

**OUR HOME, Y(OUR) TITLE:
MATRIMONIAL REAL PROPERTY
ON FIRST NATION RESERVES IN CANADA**

by

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Abstract

No legislation governs the division of matrimonial real property on First Nation reserves. This analysis of land title and reserve characteristics finds that more women live off-reserve than their proportion in the band population, supporting the contention that women are disadvantaged in retaining the matrimonial home. This disadvantage is associated with a large reserve population, more male title holders, a majority of band members residing on-reserve, more other-band members residing on-reserve, the reserve's remoteness, the use of INAC land registry systems, INAC funding for women's shelters, and the land management regime.

Alternatives to address the legislative gap and to assign occupancy of the marital home are evaluated. Federal legislation is recommended in the short-term, and self-government agreements and land codes for the long term. The occupancy of the marital home should be determined considering first the well-being of any children, followed by the well-being of the community and the individuals.

Executive Summary

The *Indian Act* establishes two forms of land interest on reserves: the collective interest of the First Nation as a whole, and an individual interest that may be held by a band member. The federal government is responsible under the *Indian Act* for First Nation lands, but the Act does not contain provisions related to the allocation of real property following the breakdown of a marriage or common law relationship. This creates a legislative gap, as provincial and territorial family law also does not apply to the division of matrimonial real property (MRP) located on reserve. There are three legislative arrangements under which First Nations reserve lands may be administered, and the MRP gap addressed. These are the *Indian Act*, the *First Nations Land Management Act* (FNLMA), and individual First Nation's *Self-Government Acts* (SGAs). Each provides a different set of arrangements under which the MRP issue is, or could be, managed.

A number of factors are believed to have contributed to the creation and continuation of the MRP problem. These include the impact of colonialism on First Nations culture, and the related gender discrimination that is entrenched in the legislation and policies that particularly disadvantages First Nations women. Another is the widespread existence of family violence within First Nations communities, which is itself linked to the negative effects on First Nations people of colonialism and gender discrimination. Structural factors that have been identified as contributors to the MRP issue include the role of family stature and networks on reserve, marriages between individuals with different legal status under the *Indian Act*, and housing shortages on reserves. The impacts of the MRP gap on the children of families experiencing marital breakdown as well as the communities to which the children and their parents belong are also considered.

This paper conducts a quantitative investigation of the MRP issue on First Nation reserves in Canada. It assesses whether the MRP gap affects women more severely than men, and compares the distribution of land titles between males, females and couples. The characteristics of reserves, such as the on reserve band population, the property management regime in place, the

extent of use of land title documentation, and the overall well being of the community are examined to determine which are associated with the MRP problem.

Two dependent and eleven independent variables are developed to identify factors associated with First Nations bands or reserves that influence whether women are negatively affected by the MRP problem. The first dependent variable 'difference' calculates the percentage of women living off reserve less the proportion of women in the total band population. As this data is non-parametric, two Spearman's rho correlations are completed using this dependent variable. The first employs the complete data set of 577 cases against ten independent variables, and the second employs 281 cases forming a sub-set of the data related to the final independent variable (title holder).

The second dependent variable 'direction' identifies whether the first dependent variable is positive, indicating more women live away from the reserve than their proportion in the total band population, or negative, indicating that more women live on reserve than their proportion in the total band population. This dichotomous variable is used to complete two logistical regressions using the eleven independent variables. Again, the first analysis is completed using the complete data set of 577 cases and ten independent variables, while the second logistic regression is conducted on the sub-set of 283 observations and the final independent variable. In addition to testing the hypotheses outlined below, the analysis also provides the opportunity to quantify some aspects of the MRP situation that have not previously had statistics associated with them. The primary sources of data are the INAC *Registered Indian Population by Sex and Residence* publications and the INAC land registry databases.

This statistical analysis shows that there is a persistent and systematic disadvantage experienced by women in the allocation of title: women are allocated less title than males, and joint title is not commonly allocated to married or common law couples living on reserve. It also finds that there is a pervasive tendency for a greater percentage of First Nation women to live off reserve compared to their proportion in the total population. Because women usually retain child custody following a relationship breakdown, this suggests that the MRP gap also affects whether children reside on or off reserve as well. Factors that are associated with this skewed distribution of women included a large reserve population, a majority of the band population living on

reserve, the use of the INAC land registry databases by the band to record title, greater remoteness of the reserve from service centres, receipt of funding from INAC for women's shelters and transition houses, the form of land management in place, and a higher percentage of other-band members residing on reserve. The control of band membership is found to have no effect on the percentage of women living off reserve and their distribution in the total band population.

Three outcome alternatives related to the occupancy of the marital home are presented: the partner with custody of the children could retain the marital home, the partner who is a band member could retain the marital home, or either partner could retain the marital home. The criteria used to evaluate these alternatives are the best interests of the children, the best interests of the community and the best interests of the individuals involved in the marital dispute. It is recommended that these alternatives should be considered to form a hierarchy rather than being mutually exclusive, and that the well being and best interests of any children affected by the breakdown of the marriage or common law relationship should be the primary consideration when deciding on the occupancy of the matrimonial home. The secondary consideration should be the best interests of the community, followed by the best interests of the adult partners.

Three implementation alternatives that address the legislative gap are considered: the use of federal legislation, the use of Self Government Agreements or Land Codes under the FNLMA process, or the use of By-Laws or Customary Law under the guidance of the First Nation Elders and Band Council. These alternatives are evaluated against the criteria of equity, equality, linkage to culture and capacity, political feasibility, and the time frames associated with their implementation. In the short-term, the creation of new federal legislation to address the MRP gap will offer an immediate solution that will enable individuals to resolve marital disputes and promote gender equality. In the long term, the use of community consultations to identify common goals and principles for the resolution of the legislative gap, implemented through either Self Government Agreements or Land Codes under the FNLMA are considered to be the most appropriate ways to address the MRP issue.

Dedication

To Seth

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1 Introduction: The Policy Problem

In Canada, there is a gap in family law that affects men and women who reside on reserve. When a marriage or common law relationship breaks down, the former partners must decide how to divide the property they own jointly, including as the family home. If this family home is located on a reserve, there is no federal or provincial/territorial legislation that may be used to resolve a dispute or impose a settlement if the former partners cannot reach a settlement on their own. It is believed that women are more disadvantaged by this legislative gap than are men due to land allocation processes used on First Nation reserves and that one consequence of this disparity is that too many women do not retain possession of the matrimonial home following a breakdown of their marriage or common law relationship. This gap in family law also has negative effects on the children of families that break down, and the communities to which these children and their parents belong.

This paper conducts a quantitative investigation of the matrimonial real property (MRP) issue on First Nation reserves in Canada. It assesses whether the MRP gap affects women more severely than men, and compares the distribution of land titles between males, females and couples. The characteristics of reserves, such as the on reserve band population, the property management regime in place, the extent of use of land title documentation, and the overall well being of the community are examined to determine which are associated with the MRP problem. Finally, the results of this quantitative research are applied in the context of commonly recommended solutions to the legislative gap, and alternative policies are evaluated to determine which approach is most effective in addressing this problem.

2 Context: The Current Situation

This section provides background information and outlines specific issues associated with matrimonial real property on First Nation reserves. While the MRP gap may affect any individual living on-reserve who is experiencing the breakdown of a marriage or common law relationship, there is a general consensus within the literature that a bias exists in favour of males receiving certificates of possession for the family home (Cornet & Lendor, 2002). General information about marital relationships and family law related to divorce and separation is followed by information on the legal and constitutional framework underlying the MRP problem. The various land management systems that operate on First Nation reserves in Canada and the factors that are believed to contribute to the MRP problem are reviewed, as is Bill C-31. Finally, data known to date about the parameters of the MRP gap are presented.

2.1 What is Matrimonial Real Property?

A majority of adults in Canada enter into marriages or common law relationships: census data show that one-half of the Canadian population is currently married. The table below presents information from the 2001 census on the marital status of the Canadian population, excluding aboriginal people, and persons of the North American Indian population.

Table 1: *Marital Status*

Population	Canadian Population		North American Indian Population	
Total Population 15 years+	23249010		395320	
Single	7673185	33%	214805	54%
Married	11748145	51%	119300	30%
Separated or Divorced	3569560	11%	53730	12%
Family members in private households:				
Married (husband or wife)	11595435	48%	116795	22%
Common law partners	2206935	9%	70725	14%

Population	Canadian Population		North American Indian Population	
Lone parents	1230360	5%	54750	10%

Source: Statistics Canada Cat. No. 97F0011XCB2001040

The North American Indian population has a much lower incidence of married individuals, and a higher incidence of common law partners than the general Canadian population. This reflects in part the larger proportion of youth that exist in the North American Indian population, as living in a common law relationship has become the preferred option for the first conjugal relationship among young people (Statistics Canada, 2003). It also may reflect some residual effects on marriage patterns and a preference for common law relationships due to the former negative legal outcomes that women experienced under the *Indian Act* following marriage, specifically that women who married non-registered men would lose their own registered status.

Over time, the definition of ‘married’ has become more inclusive of all types of committed relationships. Common law relationships, for example, are now considered to be equivalent to legal marriages for many purposes. The 1996 census was the first to advise Aboriginal people who are married according to traditional customs to report themselves as ‘legally married’ and the 2001 census was the first to include same sex partners in the ‘married and common law’ category (Statistics Canada, 2001 Census Dictionary).

Not all marriages are enduring, however, and the rate of marriage dissolution in Canada increased for thirty years prior to stabilizing in the 1990s. In 2000, 37.7 percent of all marriages were expected to end in divorce by or before their 30th wedding anniversary. The dissolution of marriages or relationships often results in the creation of families headed by a lone parent. In 2001, 81 percent of lone parent families were headed by a woman, in part because mothers usually retain custody of the children after a divorce (Statistics Canada, 2003). While the percentage of divorced individuals in the North American Indian population is approximately the same as that found in the general Canadian population, the percentage of lone parent families is twice as high.

After a marriage or common law relationship ends, the most critical issues that must be resolved between the former partners include the custody of children, the payment of financial aid from one partner to another in the form of alimony or child support, and the division of any family assets. Family assets are the “property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose” (Government of BC, 1996, Part 5, 58.2). One form family assets may take are personal items of worth, such as vehicles, jewellery, and savings or pension entitlements. The second form that family assets may take is real assets, which are defined as land and buildings on that land. Provincial and territorial family laws govern the resolution of child custody, support payments and the division of assets and these laws continue to be revised as “contemporary notions of gender equality and evolving notions of family in the Canadian society” change over time” (Cornet & Lendor, 2002, p. 12). Unfortunately, “courts in Canada have ruled that provincial laws about equal division of matrimonial real property do not apply to First Nations because the *Indian Act*, and not provincial law, governs real property on reserves (Greene, 2003, p. 1). This means that people living on reserve are not able to refer disputes over the distribution of assets to provincial or territorial courts, but there is no federal law that would assist them to address these issues. This jurisdictional issue and the legislative gap that it creates are described in greater detail in the following section.

2.2 The Legal and Constitutional Framework

In Canada constitutional responsibility for matters relating to divorce is divided between the federal and provincial/territorial governments. The federal government is responsible under section 91(26) for marriage and divorce; the provincial/territorial governments are responsible for the solemnization of marriage under section 92(12), for property and civil rights under section 92(13) and for the administration of justice under section 92 (14) (*Constitution Act*, 1867). Provincial and territorial family laws generally recognize the equal rights of each spouse to the division of the value of matrimonial property, possession of the family home and the proceeds of the sale of matrimonial property.

While these rights exist in all provinces and territories for married individuals, only some provinces extend these rights to common-law couples, including same-sex common-law couples (INAC, Information on Spousal Rights, 2004). In British Columbia, for example, the sections of the *Family Relations Act* that relate to both personal and real property do not apply to common

law relationships, unless the common law partners have signed a cohabitation agreement (Legal Services Society, 2005). A similar situation exists in Ontario, where common law couples do not have the same rights as married couples to property bought during the time of cohabitation. Under Ontario's family law, "only married couples have an automatic legal right to half the value of family property" (Ministry of the Attorney General, 2002, p. 47). These rules also affect the division of the increase in value of any property each individual brought with them to the relationship (ibid). Similarly, the Yukon has different division of property rules for married and common law spouses (Yukon Department of Justice, 2004). For other matters, however, including child support, custody and access, the rules for married and common law couples are the same in these three jurisdictions.

The federal government is solely responsible for "Indians and the lands reserved for Indians" under section 91(24) of the *Constitution Act* which means that "provincial laws cannot be applied to the division of real property" that is located on reserves (Standing Senate Committee, 2003, p. 22). These lands are only subject to the federal *Indian Act*, which does not contain provisions related to the breakdown of marriages or common law relationships. This creates a legislative gap as there is no federal legislation that may be applied on reserves to settle "claims to occupation, possession, partition or ownership of the matrimonial home by one of the spouses upon separation or dissolution of the relationship" (Ebert & Jacobs, 2004, p. 27). This gap has been challenged in court, however, the Supreme Court ruled in *Derrickson v. Derrickson* that the *Indian Act* governs the possession of land on reserves and therefore "the courts cannot base themselves on provincial law to order the division of matrimonial real property on reserve" (Standing Senate Committee, 2003, p. 22).

The division of real assets belonging to married or common law partners is not the only problem related to MRP and the legislative gap that affects individuals living on reserves. Women who reside on reserves are also unable to use provincial or territorial family law "to obtain possession of the matrimonial home on separation, [or] to obtain orders to exclude violent spouses from the home" (Ebert & Jacobs, 2004, p. 7). On reserves, a Certificate of Possession (CP) is the document that records title to the family home. If a CP has been issued to only one spouse, the other spouse cannot obtain temporary possession of the home, and the spouse named on the CP can sell the family home after a separation or marriage breakdown. If both spouses are named on the Certificate of Possession, neither can prevent the other from staying in the family

home (INAC, Information on Spousal Rights, 2004). This situation is further complicated by the possibility that the partners in a marriage may each have a different legal status under the *Indian Act*, a different band membership status, or a different land claim beneficiary status, and thus could claim that different laws and policies apply to their personal situation.

A further problem arises if violence has occurred in the marital relationship. The spouse or partner who experienced the violence may feel unable to negotiate a fair division of matrimonial assets, because of their fear of experiencing further abuse. Although provincial courts may be requested to resolve disputes related to personal property, and these “provincial laws are technically applicable to the division of personal property in the event of a marriage breakdown on a reserve, in practice they are of little help to Aboriginal women” (Standing Senate Committee, 2003, p. 21). This is because it can be very difficult for women to have these decisions enforced if the matrimonial home and personal property are located on reserve, often due to a lack of knowledge among law enforcement officials regarding how to effectively enforce these decisions.

The right of First Nations to self-government and jurisdiction over matters related to marriage and MRP has been acknowledged by the federal government. The Royal Commission on Aboriginal People stated that “federal and provincial governments should acknowledge the authority of Aboriginal governments to adopt laws with regard to the matrimonial home and to establish their family law regimes compatible with their cultures and traditions” (RCAP, 1996, 3.2.4, paragraph 3). The practical application of this right to establish First Nations family law is that it makes MRP one subject among many that may potentially be addressed in the process of negotiation that leads to a self-government agreement. There is also debate about which Act should be used as the base for the legislative response to the MRP issue. One option is to base the response in First Nations jurisdiction under section 35 of the *Constitution Act, 1982*; another alternative is to rely on the federal legislative jurisdiction that exists under section 91(24) of the *Constitution Act, 1867*. The Supreme Court of Canada has rendered a decision that the “wills and estates provisions of the Indian Act are a valid exercise of federal jurisdiction under section 91(24), and that this jurisdiction includes the property and civil rights of Indians” (Cornet & Lendor, 2002, p. 13). This indicates that the federal government could create legislation that would be applicable on reserve to resolve the MRP gap. The following section outlines the land

management regimes that may exist on First Nations reserves, which are markedly different from those experienced by other Canadians.

2.3 Reserve Land Management

There are three legislative arrangements under which First Nations reserve land may be managed. These are the *Indian Act*, the *First Nations Land Management Act* (FNLMA), and individual First Nation's *Self-Government Acts* (SGAs). The general framework of each arrangement is reviewed below, including the provisions and requirements related to MRP, because this issue is managed differently under each land regime.

2.3.1 Indian Act

The *Indian Act* establishes two forms of land interest on reserves: there is the collective interest of the First Nation as a whole, and an individual interest that may be held by a band member (INAC Land Management Manual, 2002). The goal of the federal government as expressed through the *Indian Act* is to encourage the acceptance of the concept of individual property rights among First Nations and facilitate the practice of individual landholding on reserves. Originally the individual property interests were administered through the federal location ticket system, introduced in 1869, which “granted exclusive rights of occupancy and possession (but not ownership) of particular plots of reserve land” (Cornet & Lendor, 2002, p. 10). Location tickets were replaced in 1951 by the Certificate of Possession (CP) system, and existing location tickets were grandfathered under the new system.

An individual interest in a plot of land under the CP system may be held by one or more people. This interest may be transferred or leased to other individuals, with some restrictions, but the right to possession may only be transferred to another member of the First Nation, or to the First Nation (Band) itself. Any “purported transfer to an individual other than a member of that First Nation is void” (INAC Land Management Manual, 2002, p. 33). If the person who holds an individual land interest becomes no longer entitled to reside on the reserve, his or her interest must be transferred to another band member or to the First Nation within six months. If this is not done, the land interest will automatically revert to the First Nation (INAC, Land Management Manual, 2002). The table below summarizes the different forms through which a band member may hold an interest in land on reserve.

Table 2: Indian Act Land Management Processes

Purpose	Process	Details
Lawful possession of First Nation land by a band member for indefinite period of time (new allotment)	Band Council Resolution and Certificate of Possession (CP) or Certificate of Occupation (CO)	<ul style="list-style-type: none"> • Band members only • Ministerial approval required • CO is temporary, and often is conditional
Transfer of lawful possession (change in ownership of an existing allotment)	Transfer Form and Certificate of Possession (CP)	<ul style="list-style-type: none"> • Band members only • First Nation Band council consent is not required • Ministerial approval required
Reversion of Lawful Possession to First Nation	Transfer Form and Certificate of Possession (CP) in the name of the Band	<ul style="list-style-type: none"> • Ministerial approval required • Automatic reversion to First Nation 6 months after individual is no longer eligible to reside on reserve
Lawful possession of First Nation land to a band member for an indefinite period of time	First Nations Certificate, Appendix 'M' (FNM)	<ul style="list-style-type: none"> • Band members only • New title format used by bands with a ratified land code under the FNLMA
Possession and Use of First Nation land to a band member for an indefinite time period	Customary or Traditional land holding practices	<ul style="list-style-type: none"> • Band council grants rights to possession and use at the pleasure of the council • Not recognized by INAC as lawful possession
Lawful possession of First Nation land to First Nation members for indefinite period of time (allotment)	Notice of Entitlement (NE) No Evidence of Title Issued (NETI)	<ul style="list-style-type: none"> • Old title format grandfathered under current CP system and no longer issued • May be replaced by a CP if a land survey is completed or other conditions are met

Source: INAC Land Management Manual, 2002

There are concerns associated with the policies and practices related to land holding under the *Indian Act*. When a Certificate of Possession is allotted to two or more individuals it

may be held by them either as joint tenants or as tenants in common. Joint tenants enjoy a right of survivorship: this means if one person named on the CP dies then his or her interest in the property passes automatically to the other person or persons named on the CP. Tenants in common do not enjoy the right of survivorship which means that if one person named on the CP dies then his or her full interest in the property passes to the heirs designated in his or her will. The heirs share the interest in the property with the other person or person(s) named on the CP. INAC policy states that if the individuals do not make an election as to which type of tenancy when they acquire lawful possession of an individual parcel of land, the interest will be recorded as tenants in common (INAC, Land Management Manual, 2003). This choice has implications for the passing of property interests through inheritance and the rights of a surviving spouse in relation to the matrimonial home.

A second concern is related to the management of land through customary or traditional processes. Some First Nations responded to the threat of assimilation inherent in the *Indian Act* allotment system “by refusing to make allotments to individuals or to cooperate with the federal system of registering such allotments” (Cornet & Lendor, 2002, p.10). Instead of the *Indian Act* provisions they use traditional or customary land allocation and usage systems. Land interests that are created this way are not administered by INAC, are not considered by INAC to represent lawful possession, and are not recorded in the INAC land registry systems. The individuals who hold these customary interests do not have legal rights in relation to the allotments that would be upheld by INAC or the federal government, and therefore remain on the property at the pleasure of the First Nation band council (INAC Land Management Manual, 2002). The literature estimates that up to one half of all bands in Canada do not use the *Indian Act* system at all, and many other bands combine custom allotment system with some use of the formal Certificates of Possession. This study found that 272 bands out of 577 were not using the INAC Evidence of Title system at all on their most populous reserve to manage allotments or possession. Of the 286 bands that were using the INAC Evidence of Title system, a further 97 First Nations demonstrated minimal use of the INAC Evidence of Title system, with minimal use defined as having 10 or fewer title documents for the most populated reserve. While this approach may facilitate the achievement of First Nations goals and the furtherance of self determination and self government, it does not enable marital partners to demonstrate clear and uncontestable title to individual land interests on reserve.

A third concern relates to the processes of land allocation and entitlements used on reserves. There are two related issues here: the first concerns allotments of title in relation to gender, and the second concerns the existence of and use of clear and fair processes for allotments by First Nations bands. The INAC publication *After Marriage Breakdown* (2003, p. 4) acknowledges that “generally joint CP’s are not commonly issued”. Women are disadvantaged by the allotment system in two ways: they are less likely to be awarded certificates than men, and they are less likely to be named on joint CPs with men. If only one partner in a marriage or common law relationship is named on the CP, they may transfer their interest in the family home without the consent or knowledge of their partner (Cornet & Lendor, 2002). What is not clear in the literature, however, is how systemic or to what extent women are disadvantaged in holding title: this study provides further information on this in the later section of research results.

A final problem in the allocation of property on reserves relates to band policies in place around the process of allotments. In addition to the gender discrimination described above, there are sometimes band policies in place associated with access to housing on reserve that further disadvantage women. For example, “in some First Nations a woman who must leave the family home in the event of a divorce may be unable to obtain other accommodation, because of a policy under which only one house is allocated per family (Standing Senate Committee, 2003, p. 37). The effect is to create an environment in which women are systematically discriminated against and disadvantaged in processes related to land title and access to housing.

2.3.2 First Nations Land Management Act (FNLMA)

The *First Nations Land Management Act* came into existence in 1999, after the First Nations Land Management Agreement was signed between the federal government and fourteen First Nations. It sets up a process under which individual First Nations can assume responsibility for the management of reserve land. One requirement that the First Nation must meet to complete this process is to write a land code that contains rules and procedures for MRP on reserve, which must include “a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of First Nation land and the division of interests in First Nation land” (Government of Canada FNLMA, 1999, s. 6 (1)(f)). When a valid land code has been developed and adopted by the members of the First Nation, it displaces the *Indian Act* land code.

There are two constraints associated with the FNLMA process that negatively affect its usefulness in creating solutions to the MRP issue. The first is that the federal government has limited the number of First Nations that may enter into this process at any one time, thus placing artificial limits on the potential pace of adoption of this land management regime. The second constraint on the usefulness of the FNLMA process in addressing MRP is that although the a land code must be developed that includes provisions for MRP, the code and MRP provisions are not a pre-requisite to a land agreement being signed under the FNLMA. The First Nation is required “within twelve months after its land code comes into force, to incorporate the general rules and procedures [on Breakdown of Marriage] into its land code or enact a first nation law containing the general rules and procedures” (Government of Canada FNLMA, 1999, para. 4). This two-step process suggests that developing provisions to address MRP are a secondary addition to the completed land code rather than an integral part of such a code. A listing of all First Nations who are engaged in the process as well as of those who have completed and ratified a Land Code is included in Appendix 17.1.

The MRP provisions created by First Nations under the FNLMA to date vary from band to band. The Georgina Island Land Code, for example, allows the spouse with custody of the children to retain the family home, regardless of whether they are named on the CP. It also allows a non-band member spouse to continue to reside in the family home, but this person cannot assign their interest in the home to another individual when they no longer live in it (Chippewas of Georgina Island First Nation, 1997). The Lheidli T’enneh land code states that the children should have the right to remain in the matrimonial home, both spouses have an equal right to possession of the family home, and the related rules and procedures should not discriminate on the basis of sex (Lheidli T’enneh First Nation, 2000). The Westbank First Nation code clarifies that the rules and procedures applicable to use, occupancy, possession and division of lands on the breakdown of a marriage “shall not discriminate on the basis of sex but may distinguish as between Members and Non-Members for the purpose of determining what type of interest in Westbank Lands may be held by an individual” (Westbank First Nation, 2003, s.26.2). Again, the interests of the children are the primary consideration, and the “most important factor in determining exclusive possession shall be which parent has custody of the child” (Westbank First Nation, 2006, s.9.5). The following section describes the provisions for land management and MRP under Self Government Agreements.

2.3.3 Self Government Agreements (SGA)

In 1995 the federal government “recognized the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982* and announced a policy framework for the implementation and negotiation of Aboriginal Self-government (INAC Basic Departmental Data, 2003). The objective of the Aboriginal Self- Government Policy is “the negotiation of practical and workable agreements on how self-government will be exercised” (INAC Basic Departmental Data, 2003, p. 67). Despite the fact that federal government policy recognizes MRP as a topic that may be included in SGAs, most do not include any policy or guidance on this topic. (Ebert & Jacobs, 2004, Cornet & Lendor, 2002).

Although there are a large number of negotiations underway, the number of completed SGA’s is still comparatively small due to the complexity of the agreements and the long time frames associated with the negotiation process. A table showing the number of agreements under negotiation and the names of those completed to date is presented in Appendix 17.2. In addition to the long time frame associated with the creation of SGAs, a second concern is that there is no requirement for them to address the MRP gap. These agreements may be created and implemented without any recognition of MRP as an issue or the inclusion of any plans or processes to address it.

2.4 Bill C-31

Bill C-31, passed by the federal government in 1985, allowed for “the re-instatement of Registered Indian status to those individuals who had lost their registration through provisions of earlier versions of the *Indian Act*, and the first time registration of many of their children” (Clatworthy, 2005, p. 1). There are five ways in which Bill C-31 may alter the size of the First Nations population, through:

- Re-instatements of women
- New registration of children born to Bill C-31 registrants or re-instated women
- No removal of women from the register due to marriage or parenting with non-registered men
- No removal of children from the register due to the marriage of their mother to a non-registered man

- No registration of women who formerly would have gained registration through marriage to registered men. (Clatworthy, 2001).

Between 1985 and 1999 Bill C-31 caused an incremental growth in the registered Indian population of about 174,500 individuals, composed of 106,781 re-instatements and registrations, and 59,798 children born since Bill C31 who would not have qualified for registration under the previous *Indian Act* provisions. The table below shows the relative sizes of the populations who have been reinstated or registered under different sections of Bill C-31.

Table 3: *Bill C-31 Registration Groups and their Size*

Bill C-31 Section	Description	Size of Group
6(1)(c)	Women who were removed from the register due to marriage to a non-registered man and their children who were removed from the register with their mother	16.73%
6(2)	Children born to women after they were removed from the register because of their marriage to a non-registered man	66.96%
6(1)(f)	Individuals with two parents entitled to registration under the provisions of Bill C-31	13.65%
6(1)(d)	Those removed from the register as a result of clauses which applied prior to 1951	2.64%
6(1)(e)	Those removed from the register based on clauses that existed prior to 1920	0.02%

Source: Clatworthy, 2001

It is evident that the largest group affected by Bill C-31 are the children born to women who were removed from the register due to their marriage to a non-registered man. It should be noted that these children are both male and female, and therefore do not contribute to an increase in the female registered population only. Overall, the Bill C-31 population accounts for about 16 percent of the total registered population (Clatworthy, 2001). This group is unevenly distributed across Canada and exhibits different levels of residency on reserves as well, as illustrated below.

Table 4: Distribution of Bill C31 Population by Region

Region	Distribution of Bill C-31 Registrants	On reserve population that are Bill C-31 Registrants
Atlantic	3.51%	6%
Ontario	28.51%	4%
Manitoba	14.34%	6%
Saskatchewan	11.64%	2%
Alberta	10.44%	3%
British Columbia	17.50%	8%
Yukon	1.99%	19%
Northwest Territories	2.12%	n/a

Source: Clatworthy, 2001

The uneven distribution of Bill C-31 registrants suggests that they may have different impacts on bands and reserves in different parts of Canada.

2.5 MRP Size and Scope

This section discusses the factors that have contributed to the MRP problem in Canada, it describes those who are predominantly affected by the issue, and what those effects commonly are. The data known to date about the size and the scope of the MRP issue are also outlined.

2.5.1 What Factors Have Contributed to MRP?

A review of the available literature identifies several factors that are believed to have contributed to the creation and continuation of the MRP problem. These include the impacts of colonialism on First Nations culture, and the related gender discrimination that is entrenched in the legislation and policies that particularly disadvantages First Nations women. Another factor is the widespread existence of family violence within First Nations communities, which is itself related to the negative effects on First Nations people of colonialism and its inherent Eurocentric sexism.

The most commonly cited contributory factor to the MRP problem is the impact of colonization on First Nations people and culture, especially as it has been expressed through the *Indian Act*. Ebert & Jacobs (2004, p. 11) for example, suggest that in traditional aboriginal culture “there was a balance between the men and women regarding their roles and responsibilities” but that the Europeans “drove the women into a subordinate role in Aboriginal communities or out of

them altogether.” Because First Nations men “learned Eurocentric values, [they]...began abusing and mistreating their women” (Ebert & Jacobs, 2004, p. 22). Whether one agrees that respect for separate gender roles and responsibilities implies equality between the sexes, it is apparent that the attitudes and behaviours of European colonists towards First Nations in general and towards First Nations women in particular had a negative impact that was less beneficial for First Nations women than the respect of their peers for their culturally assigned roles and responsibilities. These attitudes were institutionalized in the *Indian Act* and the policies and administrative processes that derived from it, and have resulted in a situation where the majority of band decision makers are males (Ebert & Jacobs, 2004).

Colonization is also responsible for the introduction and imposition of European land holding practices on First Nations. The concept that an individual entitlement to property which excludes other members of the community from using that land is based in European law, and the use of terms such as ‘real property’ “presumes application of European-sourced legal concepts and assumptions, including (...) narrow legal definitions of ‘spouses’ and an assumption that MRP issues do not extend beyond to other family members who are not ‘spouses’ or ‘common law partners’” (Cornet & Lendor, 2002, p. 4). The imposition of non-Aboriginal concepts of private and individual property rights “have led to First Nation men being the primary holders of Certificates of Possession on reserve” (Ebert & Jacobs, 2004, p.24). These writers, however, do not provide information as to the size of the disparity between male and female title holders, nor whether it has changed over time.

The issue of violence within the family is another contributor to the MRP issue. The rate of spousal violence is three times higher for Aboriginal people than non-Aboriginal people: “overall 21 percent of Aboriginal people, or 24 percent of Aboriginal women and 18 percent of Aboriginal men, said they had suffered violence from a current or previous spouse or common law partner” (Statistics Canada, 2005, para. 15) compared to a rate of 7 percent for the non-Aboriginal population. If a woman has experienced violence in her relationship “it influences the decision to stay in the matrimonial home, especially when there are limited options and protection for women” (Provincial Council of Women of Manitoba, Inc., 2003, p. 5). In situations where domestic violence exists,

“if an Aboriginal woman leaves the reserve to escape domestic abuse, she can lose her home altogether. There is often (...) a great deal of pressure on band councils to re-allocate housing as soon as possible (...) in some extreme cases, a

band council will confiscate a house, if it is vacant, after only ten days” (Blair, 2005, p. 14).

A woman who is granted possession of the home by the court, or who is permitted to live with her children in a home that has been allocated to her partner by the band is vulnerable “because she risks losing possession of the home if she is forced to flee the violence to an undisclosed location off reserve temporarily” (Provincial Council of Women of Manitoba, Inc., 2003, p. 5). Although transitional housing and other feminist responses to violence are useful, “it was generally acknowledged that there are not enough supports of this kind for women, particularly in rural areas” (Stewart, Huntley & Blaney, 2001, p. 35). If there is no shelter or transition home on the reserve, given the existing shortage of housing on most reserves, women experiencing violence “usually have to choose between moving in with relatives already living in overcrowded homes, or leaving the community. The trauma of abuse is thus compounded by the loss of the woman’s home, extended family and familiar surroundings” (RCAP, 1996, Vol.3, Chapter 2, 4.3). Aboriginal women who leave the reserve to access an emergency shelter or transition house may also experience difficulties if the facility is not accommodating to First Nations culture, or lacks understanding of the particular issues facing women who live on reserves.

Finally, there are a series of structural factors that have also been identified as contributors to the MRP issue on reserve. One is the role of family status and networks among families on reserve that affect decision making about housing and other scarce resources. Abbott (2003) states that there are issues with the consistent and fair application of property division rules that “include family status on reserve and the spouses’ relationship to those who control applying the property division rules on reserve.” Marriages between First Nations individuals from different bands, or between First Nations and non-First Nations individuals also play a role. The courts “have ruled that an Indian Act by-law prohibiting non-Indian spouses from residing on reserve may contravene Section 15(1) of the Charter, but is justified in light of the socio-economic circumstances faced by the band” (Blair, 2005, p. 12). This “combination of mixed parentage and the break-up of a marriage creates conditions that promote (...) a move to the city or a decision to settle there” (Jaccoud & Brassard, 2001, p. 139). Housing shortages existing on many reserves make the situation worse: “for a non-member living on a reserve with a band member, the end of the relationship usually means the end of the opportunity to live on the reserve” (INAC, After Marriage Breakdown, 2003, p. 6).

2.5.2 Who is Affected?

The MRP situation is believed to primarily disadvantage women who live on reserve. The “lack of laws related to on reserve MRP results in people, mostly women, living on reserve, who (...) may have to leave their matrimonial home and, in some cases, leave the reserve” (INAC, *After Marriage Breakdown*, 2003, p. 6). The children of families that break down also are affected when they relocate with their mother after the loss of the family home. The lack of an equitable way to resolve MRP disputes causes “the departure of women from many communities because their conjugal unions broke apart and they found they were unable to remain on the reserve in safe and stable housing” (Ebert & Jacobs, 2004, p. 30). To a lesser extent, MRP affects non-band members of both genders who are married to band members and live on reserve: this small sub-population of individuals are also unable to retain their interest in or use of the matrimonial home following a relationship break down. The MRP gap may cause a variety of different problems for women and children. These arise from the uncertainty related to possession of the family home, and the lack of legal redress for one spouse against the other in the event of disputes over possession, violence, or finances. These potential effects of MRP are outlined in the following section.

2.5.3 What are the Effects?

The primary effect of MRP is that women and their children are unable to remain living in the on-reserve matrimonial home after the break-up of a marriage or common law relationship. This negatively affects their ability to maintain their connection to their culture and community. The court system cannot make or enforce a decision about possession or occupation of the matrimonial home, which means that “if the spouse with custody of the children is not named on the Certificate of Possession, he or she may have to leave the reserve with the children” (INAC, *After Marriage Breakdown*, 2003, p. 6). If the husband and wife were named jointly on the Certificate of Possession, in the event of a dispute over who will remain in the home, the courts are unable to resolve the issue. Qualitative research studies show that there are informal mechanisms used to ‘resolve’ disputes. One woman who lived on an island reserve reported that “there was pressure, a lot of pressure (...) for me to get out of our home (...) to get off the island” (Simpson, 2004, p. 43). Another report studied four First Nations women who were widowed and found that three of them were “forced to leave her matrimonial home and the island community. However, the situation of the fourth woman remained relatively stable (...) the Band Council allowed this woman to remain in her home in recognition of her children’s ‘status’ entitlements”

(Simpson, 2004, p. 51). This example clearly shows the key role played by the Band Council in resolving disputes, and the variable treatment that may occur based on different membership entitlements and different applications of policy.

A second effect of the MRP issue is that a spouse who experiences violence or abuse in the home is unable to temporarily bar the abusive partner from the home or enforce a temporary restraining order. Ebert & Jacobs (2004, p. 24) confirm that “Even where the spouses are joint holders of the Certificate of Possession, a court cannot grant (...) orders to exclude a violent spouse, under provincial law”. This is a significant problem due to the large number of First Nations women who report suffering violence within their marital relationship. Abbott (2003, p. 7) found in her research that “the predominant reason participants gave for leaving their home was the effects of domestic violence. Many women specifically named abuse as a primary reason for leaving the reserve.” Women feel they have no alternative other than leaving the marital home (RCAP, 1996) in part because they cannot establish a safe refuge in their home from the abuser.

Women are also unable to bar their former spouse from the matrimonial home on a permanent basis after a marriage ends, so that the woman could continue to live there alone or with their children. The provincial and territorial court system “cannot order the spouse with a Certificate of Possession to leave the matrimonial home on a reserve so the other spouse can live there” (INAC, After Marriage Breakdown, 2003, p. 6). The court cannot make an order of occupation or possession, or decide who has the right to live in a house on reserve, as this is determined by the Band Council under the *Indian Act*. Because the CP is usually assigned to the male partner, as discussed earlier in this paper, the female partner has little or no ability to remain in the marital home. Even in the situation where the spouses hold a joint Certificate of Possession, “a court cannot grant orders of occupation or possession...and cannot transfer a land interest from spouse to spouse” (Ebert & Jacobs, 2004, p. 24). There is no legal mechanism for one spouse to retain the marital home and bar the other partner from the home and its inhabitants. The next section of this paper reviews the data currently available on the MRP issue, and is followed by an analysis of dependent and independent variables linked to the MRP problem.

MRP Facts

Qualitative research that has been completed on MRP includes the focus group study completed by Abbott (2003) and the discussion papers of Cornet & Lendor (2002) and Ebert and Jacobs (2004). Although they do not provide detailed counts, they agree that women are disadvantaged relative to men in terms of holding title to land on reserves; for example more CPs are awarded to men than women, and few joint CPs are issued compared to the total number in existence. INAC recently reported that “of the 40,520-plus reported active Certificates of Possession (...) over half, 54 per cent, belong to male possessors; 46 per cent are in the name of the female. As well, many of them are in joint tenancy” (Standing Senate Committee, 2003, p. 23). In contrast, a report by the Provincial Council of Women of Manitoba (2003, p. 4) found that “there are 1,256 Certificates of Possession existing in all of the sixty-two First Nations in Manitoba. Of these 1,256 Certificates, Peguis with an on reserve population of 3,120 has 1,073 and Waywayseecappo with 1,460 people on reserve has 107 Certificates registered with INAC. The remaining 76 Certificates belong to properties on eight other First Nations in southern Manitoba.” The gender of the holders of these Certificates of Possession is not identified: however the low number of certificates existing, given that the on reserve First Nation population of Manitoba is 71,892 (INAC Registered Indian Population by Sex and Residence, 2004) provides a sense of the extent of the disparity between male and female title holders as well as the limited number of CPs that exist compared to the total size of the population. Additional information on gender and the distribution of title on reserves will be presented in the results section of this paper.

The exclusive focus on CPs does not convey the full extent of the problem related to the distribution of title between males and females. There are a wide range of title documents that may be found in the INAC land management databases, including Certificates of Occupation, Notices of Entitlement, Band title, NETI (No Evidence of Title Issued), and First Nations Certificates (FNM). A search of the INAC Indian Land Registry System in January 2006 for alternate forms of Evidence of Title records provided the information summarized in the table below.

Table 5: *Distribution of Title by Type of Title and Region*

Region	Band	CO	LT	NE	NETI
Atlantic	335	4	0	11	47
Ontario	>2394	219	40	844	>1000
Manitoba	173	0	1	26	76
Saskatchewan	191	0	1	10	7
Alberta	254	1	0	2	13
British Columbia	>1681	4	5	282	771
Yukon	0	0	0	0	0
NWT	0	0	0	0	0
Total	>5028	228	47	1175	>1915

Source: INAC Indian Land Registry System and First Nations Land Management System

The title documents in the LT, NE and NETI categories are ‘grandfathered’ and are no longer issued. They are, however, still active, and sustain the impacts of the policies and practices that were in place at the time of their creation. While these forms of title may be exchanged for a CP, there is a barrier to doing so because of the cost associated with completing land surveys or acquiring other legal documents that are required by INAC to make this exchange. This means that these old forms of title continue to perpetuate former allocation patterns and therefore should be included in the research because of their impact on the experience of women living on reserve.

Another issue related to land title is that many First Nations use traditional or customary land holding practices, either alone or in combination with the INAC title system. Although reserve land “in principle (...) continues to be managed under the *Indian Act*” (Standing Senate Committee, 2003, p. 23), it is evident from the information presented above that many First Nations are using alternate systems. INAC reported to the Standing Senate Committee (2003, p.24) that “five Ontario First Nations and two First Nations in Alberta allocate reserve land according to their custom. Thirty-three other First Nations in Ontario, one in Alberta and two in Saskatchewan have a hybrid system which combines *Indian Act* Certificates of Possession and custom allotment,” and that information about customary land allocation practices in other provinces and territories was not available. Traditional or custom allocations often follow undocumented processes: the Provincial Council of Women of Manitoba suggested that “most First Nations in that province use custom land allotment on their reserves. According to the

Department of Indian Affairs, it is not known exactly how these First Nations allot land”
(Standing Senate Committee, 2003, p. 25).

The following section describes the research methodology that was employed to gather data on MRP, including its impact on women, as well as the characteristics of bands and reserves that might influence how women living on different First Nation reserves experience this issue.

3 Methodology

In addition to a literature review, an analysis of quantitative data was completed. The initial intent was to conduct an OLS regression using one dependent variable that measured the size and the direction of the difference between the percentage of women living off reserve and their proportion in the total band population, thus indicating the extent to which women may be disadvantaged by the MRP situation. Unfortunately, this dependent variable was found to be non-parametric; the data was not normally distributed and it failed the test for kurtosis. An OLS regression was therefore not suitable for data analysis. The dependent variable was recoded to create two dependent variables that could be used in alternate statistical processes, specifically correlations and logistical regressions. The independent variables were selected in an attempt to identify factors associated with First Nations bands or reserves that may influence whether women are negatively affected by the MRP problem.

The first dependent variable ‘difference’ calculates the percentage of women living off reserve less the proportion of women in the total band population, measuring the extent to which women may be disadvantaged by the MRP situation. As this data was non-parametric, two Spearman’s rho correlations were completed using this dependent variable. The first employed the complete data set of 577 cases against the first ten independent variables, and the second employed 281 cases forming a sub-set of the data related to the final independent variable (title holder).

The second dependent variable ‘direction’ identifies whether the first dependent variable is positive, indicating more women live away from the reserve than their proportion in the total band population, or negative, indicating that more women live on reserve than their proportion in the total band population. This dichotomous variable was used to complete two logistical regressions using the eleven independent variables. Again, the first analysis was completed using the complete data set of 577 cases and the first ten independent variables, while the second logistic regression was conducted on the sub-set of 283 observations and the final independent

variable. In addition to testing the hypotheses outlined below, the analysis also provided the opportunity to quantify some aspects of the MRP situation that have not previously had statistics associated with them. The sources of data are reviewed below, after which an explanation of the calculation of dependent and independent variables is provided. The predicted direction of the relationship for each independent variables is outlined, as is the rationale for including each independent variable in the study.

3.1 Data Sources

The majority of the data utilized in this study were obtained from INAC publications and databases, specifically:

- The Indian Land Registry System, an INAC database that contains information related to land registration managed under the *Indian Act*, including active and inactive title documents, band council resolutions, and registration instruments.
- The First Nations Land Registry System, an INAC database that contains information about land registration for bands managing their land under the *First Nations Land Management Act*, including active and inactive title documents and registration instruments.
- The Self Government First Nations Land Registry System, an INAC database that contains information about land registration for bands managing their land under a self government agreement, including active and inactive title documents and registration instruments.
- The INAC publication *Registered Indian Population by Sex and Residence* for the years 2004, 2003, 2002, 2001, 2000, 1999, and 1998, which includes the registered population for each band in Canada by gender and place of residence.
- The INAC Community Well Being Index database, which assigns a well being code to each band created from four indicators of social well being.
- The INAC Band Classification Manual which provides information about the geographic zone, sub-zone and environmental index for each band.
- An unpublished INAC database identifying each band by the form of membership control used by that band: section 10 of the *Indian Act*, section 11 of the *Indian Act*, or through a self government agreement.

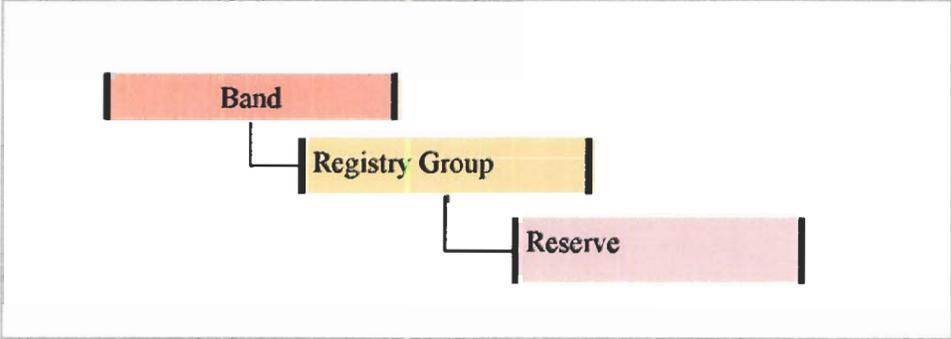
The information from these sources was compiled into a master database organized by band and by reserve using INAC-assigned codes at both the band and the reserve level to identify and cross-reference the data.

3.2 Data Limitations

First Nations located in the province of Quebec are not included in this study, because the land systems and Civil Code of Quebec which regulates family law are distinct from those in the remainder of Canada and would appropriately form the basis of a separate study. Aboriginal people living in the territory of Nunavut are also not included in this research paper: the Inuit are not included in the provisions of the *Indian Act*, therefore many of the independent variables used in this study are unrelated to their situation.

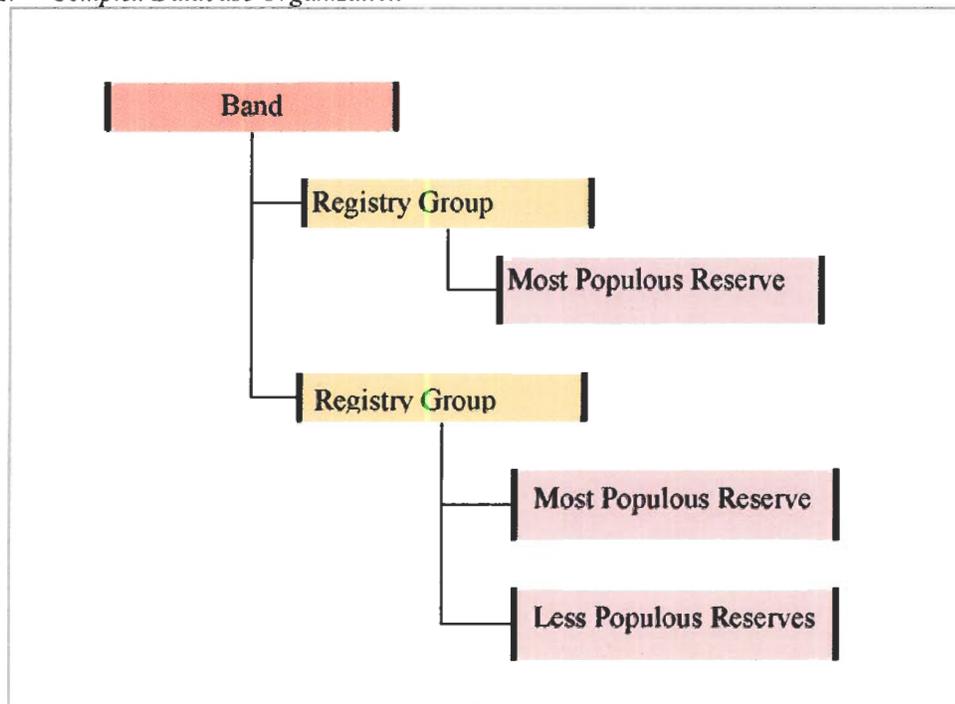
Although the data used in this research was obtained primarily from INAC databases, there is wide variation in how they are structured. Data sets may be organized by reserve, by registry group, or by band (First Nation). The size of the bands and the population resident on each reserve varies widely. The graphic below presents this information in a visual form.

Figure 1: Simple Database Organization



In this example, the First Nation has one band, one registry group, and one reserve. As a result all data are based on the same sample size. The graphic below presents an example that is more complex.

Figure 2: Complex Database Organization



In this example, the band contains more than one registry group, and one registry group has multiple reserves. While only three bands have more than one registry group (Six Nations of the Grand River has 13 registry groups, Stoney Band has three registry groups and the Champagne and Aishihik First Nations have two registry groups) there are a large number of bands with multiple reserves (INAC, Registered Indian Population by Sex and Residence, 2005).

For this study, data were collected and utilized at the level of the band or the most populous reserve, depending on which was available. The *Community Well Being Index*, for example, is based on the most populous reserve, while the data in the *Registered Indian Population by Sex and Residence* (2005) are organized at the band level. With additional resources it would be possible to compute some data sources at the reserve level for multiple reserves for each band. The independent variables that use the Evidence of Title report, for example, could be generated at the reserve level, which would expand the number of observations from 614 bands to 2,796 reserves. It was decided, however, to restrict the number of observations to 614 bands for this study, using data available for the most populous reserve for each band. This provided a balance between the expenditure of resources and the marginal benefit gained by including data at the reserve level rather than for the most populous reserve.

4 Dependent Variables

There is a high level of mobility among First Nations adults and children; for example “in the 12 months before the 2001 Census, 22 percent of Aboriginal people moved, compared with only 14 percent of their non-Aboriginal counterparts. About two-thirds of those who moved, did so within the same community, while one-third of movers changed communities” (Statistics Canada, Aboriginal Peoples of Canada, 2003, p. 11). Individuals may move away from the reserve to find employment, to enrol in education, to access medical or social services, or for the urban lifestyle. Once an adult moves away from the reserve, however, it may be difficult for them to return. There is often a shortage of housing on reserves, and individuals may have grown accustomed to the labour market options and personal services that are available in urban centres. On the other hand, many adults return to the reserve for better access to their culture and family, or to enjoy a more traditional mode of life. In the 12 months prior to the 2001 census, “there was a net gain of almost 4,000 Aboriginal people to the reserves, with 11,210 moving on to reserves and 7,230 leaving” (Statistics Canada, Aboriginal Peoples of Canada, 2003, p. 11). These considerations are likely to influence both genders in equal measure, as both men and women work, go to school, require medical treatment, or desire closer contact with their family and culture.

The dependent variables used in this study measure the degree to which registered males and females reside on reserve and off reserve in proportions differing from their representation in the total band population. The influx of new registrants under Bill C-31 contained a slightly larger number of women than men, which means that the absolute number of women in the population is somewhat higher than that of men. The use of percentages in this study, however, allows comparisons to be made between populations living on and off reserve in terms of relative, not absolute, size. The variation between the percentage of women who live away from the reserve compared to the total percentage of women in the band population is captured by the dependent variables ‘difference’ and ‘direction’. The data sources for these dependent variables as well as an explanation of how they are calculated follows below.

4.1 Dependent Variable: Difference

The data used to derive this variable is obtained from the INAC (2005) *Registered Indian Population by Sex and Residence*. It provides a detailed summary of the population for each band by gender and place of residence, which is defined as on reserve, on Crown Land, or off-reserve. On December 31, 2004, there were 614 Bands in Canada and 2,796 reserves (INAC Population by Sex and Residence, 2005). The population data used to develop this dependent variable is derived at the band level, and a total of 577 bands were included in the sample. Data on bands with fewer than 40 individuals are not available to protect the privacy of their members. Bands with no reserves are also excluded, as their members do not have a choice whether or not to live on reserve: all their band members reside off reserve by default.

This dependent variable is calculated as the difference between the percentage of women who live away from the reserve less the percentage of women in the band population. An illustration of variation in the dependent variable in several different scenarios including unequal numbers of males and females in the band population, and unequal numbers of males and females living away from the reserve is contained in Appendix 17.3. The larger the size of this dependent variable, the greater the disparity in the size of the population of women living away from the reserve and the proportion of women in the total band population. A larger percentage of women living off reserve may result from the difficulty women experience in retaining the use of the marital home following the breakdown of their marriage or common law relationship, leading them to leave the reserve to find accommodation elsewhere.

It is possible that the proportion of women residing off reserve for a particular band could change significantly over time. This variable was calculated for a sample of bands each year between 2004 and 1998, inclusive, to determine both the stability of the proportion of women in the band population and the proportion of women living away from the reserve. The data show that the level of the dependent variable was stable over this time period for the majority of bands. For bands in Atlantic Canada, for example, the range for the percentage of women in the total band population was approximately 1 percent over the time period reviewed, while the range for the percentage of women living away from the reserve averaged 2 percent over the same time period.

4.2 Dependent Variable: Direction

This is a dichotomous variable derived from the dependent variable ‘difference’ described above. It indicates whether the difference between the proportion of women living away from the reserve and the proportion of women in the total population is a positive or negative number. A positive value indicates that more women live away from the reserve than would be anticipated based on their representation in the total band population. A negative value indicates that more women live on reserve than would be anticipated, based on their representation in the total band population. The next section outlines the independent variables, discusses their relationship to the dependent variable, and predicts the direction of these relationships.

5 Independent Variables

Eleven independent variables are included in this study, each of which describes a characteristic of the band or its reserves to determine which are associated with a greater proportion of women living away from the reserve. The table below summarizes the independent variables used in this study, and is followed by an in-depth explanation of each variable.

Table 6: Summary of Independent Variables

Independent Variable	Measurement	Anticipated Relationship	Rationale
Reserve population	Number of on reserve residents	↑population ↓difference	A larger population will enable higher levels of services, enabling women to stay on reserve and access assistance
Majority of band members reside off reserve	Yes / No	Yes ↓difference	Less pressure on resources including housing
Percentage of band members residing off reserve	Percentage range, intervals of 20%	↑band members residing off reserve ↓difference	Less pressure on resources including band housing
Reserve geographic zone	Code indicating distance and road access	↑geographic distance from major centres ↑difference	Greater distance means women must leave reserve to access programs or services
Band funded by INAC to operate women's shelter or transition house	Yes / No	Yes ↓difference	Greater responsiveness to women's issues, services available on or near reserve
Land management regime	Indian Act, FNLMA or SGA	FNLMA or SGA ↓difference	FNLMA/SGA provide opportunity to implement MRP strategies that do not disadvantage women
Percentage of residents who	Percentage of non-band	↑percentage of members of other	More non-band residents will increase concern

Independent Variable	Measurement	Anticipated Relationship	Rationale
are members of other bands	member residents	bands ↑difference	about MRP in relation to land and culture retention
Community well being index	Index	↑community well being ↓difference	High community well being indicates strength in housing and other social measures
Use INAC systems to register title	Yes / No	Yes ↑difference	Use of INAC system to register title demonstrates greater adoption of colonialist practices related to land
Control of membership	Indian Act, Band Council or SGA	Band council or SGA ↓difference	Band control indicates greater opportunity to develop strategies that do not disadvantage women
Title Holder	Male, female, band or joint title	↑male holders ↑difference	Women not holding title may be unable to reside on reserve

5.1 Reserve Population

The size of the on reserve population for each band is taken from the INAC publication *Population by Sex and Residence* (2005). The population figures are grouped into ranges of 20 percent and coded. It is anticipated that a band with a larger reserve population will be able to provide a greater level of services and programs to residents, including services for individuals experiencing a marital relationship breakdown. These services could include emergency shelters, legal aid, transitional housing or personal counselling: if they are not available on reserve then women who need this assistance may move off reserve to access it, increasing the difference between the percentage of women in the band population and the percentage who live off reserve.

5.2 Majority of Members Residing Off-reserve

The number of band members who reside on and off reserve are compared to determine the value for this independent variable. The data is obtained from the INAC publication *Population by Sex and Residence* (2005) and a code is assigned to each band indicating whether the majority of the population resides on or off reserve. Bands with a majority of their members residing off reserve are anticipated to have less pressure on the existing limited housing

resources. This will make it easier for individuals to find alternate housing on reserve following a marital or common law relationship breakdown due to the lower demand for housing on reserve, resulting in a smaller difference between the proportion of women in the band population and the percentage who live away from the reserve.

5.3 Percentage of Members Residing Off-reserve

The percentage of band members who reside on and off the reserve is calculated based on population data found in INAC's *Population by Sex and Residence* (2005). This enables a distinction to be made between bands based on the percentage of the population that resides off reserve. A higher percentage of band members residing off-reserve is expected to result in lower demand for scarce resources, including limited on reserve housing, resulting in a smaller difference between the proportion of women in the band population and the percentage who live away from the reserve.

5.4 Reserve Geographic Zone

The INAC *Band Classification Manual* (2005) lists remoteness and environmental indices for each First Nation, based on the location of its most populous reserve. The geographic zone code has four levels, which are outlined in Appendix 17.4. This variable indicates the accessibility of housing, social programs and supports at the service centre nearest to the reserve that could provide assistance following the breakdown of a marriage or common law relationship. Greater distances or the lack of year round road access make it "prohibitive for Aboriginal women on many northern reserves to seek and obtain legal remedies" or other assistance (Provincial Council of Women of Manitoba, 2003, p. 5). Women who reside on a remote or special access reserve will be less able to access a range of supports and services without moving away from the reserve, and therefore it is expected that there will be a greater difference between the proportion of women in the band population and the percentage who live away from the reserve as reserves are more remote or inaccessible.

5.5 INAC Funding for Women's Shelter or Transition House

INAC provides funding to some First Nations to operate women's shelters and transition houses that are located either on reserve, or in close proximity to several reserves. The existence of these funding agreements indicates an awareness of women's issues relating to violence and housing that may translate into greater band responsiveness to women's issues and support for

women on reserve in relation to the MRP gap. In addition, the funded shelters and transition houses provide accessible, culturally appropriate assistance to First Nations women, including the availability of staff with a strong understanding of the particular issues that exist for women who reside on reserves. It is expected that First Nations who are in receipt of this funding will have a smaller difference between the proportion of women in the band population and the percentage who live away from the reserve than those who are not.

5.6 Land Management Regime

The majority of First Nation lands are managed under the *Indian Act*. Some First Nations, however, manage their lands through either the *First Nations Land Management Act* or a Self Government Agreement. For this independent variable the INAC land registry systems were searched to identify which of these three land management regimes are in place for each band. The FNLMA and SGA management regimes provide the opportunity for Bands to develop their own land management and MRP policies that better meet the needs of their members, eliminating the use of the *Indian Act* provisions that may perpetuate colonialist or misogynist attitudes towards First Nations women. It is expected that First Nations using the FNLMA or SGA to manage their lands will have a smaller difference between the proportion of women living away from the reserve and the proportion of women in the band population.

5.7 Other-Band Residents On-reserve

The percentage of First Nation individuals who are living on a reserve other than that of their own band is found in the *Registered Indian Population by Sex and Residence* (INAC, 2005). This variable indicates the extent to which MRP issues might be ‘top of mind’ for the local band council. A band with a high percentage of residents who are members of other bands may feel more concern and implement more restrictive policies for land management, housing allocations and MRP than a band where there are few or no residents on reserve who are members of other bands. It is anticipated that band with a high population of other-band residents will experience a larger difference between the proportion of women residing away from the reserve and the proportion of women in the band population.

5.8 Community Well Being Index

The Community Well Being Index was developed by INAC to measure the social and economic wellness of First Nation communities. It combines four dimensions of community well

being into a single code: education, labour force participation and employment, income, and housing. This indicator used as an independent variable in the study was derived from the Canadian census as described in detail in Appendix 17.5. The creators of this index suggest that it focuses primarily on mainstream socio-economic indicators of well being which may not accurately reflect differences in values or culture between Aboriginal and non-Aboriginal communities (Cooke, 2001). Similar broad dimensions of well being, however, are of concern to First Nations communities. The Assembly of First Nations, for example, includes education, housing, and economic partnership among its policy areas, and uses measures such as overcrowding and need for repairs to delineate the parameters of their housing policy. While the broad indicators appear similar, it is possible that the benchmarks established by the two populations could be different. It is expected that First Nations with a high community well being index will have an incentive for women to remain on reserve if possible because the community is healthy. Also, because one quarter of the index measures housing well being, a higher score also provides an indication of a healthier on reserve housing environment, which may increase the ability of individuals to access on reserve housing following the breakdown of a marital or common law relationship. It is anticipated that bands with a high community well being score will have a smaller difference between the proportion of women residing away from the reserve and the proportion of women in the band population.

5.9 Evidence of Title

The INAC Indian Land Registry System database of reserve codes was used to generate a list of the 2,796 reserves in Canada, with each cross referenced to its band. This list was used to search the Indian Land Registry System, the First Nations Land Management System and the Self Government Land Management System to determine which reserves have at least one land title document registered in these INAC databases. It was discovered that some bands enter no records for any of their reserves, other bands enter records for all of their reserves, and some bands enter records for some reserves but not others. This dichotomous independent variable, therefore, follows the convention used for the Community Well Being Index, and measures whether the band keeps records of title in the INAC databases for its most populous reserve only. Bands that enter records into the land registry systems show a greater adoption of colonialist practices related to land, and are expected to exhibit a larger difference between the proportion of women residing away from the reserve and the proportion of women in the band population.

5.10 Control of Membership

This independent variable indicates which of three possible methods of membership registration and control is used by the band. First Nations may assume control of their membership through the negotiation and signing of a Self Government Agreement. Amendments made to the *Indian Act* in 1985 also make it possible for First Nations to assume control of their membership under section 10 of the act. To do this, the First Nation must develop membership rules within the community which are sent to INAC for review and approval by the Minister. After completing this process, the First Nation controls decisions about membership in the future, without having to return to INAC for review of subsequent changes made to membership policies (Clatworthy, 2005). New membership codes must include Aboriginal persons who were reinstated under Bill C-31 as members, but subsequent amendments to the membership rules may be used to exclude these individuals (Day & McMullen, 2005). To date, 232 out of a total of 612 First Nations have assumed control over their membership and band lists maintenance under section 10 of the *Indian Act*, and another 21 First Nations have assumed control over their membership and band lists under self-government. The list of the bands included that manage their membership under a Self Government Agreement is found in Appendix 17.2.

This independent variable has three values: bands that control their membership under section 10 of the *Indian Act*, those that control their membership under a Self Government Act, and bands whose membership is managed by INAC under section 11 of the *Indian Act*. It is expected that those First Nations that have assumed membership control will have a smaller difference between the proportion of women living away from the reserve and the proportion of women in the band population because the assumption of control over membership indicates that the First Nation is taking ownership of key administrative and operational issues. As a result, this creates greater opportunities for the band to develop strategies that do not disadvantage women in relation to MRP issues.

5.11 Title Holders

The Evidence of Title report function for the INAC Indian Land Registry System, First Nations Land Management System, and Self Government Land Management System was used to generate a listing of active title documents for the most populous reserve for each of the 273 bands that have entered at least one active title document into these databases. The report lists the

active land title documents for each lot or landholding located on the reserve, and contains the full name of each person holding title, as well as the date, the type of title, registration and document numbers and a description of the land holding. A sample page from the Evidence of Title report, with personal identifying information removed, is included in Appendix 17.6 of this report, along with details on how this independent variable was calculated. Each page of the Evidence of Title report contains between one and twenty registered title documents; these were sorted into one of four groups: male title holder, female title holder, joint title or band title, based on the name(s) of the title holder. All bands with an Evidence of Title report of 120 pages or fewer have every active title included in the calculation of this independent variable. Twelve bands, each of which had more than 120 pages in the Evidence of Title report have a random sample of title documents included in the calculation of this independent variable, rather than every title document. A list of the bands for which a sample was used and the size of the sample is contained in Appendix 17.7 . Two bands were excluded as the codes for the most populous reserve did not generate a list of active title documents.

This independent variable measures the percentage of title documents that are registered to males only, to females only, to a male and female in a joint title, or to the Band. It is anticipated that First Nations with a high percentage of title documents registered to males will exhibit a greater difference between the proportion of women living away from the reserve and the proportion of women in the band population, because women who are not able to prove title or occupancy rights to the family home in the event of a marriage or common law relationship breakdown must move, and are more likely to move away from the reserve.

6 Results

This section provides an overview of the results by reviewing descriptive statistics and cross tabulations of data for the dependent and independent variables. In addition, an analysis of significant results obtained from two logistic regressions and Spearman's correlations for the dependent variables are provided. Non-significant results are presented for reference in Appendices 17.8 and 17.9.

6.1 Dependent Variables

The table below illustrates the distribution of the values obtained for the dependent variable that measures the direction of the gap between the percentage of women who live off reserve and the proportion of women in the total band population. This variable provides an initial assessment of the extent to which women live on or off reserve; if women are more disadvantaged by the MRP issue, then they would be expected to live away from the reserve in greater numbers than are men. A negative value indicates that more women reside on reserve than would be expected given their proportion in the band population. A positive value signifies that more women reside away from the reserve than would be expected given their proportion in the total band population. A neutral value (value=zero) demonstrates that there is no difference between the percentage of women who reside off reserve and their proportion in the population.

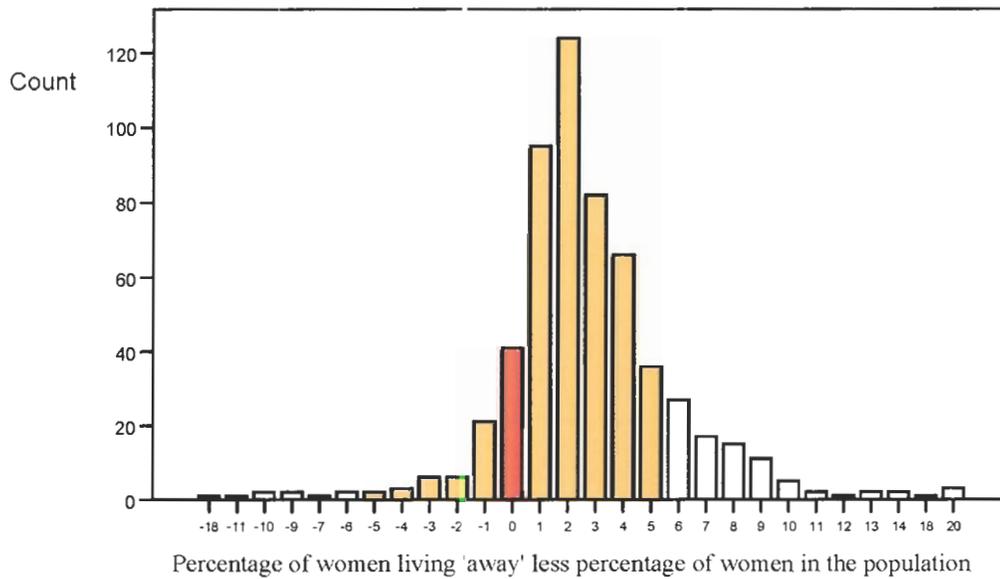
Table 7: *Distribution of the Dependent Variable Difference*

Direction	Frequency	Percent
Negative: a higher percentage of women reside on reserve than their proportion in the total band population would suggest	65	11.3%
Positive: a higher percentage of women reside away from the reserve than their proportion in the total band population would suggest	509	88.2%
Neutral: the same percentage of women reside on reserve as their proportion in the total band population	3	0.5%

Direction	Frequency	Percent
Total	577	100%

The majority of bands have a higher percentage of women residing off reserve than their proportion in the total band population, which indicates that the experiences of women and men in relation to on reserve housing are different. This supports the contention that women are disadvantaged by the MRP gap, and as a result seek off reserve housing. The second dependent variable indicates the size of the difference between the percentage of women residing away from the reserve and their proportion in the total band population. This variable measures whether women are living off-reserve to the same extent for every band across the country, or whether some bands have a greater or lesser incidence of women living off-reserve due to factors such as MRP which negatively affect the ability of women to live on reserve. Again a positive value signifies that more women live off-reserve than their proportion in the band population, while a negative number indicates that more women live on reserve than their proportion in the band population. The range found for this variable is between -18 and 20, with a mean of 1.40. These results reveal that at least one reserve has 18 percent more women residing on reserve than their proportion in the total band population, while at least one other reserve had 20 percent more women residing away from the reserve than would be expected given their proportion in the total band population. The distribution of the scores for this dependent variable are shown in the graph below.

Figure 3: Distribution of the Dependent Variable 'Distance'

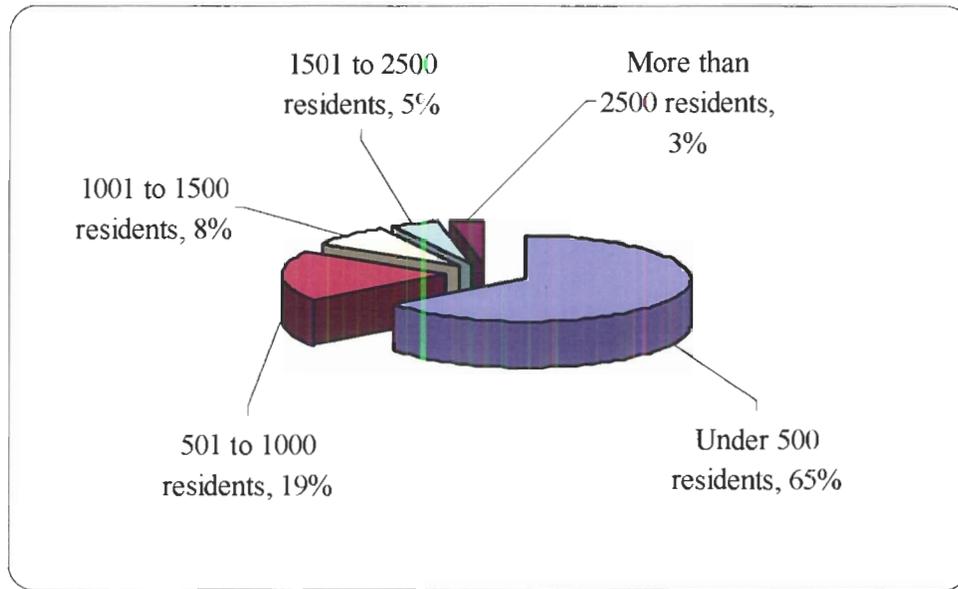


The amount of difference between the percentage of women who reside off reserve and their proportion in the total band population is small for many bands, but the positively skewed distribution of this variable is important. It demonstrates that the majority of bands have more women living away from the reserve than would be anticipated, indicating that there are variables that affect the housing situation of women more than that of men. The highlighted (red) bar for the value of zero represents the bands for which the proportion of women residing away from the reserve is effectively the same as their proportion in the total band population. There are more bands showing a value of zero for this dependent variable than are reported in the previous section for the variable direction due to the rounding of values that are less than one to zero.

6.2 Independent Variables

The majority of bands have a small population of members residing on reserve. Of the 577 bands in the study, 65 percent have 500 or fewer band members living on reserve, and 84 percent have 1,000 or fewer band members residing on reserve. Only 19 bands, or 3 percent, have a large on reserve population, defined as more than 2,500 band members. The graph below illustrates the distribution of bands by their on reserve population.

Figure 4: Independent Variable – Band Population



All bands with a population greater than 1,500 members residing on reserve were found to have more women living off reserve. Meanwhile 85 percent of the bands with more women living on reserve belong to the smallest population category, having 500 or fewer band members on reserve. This finding is contrary to the predicted relationship which suggested that smaller on reserve populations would reduce pressure on housing resources and decrease the difference between the percentage of women living away from the reserve and their proportion in the population. The table below illustrates the distribution of bands indicating whether the majority of their members live on or off reserve.

Table 8: Independent Variable – Majority of Members Live On or Off reserve

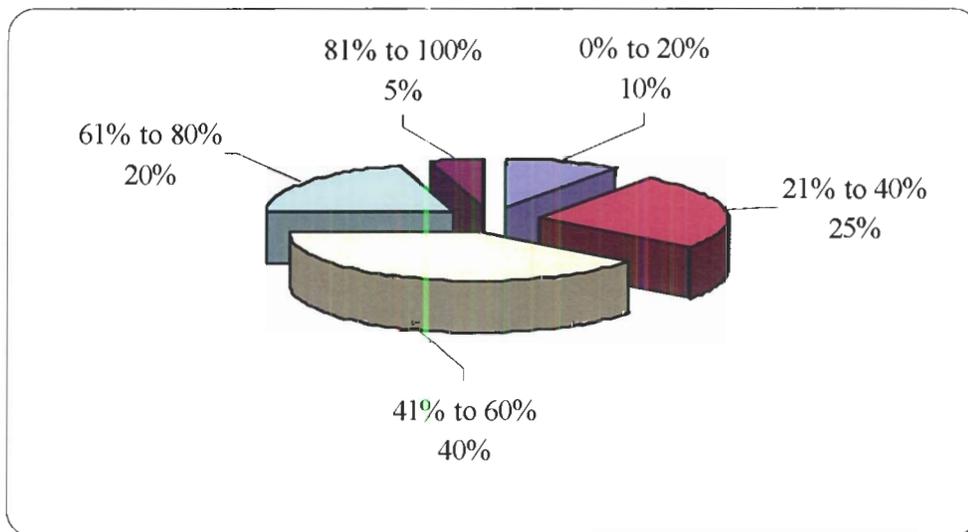
Place of residence	Frequency	Percent of Women living off-reserve
Majority of band members live on reserve	322 (55.8%)	88.8%
Majority of band members live off-reserve	255 (44.2%)	87.5%

There is effectively no difference in the distribution of the dependent variable difference between the two possible values of this independent variable. While 88.8 percent of bands that

have a majority of their members living on reserve have more women living away, 87.5 percent of bands that do not have a majority of their members living on reserve also have more women living away from the reserve. The hypothesis that there would be less pressure on resources and housing if the majority of band members reside off reserve was not supported. This may indicate that the availability of on reserve housing is inadequate for bands with a majority of their population off reserve as well as for those with a majority of their population on reserve.

The band population living off reserve was compared to the total band population in order to determine the percentage of the members who reside off reserve. The graph below reveals the distribution of this variable among the bands included in the study.

Figure 5: Independent Variable – Percentage of Band Population Living Off Reserve



The results reveal that a majority of bands have most of their members living on reserve. Over one-third of the bands (35 percent) have 40 percent or less of their population living off reserve, while only one-quarter of the bands have more than 60 percent of their population living off reserve. The distribution of the dependent variable direction across this independent variable is displayed below.

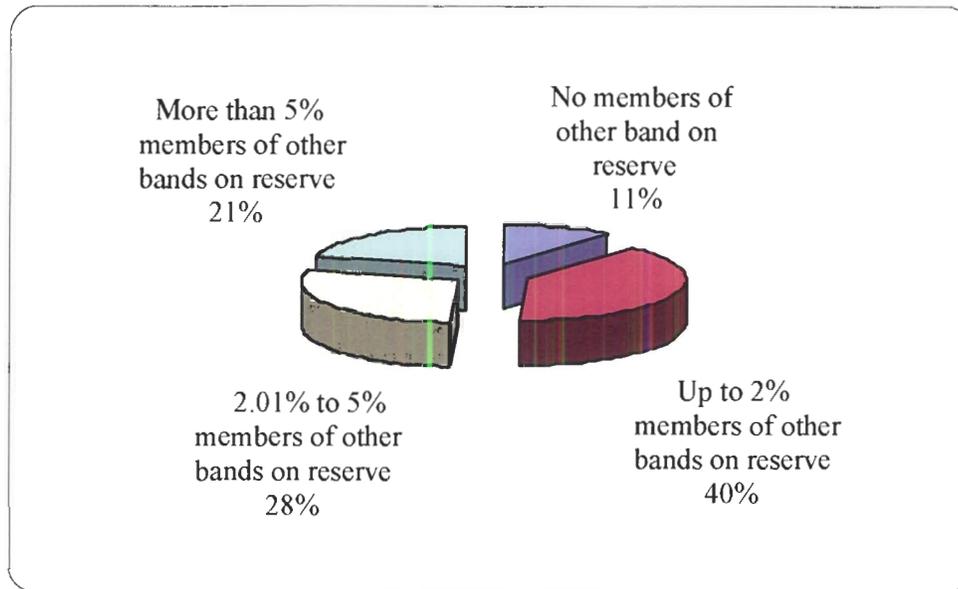
Table 9: Independent Variable – Percent of Band Members Living Off Reserve

Percent of Band Members off reserve	Negative: more women live on reserve	Positive: more women live off reserve	Neutral: no difference
0% to 20%	15.8%	84.2%	0%
21% to 40%	10.3%	89.7%	0%
41% to 60%	8.3%	91.3%	0%
61% to 80%	15.3%	84.7%	0%
81% to 100%	14.8%	77.8%	7.4%
Total	11.3%	88.2%	0.5%

Bands with the highest percentage of band members living off reserve have the largest number of reserves with no disparity between the percentage of women living away from the reserve and the proportion of women in the band population. In this category, 7.4 percent of the bands show a neutral result for the dependent variable difference indicating that an equal percentage of women live off reserve compared to their percentage in the band population. There is a corresponding decrease in the percentage of bands in this category with more women living off reserve than their proportion in the band population. Only 77.8 percent of bands with the highest percentage of their population living off reserve show a positive difference in the percentage of women living away from the reserve and their proportion in the band population. The bands with the highest off reserve population also have the least unequal distribution of women and men between on reserve and off-reserve residency.

The distribution of the independent variable indicating the percentage of members of other bands living on reserve is outlined in the chart below. This variable is classified into four groups; bands with no other-band members living on reserve, and bands with a low, medium or high percentage of other-band members living on reserve.

Figure 6: Independent Variable – Members of Other Bands Residing On Reserve



When the dependent variable ‘direction’ is analyzed with this independent variable, it is the reserves with no members of other bands residing on reserve that depart from the average pattern. The data show that 18.2 percent of the First Nations with no members of other bands living on reserve have more women living on reserve, while 80.3 percent have more women living away from the reserve. This supports the hypothesis that bands with fewer members of other bands living on reserve will have more women living on reserve. The distribution of the dependent variable for reserves with higher percentages of non-member residents do not show a pattern different from that obtained for the sample as a whole.

The largest group of bands (47 percent) have their most populous reserve located between 50 and 350 kilometres away from a service centre, and a further 32 percent of bands have their most populous reserves located less than 50 kilometres from a service centre. A small group of bands (3.5 percent) have their most populous reserve located further than 350 kilometres from a service centre, while 17.5 percent of bands do not have year round road access between their most populous reserve and the nearest service centre. This suggests that almost one third of the most populous reserves have comparatively easy access to nearby service centres, assuming that public transportation is available or residents have access to private vehicles. Women who live on these reserves could access programs or supports for divorce or separation issues available at the nearest off-reserve service centre while maintaining their on reserve residence. In contrast,

one-fifth of the most populous reserves do not have easy access to the nearest service centre, due to distance or seasonal roads. Women living on these remote reserves would find it very difficult to use programs or supports available in the nearest service centre without moving to the service centre for the duration of the program or service. This would put their on reserve housing at risk: because of the MRP gap if the woman's name is not on the title registration her ex-partner could prevent her from returning to the family home or transfer the home to another owner without her consent. If a woman is perceived to have abandoned the family home, as might occur if she has left the reserve suddenly to access emergency shelter in a service centre, the band government could come under pressure to begin the process to transfer the title for the property back to the band in preparation for reallocating it to another family.

INAC provides funding to 89 First Nations (15.4 percent of the total) to operate a women's shelter or transition house. Some of these facilities are located on reserve, while others are located at non-reserve locations mid-way between two or more reserves. The table below illustrates the distribution of the dependent variable direction between First Nations with and without INAC funding for shelter and transition house services.

Table 10: Independent Variable – INAC Funding for Shelters/Transition Houses

INAC funding	Negative: more women live on reserve	Positive: more women live away from reserve	Neutral: no difference
Yes, INAC provides funds	5.6%	93.3%	1.1%
No, INAC does not provide funds	12.3%	87.3%	0.4%
Total	11.3%	88.2%	0.5%

The First Nations that receive funding from INAC for women's shelters or transition houses have a larger percentage of bands with more women living away from the reserve than those that do not receive funds for these services, contrary to the hypothesis. The bands that receive INAC funding also are more likely to have no difference between the percentage of women living off reserve and their percentage in the total population, and a lower percentage of bands with more women living on reserve than their representation in the total band population. It

is possible that this result reflects the low level of funding provided for these facilities compared to that provided to other shelters and transition houses by provincial and territorial governments.

The Alberta Council of Women's Shelters (2005) has found that there is:

“a lack of parity between on reserve shelters and their provincially funded counterparts. The difference is up to 50% (...) In Alberta, the five on reserve shelters work with on average 20% of Alberta's total admitted abused women and 25% of the admitted dependents”.

A low level of funding and high level of utilization may impair the ability of these shelters and their staff to be effective advocates for women's issues including MRP with decision makers on reserves. It is also possible that the allocation of funding for shelter operations to these reserves is based on a third factor that also increases the impact of MRP as measured by the dependent variable for that band. For example, these reserves could be experiencing a higher than average rate of family violence, creating a need for additional shelters, which could then result in increased levels of INAC funding. A higher rate of family violence could cause a higher rate of marital failure at the same time, increasing the number of women experiencing MRP issues and subsequently moving off-reserve. There may also be differences between shelters and transition houses funded by INAC that are located on reserve as compared to those located off reserve in their utilization by local women and their potential impact on the dependent variables.

The distribution of the dependent variable direction between bands with different land management regimes does not deviate from the average values found for the complete data set. While bands using the FNLMA or SGA land management regimes have a slightly higher percentage of bands with women living on reserve, at 12.5 percent, this does not represent a noteworthy divergence from the average result of 11.3 percent obtained for all bands.

Over one half (57.9 percent) of the bands in the study use the *Indian Act* section 11 process to manage their membership. The bands using section 10 of the Indian Act to control their own membership account for 39.2 percent of the total, and 17 bands or 2.9 percent control their own membership through a Self Government Agreement. No difference is found between bands that control their own membership through Section 10 or those that use INAC section 11 processes in terms of the percentage of women who live on or off reserve. The bands that manage their membership under a Self Government Agreement do not have any reserves where more women live on reserve than would be expected: all their most populous reserves have more

women living off-reserve than their proportion in the band population. It should be noted, however, that the small number of SGA bands in the study (N=17) may suggest that these results should be interpreted with caution due to the small sample of SGA bands in the study.

The bands are almost equally split between those that have used the INAC land registry systems and those that do not. A total of 272 bands have zero entries in any of the INAC land registry systems (47.1 percent) while 292 bands (50.6 percent) have at least one record of title in one of the INAC land registry databases. There is a wide disparity between bands in the intensity of their use of the INAC land registry systems. The size of the Evidence of Title report, which lists all active and inactive individual title registrations for each band ranges from one page in length for some bands to 3,751 pages for the largest band in Canada. Bands using the Evidence of Title databases have a slightly higher percentage of bands with more women living off-reserve at 90.1 percent compared to the average of 88.2 percent for all bands. This supports the hypothesis that the use of the INAC land registry systems to register land title demonstrates a greater adopting of colonialist practices, including gender discrimination, which result in more negative outcomes for women in relation to the MRP issue.

The final independent variable, ‘Title Holder’ was organized into four groups: percentage of any type of title held by males, percentage of any type of title held by females, percentage of CP title held jointly by a male and female, and percentage of title held by the First Nations band. The table below shows the mean value of this variable for each category.

Table 11: Independent Variable – Title Holder Distribution

Statistic	Male Title	Female Title	Joint Title	Band title
Mean percentage per Band	44.87%	29.43%	6.4%	19.33%

Men hold nearly 45 percent of all the titles recorded in the INAC land registry databases while women hold less than 30 percent of all titles. Another 6.4 percent of titles recorded are joint titles, and band titles account for just over 19 percent of the total. It was also found that some

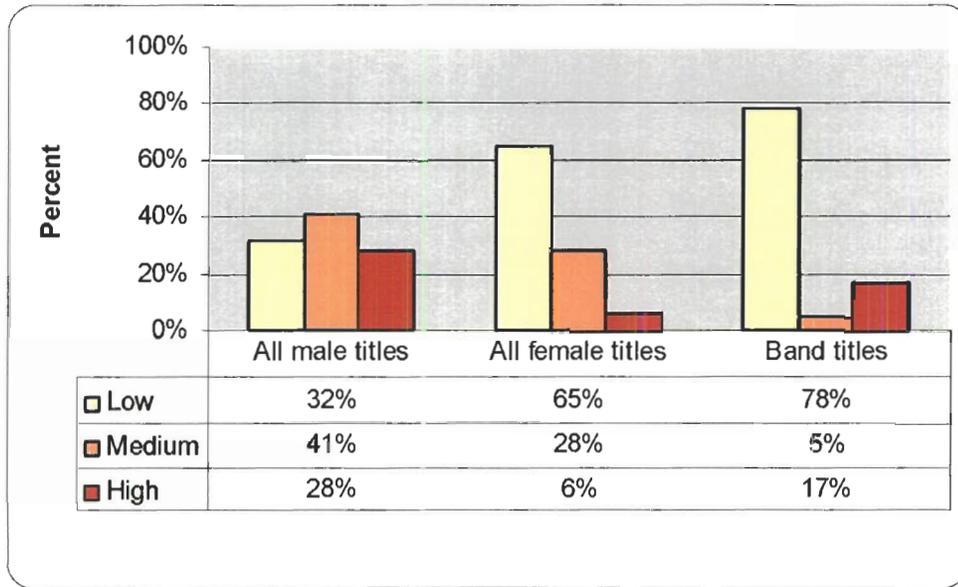
bands have no recorded documents for some types of title but not others, while other bands have all title documents recorded for the entire reserve under only one type of title. The table below shows the distribution of bands that have either no title documents or all recorded title documents in one category.

Table 12: Number of Bands with No Title Records or All Title Records in a Category

Title document distribution	Male Title	Female Title	Joint Title	Band title
Number of bands with no title records in this category	46	73	139	51
Number of bands with all title records in this category	17	4	1	34

Of the 271 bands in this sub-set, seventeen have all the active title documents recorded for their most populous reserve allocated only to males. In contrast, only 4 bands have all the active title documents recorded for their most populous reserve allocated only to females. A total of 73 bands had no active title documents allocated to women, and 139 bands had no active joint title documents recorded for their most populous reserves. This clearly indicates that there is a bias against allocating joint title records to married or common law couples in over one half of the bands in this sub-set, which would exacerbate the MRP problem for women on these reserves. The distribution of all titles held by males and females may be determined by adding the number of joint titles to those held solely by males or by females. This allows the distribution of all male and female titles to be compared to the distribution of band titles, as shown in the graph below. Each type of title is further organized by percentage into one of three categories; bands with a low percentage of titles allocated to this group (bottom third), bands with a medium percentage of titles allocated to this group, and bands with a high percentage of titles allocated to this group (top third).

Figure 7: Distribution of All Male, All Female and All Band Titles



This graph shows that the percentage of the male titles exhibits a normal distribution pattern. The distribution of female titles, however, shows a pattern that is skewed towards the bottom of the scale, with women being disadvantaged in the allocation of land title. The allocation of band titles also shows a distribution that is skewed to the low end of the scale, which suggests that the patterns and practices underlying allocation or reversion of titles to bands would benefit from further investigation.

6.3 Logistic Regression

Two logistic regressions were conducted for the dichotomous dependent variable direction using the eleven independent variables described above. The first regression was based on the first ten independent variables and all bands (N=577) in the data set. The second regression was based on one independent variable, Title Holder, and uses a smaller sub-set of bands (N=273) that have active land title documents recorded in the INAC land registry database. Those independent variables that meet the test of significance are presented in the table below: a table containing the results for all independent variables is available in Appendix 17.8.

Table 13: Significant Logistic Regression Results

Independent Variable	B	Sig	Exp (B)
Reserve Population		.262	
0 to 500 residents	.722	.087	2.058
501 to 1,000 residents	2.338	.032	10.363
1,001 to 1,500 residents	19.617	.998	
1,501 to 2,500 residents	19.817	.998	
2,501 + residents	18.508	.998	
Community Well Being Index		.218	
.41 to .50	.466	.314	1.594
.51 to .60	.650	.044	1.916
.61 to .70	.798	.335	2.221
Constant	18.288	.998	87580204.452
Nagelkerke R square	.165		
Beginning Block Overall Percentage	88.7		
Classification Table Overall Percentage	88.7		
Kurtosis	7.147		
Durban Watson	1.995		
Kolmogorov-Smirnov	3.657		

Significant values were found for a mid-range community well being index score (.51 to .60) and the second smallest reserve population size (501 to 1,000 on reserve residents). This community well being category is the second lowest for this independent variable, and contains approximately five times as many communities as are found in the lowest category for this variable. This suggests that there may be a relationship between a low level of community well being and more women living away from the reserve as was predicted. The lowest level of the community well being score may not have reached significance due to the small number of communities contained in that category. The significant result for the reserve population

independent variable also expresses agreement with the hypothesis predicted, in that a smaller community population is predictive of a larger difference between the percentage of women living off reserve and their percentage in the total band population. The explanatory power of the model, however, is weak. The independent variables in the analysis explain 16.5 percent of the variation in the dependent variable, as indicated by the Nagelkerke score. In addition, the results of the analysis did not demonstrate an improvement in the overall percentage in the classification. The weakness of the model suggests that these results, although statistically significant, cannot account for the majority of the variance in the dependent variable direction.

6.4 Correlation

Two Spearman's rho correlations were conducted for the dependent variable difference and the independent variables. The first correlation was based on the first ten independent variables and all bands (N=577) in the data set. The second correlation was based on one independent variable, Title Holder, and uses the smaller sub-set of First Nation bands (N=273) that have active land title documents recorded in the INAC land registry database. The results that achieved significance are presented in the tables below; and the full results including the non-significant variables are available in Appendix 17.9. The table below presents the results for the first correlation on the complete data set.

Table 14: Correlation Coefficients for Difference and Independent Variables

Independent Variable	Difference	Independent Variable	Difference
Land management regime	-.069*	Percent of population residing off reserve	-.366**
Geographic Zone	.113**	Majority on reserve? Yes	.291**
Percent other-band residents	.113**	Reserve population	.099**

* significant at the 0.05 level (1 tailed)

** significant at the 0.01 level (1 tailed)

The percent of the population residing off reserve shows the strongest correlation with the dependent variable: as the percent of the population residing off-reserve increases, the difference between the percentage of women residing off reserve and their proportion in the total population decreases. This supports the findings presented earlier with regards to the bands

having the highest percentage of their population living off-reserve having the least unequal distribution of women and men between on reserve and off reserve residency.

Bands that have a majority of their population residing on reserve also show an increase in the difference between the percentage of women residing off-reserve and their proportion in the total population; this result is statistically significant but the impact is smaller than that found for the percentage of the population residing off-reserve. Statistically significant results were also found for four other independent variables: the percentage of other-band residents on the reserve, the geographic zone and the size of the reserve population all demonstrate a positive relationship with the dependent variable. This supports the hypotheses outlined earlier for the percentage of other-band residents on reserve and the geographic zone, as increases in both were predicted to increase the percentage of women residing off reserve compared to their percentage in the total population. The finding that the size of the reserve population also has a positive, although weak correlation with the size of the percentage of women residing off reserve contradicts the prediction made earlier. The land management regime is found to have a negative correlation with the dependent variable, which supports the hypothesis made earlier in this paper. The table below presents the results for the second correlation on the data sub-set and the dependent variable difference.

Table 15: Correlation Coefficients for Difference and Independent Variable Possession of Title

	Difference	Percent male title holders	Percent female title holders	Percent joint titles
Percent male title holders	.137*			
Percent female title holders	-.046	-.029		
Percent joint title	-.048	-.021	.341**	
Percent band title	.013	-.642**	-.406**	-.230**

* significant at the 0.05 level (1 tailed)

** significant at the 0.01 level (1 tailed)

As predicted, the dependent variable is correlated with the percentage of male title holders, although the relationship is not strong. There are other significant correlations that emerge between different types of title. The percentage of male title holders, for example, shows a strong negative correlation with the percentage of band title and the percentage of female title. There is also a negative relationship between the percentage of male title and the percent of joint titles. The percentage of female title has a positive correlation to the percentage of joint title.

These findings suggest that there are two possible scenarios associated with the allocation of title. In the first scenario, there is a higher percentage of title allocated to males, which is negatively related to the allocation of title in all other categories. It is also associated with an increase in the difference between the percentage of women who live off reserve and their proportion in the total band population. In the second scenario, there is a higher percentage of title allocated to females and joint title holders: these two categories have a positive relationship so that as one increases, the other does as well.

Overall, some significant results were obtained from the statistical procedures. Although they do not explain all the variance in the dependent variables, they provide additional information that may be brought forward to influence the development and evaluation of alternatives to close the MRP gap. The most important factors to consider are the distribution of title between males, females, the band and joint title; the size of the band population and whether members reside on- or off-reserve; the geographic zone of the most populous reserve; the percentage of other-band residents living on reserve; and the land management regime in place. The following section will outline potential alternatives that may be utilized to ameliorate the situation of women living on reserve who experience a breakdown in their marital or common law relationship.

7 Policy Goals and Alternatives

The literature on MRP generally does not distinguish between outcome goals, which may be defined as what the closing of the MRP gap could achieve for First Nation individuals, and process goals, which may be defined as how the preferred outcome goals could be achieved. Ebert & Jacobs (2004) for example, suggest that the following goals are important in a resolution of the MRP issue. The list they provide is sorted in the table below into outcome and process goals.

Table 16: Outcome and Process Goals

Outcome Goals	Process Goals
<ul style="list-style-type: none">• Ability of a child to stay in a familiar home• Ability of a child to stay in a familiar community• Ability of a child to stay near his or her family• Safety and housing stability for the children• Safety and housing stability for the non-violent parent where there is a history or continuing threat of family violence• Well being and peace for the community	<ul style="list-style-type: none">• Ability to make child custody decisions looking at all relevant factors without giving undue weight to who has legal entitlement to the child's home• Ability to provide a fair opportunity for all parties to be heard in the decision making process• Ability to make decisions without favouring individuals with vested interests• Ability to balance the interests in the land of both marital partners in an appropriate and fair way• Ability of the decision making system to respond to crises as well as longer-term decision making• Ability to respect the dignity and integrity of the adults and children involved in the decision making process• Ability to give equal respect to both common law unions and legal marriages in the decision making process

Source: Ebert & Jacobs, 2004

Outcome goals may be singular, exclusive or non-exclusive, or hierarchical. The outcome goal presented in the table above, for example, of enabling a child to stay in a familiar home may or may not be attainable at the same time as the outcome goal of providing safety and housing stability for the child. In other words, the child's familiar home may or may not also be safe. Similarly, the outcome alternatives that exist to resolve the MRP gap may be singular, exclusive or non-exclusive, or hierarchical. Outcome alternatives will be presented and discussed in greater detail in the next section of this paper.

Processes, in contrast, are the means through which an outcome may be achieved. If the outcome goal, for example, is to enable a child to stay in a familiar home, this may be accomplished through the use of one or multiple alternative processes. The process goals identified in the table above are primarily statements of values or principles that could be used in decision making around MRP situations. The alternatives for implementing solutions to the MRP issue are the potential ways in which the current legislative and administrative regime could be changed to eliminate the MRP gap. These alternatives are grounded in specific values or principles, which form in part the criteria against which the implementation alternatives are judged. Implementation alternatives are presented, discussed and evaluated in section 11 of this study.

Some outcomes or processes may be linked to factors that influence or affect the MRP gap, or may themselves be affected or influenced by the MRP issue. These include activities such as domestic violence prevention programs, access to information on shelters, provision of transportation to shelters, acknowledgment by the community of violence issues, or increased community education and awareness of individual's legal rights on reserve (Abbott, 2003). While these are all valid, useful, and important initiatives that will improve the situation of individuals experiencing issues related to or leading to a relationship breakdown, in themselves they are not directly linked to the use and occupation of the matrimonial home and will not resolve the MRP gap. They are therefore are not considered as policy alternatives for the purposes of this paper.

8 Outcome Alternatives

The alternatives described in this section are the end-states or outcomes that would be preferable to those that are achieved now, which typically see MRP disputes being resolved by women moving away from the reserve. Outcome alternatives do not address how implementation would be managed or who would need to act; instead they are focused on the retention and occupancy of the family home following the breakdown of a marriage or common law relationship.

There are several reasons to narrow the focus of the MRP issue to retention and occupancy of the matrimonial home. This is a key concern for non-band member spouses and partners who have a different status and entitlement under band by-laws and the *Indian Act* for housing and residency on reserve. Second, the lack of ownership in fee simple on reserve diminishes the resale options available to band members and would further disadvantage non-band member spouses as they would be barred from purchasing the interest in the family home of their ex-partner. Finally, private home ownership is not widely established on most reserves, which eliminates the option of selling the home and distributing the proceeds between the two partners for individuals who reside on reserve. Three outcome alternatives are described below, along with one suggested modification to current housing allocation processes.

8.1 Partner with Child Custody Retains Home

One outcome alternative is for the partner who has custody of the children to retain the use and occupancy of the matrimonial home following the breakdown of the relationship. This assumes that one parent will be the primary custodian of the children, and that all children of the relationship remain with only one of the parents. In situations where custody is shared or divided between the two parents, further sub-guidelines could be established. The parent with the custody of the greater number of children could retain the matrimonial home, for example, or the parent with custody of the youngest children could retain the occupancy of the matrimonial home. Research indicates that women are usually the custodial parents: for example Abbott (2003)

found in her qualitative study that female partners generally retained custody of the children following the breakdown of a marriage or common law relationship.

8.2 Partner who is Band Member Retains Home

A second outcome alternative would be to enable the partner who is the band member to retain occupancy of the family home, if only one partner in the former relationship is a band member. Non-band member spouses have limited rights in relation to residency on reserve: band by-laws determine “whether the non-member spouse of a band member may reside with the spouse on the reserve, even where the band member has a Certificate of Possession and owns an house on the land” (Ebert & Jacobs, 2004, pp. 23-24). Individuals who are not band members are not currently eligible to be allocated a certificate of possession (INAC Land Management Manual, 2002). This alternative would accord well with the provisions of the *Indian Act*, which has been described as “very much band-oriented where use of lands in the reserve is at issue” (Cornet & Lendor, 2002, p. 27). This alternative would not affect a large number of individuals: Abbott found that “at the time of co-habitation, the majority of participants shared the same First Nation origin as their spouse” (2003, p. 26). This is supported by the findings of this study on the independent variable “percentage of other-band individuals residing on reserve. Thirty-five percent of bands showed a value of less than one percent for this variable, and the average for all bands in the sample was only 3.3 percent.

8.3 Either Partner Retains Home

A third alternative if both individuals are members of the First Nation is for either of them to retain the family home, which is essentially the status quo situation. To increase the equity and equality associated with this alternative, especially in situations where there is a dispute over possession or violence between the partners, there is a need for “clear, transparent and unambiguous explanation of band policies, rights and codes for band members” (Abbott, 2003, p. 68) so that issues are resolved in accordance with these policies and procedures. The effectiveness of this alternative could be increased by implementing several procedures, including:

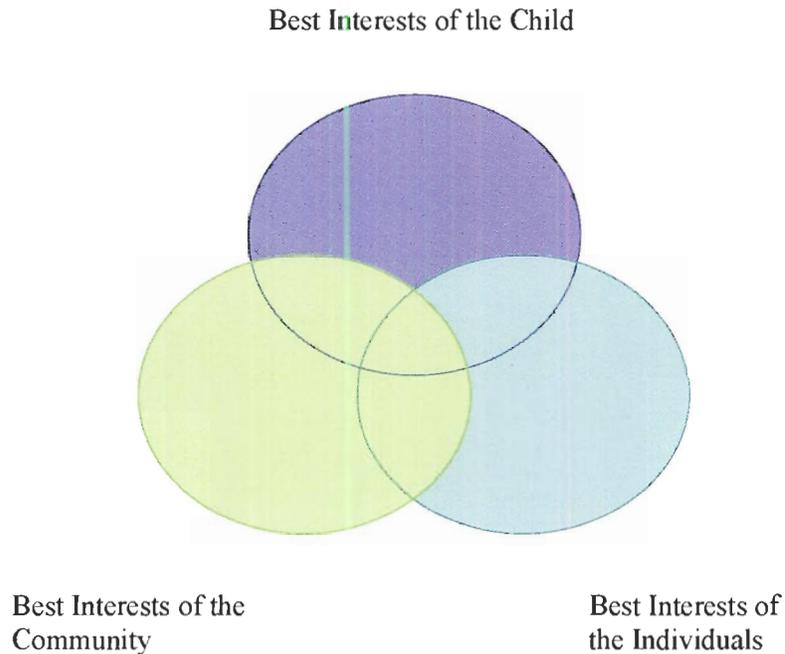
- ensuring that both males and females living on reserve have good knowledge of band housing policies and regulations

- ensure that legal assistance, and “community sanctioned, band supported mediation processes to resolve disputes” (Abbott, 2003, p. 68) are available
- recognize the right of both marital partners to occupy the marital home, including situations where one partner does not have their name on the CP, or where the CP is held by a third party (Senate Standing Committee, 2003)
- establish policies and procedures so that CP, CO and FNM certificates of title are allocated to females and allocated as joint title to couples in proportion to their proportion in the total band population.

9 Outcome Criteria

Three criteria are used to evaluate the outcome alternatives presented above: the best interests of the children in the family, the best interests of the First Nation community, and the best interests of the individuals involved in the relationship. The alternatives are not mutually exclusive: the spouse who retains custody of the children may also be a band member as illustrated in the figure below. The criteria may also overlap; what is in the best interests of the child may also meet the best interests of the community or the individuals.

Figure 8: Outcome Criteria



This potential for overlap between the three alternatives and the criteria suggests that a selection hierarchy should be established rather than a forced choice between alternatives. This would allow the MRP decision to be made considering a series of factors in order, starting with the most important and leading to the least important. At each point in the hierarchy a decision

can be made, or it may be deferred to the consideration of the next factor. The following sections describe the three criteria in decreasing order of importance.

9.1 Best Interests of the Child

The best interests of the child is a criterion found in provincial and territorial family law. The factors used to judge the best interests of the child during a divorce typically include:

- the child's safety and well being
- physical, emotional and psychological needs of the child
- continuity and stability for the child
- the child's cultural, linguistic, religious, spiritual, and racial heritage
- the child's own views and preferences
- whether a parent has demonstrated responsible parenting in the past
- the quality of relationship the child has with each parent
- the quality of relationship the child has with siblings, grandparents, or other significant persons
- the benefit to the child of maintaining a relationship with the parent in the future
- the history of family violence, conflict, or abuse
- the ability of each parent to care for and meet the needs of the child.

Another important consideration for First Nation communities is the ability of the child to preserve his or her identity as a First Nations individual (Quebec Native Women, 2003).

If the parent with the custody of the children is able to retain the family home this advances the well being of the child. It makes it possible for the child to stay in a familiar home and community rather than experience a disruptive move out of their home which may also interrupt their attendance at school and decrease their proximity and opportunity to interact with relatives and friends (Ebert & Jacobs, 2004). This criterion also connects to the research results reported earlier showing that more women live off-reserve than their population in the total band population. Because women tend to receive custody of minor children, this suggests that a large percentage of minor children may also be living off reserve; additional research on this idea

would be beneficial. If a large number of children reside off reserve with their mothers following a relationship breakdown then future negative impacts on the well being of the community may be anticipated, as these children will find it more difficult to maintain their identity as a First Nation individual and to preserve their cultural, linguistic and spiritual connection to their community.

9.2 Best Interests of the Community

Another criterion that may be used to evaluate outcome alternatives is the best interests of the community which may be framed as the well being of the household, immediate kin, the clan or social network, and the broader caring community (RCAP, 1996). The best interests of the community could include:

- gaining similar outcomes for men and women, rather than different outcomes based on gender
- ensuring the housing stock is allocated to individuals according to fair and consistent practices
- ensuring the reserve land base is well managed with fair and consistent practices in place to guide the allocation of title
- ensuring individuals are knowledgeable about their cultural, linguistic and spiritual heritage
- protecting cultural continuity and the well being of the community.

There may be a need to make choices that balance these goals. The management of housing on reserve is affected by membership rules as well as policies and practices that guide the allocation of CPs. As has been demonstrated, these have tended to favour males, with the result that females are unable to retain possession of the family home and respond by moving off-reserve. The protection of cultural continuity and community well being is not well-served by these housing and CP practices, however, if they deprive women or non-band members and their children of the ability to reside on reserve and to maintain a connection to their family, culture and community.

9.3 Best Interests of the Individuals

In the event of a marriage or common law relationship breakdown, the best interests of the parties to the marriage may also be a consideration. The best interests of the men and women involved could include:

- creating fair outcomes in terms of what each brought into and is taking away from the relationship
- ensuring a balance between the partners in terms of ongoing responsibilities such as child custody, child support, and alimony.

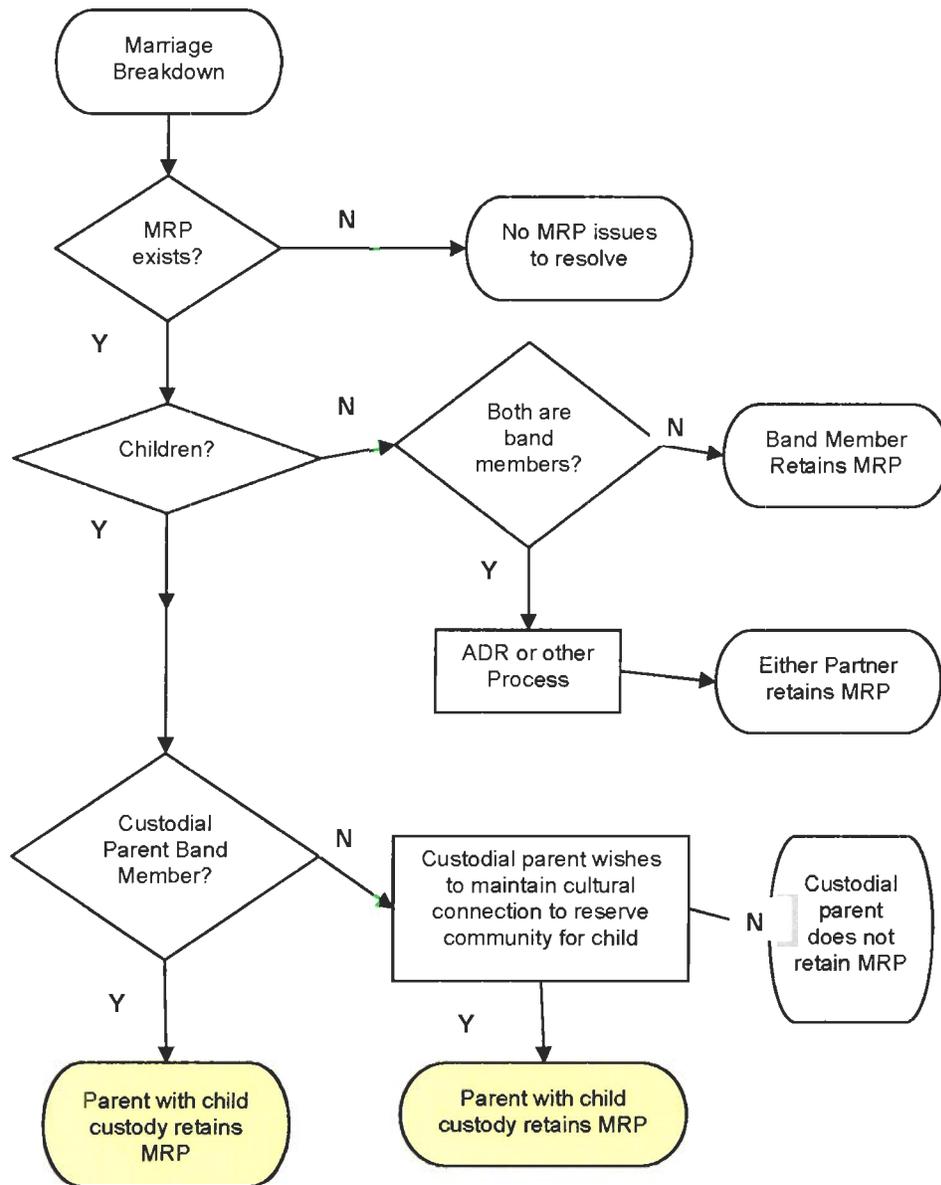
Provincial and territorial family laws set out guidelines for the division of property in the event of a divorce, which address both property brought into the marriage and property that is acquired by the couple during the marriage. These guidelines could offer a starting point for First Nations communities to develop their own solutions. The differences between the two locales in terms of personal legal rights under the *Indian Act*, land ownership, housing resources, and land markets, however, mean that provincial and territorial family law guidelines would require modification to be of use in the reserve context. The issues associated with this criterion are primarily process issues, such as taking care that both parties have access to legal aid or ADR mechanisms and ensuring the safety of the spouse and children when family violence has been a feature of the relationship.

10 Outcome Recommendation

The flow chart presented below illustrates a decision making process for choosing between the outcome alternatives available to resolve a specific MRP situation. A fundamental question related to all decisions is that of whether the interests of the child, the community or the adult individuals involved should have priority, and in what order. Any acceptable option should place first priority on the interests of the children, because of their unique vulnerability and because parents are responsible for the well being of their children. The housing situation of the custodial parent and thus the child is directly impacted by the resolution of the MRP question following a relationship breakdown. The interests of the community should have second priority for two reasons. First, the unique features associated with on reserve property means that decisions about MRP will affect not only the individual but also the community as a whole. Second, First Nation cultural values associated with the family and the community make this a key consideration. The interests of the individuals should have third priority, and thus form the third and final basis on which to make decisions about MRP issues.

In situations where children are involved it is recommended that the interests of the children in maintaining continuity in housing, education, family networks and culture should form the primary basis for decision making around MRP. The second most important factor is the interests of the First Nations community, since strengthening the community supports cultural continuity and maintenance over the long term. Finally, the interests of the two adult individuals involved in the marital situation may be considered, as this also affects the well being of the persons involved and their larger network of family, friends and community.

Figure 9: Decision Making Process for MRP Outcome Alternatives



The decision making process depicted above first considers whether there are any MRP issues to be resolved. If not, no decision is required. The second consideration is whether there are children involved in the situation. If yes, the interests of the children are the primary consideration, and the MRP decision is based on the belief is that the children will be best served by their remaining in the matrimonial home with the custodial parent. A secondary decision will be triggered if the custodial parent is not a band member. Because the well being of the children is of the highest consequence, a decision allowing them to remain in the matrimonial home is preferred. The second criterion, the well being of the community can then be considered. If the

non-band member parent with child custody wishes to remain on reserve with the children as part of the community, this will meet the interests of the community related to well being and cultural continuity. This can be facilitated by enabling the non-band member custodial parent to retain occupancy of the matrimonial home so that they may remain on reserve with their children.

If there are no children from the marriage or relationship, then the well being of the community and the band is considered. This is likely to be enhanced if the individual who is a band member is able to remain on reserve and continue participating in the culture and society. This could result in the decision that the partner who is a band member retains the family home, if the other partner is not a band member. If both partners are band members, then the criterion considering the best interests of the individuals is triggered, and either partner could retain the matrimonial home.

11 Implementation Alternatives

There are multiple implementation alternatives that would close the legislative gap associated with MRP, reducing the number of First Nation women who are unable to retain occupancy of the matrimonial home following a breakdown of their marriage or common law relationship. The differences between these alternatives are in which actors are involved, which legal or legislative mechanisms are utilized and the time frame in which action can occur. Five implementation alternatives identified from the literature on MRP are presented below, with explanations of the mechanisms involved and the beliefs of stakeholders regarding the validity of the alternatives.

11.1 Federal Government Legislation

One alternative is to use federal government legislation to close the MRP gap, based in the responsibility of the federal government for First Nation issues and First Nation reserves. This could be achieved by amending the *Indian Act* or by enacting another federal bill to ensure that there are basic legal remedies and protection in place for individuals who experience a marital relationship breakdown while living on reserve. The federal government could create entirely new legislation or could enable the relevant provincial or territorial family laws to apply to residents on reserves in each province and territory. This last approach would mirror that taken in some other family law areas, such as child welfare and child protection, where provincial and territorial policies and standards are used by both on and off reserve child protection agencies.

There is support in the federal government and among some Aboriginal organizations for amending the *Indian Act*. The Senate Standing Committee on Human Rights recommends that “the *Indian Act* be amended so that provincial/territorial laws with respect to the division of both personal and real matrimonial property could apply” (2003, p. 47). The Aboriginal Justice Inquiry of Manitoba and a report from the Quebec Native Women (2003) concur that the *Indian Act* should be amended but suggest that the outcome should be “to provide for an equal division of property upon the dissolution of the marriage” (Quebec Native Women, 2003, p. 8). The

Conservative Party of Canada advised the Congress of Aboriginal Peoples that a Conservative government would undertake “immediate amendments to the *Indian Act* to make provincial / territorial matrimonial property laws apply to personal and real matrimonial property on reserve lands (a "default code")” (Harper, 2006, p. 6). Other stakeholders suggest that amending the *Indian Act* is a poor alternative, as it is perceived to be a unsound basis for further legislation due to its basis in colonialist attitudes towards land and First Nation peoples. A different approach is required, they suggest, because “amendments to the *Indian Act* (...) could never produce a culturally appropriate response for the diverse First Nations affected and (...) new problems could be created by attempting to do so” (Cornet & Lendor, 2002, p.6).

11.2 Self Government Agreement or FNLMA

A second alternative is for First Nations to use the mechanisms of Self Government Agreements or the FNLMA to ensure that “the issue of division of matrimonial property be expressly addressed (...) and that specific provisions on this issue be included in any agreement in principle and final agreement” (Ebert & Jacobs, 2004, p.35). As remarked earlier in this paper, the FNLMA already contains a requirement that each First Nation complete a consultation process and “establish general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of First Nation land and the division of interest in First Nation land” (Provincial Council of Women of Manitoba, 2003, p. 8). The self government negotiation process, however, does not require that MRP issues be explicitly addressed. The Standing Senate Committee was advised that “not all self-government agreements contain specific provisions on matrimonial property, although in all cases land management would be assumed by the First Nation” (2003, p. 28). The assumption is that the ability of the First Nation to make laws with respect to matrimonial real property exists, although it is not expressly detailed in many Self Government Agreements nor has it been proven through the courts.

The Standing Senate Committee recommended that MRP be “expressly addressed in any self-government negotiations and that specific provisions on this issue be included in any agreement-in-principle and final agreement” (2003, p.13) that is signed in the future. This is seen by some groups such as the provincial Council of Women of Manitoba (2003) as a positive direction. The inclusion of MRP in self-government agreements is also supported by the Native Women’s Association of Canada who recommend that “Charter rights, such as the equality provision, continue to apply to First Nations under self-government regimes. This requirement

must lead to the formal inclusion of matrimonial property rights in the development of self-government agreements” (Standing Senate Committee, 2003, p.29). The Standing Committee also recognized, however, that the imposition of this requirement on First Nations could be seen as a contravention of the concept of self determination and the right of self government.

11.3 By-Laws or Customary Law

A third alternative is for band council by-laws or First Nation customary laws to be used to implement solutions to the MRP gap. The *Indian Act* (1985, section 81) states that band council by-laws may be made for “the survey and allotment of reserve lands among the members of the band and the establishment of a register (...) relating to allotments”. By-laws may also affect “the residence of band members and other persons on the reserve [and] (...) provide for the rights of spouses or common-law partners and children who reside (...) on the reserve”. (*Indian Act*, 1985, section 81 (1) p.1 and p.2). Some band councils have already adopted policies that affect the MRP issue, such as requiring new allotments to be made to a husband and wife as joint tenants when a land allocation is made to a married couple. INAC, however, has disallowed by-laws made by some First Nations regarding MRP on “the basis that there is no authority under the *Indian Act* for by-laws with respect to matrimonial real property” (Karetak-Lindell, 2005, p.7).

While it may take time for a First Nation to develop local policies and processes, they “are supportive of Native Nations’ sovereignty and self-government (...) solutions designed by non-Natives can be a poor fit for tribal circumstances and culture and create more problems” (Flies-Away, Garrow & Jorgensen, 2003, p.25). These by-laws and customary laws have not yet been challenged in court, which means that there is uncertainty regarding whether they would be upheld if challenged. In addition, these measures are generally not retroactive which means that they would only apply to new CPs or the resolution of MRP issues for individuals entering into new relationships. The situation of individuals already in marital or common law relationships might not be addressed by these approaches (Cornet & Lendor, 2002). There is also the possibility that there would be enforcement problems for these by-laws or customary laws similar to those already experienced by individuals who attempt to enforce federal or provincial/territorial law in related areas, such as marital violence (Greene, 2003).

11.4 Alternative Dispute Resolution

Another alternative is to establish Alternative Dispute Resolution (ADR) processes for individuals to access when they must resolve MRP issues. These processes generally include conflict resolution, mediation, tribunals, ombudspersons or arbitration. In some cases, legal aid services and access to legal information and other personal services are also considered to be a part of the ADR process continuum. The report of the Standing Senate Committee includes a recommendation made by the Indigenous Bar Association “that adjudicators be appointed by band councils to solve problems with the help of elders and/or the community (...) this would be a short term solution that the First Nations could implement immediately” (2003, p. 48).

A benefit of ADR processes is that they can assist individuals and the local community to assert control over the MRP dispute and its resolution. ADR tools can provide timely assistance to individuals that employs a simpler process than that found in the legal system (Green, 2003). ADR also provides individuals with a confidential process based on consensus building and other mediation techniques that are congruent with First Nation cultural practices.

A drawback of ADR is that the process may be time consuming and expensive, yet does not always result in a resolution. ADR is not suitable for situations where there is a power imbalance between the individuals involved in the dispute. This is a serious limitation to its usefulness in resolving MRP issues, where it is common for the male partner to have “the larger income and more resources to influence or coerce outcomes, effectively forcing what may not be an appropriate settlement on his partner” (Greene, 2001, p. 24). ADR is also not appropriate for use when there has been marital violence between partners. Because ADR is based on the assumption that the participants are acting in good faith, its use could inadvertently lead to a situation where “one party agrees to participate with the intent to harass, intimidate, or stall litigation, and has no real intention to reach agreement” (Greene, 2003, p. 22). Some people also fear that the safety of women and children may be compromised by these processes, because they “fail to address the underlying power inequity rife in communities from years of oppression (...) [being] based on a premise that presupposes a healed community” (Stewart, Huntley and Blaney, 2001, p. 39).

While the use of ADR could increase the probability that individuals experiencing a marriage or common law relationship breakdown would achieve a fair settlement of MRP issues, it does not close the gap in the MRP legislation. ADR processes are appropriate tools for individuals to use in resolving marital property disputes within a legislative framework, but they do not provide a solution to MRP issues on First Nation reserves. For this reason, ADR will not be included as a separate implementation alternative for evaluation in the remainder of this paper.

11.5 Community Consultations

The majority of the literature on the MRP gap advises that extensive community consultations should be conducted that include all First Nations individuals whether they reside on or off reserve. The process of conducting community consultations is not in itself an implementation alternative that will resolve the MRP gap. They are, however, a key part of the overall policy process that should be utilized regardless of which implementation alternative is selected, especially given the clearly expressed preference of First Nation stakeholders and communities for the use of this tool.

Ebert & Jacobs (2004, p. 33) suggest that gaining a “contribution and input from everyone should be a policy of all consultations involving Indigenous peoples (...) special efforts and funding arrangements should be made to solicit the views of those who might otherwise not be heard”. Community consultation is a ‘bottom up’ process that allows solutions to be developed by the local community, ensuring they meet community needs and are not imposed by external agents. It provides an opportunity for individuals to participate actively in the process, which respects and supports First Nation cultural preferences for consensus and group decision making processes. Consultations provide a sense of control and expand the legitimacy of the process for those participating; they may also produce innovative solutions that will be accepted by the community at the local level. Often the preference of individuals or stakeholders to actively participate in all aspects of decision making indicates a lack of trust in the institutions involved in the process. Greene concurs with this analysis, stating that “First Nation people do not trust the Canadian justice system, and trust is a required aspect of accessibility and participation in a fair, open and transparent process” (2003, p. 32). For women residing on reserve, the distrust of government may be compounded by concerns about aboriginal organizations and band governance structures that may also be perceived as neither operating in the best interests of women, nor including women adequately in policy or decision making processes.

Consultations are advocated by some authors as a means to achieve multiple goals. Ebert and Jacobs suggest that consultations on MRP “should begin immediately, so as to develop the capacity of women and women’s groups to speak about any proposed short term measures” (2004, p. 36); community and individual capacity building are also identified as goals for the consultation process. The Standing Senate Committee agreed that consultations are part of a long-term solution and recommends that:

“appropriate funding be given to national, provincial/territorial and regional Aboriginal women’s associations (...). These consultations should be the first step in a larger consultation process with First Nation governments and band Councils with a view to finding permanent solutions which would be culturally sensitive with the unequivocal understanding that there can be no cultural justification for violations of human rights protected under the Canadian Charter and international law” (2003, p. 49).

This recommendation makes clear the difficulties that may arise in a consultative process where different parties enter the process with different goals. The greatest drawback associated with the community consultation process is the long time frame and associated high cost to implement the ambitious and inclusive agenda promoted by organizations such as the NWAC, especially as at the same time “the needs of First Nations women for immediate protection and remedies remain” (Cornet & Lendor, 2002, p.7). A further concern is that the result of a consultation process may be a patchwork of solutions, reflecting regional and cultural differences among First Nations across the country.

Community consultations are not included as a separate implementation alternative for this paper: although they may indicate which alternatives are preferred by First Nations communities, as well as acting as a developmental tool, they will not, in themselves, resolve the MRP issue.

12 Implementation Criteria

Each alternative described above is evaluated against the same criteria: equity, equality, linkage to First Nation culture and capacity, political feasibility, and the time frame associated with implementation. Each criterion is described in the following sections, after which an evaluation of each alternative against all criteria is conducted, using a ranking system of low, medium and high.

12.1 Equity: Gender, Generational and Membership

Equity refers to the achievement of fairness between women and men, between generations, or between band members and non-band members. It measures the extent to which an alternative does not perpetuate disadvantages or the extent to which compensatory measures are able to correct discrimination caused by past practices (INAC, Gender Equity Analysis Policy, 1999). Equity considerations may result in different accommodations for individuals to obtain equal outcomes. The report submitted by the Quebec Native Women to the Senate Standing Committee clearly describes this criterion, stating that:

“the principle of non-discrimination does not mean that all persons have to be treated in an identical fashion. Differences in treatment which are based on reasonable and objective criteria will not necessarily be incompatible with a State’s international obligations. In fact, some situations may call for a different treatment. However, in all cases the measures will only be justifiable if they aim at correcting discrimination” (2003, p. 13).

Gender equity would be achieved if men and women achieve similar outcomes in the resolution of MRP issues as well as in their possession of CPs and other forms of title. Generational equity occurs when older and younger residents on reserves experience similar MRP and title holding outcomes. Measures that address the MRP gap for some residents, such as requiring all new CPs to married couples to be issued as joint title, would not ameliorate the situation of individuals who received land allocations under previous policy guidelines. Equity between First Nation band members who trace their registration to different sections of the *Indian Act*, or between band members and non-band members is another aspect of this criterion. Over

time, “equity leads to equality” (INAC Gender Equality Analysis Policy, 1999, p. 5), which is the next evaluation criterion to be described.

12.2 Gender Equality

Gender equality exists when women and men enjoy the same status in society, the same opportunities and rewards, and experience equal conditions in their daily lives (INAC, Gender Equality Policy Analysis, 1999). Gender inequality is strongly associated with the MRP gap. While it may be argued that males are equally disadvantaged by the MRP problem because legal remedies are not available for either men or women, the research completed in this study clearly shows that women hold fewer title documents of all types, and are more likely than males to be living off-reserve.

One mechanism that may be used to achieve equality is the *Charter of Rights and Freedoms*. There is some discussion within the aboriginal community whether the *Charter* is an appropriate vehicle for First Nation women to utilize as a means of gaining gender equality and a resolution of the MRP issues. Some suggest that the nature of First Nation culture and collective rights does not accord with the concept of individual rights described in the Charter. Others believe that “women can only be assured of re-asserting their rightful place in First Nation communities, if Charter Equality values are applied to all legislation whether federal or First Nation in source (Cornet & Lendor, 2002, p. 17).

12.3 Culture and Capacity

Another important criterion for evaluating each alternative is how each links to First Nation culture and capacity. Indicators for this criterion include the overall well being of the community and the ability of the community to exercise self-determination and to implement self-government. Ebert and Jacobs (2004) suggest that both women and the community share a common goal of enabling women to stay on the reserve with their children following a marital breakdown so that they can continue to contribute to the community and the First Nation culture. It is evident from the research conducted for this paper that this goal is not being met. If MRP becomes an issue for a divorcing or separating couple it may also affect and involve their families, clans, and social networks that form their community.

The wider issue of how to define ‘culture’ in the context of the 21st century and the potential effectiveness of a ‘return to tradition’ in developing solutions to the MRP gap is also questioned by some authors. The report of the Quebec Native Women to the Standing Senate Committee suggests this is:

“a simplistic notion which will only cause more misery....First Nations societies can no more turn back the clock 600 years than can the rest of the world, and to naively suggest that they can is to invite disaster.... Six hundred years ago, housing was neither difficult to obtain, nor in most cases did it represent a major investment of whatever ‘wealth’ a family might have had. To suggest that the social systems which may have been effective six hundred years ago could work equally well in the present day situation is wishful thinking” (2003, p.7).

Of course, other authors suggest that a return to traditional practices or to traditional values is an appropriate response. Stewart, Huntley & Blaney suggest that “as a goal, Aboriginal peoples need to arrive at a place where speaking out is not seen as breaking with tradition” (2001, p. 53). There is also a danger associated with the promotion of a ‘pan-aboriginal’ approach that borrows elements from many First Nations but belongs wholly to none. In light of these concerns, this criterion is broadly interpreted to indicate the extent to which the alternative supports First Nations self-determination and community well being.

12.4 Political Feasibility

As a criterion for evaluating alternatives, political feasibility measures the extent to which each would be supported or blocked by governments, institutions, stakeholder organizations and individuals. There are several dimensions to the concept of political feasibility. One measures the level of support that an alternative might receive from the various political institutions and players. A second relates to how well the alternative integrates with initiatives already underway: for example “any new reforms or legislative initiatives should not disrupt existing negotiation processes [and] (...) should respect the recognition of the inherent right of self-government of First Nations” (Cornet & Lendor, 2002, p.7). A third aspect of political feasibility considers the integration of the alternative with the already established positions, alliances and networks that exist among stakeholders.

12.5 Time Frame

The time frame within which action can be implemented is the final criterion for evaluating each alternative. This model suggests a three-stage time frame be used:

- short term, defined as one to two years
- medium term, defined as three to five years, and
- long term, defined as more than five years.

The rationale for these stages is to distinguish immediate actions from those that will span more than one government's mandate at the federal, provincial, territorial or band council level. A related consideration is the time frame that would be required for the alternative to be implemented by all First Nations across the country. The final aspect of this criterion is who controls the timing of the alternative. The timing and schedule of some alternatives, such as the use of federal legislation are controlled solely by the federal government. Alternatives that depend on band by-laws or customary law would be scheduled by the First Nation, while other alternatives, such as the use of SGA or FNLMA agreements make possible joint or shared control of the timing and schedule for implementation.

13 Evaluation of Implementation Alternatives

Each process alternative is evaluated against the criteria described above. The table below provides a summary of the evaluation results and is followed by a discussion of the strengths and weaknesses of each alternative.

Table 17: Summary of Implementation Alternatives Evaluation

	Federal Legislation	SGA or FNLMA	Band By Law or Customary Law
Equity	Low	Medium	Medium
Equality	High	Medium	Low to medium
Linkage to Culture & Capacity	Low	High	High
Political Feasibility	Low	High	Medium to High
Time Frame	Short	Long	Medium

13.1 Federal Government Legislation

One benefit of using federal government legislation to address MRP is that it may be completed within a short time frame. Because this matter falls within federal legislative jurisdiction, an amendment to the *Indian Act* or new federal legislation could be drafted and

enacted into a law that would affect all First Nations more quickly than any other alternative under review, assuming that the SGA / FNLMA processes will not proceed more quickly in the foreseeable future than they have in the past. The inclusion of a consultation phase in this alternative would be possible without substantially affecting the time frame if the consultation was well funded and occurred concurrently in communities across the country. The other reason that this alternative scores well on this criterion is that it could ensure the implementation of a common solution to the MRP legislative gap across a specified geography (national or provincial/territorial) at one time, rather than being implemented in stages or for one First Nation at a time as agreements are signed or by-laws are created.

A second strength of this alternative is that it could be developed to ensure gender equality is maintained in the new legislation. This would allow the federal government to fulfill its obligations under the *Charter of Rights and Freedoms*. The closure of the legislative gap would remove an inequality that currently exists between individuals residing on- and off-reserve. The use of the federal legislative power would also make it more likely that INAC policies and procedures would be amended to match the new legislation. It would also allow individuals to use the court system to address situations where they are experiencing disadvantage in relation to MRP through the actions of their local government or former partner.

The implementation of federal legislation would not necessarily result in high equity, however, as it may lack retroactive measure that would redress previous policies which created generational inequities and disparities linked to the MRP issue. Another problem is that if provincial/territorial family law is adopted as the minimum standard, then there will be differences between provinces based on the current state of family law. A further lack of equity could then result from the disparity in provincial/territorial family law in the treatment of married and common law individuals. The high proportion of common law marriages in the First Nations population, and the fact that this disparity in family law specifically affects property rights in several jurisdictions, could result in the MRP gap being displaced by a new equity gap between those who are married and those who have a common law relationship. The use of a legislative approach based on provincial/territorial family law could also be problematic for individuals who have entered into a customary marriage, as it is not known how these marriages would be regarded under provincial and territorial family law. Finally, additional provisions to provincial or territorial family law would be required to address the unique features of on reserve residents and

residency that would be affected by marital dissolution. These include the potential combinations of registered and non-registered individuals, band members and non-band members and beneficiaries and non-beneficiaries that could be encountered, as well as the various land-holding practices found on reserve.

A weakness associated with this alternative is that it is a top-down, imposed process that is neither determined by the community nor benefits from the input of the community in designing solutions. It will be perceived to be a continuation of the ‘colonization’ approach to First Nations issues by the federal government, and as such would not be seen as supportive of First Nations self government initiatives. The lack of community consultation and the unilateral action taken by the federal government under this alternative means that support by traditionally-based First Nation organizations and other stakeholders is likely to be low. This could become costly to the federal government if the legislation is delayed or blocked, especially if the issue is negatively framed and receives widespread media coverage. The federal government’s reputation could be further harmed if it is perceived by non-First Nation individuals to be poorly managing an issue that relates directly to gender equality.

This alternative would not have a beneficial effect on First Nations culture and capacity as it does not support First Nation self-government and self-determination. The proposed solution is not based on First Nation culture or beliefs, and so is likely to lack cultural appropriateness in the view of First Nations stakeholders. Finally, the imposition of a federal legislative response does not aid the First Nations communities or governments in building internal capacity to resolve issues.

The use of federal legislation to close the MRP gap would make it possible for the outcome recommendations described earlier in this paper to be implemented. The primary importance of the interests and well being of the children is congruent with current provincial and territorial family law. The secondary focus on the interests of the First Nations community would meet the needs of aboriginal organizations and other stakeholders as well as the mandate and policy focus of INAC. While some changes would be required to INAC land management policies to enable a non-band member spouse with child custody to continue their residency on

reserve, these could be accommodated without requiring a major revision of current land allocation practices or procedures.

13.2 Self Government Agreement or FNLMA

Both the SGA and FNLMA support First Nations culture and community, in terms of overall community well being and support for self-determination and self-government. Some commentators suggest that the FNLMA process does not truly further self government because the pace of the process and the number of First Nations involved at any one time is controlled by the federal government, and the federal government establishes the minimum content and requirements for the final FNLMA land code. The same argument may be made, to a lesser degree, for the SGA process as well. Both result in the First Nation community being able to implement and manage solutions to MRP issues on the reserve, without the further involvement of the federal government.

The use of these already existing opportunities for First Nations to create legislation and policies to manage the MRP issue places control over the choice of a response in the First Nation community. The use of the FNLMA requires that the community be consulted to provide input into the solutions selected, and both require the community to ratify the final codes before they are accepted. The inclusion of community consultation processes and the strong role for the First Nation leaders result in these options having a higher level of political feasibility for First Nations stakeholders. There is ample opportunity in the SGA process for First Nations to address the MRP gap, and a community consultation process could be included in the development of the agreement if the local community and its leaders wish to do so. Because both processes are already in place, there are no negative political implications for the federal government, unlike the implementation of new legislation which could become a lightning rod for discontent.

The level of equality and equity associated with this alternative depends on the content of the MRP processes developed and implemented through the FNLMA and SGAs. Because the SGA process does not explicitly require the community to address the MRP gap, there is the possibility that some communities will choose not to enact policies or legislation addressing MRP, thus reducing the overall effectiveness of this alternative. In addition, although the FNLMA requires MRP provisions to be enacted, it appears that the process may be slower than

expected and the content of the provisions differs from First Nation to First Nation. The policies developed by some First Nations may not enhance equity as much as those developed by other First Nations. This potential for disparity, along with the uncertainty whether the measures adopted will eliminate systemic disadvantages experienced by women related to housing allocations and title practices associated with MRP, lessens the effectiveness of the alternative. Similarly, the potentially different provisions adopted by various First Nations will result in different levels of equity for non-band members or individuals belonging to different generations.

The outcome of this alternative in terms of equality is also uncertain, based on the measures developed under the SGA or FNLMA. While it is probable that most First Nations would develop codes that provide males and females with equality, the potential for this not to occur does exist. For this reason, the scores that this alternative receives for the equity and equality criteria are slightly below the best possible ranking.

A major drawback of this alternative is the long time frame associated with its implementation. Completing an SGA process is a time consuming process. The federal government's limit on the number of First Nations that may enter the FNLMA process at any one time also reduces the speed with which this alternative may be used to implement change on the MRP file. This alternative also does not result in a change that affects all First Nations at once, as the new provisions are developed agreement by agreement and implemented in a piecemeal fashion across the country. For these reasons the alternative scores at the lowest rank for this criterion, as it would take much more than five years for all First Nations to develop these agreements at the current rate of progress. Even if the federal government engaged more First Nations at one time in both processes, the complexity of the negotiations and the need for community consultations and community ratifications make this a long-term course of action.

The use of SGA or FNLMLA agreements to close the MRP gap would easily accommodate the outcomes recommended earlier in this study. The primary importance assigned to the interests and well being of children is congruent with First Nations practices and principles, as is the second focus on the interests of the First Nations community. Land codes that have been completed already through the FNLMA process contain these elements, in full or in part (Westbank First Nation, 2006, Chippewas of Georgina Island First Nation, 1997).

13.3 By-Laws or Customary Law

One benefit of using band by-laws or customary law to address the MRP gap is that this places control over the issue in the First Nation community. This bottom-up process may provide local input into the resolution, thereby increasing the level of political support for this option from First Nations governments and other stakeholders. The use of by-laws may appeal slightly more to the federal government than the use of customary law because this could be presented to the non-First Nations population as an approach that shares similarities with municipal by-law processes, thus enhancing its accessibility to the general electorate.

This alternative would represent a positive response to First Nations cultural and community needs. It supports First Nation self determination and self government, and could enhance the overall well being of individuals and the community. It could be placed into effect quickly, and the cost of implementation would be low as no community consultations or federal legislation would be required. To implement this alternative, the federal government would have to remove the barriers that currently cause INAC to disallow by-laws created by bands to address the MRP gap (Karetak-Lindell, 2005). First Nations using customary law might not encounter this roadblock. This alternative does not score highly on the criterion of time frame, however, because it would also result in a piecemeal approach to the resolution of the MRP gap. Not all First Nations would address the issue at the same time, and the pace of change would be uncertain. Unless the alternative was endorsed or promoted by a stakeholder group representing First Nations, such as the Assembly of First Nations or a provincial Chief's association, there might be little incentive for some First Nations to address the issue at a local level.

A weakness of this approach is that there is no requirement for the band council or elders to consult with the community prior to implementing a MRP resolution. The approach chosen could vary widely from First Nation to First Nation, resulting in a patchwork approach where policies are applied differently to situations and individuals with no guaranteed minimum standard or level of protection. Some individuals are concerned that use of custom land allotments "could be used by Band Councils as a pretext for flouting the provisions of the *Indian Act* and retaining wide discretion on deciding who can occupy reserve land; this can lead to abuses" (Standing Senate Committee, 2003, p. 25). Others worry that this alternative would lead

to practices that “may be affected by local alliances or may be seen to be unfair by some individuals” (Flies-Away, Garrow & Jorgensen, 2003, p. 22).

There are also concerns about equity and equality of measures under this alternative, due in part to the power imbalances that may exist in First Nations communities. Men generally hold administrative and political power in the communities, and band councils are described as “complex and bureaucratic” (Stewart, Huntley and Blaney, 2001, p. 39). The Standing Senate Committee recognized that there are few women sitting on band councils, and that “women living on reserve are often not aware of their rights” (2003, p. 40). The lack of women on council is further complicated by the high number of women living off reserve, where they are less likely to be able to influence band policies, vote in band elections, or stand for band council positions. For this alternative to achieve equality or equity, band codes or by-laws need to “be developed with the equal participation of Aboriginal women and with openly-arrived at and shared gender equality analysis of the bands codes and the administration of band codes” (Provincial Council of Women of Manitoba, 2003, p. 8), but it is unclear to what extent this would occur.

The use of band by-laws or customary law to close the MRP gap could accommodate the outcome recommendations contained earlier in this paper. The primary barrier to this occurring is the existence of INAC policies and practices on the allocation of housing to non-band members and the proscription of band by-laws by INAC that have been enacted to resolve MRP issues. The focus on the interests of children and the community would be acceptable to First Nation band governments and organizations.

14 Implementation Recommendation

The analysis conducted above results in two implementation recommendations: one short-term and one for the medium to long term. Each recommendation is described below.

14.1 Short Term Implementation Recommendation

In the short term, the federal government must accept “responsibility for the complexities and structural discrimination of the *Indian Act*” (Provincial Council of Women of Manitoba, 2003, p. 1) by eliminating gender-based discrimination based in the *Indian Act* and its administration by INAC and First Nations governments. The federal government must close the MRP legislative gap. The simplest process would be to enable provincial or territorial family law to be applied to on reserve MRP situations, if there is not already a by-law or land code provision under the SGA or FNLMA in effect that provides at least the same level of amelioration. There are, however, multiple problems with this approach. There is substantial political baggage associated with the *Indian Act* in the view of First Nation stakeholders as well as operational difficulties for the federal government in attempting to create a strong amendment on a weak foundation. Some provincial and territorial family laws do not treat married and common law partners equally in relation to matrimonial real property. Given the high proportion of common-law relationships among First Nation people, implementing this solution would simply move the nexus of discrimination and disadvantage under MRP to a new location. This approach also would not address the generational equity issues, nor those associated with individuals having different legal status under the *Indian Act*. Also, while this solution would address the best interests of the children affected by marital breakdowns, as this is a paramount concern in provincial and territorial law, it would not address concerns related to the best interests of First Nations communities which are uniquely affected by the land management regimes and processes in place on reserves in Canada.

For these reasons, it is recommended that new, stand-alone legislation be created to address the MRP gap on First Nation reserves. This legislation could:

- remove gender-based discriminatory policies and administrative processes related to title and land allocations
- encourage the allocation of joint titles to married or common law partners
- create policies and administrative processes that protect the rights of individuals with different registration, membership and beneficiary status, as well as the rights of individuals who do not possess this status, and
- establish the outcomes recommended earlier in this paper that the resolution to the MRP issue should first consider the best interests of the children of the marital relationship, enabling them to reside in the matrimonial home with the custodial parent, if this their preferred option. The second consideration in choosing an outcome would be the best interests of the First Nations community, followed by the best interests of the individuals experiencing the marital breakdown.

This recommendation would be supported by some First Nation organizations and stakeholders such as Native Women’s Association of Canada, who take:

“the position that effective remedies to address a lack of matrimonial property rights regimes on reserves must be implemented in all communities immediately, even if this is before the realization of self government and even if this means legislative reform due to the severity of its impacts on the lives of First Nations women and their children” (Standing Senate Committee, 2003, p. 44).

It would provide an immediate resolution to the MRP legislative gap, and could be superseded by the long-term implementation recommendation described below.

14.2 Long Term Implementation Recommendation

In the medium to long term, consultations with First Nations should be completed to identify local community-sanctioned resolutions to the MRP gap, involving First Nations leaders, stakeholders and individuals. It is further recommended that either the SGA or FNLMA processes be used as the mechanism to implement the outcome solutions in the long-term. This is because these processes provide better support to the community in terms of culture and capacity, and because they are believed to result in better accountability, due to the community consultation and ratification measures built into their structure. It is anticipated that there will not be one single, pan-First Nation solution to the MRP issue. Most likely there will be a variety of responses that address the particular cultural and situational conditions of the individual First Nations.

15 Conclusions

The legislative gap concerning the disposition of matrimonial real property on First Nation reserves has been the subject of intensive investigation and debate for almost a decade. This study contributes an analysis of the actual impact of the MRP situation by considering factors related to the band and the reserve, as well as the actual distribution of title between males, females, joint title and band title, to determine the influence these factors have on the percentage of women living off-reserve compared to their proportion in the total band population.

This research shows that there is a persistent and systematic disadvantage experienced by women in the allocation of title: women are allocated less title than males, and joint title is not commonly allocated to married or common law couples living on reserve. It also finds that there is a pervasive tendency for a greater percentage of First Nation women to live off reserve compared to their proportion in the total population. Factors that are associated with this skewed distribution of women included a large reserve population, a majority of the band population living on reserve, the use of the INAC land registry databases by the band to record title, increased remoteness of the reserve from service centres, receipt of funding from INAC for women's shelters and transition houses, the form of land management in place, and a higher percentage of other-band members residing on reserve. The control of band membership was found to have no effect on the percentage of women living off reserve and their distribution in the total band population.

Alternatives for resolving the MRP legislative gap include those that rank the desired outcomes related to the occupancy of the matrimonial home and those that address the gap in legislation affecting individuals residing on First Nation reserves. As a starting point, it is suggested that a hierarchy of outcome alternatives be implemented using a decision-making flow chart with a cascading series of choice alternatives. The well being of any children affected by the marital dispute is presented as the primary consideration: if their interests are best served by their being able to continue residing on reserve then the parent with child custody would retain

occupancy of the matrimonial home. The second concern is the well being of the First Nation community; if there are no children involved in the situation then these interests may best be served by enabling the band member to retain possession of the matrimonial home. Finally, the third consideration would be the well being of the individuals involved in the marital dispute.

In the short-term, the creation of new federal legislation to address the MRP gap will offer an immediate solution that will enable individuals to resolve marital disputes and promote gender equality. In the medium to long term, the creation of self-government agreements or land codes under the FNLMA which contain provisions addressing MRP will enable First Nations to supersede the federal legislation with solutions created in the local communities. This long-term process should include community consultations that will allow First Nation communities to establish common goals and principles on which these MRP solutions should build.

16 Areas for Further Study

This study has confined its investigation of the issue of matrimonial real property on reserve to heterosexual marriages and common law relationships only. There are other areas that would benefit from further study in terms of the individuals affected and the overall framing of the issue which are described in detail below.

16.1 Same Sex Marriages or Relationships

The impact of the MRP gap on individuals who enter into same-sex common law relationships or marriages has not been considered in this paper. This research found multiple examples of joint titles held by two individuals of the same sex, but whether these are marital partners, common law couples, siblings or friends is unclear. Same sex partners would face the same MRP legislative gap in terms of real property as heterosexual couples: further research would be necessary to determine the size of this population and any unique features related to MRP that they experience.

16.2 Widows and Widowers

Widows and widowers may also encounter issues related to matrimonial real property and their ability to retain occupancy of their marital home on reserve. Because a new Certificate of Possession is not necessarily issued when one partner is widowed, it is unclear from this research how many individuals named on joint CPs might be widows or widowers. Further research would be necessary to determine the size of this population and any unique features related to MRP that they experience.

16.3 Adults Living Together

There are a number of adults who either live together or share a property interest in land on reserve who are not married or part of a common law couple. Adult siblings, for example, may share a residence or share a partial interest in a particular house or property. The review of the Evidence of Title reports conducted for this study found numerous instances where three, four,

five or more adults were named on Certificates of Possession for the same property. There are other situations where adults could be living together or sharing an interest in a property, such as a young adult child living with a parent or an adult grandchild living with a grandparent. It is also possible that unrelated adults who are not marital partners could share a residence or interest in a property. This paper has not entered into any discussion as to how differences among these adults could be resolved if any arose over the use or occupancy of the shared property interests; there may be a need for some mechanism to resolve disputes, but this matter was outside the scope of this research paper.

16.4 Cultural Framing

Although this paper briefly touched on some issues related to culturally appropriate measures, colonialism, gender equality and the framing of the MRP issue, it has not explored these concepts in depth. There is a divergence in opinion, for example, about the alternatives suggested to resolve the MRP issue and whether they will perpetuate or resolve issues attributed to colonialism and gender inequality as they affect both women and the community. A study of the differences between First Nation and Canadian concepts of equality, equity, cultural retention and capacity, land management practices, and the rights and obligations of the individual towards the land would be of interest as it would add further layers of meaning to the debate, as well as clarifying the views held by the stakeholders in the policy process.

16.5 Membership Versus Registration

Until very recently, eligibility for registration and eligibility for band membership were essentially the same. There is new evidence, however, that suggests a disparity is developing for some First Nations between the number of individuals eligible for registration and the number of individuals eligible for band membership (Clatworthy, 2005). Bands that have taken control of their own membership rules may enact policies that exclude registered individuals from band membership based on residency, percentage of aboriginal 'blood' or the registration or membership status of their parents. Because individuals who are not eligible for membership may not be able to access band-provided services such as housing or may not be eligible to live on reserve, this disparity between band members and registrants may impact the MRP issue in the future. The research completed for this paper found that approximately one half of all bands have assumed control of their own membership policies, which suggests that this disparity between registration and band membership may continue to increase in the future.

17 Appendices

17.1 First Nations in the FNLMA Process

There are thirty-four First Nations currently involved in the FNLMA process, identified in the table below.

Table 18: FNLMA First Nations

Region	First Nations
British Columbia	Squamish
	Lheidli T'enneh – ratified land code in effect
	Musqueam
	N'Quatqua
	Westbank – ratified land code in effect
	Tsekani (McLeod Lake)- ratified land code in effect
	Tsawout
	Beecher Bay – ratified land code in effect
	Ts'kw'aylaxw (Pavilion) – ratified land code in effect
	Sliammon – ratified land code in effect
	Burrard
	Tsawwassen – ratified land code in effect
	Osyoos
	Kitselas – ratified land code in effect
Skeetchesn	
Alberta	Siksika
Saskatchewan	Muskoday – ratified land code in effect
	Cowessess
	Whitecap Dakota Sioux – ratified land code in effect
	Kinistin – ratified land code in effect
	Muskeg Lake
Manitoba	Opaskwayak Cree – ratified land code in effect
Ontario	Chippewas of Georgina Island – ratified land code in effect
	Mississaugas of Scugog Island – ratified land code in effect

Region	First Nations
	Chippewas of Mnjikaning Nipissing – ratified land code in effect Moose Deer Point Chippewas of Kettle and Stoney Chippewas of the Thames Mississauga Garden River Whitefish Lake Dokis
New Brunswick	Saint Mary's Kingsclear

Source: First Nations Land Management Resource Centre

17.2 Self Government Agreements and SGA Negotiation Tables

Table 19: Self Government Agreements Completed and in Negotiation

Region	Negotiation Tables	Communities	Completed SGA's
Atlantic	1	5	-
Ontario	8	112	Anishnaabe Government (Beausoleil First Nation, Curve Lake First Nation, Hiawatha First Nation and Moose Deer Point First Nation)
Manitoba	2	63	-
Saskatchewan	2	77	-
Alberta	2	23	-
British Columbia	42	123	Nisga'a Nation, Westbank First Nation, Sechelt
Yukon	4	4	Kwanlin Dun First Nation, Kluane First Nation, Ta'an Kwachan Council, Tr'ondek Hwech'in, Little Salmon/Carmacks First Nation, Selkirk First Nation, Vuntut Gwichin First Nation, Champagne and Aishihik First Nation, Teslin Tlingit, Nacho Nyak Dun First Nation
NWT	5	24	Tlicho
Total	72	457	-

Source: INAC Basic Departmental Data, 2003, and INAC data, 2005

17.3 Calculation of the Dependent Variable ‘Difference’

Situation 1: Equal Percentages of Women in the Population and Off Reserve

Assuming a band population of 200 individuals, who are equally split between males and females, the calculation of the dependent variable is outlined in the table below.

Table 20: *Men and Women Live Away From the Reserve in Equal Proportions*

	Males form 50% of total band population “A”	Females form 50% of total band population “B”
Living on reserve	60 Male band members live on reserve “C”	60 Female band members live on reserve “D”
Living off reserve	40 Male band members live off-reserve “E”	40 Female band members live off-reserve “F”

The calculation of the dependent variable ‘distance’ uses the formula:

$$(F/(F+E)*100) - (B/(B+A)*100)$$

$$=50\% - 50\%$$

$$=0$$

In this situation, women live away from the reserve in the same proportion as they are found in the band population. The dependent variable with a value of zero indicates that there are no more women living away from the reserve than would be expected, given their representation in the population. The table below outlines a situation where there is an unequal distribution of men and women in the band population.

Situation 2: Unequal Gender Distribution within the Band Population

It is possible that some bands experience a gender imbalance within the band population, although an equal proportion of men and women might live away from the reserve. Assuming the population of the band is the same as in the example above, the calculation of the dependent variable in this situation is described below.

Table 21: *Men and Women Live On Reserve in Equal Proportions with an Unequal Distribution of Gender within the Band Population*

	Males form 40% of total band population "A"	Females form 60% of total band population "B"
Living on reserve	40 Male band members live on reserve "C"	60 Female band members live on reserve "D"
Living off reserve	40 Male band members live off reserve "E"	60 Female band members live off reserve "F"

The calculation of the dependent variable 'distance' uses the formula:

$$(F/(F+E)*100) - (B/(B+A)*100)$$

$$= 60\% - 60\%$$

$$= 0$$

Here women live away from the reserve in the same proportion as they are found in the band population, although there are more women in the total band population, and more women than men living away from the reserve. This band would be considered equivalent to the band in situation 1 in terms of the dependent variable.

Situation 3: More Women Live Off Reserve

In this situation, there is an equal distribution of men and women in the total population of the band. The number of women who live away from the reserve, however, is greater than the number of men who live away from the reserve.

Table 22: *More Women Live Off Reserve*

	Males form 50% of total band population "A"	Females form 50% of total band population "B"
Living on reserve	80 Male band members live on reserve "C"	40 Female band members live on reserve "D"
Living off reserve	20 Male band members live off-reserve "E"	60 Female band members live off-reserve "F"

The calculation of the dependent variable 'distance' uses the formula:

$$\begin{aligned}
 & (F/(F+E)*100) - (B/(B+A)*100) \\
 & = 75\% - 50\% \\
 & = 25
 \end{aligned}$$

Here, more women live away from the reserve than would be expected, given their proportion in the total band population. The size of the dependent variable gives an indication of the gap between the proportion of women in the population and the percentage of women who reside away from the reserve.

Situation 4: More Women Live On Reserve

In this situation, there is an equal distribution of men and women in the total population of the band, and the total population is the same as in the examples above. More men live away from the reserve in this example, and more women live on reserve.

Table 23: *More Women Live On Reserve*

	Males form 50% of total band population "A"	Females form 50% of total band population "B"
Living on reserve	50 Male band members live on reserve "C"	70 Female band members live on reserve "D"
Living off reserve	50 Male band members live off reserve "E"	30 Female band members live off reserve "F"

The calculation of the dependent variable 'distance' uses the formula:

$$\begin{aligned}
 & (F/(F+E)*100) - (B/(B+A)*100) \\
 & = 37.5\% - 50\% \\
 & = - 12.5
 \end{aligned}$$

In this situation, more women live on the reserve than would be expected, given their proportion in the total band population. This is shown by the dependent variable being negative. As before, the size of the dependent variable indicates the size of the imbalance between the percentage of women living away from the reserve and the proportion of women in the total band population.

17.4 Independent Variable: Geographic Location

The geographic zone code used as an independent variable in this study has four levels, as outlined in the table below.

Table 24: *INAC Geographic Zone*

Code	Description
1	The First Nation is located within 50 kilometres of the nearest service centre and has year-round road access
2	The First Nation is located between 50 and 350 kilometres of the nearest service centre and has year-round road access
3	The First Nation is located more than 350 kilometres of the nearest service centre and has your round road access
4	The First Nation does not have year-round road access to the a service centre

Source: INAC Band Classification Manual, 2005

17.5 Independent Variable: Community Well Being Index

Four elements were combined to create the single Community Well Being Index score as described in the table below.

Table 25: *Community Well Being Index*

Index element	Indicators	Weight within Element
Education	<ul style="list-style-type: none"> • Functional literacy measured by the proportion of the population 15+ with grade 9 or higher education 	• Two thirds
	<ul style="list-style-type: none"> • Proportion of the population aged 20+ with at least a high school education 	• One third
Labour Force Activity	<ul style="list-style-type: none"> • Labour force participation in the week prior to the census, population age 20+ 	• One half
	<ul style="list-style-type: none"> • Proportion of the total labour force age 15+ employed in the week prior to the census 	• One half
Income per capita	<ul style="list-style-type: none"> • Total income divided by total population, with a log function applied to raw income values to account for the diminishing marginal utility of income. 	• One
Housing	<ul style="list-style-type: none"> • Quantity: the proportion of the population living in dwellings with no more than one person per room 	• One half
	<ul style="list-style-type: none"> • Quality: the proportion of the population that reported their dwellings were not in need of major repairs 	• One half

Source: *First Nations Community Well Being Index, 2001*

The four components of education, labour force activity, income and housing are combined with equal weighting to create the First Nations Community Well Being Index.

17.6 Sample INAC Evidence of Title Report

Please note that names displayed on this document are pseudonyms to protect privacy; the identifying band and registration codes have been altered for the same reason.

Figure 10: Sample Evidence of Title Report



Evidence Of Title Report

Reserve: 08XXX

Region/Province: BRITISH COLUMBIA

Band: XXX - XXXXXXXXXXXX

PIN: 9020XXXXX LOT 10

Registration Number: 55XXX

Registration Date: 1976/Mar/08

Grantee: JAMES GREENE #00XXX

Evidence of Title: CP XXXXX Active

Grantee: ROBERT WHYTE #00XXX

Evidence of Title: CP XXXXX Active

Registration Number: 32XXXXX

Registration Date: 1994/Jul/18

Grantee: JOHN BLACK #00XXX

Evidence of Title: CP XXXXX Active

PIN: 9020XXXXX LOT 11

Registration Number: 10XXXXX

Registration Date: 1985/Jun/20

Grantee: GEORGE GREENE #00XXX

Evidence of Title: CP XXXXX Active

Grantee: MONICA GREENE #00XXX

Evidence of Title: CP XXXXX Active

PIN: 9020XXXXX LOT 11A

Registration Number: 10XXXXX

Registration Date: 1985/Jun/20

Grantee: BAND

Evidence of Title: BAND Active

PIN: 9020XXXXX LOT 12

The figure above is a sample page from an Evidence of Title report generated from the INAC Indian Land Registry System. The Evidence of Title reports contained in the INAC First Nations Land Registry System (under the FNLMA) and the Self Government Land Registry System follow the same format. The names displayed on this document are pseudonyms, to protect the privacy of individuals. The PIN, registration and band numbers, and CP numbers have also been altered to protect the privacy of individuals.

The first set of records for Lot 10 demonstrate three title registrations against one lot. In this situation, these would be counted as three male titleholders. The first two grantees, James Greene and Robert Whyte, may hold CPs with the same reference number, or each hold a CP with a different reference number. In either situation, this would be counted as two male title holders for the purposes of the independent variable used in this study. Estimating the prevalence of same sex relationships on reserves is outside the scope of this study: two males or two females holding a joint title are calculated as two individuals holding title for the calculation of the independent variable.

The third record, for George Green and Monica Greene, could also refer to a CP with the same reference number or with different reference numbers. If the CP reference number for a male and female pair was the same for both individuals, then this was counted as a joint CP for the calculation of the independent variable. If the record showed two different CP reference numbers, one for the male and one for the female then this was counted as one male title holder and one female title holder for the calculation of the independent variable (not as a joint title). Where there are two CP reference numbers, the individuals could be siblings, cousins, parent and child, grandparent and child, friends, or partners: for this study a restrictive definition was used counting these as individual CPs which means that the count of CPs used for the independent variable is slightly underestimated.

17.7 Independent Variable: Title Holder Report Sample

The independent variable 'Title Holder' was created using a sample from the Evidence of Title report for the bands listed below rather than all entries in the Evidence of Title report as was done for all other bands. This sample was randomly generated by selecting every second, third, or fourth page in the Evidence of Title report for review. The table below provides the name of the band, the code for the most populous reserve, the number of pages in the Evidence of Title report, and the sample size.

Table 26: First Nations Where a Sample of Title was Utilized in Statistics

Band	Reserve Code	Evidence of Title report (active)	Sample Size
Mchigeeng First Nation	6180	153 pages	One half
Aamjiwanaanj First Nation	6194	147 pages	One half
Chippewas of Stoney and Kettle	6193	253 pages	One third
Chippewas of Nawash	6218	218 pages	One half
Chippewas of the Thames	6188	147 pages	One half
Curve Lake First Nation	6213	150 pages	One half
Mohawks of Akwesasne	6210	208 pages	One half
Mohawks of the Bay of Quinte	6217	452 pages	One quarter
Walpole Island	6192	418 pages	One quarter
Peguis First Nation	6373	183 pages	One half
Cowichan	6799	195 pages	One half
Six Nations Indian Reserve No. 40	6225	1288 pages	One quarter
Bands not included in the sample:			
Saugeen First Nation	Title Report not found		
Beaver Lake Cree	Title Report not found		

17.8 Logistic Regression Results

Table 27: Logistic Regression Results for First Ten Independent Variables

Independent Variable	B	Sig	Exp (B)
Reserve Population		.262	
0-500 residents	.722	.087	2.058
501-1,000 residents	2.338	.032	10.363
1,001-1,500 residents	19.617	.998	330676566.644
1,501-2,500 residents	19.817	.998	404051096.077
2,501 + residents	18.508	.998	109165059.198
Majority Reside on reserve	-.669	.168	.512
Percent of Population residing off reserve		.169	
0-20%	.759	.160	2.135
21-40%	.943	.096	2.567
41-60%	.054	.939	1.056
Group	.358	.680	1.431
Members of other bands		.772	
Group	.234	.589	1.264
Group	.129	.770	1.137
Group	.458	.330	1.580
Geographic Zone		.270	
Up to 50 km from service centre	.435	.200	1.545
50-350 km from service centre	.644	.447	1.905
350+ km from service centre	.969	.054	2.635
INAC funds for shelter	.803	.119	2.232
Land Management regime	.075	.927	1.078
Evidence of Title		.576	
None	.300	.347	1.349
At least one	-.485	.697	.616

Independent Variable	B	Sig	Exp (B)
Membership Control		.995	
Section 10	-18.020	.998	.000
Section 11	-18.020	.998	.000
Community Well Being Index		.218	
.21-.40	.466	.314	1.594
.41-.60	.650	.044	1.916
.61-.80	.798	.335	2.221
Constant	18.288	.998	87580204.452
Nagelkerke R square		.165	
Beginning Block Overall Percentage		88.7	
Classification Table Overall percentage		88.7	

Table 28: Logistic Regression Results for Title Holder Independent Variable

Independent Variable	B	Sig	Exp (B)
Percent male title holders	.525	.165	1.690
Percent female title holders	.522	.168	1.685
Percent joint titles	.512	.176	1.669
Percent band titles	.525	.165	1.690
Constant	-50.123	.185	.000
Nagelkerke R square		.020	
Beginning Block Overall Percentage		90.1	
Classification Table Overall Percentage		90.1	

17.9 Correlation Results

Table 29: Correlation Results for Independent Variables

	Dependent	Community well being	Membership control	Evidence of Title usage	Land mgt. regime	INAC shelter funding	Geographic zone	Percent other band members	Percent living off reserve	Majority on reserve?
Community well being	.049									
Membership Control	-.039	-.107**								
Evidence of Title usage	-.032	.137**	.021							
Land mgt. regime	-.069*	.064	-.031	.079*						
INAC shelter funding	.037	.003	.052	.185**	-.072*					
Geographic zone	.113**	-.131	-.003	-.355**	-.144**	-.182**				
Percent other band members	.113**	.038	-.059	.042	-.037	-.036	-.050			
Percent living off-reserve	-.366**	.006	.007	.176**	.071*	.019	-.091*	-.093*		

	Dependent	Community well being	Membership control	Evidence of Title usage	Land mgt. regime	INAC shelter funding	Geographic zone	Percent other band members	Percent living off reserve	Majority on reserve?
Majority on reserve?	.291**	.058	-.011	-.104**	-.062	-.045	.025	.098**	-.746**	
Reserve population	.099**	-.072*	-.067	-.013	-.067	.055	.017	-.170**	-.257**	.247**

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