefore, First Nations that have not passed their own custom MRP Laws are now governed by the “provisional federal rules” under the *Act*.
- The “provisional federal rules” serve to fill the legislative gap in the absence of a First Nation's own custom law.



What is the *Family Homes on Reserves and Matrimonial Rights or Interest Act* (the “Act”)?

- However, First Nations can still choose to pass their own custom MRP Laws so that the provisional rules under the *Act* will no longer apply to them.
- Such custom MRP Laws can govern:
 - i. the use, occupation and possession of family homes on-reserve;
 - ii. the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on reserves.

The Act covers:

1. The power of First Nation to enact their own custom MRP laws; and
2. “Provisional rules” that will govern if a First Nation does not pass its own MRP law. These rules govern:
 - a) The family home (what it is and who can occupy it upon relationship breakdown).
 - b) Emergency protection orders (e.g. if there has been domestic violence or to protect property, a court can order a spouse or partner to leave a family home).



The Act covers, cont'd...

- c) Exclusive occupation orders (grant exclusive occupation of the family home to one spouse or partner).
- d) The division of the value of matrimonial interests or rights (each spouse receives 50%)
- e) The death of a spouse (surviving spouse is entitled to receive 50% of the value of the interest in the family home and other compensation, subject to the best interests of any children as well as any prior agreements).
- f) Jurisdiction of the courts, for example, in making the above orders.
- g) And more...



Pros & Cons of the Act:



Pros:

1. Provides a complete/comprehensive MRP regime and list of rules similar to those applicable to people living off-reserve;
2. Less finances required by the First Nation;
3. No requirement for community engagement respecting law-making;
4. Addresses a longstanding issue;

Cons:

1. Imposed by the government;
2. No input from First Nation members;
3. Not reflective of First Nations' values;
4. Definitions may not be acceptable;
5. Resources required for implementation;
6. May have to update First Nation policies;
7. Community awareness and education.

The *Act* also addresses domestic violence issues:



Before the *Act*:

- In the event of a dispute, the title holder would remain in the home;
- Victims (most often women and children) were required to vacate the home;
- As a result, victims were often forced to live off-reserve and/or left homeless or living in shelters;
- Victims had no legal recourse.

After the *Act*:

- Section 16 allows victims to apply for an Emergency Protection Order (for up to 90 days);
- Order can require the victim's spouse to vacate the family home;
- Victim may also apply for exclusive occupation of the family home (section 20).

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- Aamjiwnaang has inherent rights to address matrimonial property issues, including:
 1. Possession of the Family Home (whether rented or owned);
 2. Division of other assets; and
 3. Rights held by spouses and common law partners relating to structures and lands on-reserves.

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- Aamjiwnaang's customs/traditions for matrimonial property may be incorporated into the MRP Law if they are supported by historical community research and consultation with Elders.
- Meeting with community Elders is an important step as they are most often the greatest sources of Traditional Knowledge.

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- This will also help defend against any potential challenges to the MRP law, as the law will reflect practices that are “integral to the distinctive culture” of Aamjiwnaang and thus would form part of Aamjiwnaang’s inherent right to self-government;
- While this alone would not eliminate the risk of future legal challenges, it would establish an evidentiary basis for the inclusion of Aamjiwnaang’s customs and traditions in the MRP Law.

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- The inclusion of such customs in an MRP Law would better position the Law to withstand potential legal challenges, provided the MRP Law is consistent with:
 1. Aamjiwnaang's own historical practices as a basis for self-government (along with supporting evidence);
 2. Canada's Constitution – including the legal tests for recognizing an Aboriginal right; and
 3. Other applicable statutory law, including the *Act* itself.

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- The legacy of colonialism has taken a toll on the collective culture and identity of First Nations across Canada;
- Therefore, if applicable, we may consider revitalizing our traditions, customs and practices by looking to sister Anishinaabe communities for support and insight when identifying customs and traditions that will inform our MRP Law.

Incorporating Aamjiwnaang's Unique Cultural Customs, Traditions & Practices into a custom MRP Law:



- There remains some legal uncertainty in the area of custom MRP laws given that there was no previous legislation that specifically addressed MRP issues on-reserve.
- Therefore, the case law around the *Act* and custom MRP Laws is still developing...

Pros & Cons of Aamjiwnaang Enacting a Custom MRP Law:



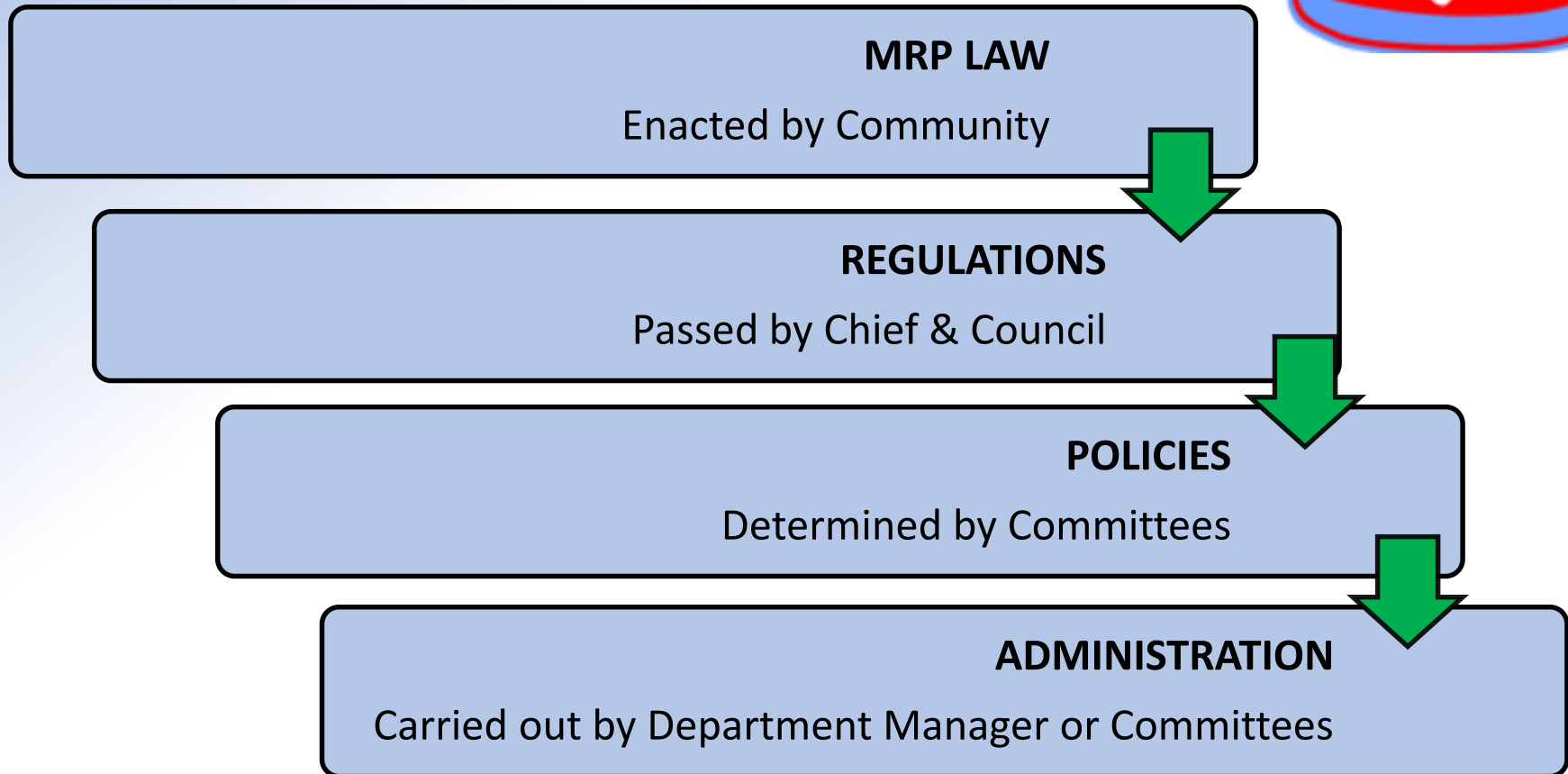
Pros:

- Community taking responsibility and exercising its inherent right to sovereignty and self-government;
- Law would reflect community's values, customs, traditions and practices;
- Would be tailored to fit Aamjiwnaang's existing policies and laws;
- Community has ultimate authority to ratify the MRP Law;
- If Aamjiwnaang *does* ratify the MRP Law, there is no Ministerial discretion to block it.

Con:

- Improper planning can be costly;
- Depending on how the law is arranged, it can still be costly to administer even with proper planning.
- Complex legal process to draft, ratify, enact and administer the MRP Law;
- Would result in additional administrative requirements and considerations for Aamjiwnaang.

Example of How a Custom MRP Law Could be Administered:



Ratification:

- Under the *Act*, at least 25% of a First Nation's total eligible voters must participate in a ratification vote.
- Of that 25% of eligible votes – a majority must vote in favour of a custom MRP Law for it to be ratified.
- This is a high threshold for ratification. Many feel that the federal government deliberately set this high threshold in order to prevent First Nations from developing their own laws.



Ratification:

- Once the MRP Law is ratified, Council must inform the Minister without delay of the result of the vote and send a copy of the approved law to:
 - i. The Minister of Crown-Indigenous Relations and Northern Affairs (“CIRNA”);
 - ii. The Centre of Excellence for Matrimonial Real Property; and
 - iii. The Attorney General of Ontario.



Additional Considerations:

- The heart of this law will be the body set up to make orders, provide mediation/dispute resolution and enforce the law.
- If Aamjiwnaang wishes to have a fully community driven process, we can discuss dispute resolution mechanisms that keep family disputes in the community and only resort to the courts in the event of appeals.
- However, the cost of these internal dispute resolution mechanisms will also be an important consideration (i.e. what is practical and affordable for the community and its members to access).



Debenjiged kiimiingona dedbinwe wi naagdowendiwin.

(Creator gave us sovereignty to govern ourselves).

*-Aamjiwnaang Chi'Naaknigewin
(Community Constitution) at p. 2*