Rights and Risks for Women Living on First Nations Reserves in Situations of Divorce and Separation: A Resource Map for Women and Advocates

by

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BA, University of Victoria, 2008

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Executive Summary

The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* has been designed to address the high risk of prolonged exposure to spousal violence and the legal barriers that prevent First Nations women living on reserves from accessing safe housing and a share of the family assets in situations of divorce and separation. These legal barriers and risks have been created by a lack of legislation to address matrimonial real property on First Nations reserves. Matrimonial real property refers to the access, and exclusive access in cases of abuse, to the family home, and to shared finances and property.

This project, produced for the West Coast Community Resources Society Transition House staff of Ucluelet, British Columbia, created two resource maps to identify the safety considerations and legal risks, rights, and resources available to First Nations women living on reserves in situations of divorce and separation. The resource maps function as flow charts that can be used to isolate the specific and relevant circumstances that determine the application of current and incoming laws to the situation of the user. A document review (Creswell, 2009) methodology was used to compare text-based data and to analyze the content and context of the

information. The comparison of the documents was also used to gain insight into the relationships and power balances between the government, First Nations, and third party stakeholders on the topic. Two dispute resolution theoretical frameworks, an interest based (Fisher & Ury, 1981; Folger & Bush, 1994) and a culturally inclusive approach (LeBaron, 2004), were used to analyze conflicting stakeholder approaches to understanding and addressing the problems experienced by women living on First Nations reserves in situations of abuse, divorce and separation. The research focuses on the realities facing women in situations of spousal abuse and on the impact of the lack of legal rights to access matrimonial real property on a woman's ability to safely leave an abusive relationship. Without legal rights to access matrimonial real property in situations of separations or divorce, many women are faced with poverty, homelessness or remaining in an abusive relationship as her only options. The purpose of the resource maps is to create an advocacy tool for the staff and clients of the WCCRS to outline the legal conditions, rights and risks that apply to safety plans that are created for planning a separation or divorce from an abusive (ex)spouse. This report also reviews the proposed federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* that will offer an entirely new set of rights and risks for First Nations women in situations of separation or divorce.

An analysis of the content, consultation process, and reactions to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* reveals an incompatibility between the approaches to framing the issues and the solutions proposed by the Federal Government and First Nations consultation groups. Based on the research findings, an interpretation of the impacts of the current legal conditions and incoming legislation was possible. The findings include the observance of a power imbalance between the government and First Nations consultation groups,

incompatible cultural views of the problems facing women on First Nations reserves, and conflicting assessments of the appropriate interests and solutions to address the problem. The results of this research are expressed and presented through the creation of the resource map tools.

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Introduction

The project client is the West Coast Community Resources Society (WCCRS). WCCRS is a non-profit organization that provides services to members of the Tofino, Ucluelet, and remote surrounding communities on the West Coast of Vancouver Island, British Columbia. WCCRS programs are confidential and free of charge to its clients. WCCRS programs include: a transition house, Stopping the Violence Women's Counseling Program, Children Who Witness Abuse Counseling Program, Women's Outreach services, as well as Community and Youth Outreach Programs and a 24 hour emergency help line.

The objective of this project is to create a presentation and resource maps for the WCCRS members, specifically Transition House workers, that would help staff and clients to understand and apply current and incoming federal legislation that seeks to address the current lack of legal protection for First Nations women living on-reserve who wish to separate from common-law or marriage relationships.

On July 13, 2011, the resource map tools were introduced to the WCCRS staff at the WCCRS office space at the Ucluelet Community Centre, Ucluelet BC. The purpose of the presentation was to offer background information on the legal and historical factors that contribute to the creation of the issues that the WCCRS see in their work with clients. The resource maps were then presented the WCCRS personnel who are working to provide advocacy and assistance to their clients in building and implementing safety plans which may include legal and personal safety in leaving common-law or marriage relationships. The resource maps will be added to the resource bank used by practitioners and clients working with the WCCRS.

Significant changes to the legal rights of First Nations women living on reserves are imminent in the area of divorce and separation. The *Family Homes on Reserves and Matrimonial Interests or Rights Act* proposes a new set of legal conditions, rights and barriers for First Nations women in Canada in relation to matrimonial real property. These conditions include the management of access to the home during and after a separation, the division of shared assets, and access to emergency protection orders and exclusive occupancy orders for the family home in cases of abuse that are not connected to a criminal investigation. Rights to access these protections do not currently exist on First Nations reserves (INAC, 2009).

The final research product provided the client with a contextualized summary of the legal barriers and risks that currently exist, a guide to accessing and applying the proposed changes to the legal rights of First Nations women living on reserves, as well as an assessment of the new barriers and systemic risks that will be sustained or introduced with the new legislation. These barriers are discussed further in the report. From this information, I created the advocacy maps to identify the legal rights, risks, and resources for women living on reserves who are considering a divorce or separation. The function of the resource maps is to connect women with the information specific to their circumstances. The resource maps are focused on instances of abuse to inform the application of the research to real life.

This project contributes to dispute resolution literature by examining a legal intersection that addresses family violence, human rights and legislative boundaries between First Nations law-making powers and Federal and Provincial jurisdictions. The project report discusses the conflict between the theoretical approaches to dispute resolution theory employed by the federal government and by the First Nations groups who were consulted in the creation of the federal government's *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

The project deliverables offer a plain language, consolidated representation and map of the information contained in the proposed federal government solution to the problems and dangers facing women living on First Nations reserves who are in situations of divorce or separation and abuse. This collection and comparison of information did not exist prior to this project. Dynamics of power, culture, and the theoretical approaches within dispute resolution processes are the focus of this report. The research is framed to create access to this legislation by service providers and individuals that this legislation was designed to protect.

This report provides a synthesis and analysis of the factors that contribute to the current legal dangers that exist as a result of the current lack of legal protections, the contextual features that contribute to the complexity and implications of the issue, and the statements of the identified conflict parties that make up the dialogue surrounding this conflict. The resource map deliverables are provided as appendices of this report.

Background

The inability of women to access legal protection in situations of divorce and separation puts women living on First Nations reserves in an unjust and unsafe position (Assembly of First Nations, 2009). To make clearer the implications of this jurisdictional gap, a brief history of the origins of the laws, an overview of the features of relationship violence that are exacerbated by the current legal conditions, and information about the conflict history between the parties involved in the creation of the incoming legislation are outlined below.

Since 1986, a jurisdictional gap between provincial laws regulating divorce and separation and the Indian Act of Canada has existed that has positioned First Nations women living on reserves at a high risk of remaining in situations of perpetuated family violence (Assembly of First Nations, 2009). The 1986 Supreme Court decision to discontinue the applicability of the *Family Relations Act* was made as a response in the *Derrikson v. Derrikson* ruling in which the court denied the power of the act to reassign property on First Nations reserves (Supreme Court of Canada, 1986). The resulting jurisdictional gap has maintained several policy-based barriers to accessing equality and property rights in the division of matrimonial real property in relationship breakdowns. Laws regulating the division of property in separations and divorces in Canadian provinces do not apply to First Nations people living on reserves (Supreme Court of Canada, 1986). The Indian Act does not include provisions for the division of assets at the end of a relationship, and does not delegate power to bands to pass enforceable bylaws in this subject area (Supreme Court of Canada, 1986). This creates a gap between provincial and federal policies that effectively excludes on-reserve populations from enforceable protections of matrimonial real property which includes access to family housing and finances. Under the current conditions, in 90% of separations on reserves, no division of assets occurs (NWAC, 2009).

Many women who wish to leave marriage or common-law relationships on First Nations reserves are met with the following legal realities:

- no rights to access family housing after separation;
- no rights to family finances after separation;
- no rights to access Emergency Protection Orders in instances of danger
- no rights to access Exclusive Occupancy Orders in instances of family violence[1] (Scow Institute, 2008).

This policy gap has been recognized by federal government legislative committees, First Nations groups, the Canadian Bar Association, United Nations treaty bodies, and community resource providers and has been under scrutiny in recent years (Canadian Bar Association, 2010; NWAC, 2009; AFN, 2009; Senate Standing Committee on Human Rights, 2003). Transition houses have been identified, by the stakeholders consulted in the formation of the act, as a key resource for women negatively impacted by the conditions that the bill seeks to address (Canadian Bar Association, 2010). Published critiques of the new legislation on which this research project is based consider remote communities, such as the service area of WCCRS, to be under-serviced (Canadian Bar Association, 2010).

A significant history of conflict has developed between the Federal Government of Canada, the Assembly of First Nations, and the Native Women's Association of Canada; these two First Nations parties were the main stakeholders consulted. The act has been proposed with identical text three times between 2008 and 2011.

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[1] It is important to note that resources, options, policies, or practices may exist in reserve communities to address the needs of women in abusive situations or in instances of divorce or separation that may not be recorded or documented in a way that is accessible to research following a document review research methodology.

The first attempt died on the order paper following the dissolution of parliament in September of 2008. In May of 2009, it was voted down by the conservative government. As Bill S-4, the act was passed in January of 2011; the call of the May 2011 federal election put a halt on the bill before it came into force. As of September 2011, the bill is likely to be passed by the current government as it has been referenced as a priority in the Speech from the Throne in the formation of the 41st sitting of Parliament in 2011 (Parliament of Canada, 2011).

Review of Literature

Several different theoretical approaches to conflict and dispute resolution theory exist as guides to observing, analyzing, and understanding conflict histories and interactions between parties. Among the most notable and applicable theories, for the purposes of this research project, are transformational theory (J.P. Lederach, 1995), an interest based approach (Fisher & Ury, 1981), a narrative approach (Gergen, 2001; Boyd & Richardson, 1986), and a culturally inclusive approach, as articulated by Michelle LeBaron (2004). To describe the application of dispute resolution theory to the analysis of conflict, conflict theorists Robert Bush and Joseph Folger offer the following explanation "Conflict ideologies carry notions of what conflict is, as well as expectations about what moves or responses are possible or required in specific contexts, what role third parties play, and what outcomes are desirable" (Folger & Bush, 1994, p. 8). This approach to applying a theoretical approach to conflict analysis research was used to better understand the experience of the conflict of the parties involved in the process of creating the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. A brief overview of each of these four theoretical approaches is included below. Of these theories, an interest based and a culturally inclusive perspective are most applicable to this research project and they are applied to this case.

Narrative theory places importance on the context, relationships, and the meanings behind the stories of disputing parties. Language and meaning are seen as, "systems onto themselves," and are the main units of analysis in the social construction of conflict (Gergen, 2001, p. 805). Narrative theorists, Boyd and Richardson propose that "conflict may involve… not a clash of basic needs as such, but a clash of… culturally determined ways in which needs are expressed" (Boyd & Richardson, 1986, p. 343). The ability to dominate the storytelling process determines the balance of power between parties according to a narrative perspective.

Alternatively, the focus of transformational theory is on relationships as the unit of analysis for examining conflict, and views individual conflict episodes as part of an ongoing, emergent reality in the context of a greater relational whole (Lederach, 1995). Transformational theory, as described by Lederach (1995), approaches conflict as a positive opportunity for change and growth that is an inevitable and healthy part of human relationships.

An interest based approach gained notoriety through the work of Roger Fisher and William Ury beginning in the 1980's. This theoretical approach works from the premise that conflict as a problem in need of solution. Conflicts are solved by identifying the needs and interests of each conflict party for the purpose of establishing common solutions to resolve disputes through negotiation (Fisher & Ury, 1981). This theory was also discussed by Joseph Folger and Robert Bush (Folger & Bush, 1994).

A culturally inclusive perspective, as articulated by Michelle LeBaron (LeBaron, 2004), is also relevant to the consideration of a conflict between First Nations parties and the federal government. A culturally inclusive approach includes culture as a feature of conflict that is inherently involved in the social and personal construction and perception of conflict experiences as well as the ways of being in, and engaging in conflict (LeBaron, 2004).

An example of a cultural feature within conflict is a consideration of communitarianism and individualism as two opposing approaches to engaging in, identifying with one's community, and being in conflict (LeBaron & Pillay, 2006). These cultural elements are inherently present in conflict and inform the way each party participates in the conflict experience observed in this research. References to culturally understood views of approaching conflict are present in the statements made by the First Nations consultation groups and form a critical insight to observing the conflict experience surrounding the legal realities of separation and divorce and abuse on First Nations reserves.

Research Methodology

The research followed a methodology of document review (Creswell, 2009). A document review is a qualitative research methodology that is used to analyze text-based information. This methodology, which compares the content of the text based information and considers the context and purpose for which it was created, was chosen because of the large volume of technical information that has been published on the subject in formats that are not written with the intention for use by the people who are impacted by this set of issues.

The strengths of this methodology for the project are in the process of observing the chronology of published communications from each of the conflict parties and the analysis and comparison of the public retellings of shared experiences and processes to highlight differences in the perception of the problems to be addressed and the interactions between stakeholders. By comparing legal documents and critiques, the specific risks that are important to acknowledge in the safety planning of the clients of WCCR become clear.

The identifiable weaknesses of the application of this methodology to this research project include the imbalance between the access to professional and public communication outlets between the federal government and the First Nations Stakeholders. The federal government is represented in official statements that speak for entire branches of government while the voices of the smaller First Nations groups may carry different messages that get grouped together, have less political visibility, and are speaking from within a consultation process that they did not co-design. This creates the opportunity for First Nations communications to be diluted, left out, or not as widely published or accessible to review and creates a risk of the more centralized party being overrepresented in this research project.

Personal accounts and interviews are not part of the methodology. Personal interview data is outside of the scope of this project. Subsequent research, including interviews with individuals, on this topic would be beneficial to further contextualize the information presented in this project.

This research project examines the interactions of the federal government and First Nations consultation parties and presents the consultation relationship as being informed by two different theoretical approaches to dispute resolution. The research compares an interest based approach, as defined by Fisher and Ury, as well as Folger and Bush (1994), with a culturally inclusive perspective, as articulated by the work of conflict theorist, Michelle LeBaron (2004). These theories were compared and used to analyze the published statements by each of the consultation parties that participated in the process of creating the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. By comparing the information contained in the documents through the lenses of each framework, I was able to see the how the priorities of each party, based on the frameworks were addressed, or not addressed, by the act.

The Reports by women's organizations that provide background information on the dynamics of abuse in relationships, separations, and divorces were then used to inform the interpretation of the impacts of the current and incoming legal conditions on the lives of First Nations women. The following section identifies these literary sources.

The research was conducted by completing an analysis of the relevant legal texts, legal critiques and consultation reports to identify the provisions of the legislation, how the act changes the current legal circumstances, and what the perceived strengths and weaknesses of the act are. The documents were chosen based on their published references to each other, a review of local resources and observable patterns in the WCCRS community observed during previous work with the client organization and from recommendations from the WCCRS community of practice. The local laws that exist in four of the 14 First Nations that make up the Nuu-chal-nuth Tribal Council and Maa-nulth Treaty Society in the WCCRS area were then reviewed. The second phase of analysis was based on a comparison of the current legal conditions and incoming legislation with the documents produced by legal critics, statements by the First Nations groups objecting to the legislation, and reports produced by women's organizations detailing the features of abuse in relation to matrimonial real property.

The purpose of this review was to identify the provisions for divorce and separation that create local legal options and possibilities and to determine their jurisdictional relationship with the *Federal Family Homes on Reserves and Matrimonial Interests or Rights Act*. Documents chosen for the analysis were selected to provide data on the act, its context, content, and critiques, the experience of the consultation process by the First Nations stakeholder groups, the perception of the problems and solutions as defined by each party, and the local processes, provisions, and resources available to women and the clients of WCCRS.

The following is a listing of the documents reviewed the documents are presented as a list for the purpose of efficient reference by practitioners:

Laws and Legal Rulings:

Family Homes on Reserves and Matrimonial Interests or Rights Act, 2011;

The proposed legislation to address matrimonial real property on First Nations reserves. This legislation was created after the consultations with the Assembly of First Nations, the Native Women's Association of Canada

Family Relations Act,1996;

The legislation that regulates legal rights associated with divorce, separation off reserves in British Columbia

Supreme Court of Canada. Judgments of the Supreme Court of Canada: Derrikson v. Derrikson, 1986;

The Supreme Court of Canada ruling that removed the force of the Family Relations Act from application First Nations reserves

Ucluelet Nation Land Act, 2011;

Toquaht Nation Land Act, 2011;

Huu-ay-aht Nation Land Act, 2011;

Uchuchlesaht Nation Land Act, 2011.

Local First Nations Land Acts that create First Nations laws to manage divorce and separation on First Nations lands these groups are geographically located in the area that WCCRS serves and are part of the Nuu-chah-nulth First Nations groups and the *Maa-nulth Treaty group*. These Land Acts describe the legal processes and regulation of matrimonial real property for 4 of the 14 First Nations in the WCCRS area

Commentary and Background Information on Laws:

Information on Spousal Rights to the Family home on Reserves, 2010;

Indian and Northern Affairs Canada published information guide for First Nations women and individuals seeking information on their legal rights around divorce and separation on First Nations reserves

Bill C-8: Family Homes on Reserves and Matrimonial Interests or Rights Act News Release, 2009;

Statement produced by the federal government, Indian and Northern Affairs Canada, to describe the experience of the consultation process from the perspective of the federal government

Speech from the Throne to Open the First Session of the Forty-First Parliament of Canada, 2009;

This speech includes references and commitments to the urgency and timeline for the creation of legal rights for First Nations women

A Hard Bed To Lie In: Matrimonial Real Property on Reserve, Interim Report of the Standing Senate Committee on Human Rights, 2003;

A report on the process of creating the *Family Homes on Reserves and Matrimonial Interests or Rights Act* from a human rights legislation perspective

Native Women's Association of Canada. Background Document on Aboriginal Women and Housing, 2004;

An overview of the relationship between First Nations women and housing, and domestic violence

Assembly of First Nations. NWAC, AFN and AFN Women's Council Unite to Oppose Bill C-8 on Matrimonial Real Property, 2009;

Commentary and statements made by the consultation groups in response to the introduction of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

The Scow Institute. Matrimonial Property on Reserve, 2008;

A review of domestic violence in a First Nations context and of the impact of matrimonial real property issues on the lives of First Nations women

The Westerly News, 2003-2011;

The local newspaper in the Tofino and Ucluelet area was reviewed for relevant content. No mention of matrimonial real property, the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* or divorce and separation on First Nations reserves was made in this publication

An interest based theoretical perspective (Folger & Bush, 1994; Fisher & Ury, 1988), served as the reference point for analyzing the publications produced by each of the conflict parties. An assessment of the prioritized issues and desirable outcomes was gained from this analysis. A culturally inclusive theoretical perspective, as described by LeBaron (2004), was then applied to identify the assumptions inherent in the solution-focus of an interest based approach employed by the federal government.

By overlapping these two perspectives, the differences between the approaches of the First Nations stakeholder groups and the federal government became evident in the understanding of the problems, how they are talked about, and what action is deemed necessary to address the current danger that many women living on First Nations reserves are in.

From the information collected in the document review, two visual resource map deliverables were created to integrate and distil the information from all of the text sources. One map (Appendix 2) was designed to represent the current legal rights, risks, and options for First Nations women living on reserves in relation to separation and divorce. The second map (Appendix 3) was produced to demonstrate the new set of realities that the proposed *Family Homes on Reserves and Matrimonial Interests or Rights Act* would create. The resource maps reflect the legislative priorities of the federal government that seek to fill in the legal gaps that are present under the current conditions. These changes can be observed in a comparison between the two versions of the resource maps. The concerns and problems raised by the First Nations consultation parties in response to the *Family Homes on Reserves and Matrimonial Interests or Rights Act,* as well as the critiques by the Canadian Bar Association and women's groups, informed the projection of risks and barriers that are highlighted in the resource maps. The resource maps are intended to be used as a single source to facilitate the easy access to a large volume of information from many documents.

Findings

From the data analysis, a significant power imbalance in the consultation process was observable as well as a clear conflict between the government and First Nations priorities of the interest and solutions to address the problems. This comparison of documents made clear several

risks and legal disadvantages that will be maintained and introduced with the new legislation. These findings are discussed in the following section of this report.

The Impact of an Interest Based Approach to Power on Culture in Conflict

The application of the work of Folger and Bush to this conflict is particularly important to an understanding of the power imbalance between the federal government and the First Nations stakeholder groups in relation to defining and addressing the dangers facing women living on First Nations reserves.

The ability to provide solutions and action and to determine the needs of conflict parties is what constitutes power from an interest based theoretical perspective. This approach to dispute resolution identifies conflict as episodic incompatibilities of interests that can be solved by meeting the specific needs of the conflict parties (Folger &Bush, 1994). The federal government has the authority and authorship over the design of the process for addressing the issue, as well as the resources, and law making ability; therefore, the government holds the power to define and determine what both the needs and solutions are for all parties.

Many of the diverse First Nations groups identify facets of the debate as being culturally significant, such as the construction of domestic violence as an offence against an entire community, as opposed to the legislative design that focuses on the conflicts and assaults between individuals (NWAC, 2008). A purely interest based approach, which in this case, translates to a discussion of legislative measures as solutions to legal needs, without consideration for immediate program funding and development, serve to contribute to the dissatisfaction, frustration, and polarization of the approaches of the First Nations communities and the federal government.

A review of the template developed by INAC to inform the direction of the consultation processes in 2009 reveals a limiting of the discussion to “three options for consideration” (INAC, 2009). The first option was the incorporation of matrimonial real property law amendments into provincial and territorial structures, the second option built on the latter and included a First Nations jurisdictional recognition over matrimonial real property. The third option outlined the implementation of substantive federal law in combination with some recognition of First Nations jurisdiction. (INAC, 2009) The consultation template unilaterally identifies the interests and solutions that, based on an interest based approach, define the terms of the conflict. By assuming authorship over the process of articulating the needs that are relevant to address in a solution to the problem facing First Nations women, the outcomes of the dialogue are limited to reflect only the needs and solutions as defined by the government of Canada. The predetermination of the parameters of the dialogue by the Federal Government excluded crucial cultural and contextual elements that are central to the debate.

Dispute resolution scholar and practitioner Michelle LeBaron references the impact of dispute resolution processes created without an acknowledgment of the underlying cultural assumptions. LeBaron (2004) states that these, “processes are . . . likely to mirror bureaucratic, legal culture . . .” and that, “[n]on dominant cultural values may be pushed to the sidelines in the interests of efficiency, cost savings, and even the laudable goal of fairness" (p. 16). The federal government’s construction of the conflict surrounding the lack of regulation of divorce and separation on reserves, and the subsequent impact on the First Nations communities, appears to be one of a legislative oversight. This is made clear by the lack of reference in federal government publications to the immediate program and resource development that has been

identified by First Nations groups as a crucial need throughout the 9 year period that this problem has been formally acknowledged by the federal government.

For the First Nations parties, the preferred dialogue appears to include cultural and value based complexities that translate to non-legislative considerations. For example, the NWAC offers in the consultation report reference to the First Nations cultural construction of domestic violence as a community offence rather than an infraction of law and individual offence. The importance placed on the victims of abuse remaining in their reserve communities offer another example of this layer of cultural significance. The creation of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* to mirror the *Family Relations Act* and give rights to women on First Nations reserves that other Canadians hold is the choice made by the federal government. This choice does not take into consideration that the needs of First Nations women have been articulated to be different than those of other Canadians in this situation. The value of remaining in one's community or reserve community is of high cultural importance; for a woman to need to leave her community is a great loss and poses a risk to her connection to culture and wellbeing. (NWAC, 2009) This cultural factor is not accounted for in the federal government's description of the problem as an injustice based on a lack of legal rights that are guaranteed to others.

As the groups define the problem in different terms, a process of consultation designed by one party to address the concerns of a diverse group of stakeholders risks an inequity, as observed in this situation. LeBaron's emphasis on culture as a crucial element that saturates the construction of a conflict is of relevance to this debate. She asserts that processes that are designed to address disputes "may be stretched and applied outside the context in which they were developed, but this may be both disrespectful and dysfunctional" (LeBaron, 2004, p. 16).

The choice by the federal government to exclude the findings from the First Nations consultation reports that call for increased resources for women and families that have been impacted by this problem provides an example of the focus on legal measures as solutions to a problem that is described by First Nations group as in need of social measures. The public declaration of the consultation process as one of cooperation and partnership, despite First Nations publications to the contrary, provides an example of LeBaron's description of a lack of acknowledgment of cultural assumptions in process and outcome. The exclusion of culture, and culturally understood meanings, into the consultation dialogue appears to be a significant factor in the strain on the relationship between INAC and the AFN and NWAC.

The Impacts of Theoretical Assumptions on Positions of Power in Conflict Relationships

In reviewing the publications, literature, and reports created by each of the stakeholders connected by the issue, its impacts, the accountability it creates, as well as the problem solving approaches of each party, it is clear that the problem has been approached from very different theoretical assumptions and positions of power.

The responses by the Federal government to the lack of protections for First Nations women living on reserves in situations of separation or divorce have identified and acknowledged the severity, the dangers, and urgency of the situation. The Canadian Senate Standing Committee on Human Rights cites the formal recognition by three parliamentary committees of the danger that many First Nations women living on reserves remain in while they wait for action. The House of Commons Standing Committee on Aboriginal Affairs and Northern Development, the House of Commons Standing Committee on the Status of Women, and the Senate Standing Committee on Human Rights have each published statements to this effect. (Senate Standing Committee on Human Rights, 2003).

The Canadian Senate Standing Committee on Human Rights prepared a report on the issue and cited the conditions facing First Nations women as clear examples of "unconstitutional discrimination" (2003, p. 9). The report acknowledged that " . . . [f]amily lives are at stake" (2003, p. 9) and recognized suicides and deaths as consequences of the current conditions. The report concluded that "[t]his situation can no longer be tolerated in Canada. It is morally wrong. It contravenes the equality rights guaranteed to everyone in Canada under the Charter of Rights and Freedoms . . . " (2003, p. 9) Furthermore, the committee cited United Nations treaty bodies' general responses to Canada's inaction to provide legal rights for First Nations women as, "incompatible with its international obligations" (Standing Senate Committee on Human Rights, 2003, p. 84). These sentiments allude to immediate action. It is important to note that these statements were made in 2003. The immediacy of the situation has not been translated into support for the women in danger, in the form of funding or program development, while the legislative process has continued for over nine years and has been stalled twice by the calling of federal elections. This is important to note in light of the immediate social programming support needs identified by First Nations groups throughout the government processes of addressing this problem.

Published statements and literature produced by many First Nations groups have come forward to oppose the Act in its different incarnations. The issues raised by the groups follow a pattern of recognizing the approach of the consultation process as a main concern and point of protest. The First Nations organizations involved in the consultation, the Assembly of First Nations and the Native Women's Association of Canada, summarize the consultation process as an exercise that was "undemocratic" (AFN, 2009, para 7), and, "[felt] like another experience of colonialism" (NWAC, 2009, para 3). The federal government titled the report of the 2009

consultation, *Walking Arm in Arm*. The descriptions of the consultation process by each party, after its completion in 2009, offer information about the compatibility of the different approaches that informed the consultation in practice. The importance of culture to the members of the consultation groups is evident in the assertion that the measures to address the issues be "innovative, inclusive, holistic, respectful, and flexible to address the complex and unique nature of the matrimonial real property regime on reserve" (Scow Institute, 2008, p. 16). References is also made to the legacy of colonization on the realities that are experienced today. "Pre-contact Aboriginal societies differed and clashed with European concepts of property in many fundamental ways. Colonization has effectively reversed the positions of Aboriginal women; they now have no property rights and no family support or housing" (Scow Institute, 2008, p.11). Given the strong reactions of the First Nations groups to the consultation process, and the federal government's opposing assertions that the issues were successfully addressed by a collaborative multi-stakeholder consultative process, a divergence in the narrative of each of the groups is clear.

Interests and Solutions to Address the Issues Facing Women on First Nations Reserves

The application of Bush and Folger's interest based approach in the analysis of the AFN and NWAC's narratives on the interests and needs of the individuals and families impacted by the dangerous realities connected to the lack of protections for matrimonial real property on First Nations reserves, reveals a difference in the definition and proposed solutions to the problems. First Nations groups have called for non-legislative options and funding for program development to address the causes and symptoms of the danger women are in.

The following is a list of immediate resource needs generated by the First Nations groups in consultation for the *Family Homes on Reserves and Matrimonial Interests or Rights Act*:

- funding for women's shelters and transition housing, especially in remote communities;
- treatment program funding;
- First Nations dispute resolution programming and funding;
- on reserve housing loan funds to address housing shortage backlogs to enable women to remain in their communities near family and community support;
- spousal compensation loan funds to facilitate the payment of women of their share of marital assets;
- family law Legal Aid funding;
- video court for remote communities;
- First Nations Self Governing Powers (Canadian Bar Association, 2010).

None of these options have been included in the response of the Federal Government's *Family Homes on Reserves and Matrimonial Interests or Rights Act.* From an interest based perspective, which defines a solution to conflict as the meeting of needs, the needs of the First Nations stakeholders have not been met by the act. A consideration of LeBaron's articulation of cultural features as having an inevitable impact on the experience and conflict and its resolution sensitize a reading of the document data to a lack of consideration for the important cultural elements brought to light by the First Nations consultation groups.

Key Points of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*

The following three tables represent an analysis of the provisions contained in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* and a projection of the potential risks and benefits of their application to the women that the client organization serves according to an interest based theoretical framework. This analysis was highlighted in the presentation to the West Coast Community Resources Society staff.

Table 1 is a breakdown of the general features and applications of the act, including the conditions outlining who may be protected under the act. Tables 2 and 3 detail the provisions included for Emergency Protection Orders and Exclusive Occupancy Orders in cases of abuse. Analysis is included in the tables that highlight local considerations and concerns that exist in the communities that WCCRS services.

Table 1 Application of the Proposed Law

Proposed Legal Rights	Analysis
• Applicable after 1 year of co-habitation.	• The application of the act after 1 year of cohabitation offers legal recourse one earlier than the *Family Relations Act*, that applies off reserves, which is applicable after 2 years. This makes the legislation available to more people.
• Available to spouses who are not on the title of the Family home. • Available to non-First Nations spouses.	• These provisions are especially relevant to women; men hold the majority of the Certificates of Possession issued for homes on reserves. This reality limits a woman's ability to enforce protection orders or have rights to her family home. This is also the case for women who are not eligible or registered as members of the nation or community in which they live

Table 2 Emergency Protection Orders under the Proposed Law	
Proposed Legal Rights	**Analysis**
• Applications can be made for 90 days of civil protection for self, children, and property and can be renewed for a total of 180 days.	• The *Family Relations Act*, which applies off of First Nations Reserves, does not define a time limit for Emergency Protection Orders.
• Applications for protection orders can be made on behalf of an individual by a third party.	• First Nations reserve communities that are geographically remote and far from police are at a disadvantage for accessing enforcement of their orders. This provision allows a woman to access an Emergency Protection Order without leaving her community, which addresses potential safety concerns. • Multigenerational housing is common in the region WCCRS serves; this reality is not accounted for in the legislation. If a woman lives in her (ex)spouses' family home with her (ex)spouse's family members or in a community where she is not a member, she may still be under threat based on her proximity and the power dynamic of family or community relationships and loyalties. Applying a system of property access that does not take this fact into account ignores a culturally significant factor that impacts the safety of the women who are seeking safety in multigenerational homes in cases of abuse.

Table 3 Exclusive Occupancy Order under the Proposed Law	
Proposed Legal Rights	**Analysis**
• Applications for exclusive use of the family home in cases of abuse or danger can remove and abusive (ex)spouse from the home (without beginning the process with a police investigation).	• The prevalence of multi-generational housing has not been taken into consideration in the creation of this provision. If a woman is living in her (ex)spouse's family home with several generations of his family, remaining in that home after his removal may not be a safe or practical option.
• No funding for shelters, social programming, or transition houses has been included to support the women using this act.	• Increased demand and wait times to access already backlogged Legal Aid and community resources with shrinking budgets. These shelter and Transition House services are crucial. After a woman leaves an abusive situation is cited as the most dangerous stage in an abusive relationship.
• Length of the order is undefined and set by the court. • The provisions cannot re-assign the possession of the family home or property but grants exclusive use.	• Controversy over the Federal legislative ability to re-assign the use of a home on reserve to a non-band member or non-First Nations individual, for an unlimited amount of time, creates the potential for a challenge to the law's constitutionality and compatibility with First Nations Self Governance principles.

The Context and Cultural Features of the Problems and the Proposed Solution

In situations of abuse and violence, the characteristics of control and financial abuse, paired with these legal realities, combine to keep women in situations of danger (Scow Institute, 2008). The inferred impacts of these conditions are far-reaching and include: the perpetuation of family violence and generational violence, harm to individuals, increased child apprehensions, poverty and homelessness.

Other issues such as housing shortages on reserves, the dynamics of multigenerational housing, lack of funding and access to Transition House services, geographic isolation, and lack of proximity to law enforcement can also be factored into an assessment of the impact on the lives of women and families affected by this issue.

The stakeholder reports and statements created by the AFN and NWAC offer insight into the impacts of the current and proposed legal conditions surrounding matrimonial real property on First Nations reserves. The lack of legislation to protect First Nations women living on reserves in situations of divorce or separation has real and urgent impacts that are compounded by a host of systemic factors and realities facing First Nations women in Canada. The provisions proposed by the *Family Homes on Reserves and Matrimonial Interests or Rights Act* seek to neutralize the legal inequalities that exist. In some instances, the bill fails to recognize or account for the social and contextual realities that entrench the vulnerability of women on First Nations reserves.

Resource Map Deliverables

The key findings of this analysis of *the Family Homes on Reserves and Matrimonial Interests or Rights Act* are presented in the resource map deliverables. The results of the document review data analysis provided information on the legal conditions, rights, and risks associated with the current and incoming matrimonial real property laws as well as the processes that led to their formation. The information is laid out to link the legal information with the cultural and contextual information. The information was synthesized into a flowchart format that matches the legal conditions with the relevant information on the risks and resources associated with each legal implication. Each of the legal texts, critiques, consultation report

statements, relationship violence resources, and local sources informed the creation of the resource map deliverables. The resource maps are contextualized by an understanding of the consultation process that led to the creation of the laws they are based on.

Recommendations

Several of the provisions generated by First Nations groups could be implemented prior to the passing of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* that would provide support and programming to women and families immediately. These options would serve the current needs identified by First Nations stakeholders and create the infrastructure for the incoming legislation and policy. The demand and strain on government and non-profit resources will increase as a result of the enactment of the measures contained in the act.

The review and analysis conducted of the documents included in this research project indicate that both the current legal matrimonial real property conditions and the proposed, incoming legislative measures present potential safety risks to women leaving or planning to leave an abusive relationship. These findings, when considered alongside the reality that the most dangerous point in an abusive relationship is widely cited as during, and immediately after, a woman leaves the relationship, indicate the need for a clear understanding of the legal rights available to First Nations and other women living on reserves and the limitations and risks associated with those rights (Scow Institute, 2008). In light of the frequency that women return to abusive relationships multiple times from shelters, and revisit the shelter multiple times, it is a practice of transition house workers to assist their clients to strengthen their plans for safety with each stay at the shelter. A suggested application of the resource map tool is to assist workers in achieving this goal. By offering the resource map tool as a reference for a discussion or for

personal consideration, an opportunity is created for a woman and her family to gain a more clear awareness of the legal risks that she will be exposed to and enable her to build a more specific and accurate safety plan.

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Resources

Police
911

West Coast Community Resources Society Transition House and Crisis Line
1 877 726 2028

Kuu-us Crisis Line (24 hour)
1 800 588 8717

Victim Services Worker
1 800 563 0808

Legal Services Society of BC: Legal Aid Funding and Legal Advice over the Phone
1 866 577 2525

Aboriginal Community Legal Worker (Nanaimo)
1 800 578 8511

What is This Resource For?

Divorce and separation laws in Canada do not apply on First Nations Reserves.

Your community may have options and resources to assist you with a separation or divorce that are out of court and community based.

This resource provides information on what legal rights and options can be used to:

- Protect your physical safety and the safety of your children during and after the breakdown of a relationship.

- Keep a share of your family finances, property and family home in your separation.

- Manage access to your family home during and after your separation or divorce

Divorce and Separation from Marriage and Common Law Relationships

A Resource Map
for First Nations Women
and Advocates

Exploring Legal Rights,
Risks and Options

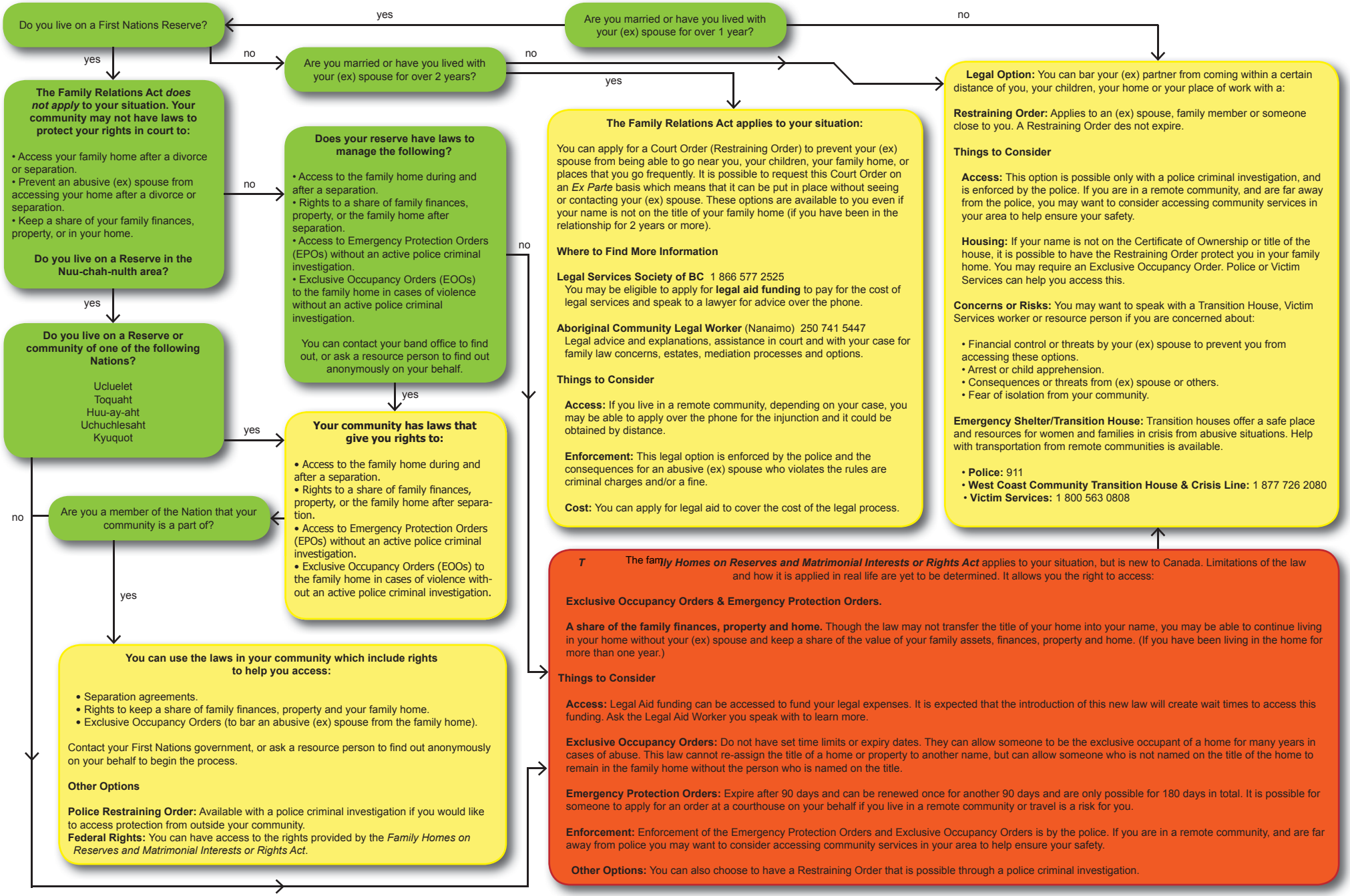
with a special focus on
situations of abuse

What Legal Rights Can you Access?

Divorce and Separation from Marriage and Common-Law Relationships

A Resource Map for First Nations Women and Advocates
Exploring Legal Rights, Risks & Options
with a special focus on situations of abuse

What legal rights can you access?



This resource map is for use after the enactment of the Family Homes on Reserves and Matrimonial Interests or Rights Act

Divorce and Separation from Marriage and Common-Law Relationships

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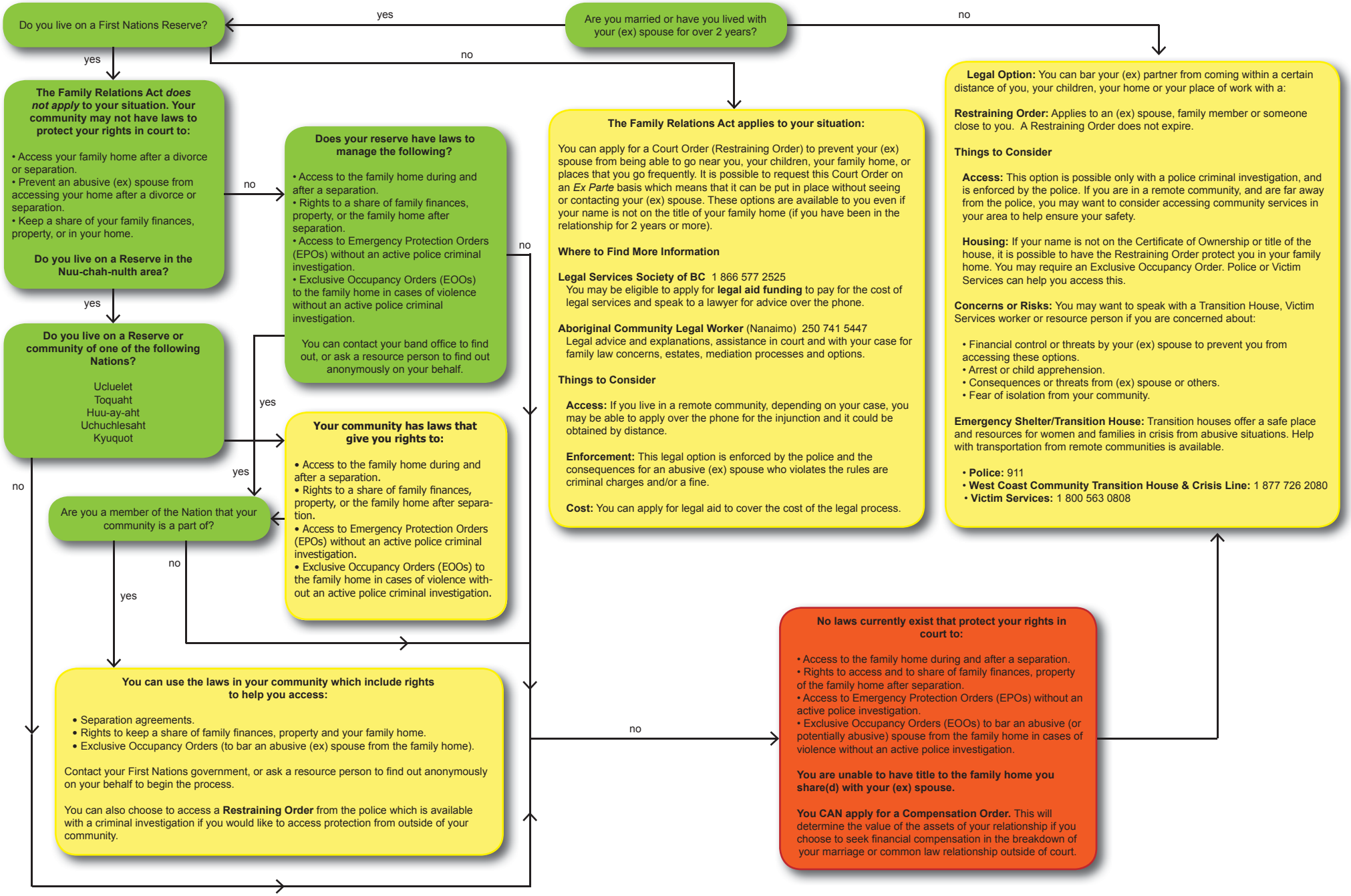
What legal rights can you access?



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