



**NANAIMO REGIONAL CONFERENCE:
Family & Child Protection Law, Aboriginal Services & Civil Law Issues**

**Vancouver Island Conference Centre
101 Gordon Street, Nanaimo BC V9R 5J8
Thursday, May 19, 2016 and Friday, May 20, 2016**

AGENDA – Thursday, May 19, 2016

Time	Session	Speaker	Facilitator
8:00 – 9:00	Registration & Breakfast		
8:45 – 9:00	Opening Ceremony & Welcome	• Eleanor White	Baljinder Gill
9:00 – 10:45	Overview of Family Law Act and Protection orders	• Elisabeth Strain – Family Lawyer	
10:45 – 11:00	Break		
11:00 – 12:45	Working with LSS Intake and other Resources	• Sherilyn Thompson – LSS Intake • Donna Moon – Community update • Agnes Tong – Access Probono • Patricia Lim – PLEI	Baljinder Gill
12:45 – 1:30	Lunch		
1:30 – 2:45	My Law BC Scenario based study	• John Simpson – LSS Manager, Community & Publishing Services • Patricia Lim – LSS Publications Development Coordinator	Baljinder Gill
2:45 – 3:00	Break		
3:00 – 4:30	Gladue and Restorative Justice	• Halie Bruce – Lawyer • Kim Fagerlund – John Howard society	Baljinder Gill

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Time	Session	Speaker	Facilitator
8:30 – 9:00	Breakfast		
9:00 – 10:30	Overview of Child Protection law	• Ardith Walkem – Lawyer	Baljinder Gill
10:30 – 10:45	Break		
10:45 – 11:30	Ministry of Justice update	• Jan Fontaine – Ministry of Justice	Baljinder Gill
11:30 – 12:30	Wills and Estates off and on Reserve	• Michael Warsh - Lawyer	
12:30 – 1:15	Lunch		
1:15 – 2:45	Updates on the new Matrimonial Property Act	• Ardith Walkem – Lawyer • Halie Bruce - Lawyer	Baljinder Gill

Overview of Child Welfare Process in BC

- Ministry of Child and Family Development
 - Roles and Responsibilities
- Delegated Aboriginal Agencies
- Main steps of the CFCSA legislation



Child Welfare system is not working for Aboriginal children

- Does not reflect Indigenous laws, cultures or ways of making decisions about, and taking action to protect children
- Disproportional Representation: 54% of all children in care are aboriginal – numbers increasing



CFCSA Provisions Protecting Aboriginal Identity and Heritage

- Amended approximately 1996 – rarely used

**** many provisions also apply to other cultural communities ****



WRAPPING OUR WAYS AROUND THEM



Aboriginal Communities and the CFCSA Guidebook



Who is an Aboriginal Community?

- Bands / First Nations / Treaty Nations
- Some Indigenous communities have negotiated separate agreements
- Organizations such as Friendship Centres or Metis organizations may be identified by parents

Delegated Aboriginal Agency?

- Does not lessen or replace obligation to involve Aboriginal community(ies)



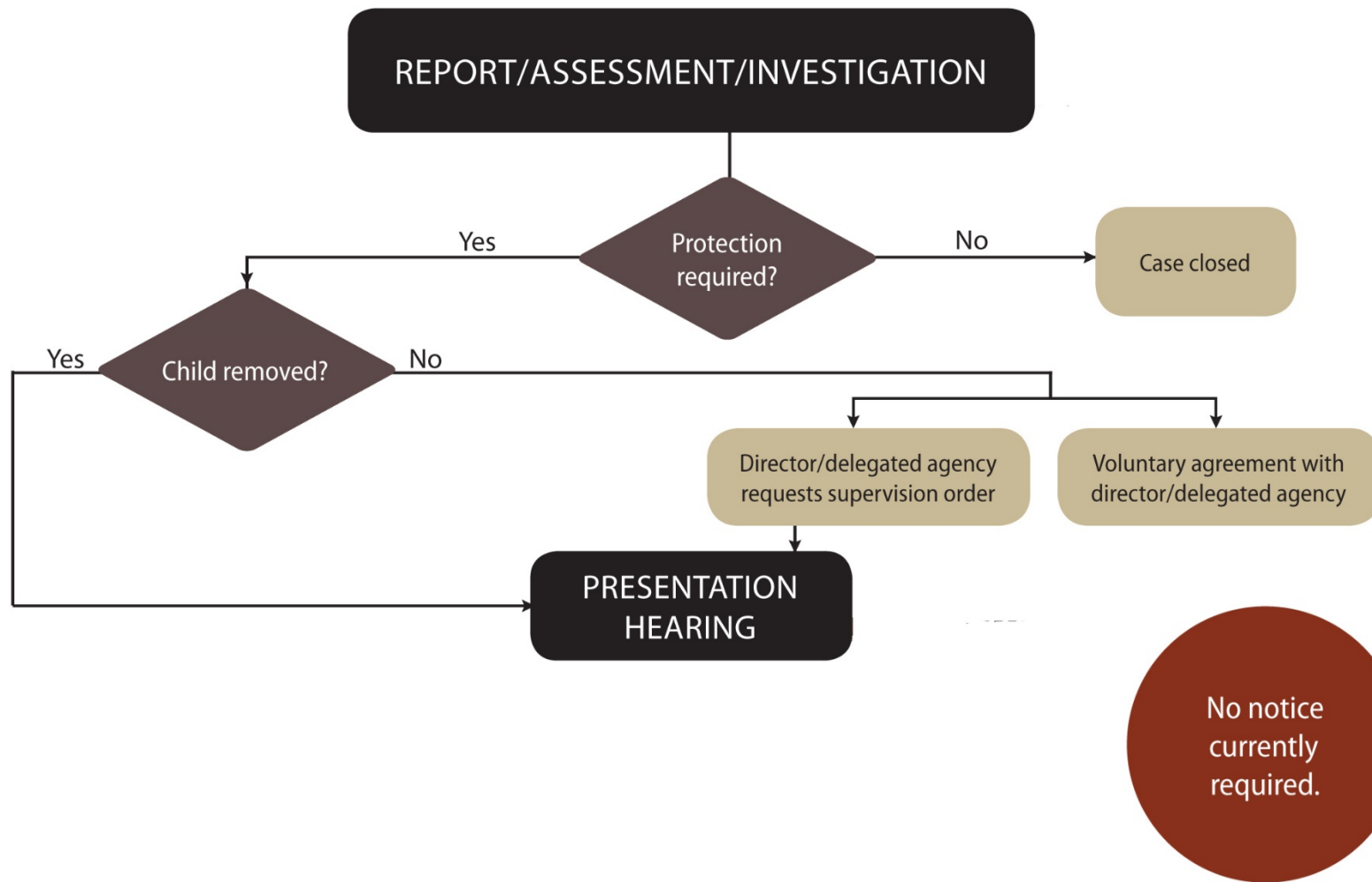
WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook



If an Aboriginal Community Appears they are entitled to Party Status, to:

- be involved in court proceedings,
- make arguments,
- disclosure of information,
- call witnesses,
- make applications





Report and Investigation Stages:

- Assess child protection concerns in a culturally sensitive way
- Dispute Resolutions options can be asked for and used at all stages



Voluntary Agreements:

- Strengthen the effectiveness of supervision terms, offer alternatives, and identify where terms are not likely to protect a child
- Enter into agreements with the director to provide preventative or support services to the child or family (s. 93)
- Emergency plan for breaches of a supervision order



Alternative and Traditional Dispute Resolution Options

- Mediation
- Family group conferencing
- Case conferences
- Traditional Dispute Resolution options discussed later



Child, Family and Community Service Act

Guiding principles s. 2

- Children have a right to be protected from abuse, neglect, and harm or threat of harm
- Belief that the best place for children is with their parents - families
- If parents need help to care for their children, the Director should provide support services
- Children's right to be heard (voice of the child)
- Need to decide quickly (time important in decisions about children)



Child, Family and Community Services Act

Best Interest of Child factors - s.3

- Child's safety
- Child's physical and emotional needs and level of development
- Importance of continuity in the child's care
- Quality of relationship child has with parent or other person and the effect of maintaining that relationship
- Child's views
- Effect of child if there is a delay in making a decision



s. 2 Guiding Principles – decisions made about a child should consider

- the child's views; kinship ties and attachment to extended family
- cultural identity of aboriginal children

s. 3 Service delivery principles

- aboriginal people should be involved in the planning and delivery of services
- services sensitive to cultural, racial and religious heritage

s. 4 Best interests of child

- must include a consideration of the child's views, and cultural, racial, linguistic and religious heritage
- importance of preserving an aboriginal child's cultural identity

Presentation and protection hearings:

- **Directors must show how they plan to preserve a child's aboriginal identity**



Responsibilities of Parents

- Keep their children safe
- Take care of their children's needs
- Get medical care for their children
- Protect their children from physical, sexual, and emotional abuse (includes when children witness violence in home)
- Not neglect children, by, for example:
 - Leaving them with someone using drugs or alcohol
 - Not providing a safe place to live, clothes, food or supervision



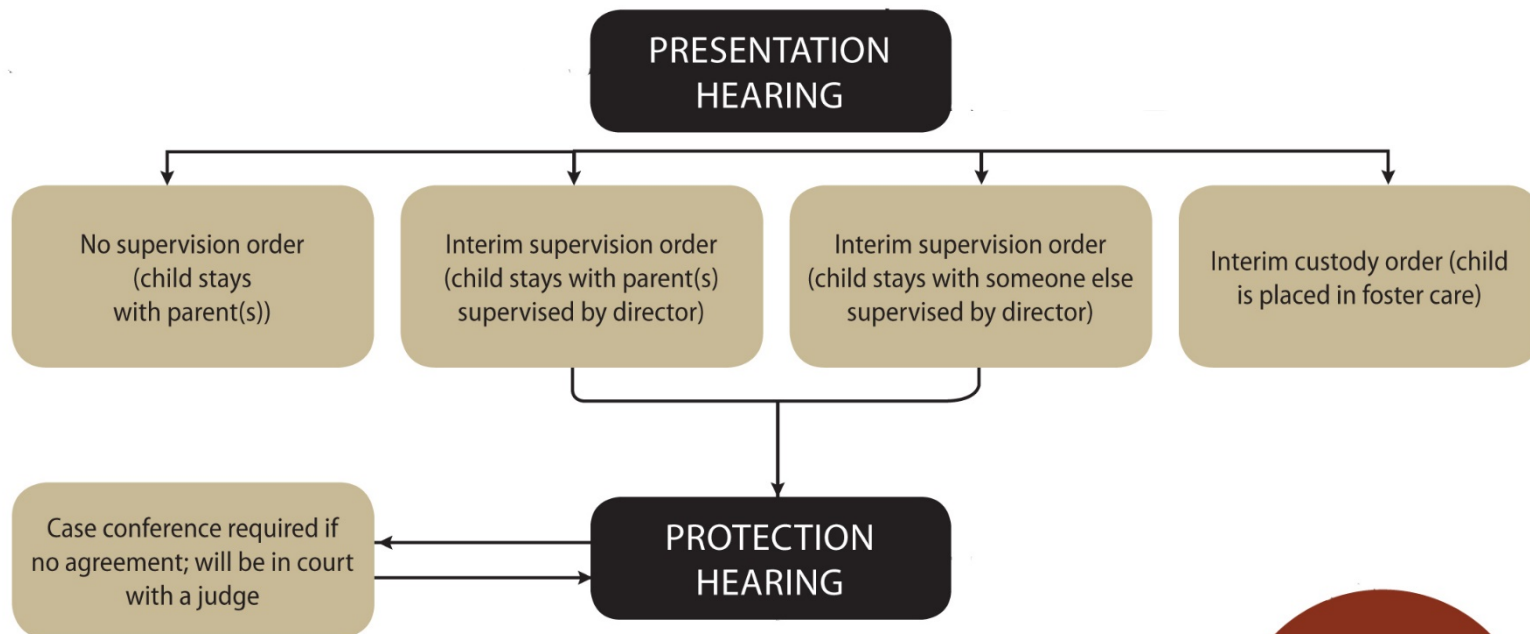
- Children in care have the right to receive guidance and encouragement to maintain their cultural heritage (s.70)

Placement Preferences (s.71)

Priority placement for an Aboriginal child:

- (a) with the child's extended family or within the child's aboriginal cultural community;
- (b) with another aboriginal family, if the child cannot be safely placed within their extended family or community





Notice given to a child's Aboriginal community (if practicable).



Presentation and Protection Stages:

Set out an Aboriginal Cultural Preservation plan unique to their own culture and traditions, and identify:

- Alternate caregivers within a child's family or cultural community
- Steps that need to be taken to ensure a child maintains their Aboriginal identity and cultural heritage
- Less disruptive measures available to avoid removing the child from their family or aboriginal community
- Culturally appropriate interventions, programs and services
- Issues related to access, including for members of a child's extended family or other community members
- Supports to keep the child in the home or within the family or community
- Alternative permanency solutions which protect a child's Aboriginal identity, culture and community connections



CFCSA Regulation (s. 8) a child's plan of care:

- Involvement of the child's aboriginal community in the development of the plan of care and their views;
- a description of how the Director proposes to meet the child's need for continuity of the child's cultural heritage, religion, language, and social and recreational activities;
- steps taken to preserve an aboriginal child's cultural identity.



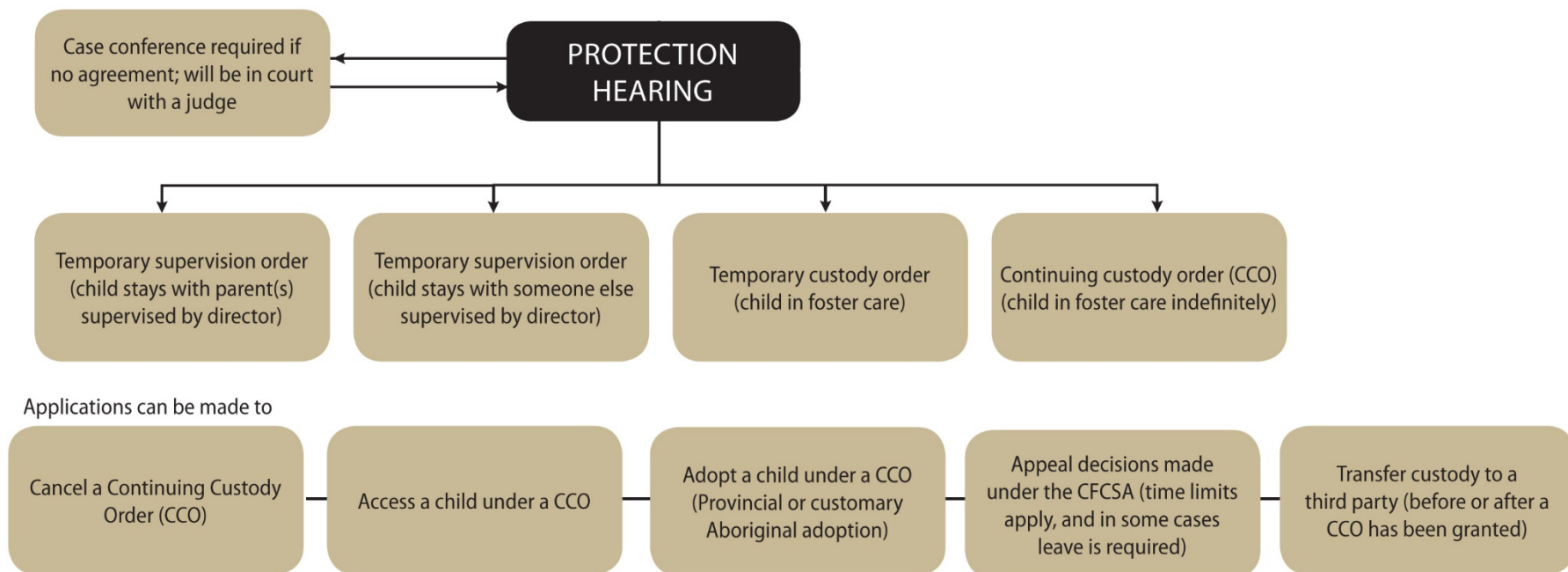
Culture is about participation, belonging to a particular people

Proposing an Aboriginal Cultural Preservation Plan



WRAPPING OUR WAYS AROUND THEM
Aboriginal Communities and the CFCSA Guidebook





First stage at which notice MUST be given to a child's Aboriginal community.



OPTIONS AFTER A CCO

- Cancelling a CCO
- Access to a child under CCO
- Adoptions
- Transfer to Custody to a third party
- Appeal (within time limits)



Defining the risks that a child faces with regard to cultural factors:

- 1) how removing a child from their cultural connections may endanger them over the long term; and**
- 2) how cultural factors may insulate a child against identified risks.**



- **Defining best interests of aboriginal children to incorporate aboriginal culture**
- **Ensuring Both Attachments and Cultural Continuity over a lifetime**



Judicial Notice

Long-term impact on Aboriginal children in care
(actions taken to protect – harm)

- risk of low education attainment
- Higher risk of street involvement
- more likely to age out of system (no permanent adoption or other solution)
- higher contact with the criminal justice and child welfare system in their own lives



Alternative and Traditional Dispute Resolution Options

- Section 22- allows for traditional dispute resolution processes – Aboriginal communities could propose these
- Has been done in BC and in other Provinces
 - **ShchEma-mee.tkt**
 - **Opikinawasowin**
- Vastly underused



- **Healing Courts (CFCSA Courts)**
- **S. 104 Tribunals**



Disproportionate number of Indigenous kids in Care

Canadian Human Rights Tribunal Complaint
First Nations Child and Family Caring Society and AFN

- Finding of discrimination by Canada
- Lower funding for on reserve child welfare regimes
- Policies that do not protect children



- United States: ACLU also involved in similar cases
- OGLALA SIOUX TRIBE V. VAN HUNNIK – United States federal court
- Pennington Country South Dakota: over last 4 years, over 500 Indian children
 - Some hearings – 60 seconds; parents not advised that they could make representations and call witnesses Parents lost 100% of cases

OVERALL FOCUS INTERNATIONALLY ON INDIGENOUS OVERPRESENTATION



Aboriginal Communities and the Child Protection Process



Any party can request an alternative dispute resolution (ADR) process (s.22) which could include:

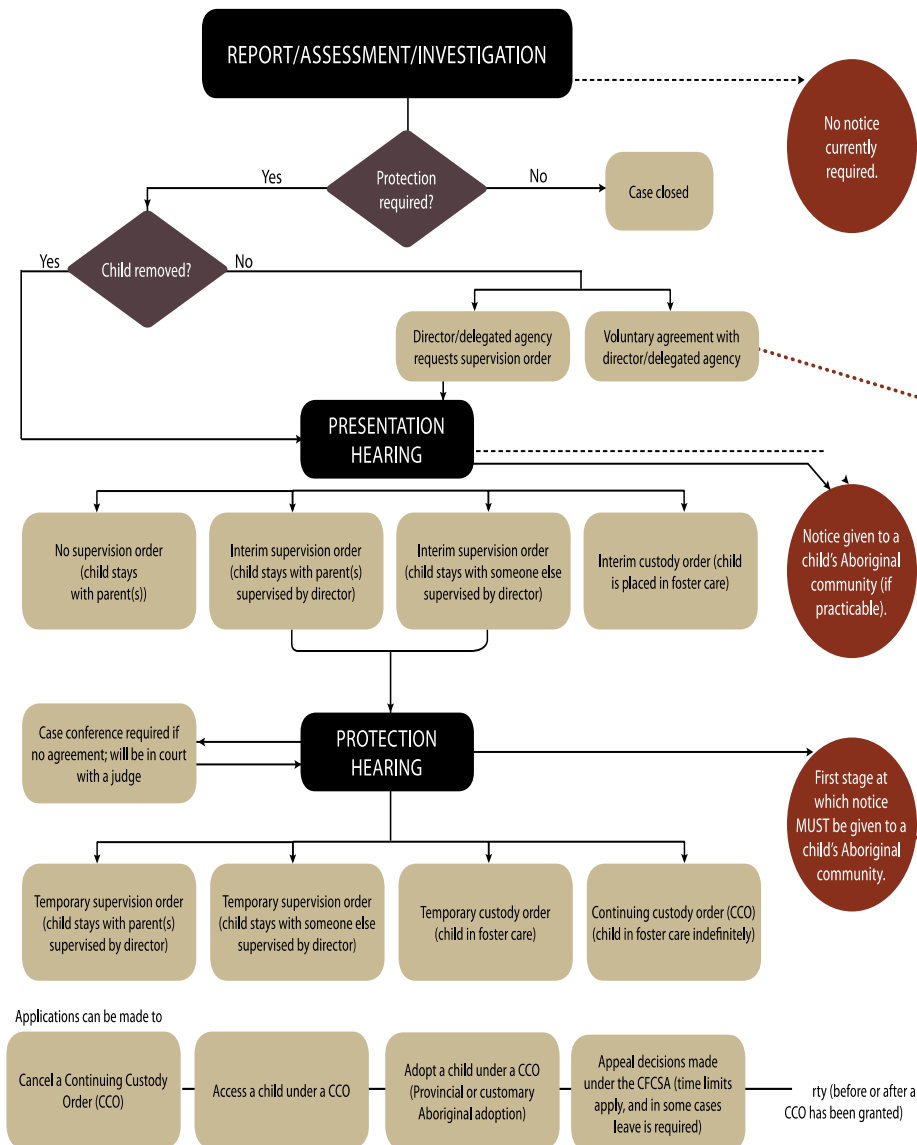
- A traditional Aboriginal dispute resolution process (reflecting Aboriginal legal traditions and processes)
- Mediation
- Case Conference
- Family Group Conferencing

Aboriginal communities as parties could:

- Help structure or suggest alternative dispute resolution mechanisms which are culturally relevant to the child and family; or
- Actively participate as a party in all ADR processes used.

AT ALL STAGES

The **Representative of Children and Youth** provides oversight to the way services are delivered to children under the CFCSA – and can serve an advocacy or investigative role where someone believes that services have not been provided as required under the CFCSA.



REPORT AND INVESTIGATION STAGES

- Assess child protection concerns in a culturally sensitive way

VOLUNTARY AGREEMENTS

- Strengthen the effectiveness of supervision terms, offer alternatives, and identify where terms are not likely to protect a child
- Enter into agreements with the director to provide preventative or support services to the child or family (s. 93)
- Emergency plan for breaches of a supervision order

PRESENTATION AND PROTECTION STAGES

Set out an Aboriginal Cultural Preservation plan unique to their own culture and traditions, and identify:

- Alternate caregivers within a child's family or cultural community;
- Steps that need to be taken to ensure a child maintains their Aboriginal identity and cultural heritage;
- Less disruptive measures available to avoid removing the child from their family or Aboriginal community;
- Culturally appropriate interventions, programs and services;
- Issues related to access, including for members of a child's extended family or other community members;
- Supports to keep the child in the home or within the family or community;
- Alternative permanency solutions which protect a child's Aboriginal identity, culture and community connections.



ShchEma'omee.tkt

Family Law Act

2011 SBC Chapter 25

About me...

- ▶ Completed my undergraduate degree in Criminology
- ▶ Attended law school at the University of British Columbia in 1988, and articulated at a criminal defense firm
- ▶ Called to the bar in British Columbia in 1989
- ▶ Worked as a crown prosecutor from 1989 to 1993
- ▶ Started working in family law in 1993

...then on March 18, 2013, the new *Family Law Act* came into force

Overview of the Act

► *FAMILY LAW ACT, SBC 2011 C 25*

- Part 1 — Interpretation
- Part 2 — Resolution of Family Law Disputes
- Part 3 — Parentage
- Part 4 — Care of and Time with Children
- Part 5 — Property Division
- Part 6 — Pension Division
- Part 7 — Child and Spousal Support
- Part 8 — Children's Property
- Part 9 — Protection from Family Violence
- Part 10 — Court Processes
- Part 11 — Search Officers
- Part 12 — Regulations
- Part 13 — Transitional Provisions
- Part 14 — Repeals, Related Amendment and Consequential Amendments

Our Focus

- ▶ To whom does the Act apply? (Part 1)
- ▶ How is property divided under the new Act? (Part 5)
- ▶ Children:
 - Who is a parent and who is a guardian? (Part 3/Part 4)
 - What about the “best interests of the child”? (Part 4)
 - Specifically, when and how can you relocate a child? (part 4)
- ▶ How does the Act respond to Family Violence? (Part 9)
- ▶ How does the Act encourage settlement and control conduct? (Part 10)

To whom does the FLA apply?

► Spouses and relationships between spouses

3 (1) A person is a spouse for the purposes of this Act if the person

(a) is married to another person, or

(b) has lived with another person in a marriage-like relationship, and

(i) has done so for a continuous period of at least 2 years, or

(ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.

(2) A spouse includes a former spouse.

(3) A relationship between spouses begins on the earlier of the following:

(a) the date on which they began to live together in a marriage-like relationship;

(b) the date of their marriage.

(4) For the purposes of this Act,

(a) spouses may be separated despite continuing to live in the same residence, and

(b) the court may consider, as evidence of separation,

(i) communication, by one spouse to the other spouse, of an intention to separate permanently, and

(ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

PROPERTY DIVISION

PART 5

How is property divided?

- ▶ Only two types of Property under the FLA:
 - **Family Property** - which is divisible and presumed to be fairly divided 50/50.
 - **Excluded Property** - which is not divisible, except in certain, limited situations.

Property Division

- ▶ Section 84 defines Family Property, as property that was acquired by either spouse during the course of the relationship, including things like:
 - Shares or interests in partnerships and corporations;
 - Property owing to a spouse;
 - Money in bank accounts;
 - Pensions; and,
 - The increase in value of excluded property.
- ▶ Section 85 defines Excluded Property, as property that was acquired by either spouse before the relationship, and other property such as:
 - Gifts and inheritances;
 - Settlements and awards; and,
 - Or property derived from excluded property.

Fly in the Ointment

- ▶ VJF v SKW

- ▶ 2016 BCCA 186

- ▶ Presumption of Advancement

What about Debt?

- ▶ Just like family property, debts are presumed to be shared equally between the parties.
- ▶ Section 86 defined Family Debt to include:
 - all financial obligations incurred by a spouse during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and after the date of separation, if incurred for the purpose of maintaining family property.

Opting out of the shared property regime?

- ▶ Section 92 provides that Parties can make **Agreements** respecting property division, prenuptial or separation Agreements for example.
- ▶ Section 93 provides that such **Agreements** can be set aside, either by further Agreement or by court order.
- ▶ New threshold for setting aside Agreements is “significantly unfair”.

Not necessarily 50/50

- ▶ Equal division for family property and family debt is only the starting point.
- ▶ Section 95 provides discretion for the Court to divide property unequally.
- ▶ Section 96 provides discretion for the Court to divide Excluded Property if it would be significantly unfair not to.

PARENTAGE & CHILDREN

PART 3 & PART 4

Parentage: Who is a “parent”?

- ▶ Section 26: **no assisted reproduction** – parents are the birth mother and biological father.
- ▶ Section 27: **assisted reproduction**, but not a surrogacy agreement – parents are the birth mother and her spouse.
- ▶ Section 24: **donor is not a parent** simply by reason of donation, and **must not** be declared by the court to be a parent simply by reason of donation.
- ▶ Section 28: person can be **declared a parent after death**, and also provides that the deceased spouse would be a parent.
- ▶ Section 29: surrogacy agreements, in which the birth mother is not a parent.
- ▶ Section 30: gives the court the power to declare an individual a parent.

Biological Father?

► Section 26:

- A male person is presumed the biological father, unless the contrary is proved or more than one person may be presumed, and any of many circumstances apply, as laid out in the section.
- Such circumstances include:
 - he was married to the child's birth mother on the day of the child's birth;
 - he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended by his death, by a judgment of divorce, or as referred to in section 21 *[void and voidable marriages]*;
 - he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth;
 - he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49.

Parentage: Who is a “parent”?

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- ▶ Section 28: person can be **declared a parent after death**, and also provides that the deceased spouse would be a parent.
- ▶ Section 29: surrogacy agreements, in which the birth mother is not a parent.
- ▶ Section 30: gives the court the power to declare an individual a parent.

Parents, more than two?

► Parentage if other arrangement

30 (1) This section applies if there is a **written agreement** that

(a) **is made before a child is conceived** through assisted reproduction,

(b) is made between

(i) **an intended parent or the intended parents and a potential birth mother** who agrees to be a parent together with the intended parent or intended parents, or

(ii) **the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother, and**

(c) provides that

(i) the potential birth mother will be the birth mother of a child conceived through assisted reproduction, and

(ii) on the child's birth, the parties to the agreement will be the parents of the child.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are the parties to the agreement.

(3) If an agreement described in subsection (1) is made but, before a child is conceived, a party withdraws from the agreement or dies, the agreement is deemed to be revoked.

Parents, more than two!

On Family Day 2014, Della Wolf became the first child in BC to have three parents on her birth certificate.



<http://www.cbc.ca/news/canada/british-columbia/della-wolf-is-bc-s-1st-child-with-3-parents-on-birth-certificate-1.2526584>

Who is a Guardian?

► Parents are generally guardians:

39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(2) Despite subsection (1), an **agreement or order** made after separation or when the parents are about to separate **may provide that a parent is not the child's guardian.**

(3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:

(a) section 30 applies and the person is a parent under that section;

(b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;

(c) the parent regularly cares for the child.

(4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

Why is Guardianship important?

- ▶ Only a guardian can have **Parenting Time** or exercise **Parenting Responsibilities**.
- ▶ All those who are not guardians have **CONTACT** with the child.
- ▶ **Parenting Responsibilities** (section 41) include, but are not limited to, such things as:
 - making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - making decisions respecting where the child will reside;
 - making decisions respecting with whom the child will live and associate;
 - making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
 - subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - giving, refusing or withdrawing consent for the child, if consent is required;
 - receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - requesting and receiving from third parties health, education or other information respecting the child;
 - subject to any applicable provincial legislation, starting, defending, compromising or settling any proceeding relating to the child, and identifying, advancing and protecting the child's legal and financial interests;
 - exercising any other responsibilities reasonably necessary to nurture the child's development.

Relocating a child?

► Definition and application

65 (1) In this Division, "relocation" means a **change in the location of the residence of a child or child's guardian** that can reasonably be expected to have a significant impact on the child's relationship with

- (a) a guardian, or
- (b) one or more other persons having a significant role in the child's life.

(2) This Division applies if

- (a) **a child's guardian plans to relocate himself or herself or the child**, or both, and
- (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.

Giving notice to relocate

- ▶ A guardian wishing to relocate, either themselves or a child, or themselves and a child, must give 60 days written notice to every other guardian of the child and any person who has a right to contact with the child prior to relocating (section 66).
- ▶ Parties are expected to co-operate to work out issues arising from the relocation (section 67).
- ▶ Unless a guardian objects within 30 days of receiving notice by formally filing an objection with the court, the relocation can go ahead on the date specified in the notice (section 68).
- ▶ An individual with only the right to contact with a child cannot object under section 68, but (perhaps) pursuant to section 67(2) can apply to the court under section 59 or 60 to stop the relocation if it will effect their contact with the child.

In case of an objection...

- ▶ The court can make an order either permitting or prohibiting a child's relocation.
- ▶ Which test the court will employ depends on whether the guardians have substantially equal parenting time:
 - If substantially equal, the onus is on the relocating guardian to show why it is in the child's best interests to relocate.
 - If not substantially equal, the onus is on the opposing guardian to show why the move is not in the child's best interests.

Best Interests of the Child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the **child's health and emotional well-being**;
- (b) the **child's views**, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and **significant persons in the child's life**;
- (d) the **history of the child's care**;
- (e) the **child's need for stability**, given the child's age and stage of development;
- (f) the **ability of each person who is a guardian** or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the **impact of any family violence** on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the **actions of a person responsible for family violence** indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would **require the child's guardians to cooperate** on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any **civil or criminal proceeding** relevant to the child's safety, security or well-being.

Family Violence

The FLA both defines and provides statutory guidance on how Family Violence should be assessed in specific regard to the best interest of the child.

"family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [*best interests of child*], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

PROTECTION FROM FAMILY VIOLENCE

Part 9

What is a Protection Order?



Whether to grant a Protection Order?

Whether to make protection order

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to his or her own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Whether to grant a Protection Order?

(2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account

- (a) the history of, and potential for, family violence,
- (b) the extent of any injuries or harm suffered, and
- (c) the respective vulnerability of the applicants.

(3) For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.

(4) The court may make an order under this Part regardless of whether any of the following circumstances exist:

- (a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;
- (b) the family member against whom the order is to be made is temporarily absent from the residence;
- (c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;
- (d) criminal charges have been or may be laid against the family member against whom the order is to be made;
- (e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;
- (f) an order under section 225 [orders restricting communications] has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

Protection Orders & Children

If child a family member

185 If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

- (a) whether the child may be exposed to family violence if an order under this Part is not made, and
- (b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

ADR & ORDERS RESPECTING CONDUCT

Part 10 - Division 5

Resolution of Family Law Disputes

- The new Act is all about encouraging the resolution of family law conflict, ideally without court intervention. Early sections of the Act lay the groundwork for resolution.

If in this family law case a claim is made under the Family Law Act and the claimant is represented by a lawyer, the lawyer must complete the following certificate.

LAWYER'S CERTIFICATE (FAMILY LAW ACT, s. 8(2))

I, _____, lawyer for _____

certify that, in accordance with section 8 (2) of the *Family Law Act*, I have

(a) discussed with the party the advisability of using various types of family dispute resolution to resolve the matter, and (b) informed the party of the facilities and other resources, known to me, that may be available to assist in resolving the dispute.

Date: _____

Signature of lawyer

Types of Conduct Orders

- ▶ The Act provides for Conduct Orders that a party or parties must:
 - Attend counselling;
 - Attend a dispute resolution session;
 - Follow an existing court order;
 - Stop communicating with an ex-spouse or someone else;
 - Make payments toward a family residence or other family property;
 - Report to the court or some other person;
 - “Do or do not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222”.

Penalties regarding Conduct Orders

- ▶ The Act also provides for penalties in the instance that Conduct Orders are not followed:
 - make a further order under this Division;
 - draw an inference that is adverse to the party, and make an order based on the inference;
 - make an order requiring the party to pay
 - the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - a fine not exceeding \$5 000;

QUESTIONS

Property Division under the Family Law Act

- ▶ Section 84 defines **Family Property**, as property that was acquired by either spouse during the course of the relationship, including things like:
 - Shares or interests in partnerships and corporations;
 - Property owing to a spouse;
 - Money in bank accounts;
 - Pensions; and,
 - The increase in value of excluded property.

- ▶ Section 85 defines **Excluded Property**, as property that was acquired by either spouse before the relationship, and other property such as:
 - Gifts and inheritances;
 - Settlements and awards; and,
 - Or property derived from excluded property.

Question 1

Sally and Don meet in 2008 and commence cohabitation in 2009

Marry in June 2014

Separate in 2015

When they entered the relationship in 2009

Sally had:

House worth \$265,000 with a mortgage of \$200,000

In September 2014 Sally receives \$100,000 inheritance:

\$25,000 onto the mortgage

\$75,000 clearing off the couples' credit card debt

\$10,000 on a cruise

\$15,000 on a roof on the house

Don:

Business worth according to his 2009 income tax -(\$10,000)

In 2012 Don had a personal injury settlement of \$50,000 received 2013 with which he bought \$50,000 RRSPs.

At the time of their separation in 2015

House is worth \$500,000/mortgage \$50,000 - equity \$450,000

RRSPs worth \$60,000 (from seed money of Don's personal injury settlement + minor additions each year)

Each have a vehicle worth approximately equal

Small credit card debt

Don's business is worth about \$600,000 (there has been a valuation)

How would this family divide their assets as per the FLAct

Property Division under the Family Law Act

- ▶ Section 92 provides that Parties can make **Agreements** respecting property division, prenuptial or separation Agreements for example.
- ▶ Section 93 provides that such **Agreements** can be set aside, either by further Agreement or by court order.
- ▶ New threshold for setting aside Agreements is "significantly unfair".

Question 2 - will the agreement be upheld in court

Facts of couple

Bob (45) and Stephen (44) make a Separation Agreement

Lived together 7 years/married 4

No children

The parties own 2 properties both bought during marriage:

Home in Nanaimo (\$550,000- \$250,000 mortgage = \$100,000 net)

Vacation property Mt. Washington - net worth \$150,000

RRSPs: Bob \$85,000

Stephen \$82,000

Bob has delivered to Stephen his belongings and approximately $\frac{1}{2}$ of the chattels that they purchased together.

Bob has a vehicle worth \$26,000 with a loan still owing \$15,000 - \$300 per month

Stephen has a vehicle worth about \$5,000

They have 4 credit cards 3 in Bob's name and 1 in Stephen's name. The 3 in Bob's name equal \$7,500 and Stephen's card is \$5,340. They are clearly family debt

Bob is a teacher and earns about \$75,000 per year

Stephen is a community support worker and earns about \$40,000

They both have pensions through their work though Bob's pension is worth more because his job pays better.

Agreement

The Agreement is signed 2 weeks after separation. Bob had wanted to separate for about 6 months and had been leading up to separation for weeks by "dropping hints".

For Stephen the separation came out of the blue. He is emotionally devastated and on medication.

The Agreement is written by a lawyer retained by Bob.

Stephen has been asked to get Independent Legal Advice but has chosen not to.

The agreement spells out

- Bob keeps the family home and will take Stephen off the mortgage

- Stephen keeps the vacation property

- Each will keep the vehicle in their possession

- Each will keep the belongings that they have in their possession

- Each sign off the other's work pension and RRSPs

- Each sign off the other's CPP

- Each sign off spousal support

- Each will keep the other on their medical and dental until they are no longer able per their work's medical and dental plan

- Bob will keep his credit card debt and car debt

- Stephen will keep his credit card debt

Who is your Parent

- ▶ Section 26: **no assisted reproduction** - parents are the birth mother and biological father.
 - ▶ Section 27: **assisted reproduction**, but not a surrogacy agreement - parents are the birth mother and her spouse.
 - ▶ Section 24: **donor is not a parent** simply by reason of donation, and **must not** be declared by the court to be a parent simply by reason of donation.
 - ▶ Section 28: person can be **declared a parent after death**, and also provides that the deceased spouse would be a parent.
 - ▶ Section 29: surrogacy agreements, in which the birth mother is not a parent.
 - ▶ Section 30: gives the court the power to declare an individual a parent.
-
1. Charles donates his sperm to his sister so that she and her husband can conceive a child through DI. There is a donor agreement signed before conception. Mary and Tom separate, Tom gets parenting responsibility of the child. He sues Charles for child support as a parent.
 2. Rachel and Francis want to have a baby and they have asked their close friend Henry to donate sperm. They want to acknowledge Henry on the birth certificate as a father to the baby but they also want to be mothers on the birth certificate can they do it. If so what steps do they have to take.
 3. How many parents can be on a birth certificate

Why is it important to be a Guardian?

- ▶ Only a guardian can have **Parenting Time** or exercise **Parenting Responsibilities**.
- ▶ All those who are not guardians have **CONTACT** with the child.
- ▶ **Parenting Responsibilities** (section 41) include, but are not limited to, such things as:
 - making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - making decisions respecting where the child will reside;
 - making decisions respecting with whom the child will live and associate;
 - making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
 - subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - giving, refusing or withdrawing consent for the child, if consent is required;
 - receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - requesting and receiving from third parties health, education or other information respecting the child;
 - subject to any applicable provincial legislation, starting, defending, compromising or settling any proceeding relating to the child, and identifying, advancing and protecting the child's legal and financial interests;
 - exercising any other responsibilities reasonably necessary to nurture the child's development.

Best interests of the Child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the **child's health and emotional well-being**;
- (b) the **child's views**, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and **significant persons in the child's life**;
- (d) the **history of the child's care**;
- (e) the **child's need for stability**, given the child's age and stage of development;
- (f) the **ability of each person who is a guardian** or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the **impact of any family violence** on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the **actions of a person responsible for family violence** indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would **require the child's guardians to cooperate** on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any **civil or criminal proceeding relevant** to the child's safety, security or well-being.

Relocation

- ▶ A guardian wishing to relocate, either themselves or a child, or themselves and a child, must give 60 days written notice to every other guardian of the child and any person who has a right to contact with the child prior to relocating (section 66).
- ▶ Parties are expected to co-operate to work out issues arising from the relocation (section 67).
- ▶ Unless a guardian objects within 30 days of receiving notice by formally filing an objection with the court, the relocation can go ahead on the date specified in the notice (section 68).
- ▶ An individual with only the right to contact with a child cannot object under section 68, but (perhaps) pursuant to section 67(2) can apply to the court under section 59 or 60 to stop the relocation if it will effect their contact with the child.

If there is an objection – the test

- ▶ Which test the court will employ depends on whether the guardians have substantially equal parenting time:
 - If substantially equal, the onus is on the relocating guardian to show why it is in the child's best interests to relocate.
 - If not substantially equal, the onus is on the opposing guardian to show why the move is not in the child's best interests.

The Edmonton move:

Betty and Tom were married for 10 years.

They lived in Edmonton for 2 of those 10 years before moving to Nanaimo so that Tom could work in the forest industry

Betty retrained when she got to Nanaimo and has become an editor for the Nanaimo newspaper

Betty earns \$50,000 per year as an editor - she cannot expect to earn much more in the next 10 years as she is at the high end of her skill level

Tom earns about \$120,000 per year as a faller. Unless something drastic happens re: fire season his job prospects look good in Nanaimo

Both sets of grandparents live in Edmonton

The parties have no family here but have a close knit group of friends that revolve around their church.

Betty now finds it hard to go to church as she feels that most of the people have "sided" with Tom.

Todd is 5. He lives primary with his Mom and sees his Dad every second weekend from Friday at 5:00 p.m. until Sunday at 4:00 p.m. He also takes Todd to his soccer practices and games as both parents agree that he is the athletic one. Betty is more interested in school so she attends parent teacher meetings etc and reports to Tom.

Todd has completed kindergarten at Pauline Haarer and is scheduled to attend Grade 1 there. He is taking to the French language well and is almost fluent now which both parents put down to the fact that his nanny is Francophone. Both want their son in French Immersion.

Todd is in swimming lessons and soccer

Betty has received a job offer from a large newspaper in Edmonton. Her income will be about the same but there is room for advancement.

Betty also has relatives in Edmonton and the family plan had always to move back to Edmonton after living her about 5 years to make some money. She says it has been over 5 years now.

Betty is lonely and feels that she needs support.

Tom is adamant that Todd stay in Nanaimo. He is more than willing to pay child support - he has never missed a payment. He will even help Betty pay for her and Todd to go to Edmonton twice a year but he will not agree to the move. He feels that it will hurt his relationship with his son.

Betty is willing to reduce Tom's child support so as to free up income to pay for visit costs and she will drive $\frac{1}{2}$ way to facilitate pick up and drop off. Further, she is willing to divide the summer between them so that Tom will have Todd for an entire month over the summer. Basically, Betty is willing to try to change the time that Todd and Tom have together so that they have the same number of days but in a more compressed period of time.

Question:

1. Which test
2. What are Betty's arguments
3. What are Tom's arguments
4. Who will succeed

Whether to make protection order

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

(a) any history of family violence by the family member against whom the order is to be made;

(b) whether any family violence is **repetitive or escalating**;

(c) whether any psychological or emotional abuse constitutes, or is evidence of, a **pattern** of coercive and controlling behaviour directed at the at-risk family member;

(d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any **recent separation or intention to separate**;

(e) any circumstance of the family member against whom the order is to be made that **may increase the risk of family violence** by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member's **perception of risks to his or her own safety** and security;

(g) any **circumstance that may increase the at-risk family member's vulnerability**, including pregnancy, age, family circumstances, health or economic dependence.

2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account

(a) the history of, and potential for, family violence,

(b) the extent of any injuries or harm suffered, and

(c) the respective vulnerability of the applicants.

(3) For the purposes of subsection (2), the **person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made**.

(4) The court may make an order under this Part regardless of whether any of the following circumstances exist:

- (a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;
- (b) the family member against whom the order is to be made is temporarily absent from the residence;
- (c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;
- (d) criminal charges have been or may be laid against the family member against whom the order is to be made;
- (e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;
- (f) an order under section 225 [orders restricting communications] has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

If child a family member

185 If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

- (a) whether the child may be exposed to family violence if an order under this Part is not made, and
- (b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

Conduct Orders

- ▶ The Act provides for Conduct Orders that a party or parties must:
 - Attend counselling;
 - Attend a dispute resolution session;
 - Follow an existing court order;
 - Stop communicating with an ex-spouse or someone else;
 - Make payments toward a family residence or other family property;
 - Report to the court or some other person;
 - "Do or do not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222".

Would a protection order be made?

1. Lily and Bill broke up 2 weeks ago days ago. Since that time Bill has:
 - a. Attended at Lily's work 3 days running this past week to demand she talk to him about outstanding debts that they share;
 - b. Driven to her house and knocked on her door at 8:00 p.m. this past Wednesday. She says to harass her, he says to provide her with court documents that he had been served that afternoon by the bank showing the house was in foreclosure.
 - c. Attended at their son's school for hot dog day on Friday, causing Lily to leave. This was the first time that he had attended the school during the day. He always said that he was too busy at work
 - d. Told her the day that they separated that she would not get a dime from him and if he goes down so would she.
 - e. He told her that he has taken stress leave from work and that if he gets EI it will not be for a few weeks so she can't expect to get any money.
 - f. When she said, "Well if your so stressed you probably won't be able to take care of our son so you'll just have to have day time visits

He said, "If you think you're stressed now just wait till see how you'll feel if you try to keep my son away from me".

- a. Do you think that this scenario would warrant a protection order?
- b. If so what type of family violence is evident in this scenario
- c. What if any orders could be made.

2. Terry and Chris broke up a 2 months ago. Rose who is 12 stayed in the family home with Chris. Terry's Mom and Dad (grandparents also live in the family home).
 - a. Terry has an alcohol problem and when he is drunk he becomes very abusive;
 - b. Terry broke Chris' jaw 5 years ago and went to jail for 2 months.
 - c. During the time that he was in jail Terry went to anger management counseling and continued that counseling when he was released.
 - d. Terry was clean and sober for 4 $\frac{1}{2}$ years until 6 months ago when his brother died. He started to drink at the funeral and has not stopped drinking since.
 - e. As before Terry is an angry drunk.

First separation:

- a. He had not hit Chris or Rose but he had punched holes in the wall, yelled at Rose and Chris and Chris finally called the police when Terry threatened to burn the house down.
- b. The police incident took place 1 month ago, Rose and Chris went to Haven House where they stayed for 6 nights and then went home. Terry was there with his mother and father. They agreed to try again. Terry agreed to go to AA and said that if he started to drink again he would leave the home and sign over everything to Chris.

Second separation

- a. Three days ago Terry got drunk, he refused to leave the home there was a fight the police were called. During the fight his father was pushed into a wall and they are worried that he has a broken rib.
- b. Chris, Rose and the grandparents left the family home and are currently residing with a friend.

- c. Chris has found out that Terry has taken her off all of the credit cards and the joint bank account. She was always the secondary bread earner and she has no credit in her name.
- d. Terry's mother and father has very little money as they are pensioners and are very frightened of living in the house but have nowhere to go.
- e. Terry has been charged with assault of his father and there are no contact provisions on his bail conditions including not to contact his father.
- f. Terry is very sorry and has sent flowers, told Chris, Rose and his Mom and Dad that he has been sober since the incident and he is waiting to go to rehab.
- g. He refuses to put Chris back on the bank accounts though because "she likes to spend money" and he doesn't want her "ruining them financially" while he is away.

1. What type of family violence is evident in this scenario
2. Does it matter that Chris took Terry back
3. Does it matter that Chris and Rose are not residing in the family home at present
4. Does it matter that the police have charged Terry and there is a no contact provision stopping him from contacting the father.
5. Does it matter that Terry is truly sorry.
6. Who would you be seeking the protection order for
7. Can you do anything to help the financial circumstance of Rose and Chris

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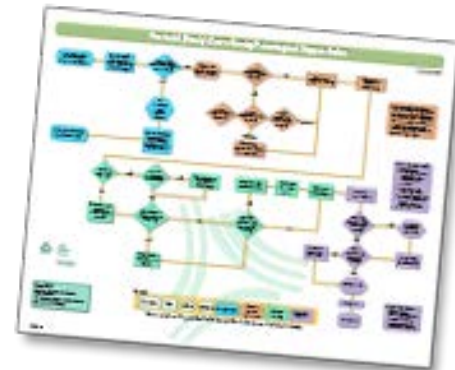
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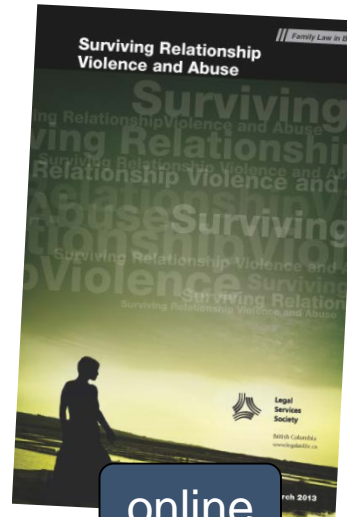


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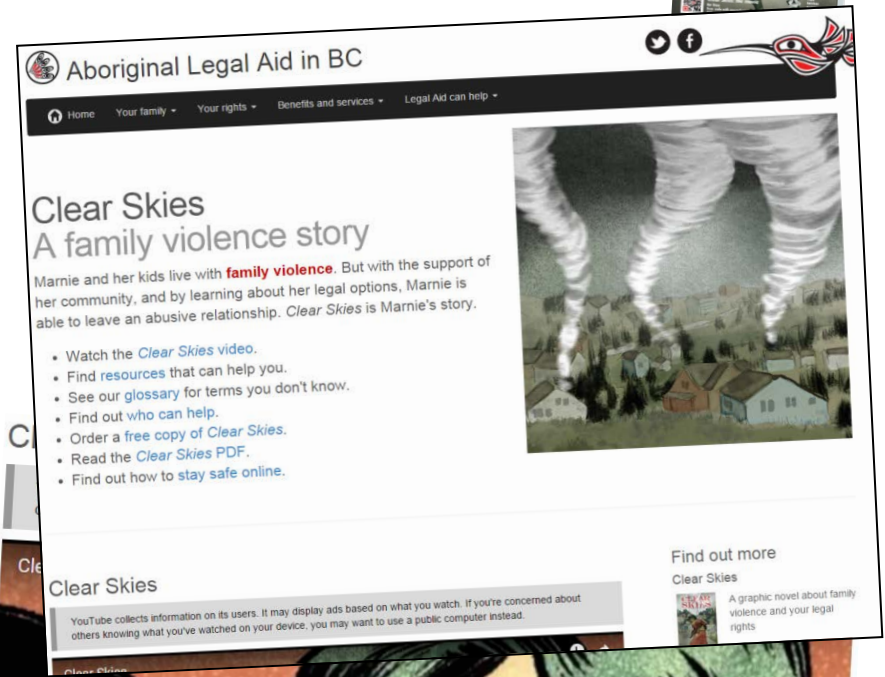
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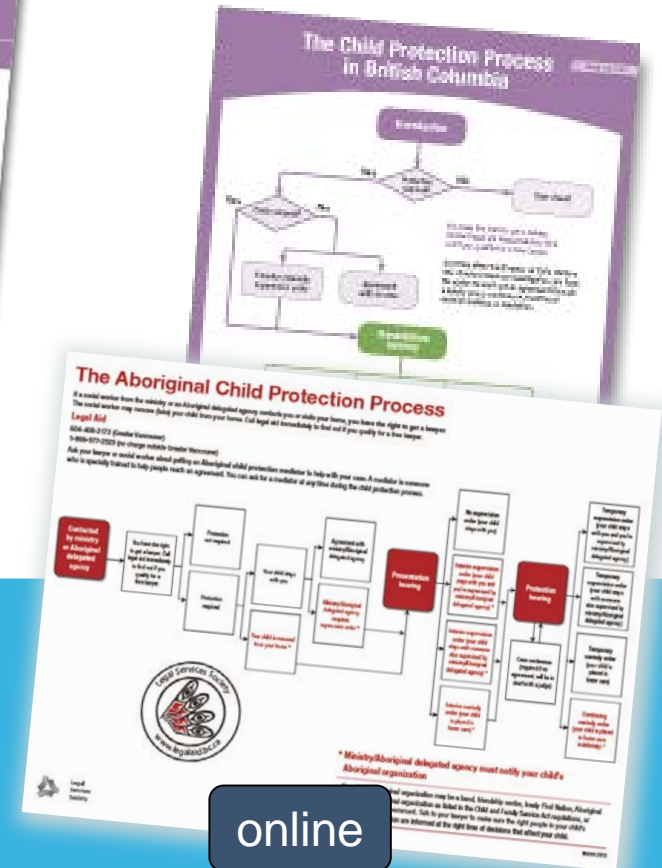


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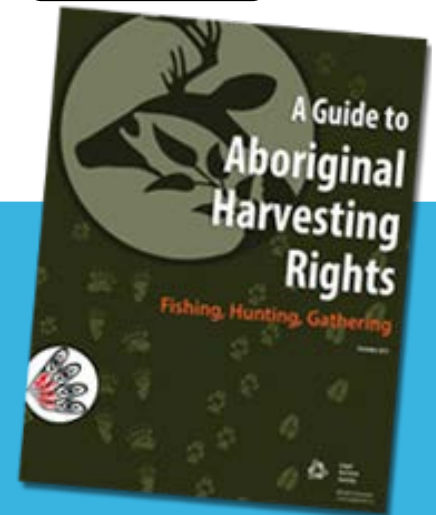
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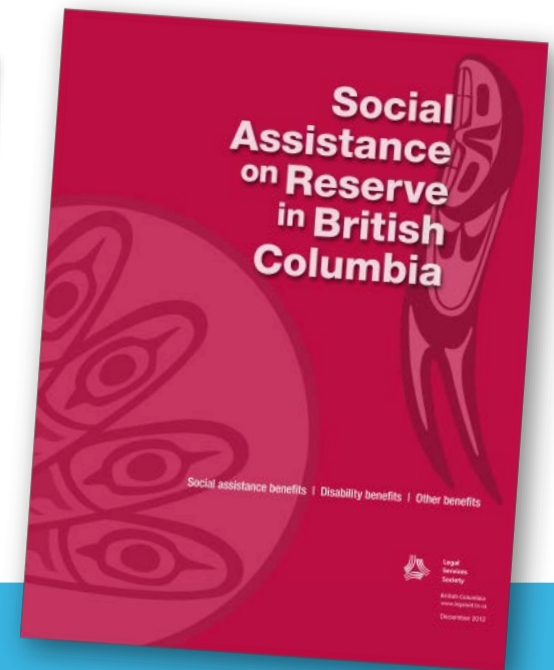


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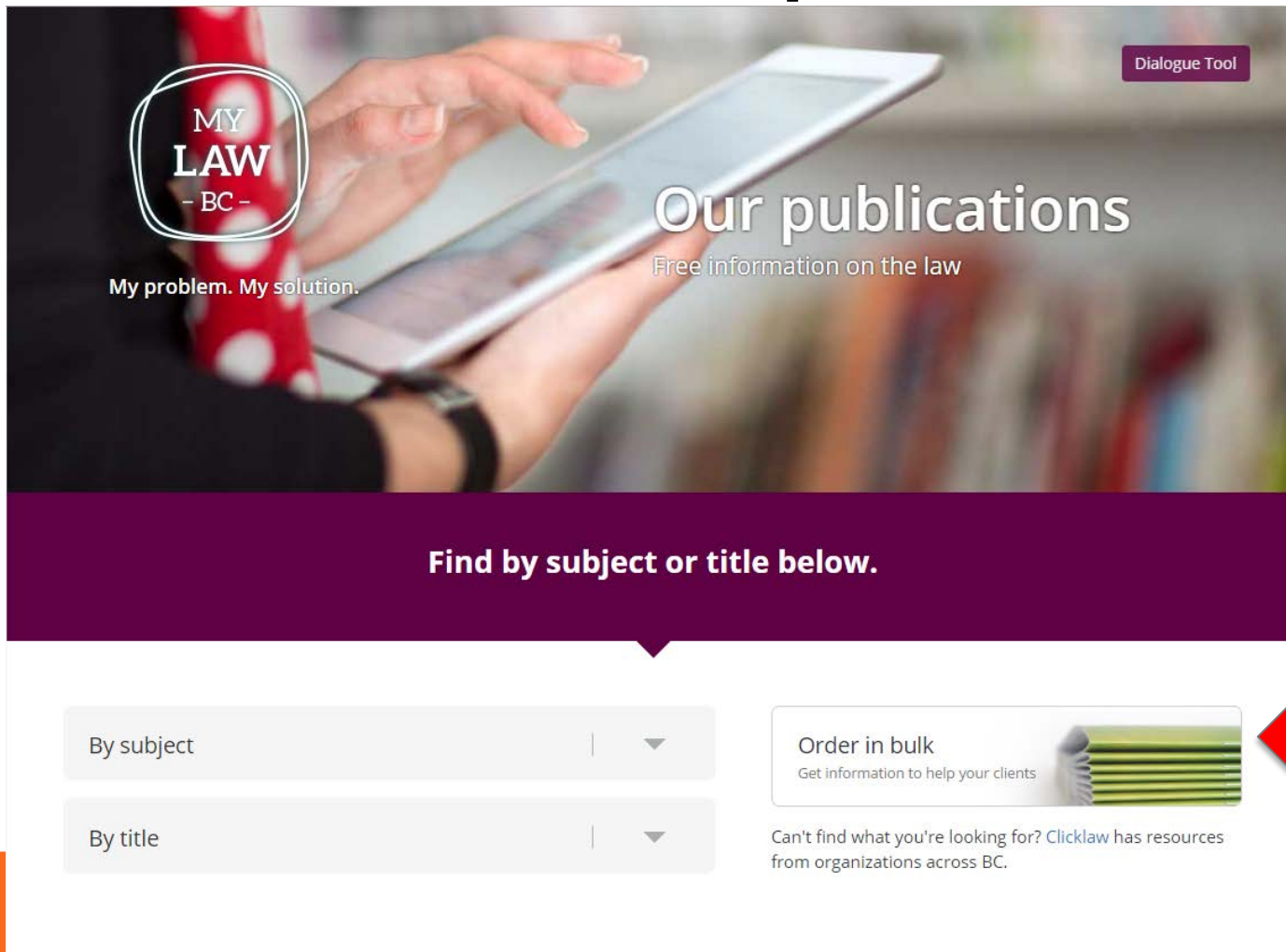
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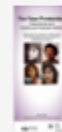
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Explains how and when people can apply for peace bonds and family law protection orders, and what the differences are between them. This publication is for women who need protection from violent partners or former partners, but the information applies to anyone in an abusive relationship. Updated to conform to the new BC Family Law Act (March 18, 2013).

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[Legal Services Society, Abuse > Family Violence](#)

Publish Date:

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Format:

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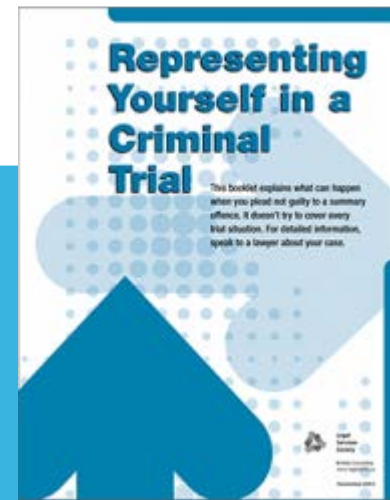
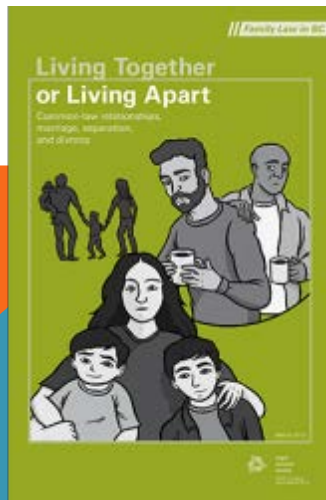
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www.crownpub.bc.ca

The LSS Game Show

Q 1: WHICH PUBLICATION HAD THE MOST ORDERS IN NANAIMO LAST YEAR?

- A. Living Together or Living Apart
- B. Sponsorship Breakdown
- C. For Your Protection
- D. Representing Yourself in a Criminal Trial



**Q 2: HOW MANY PUBLICATIONS WERE
ORDERED BY NANAIMO LAST YEAR?**

A. 1,865

B. 2,445

C. 2,875

D. 3,451



Q3: PLEI IS AN ACRONYM FOR:


A. Public Law Education Institute

B. People for Legal Education Innovation

C. Pelvic and Lower Extremity Injury

D. Public Legal Education and Information





Providing legal information
for British Columbians

SOCIAL MEDIA & WEBSITES

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PLEI websites from LSS

1. Family Law Website

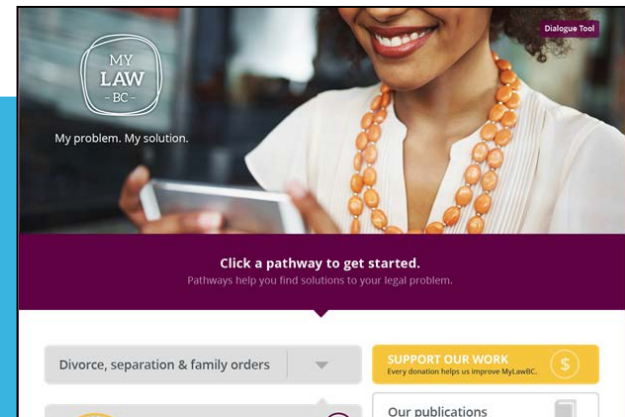
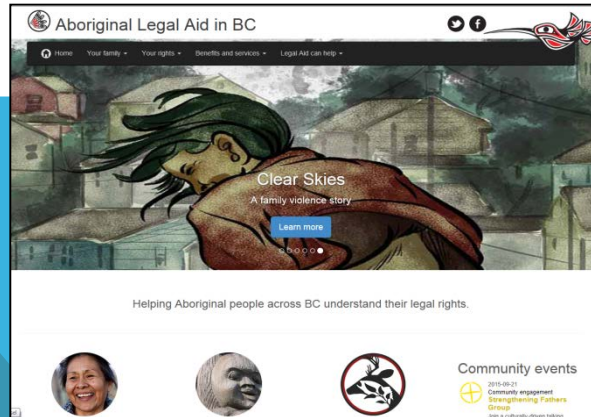
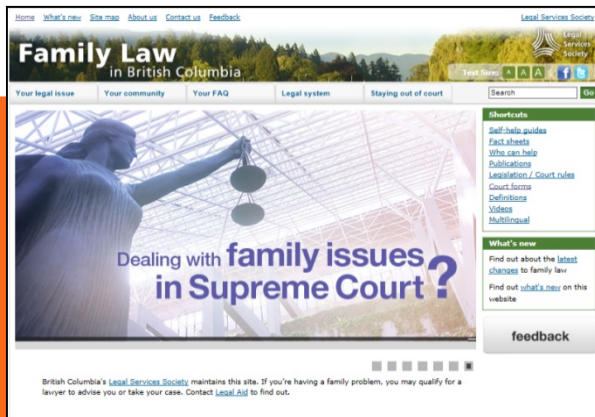
familylaw.lss.bc.ca

2. Aboriginal Legal Aid in BC

aboriginal.legalaid.bc.ca

3. MyLawBC

mylawbc.com



Family Law

in British Columbia



Text Size:



FAMILY LAW WEBSITE

WWW.FAMILYLAW.LSS.BC.CA

Family Law

in British Columbia



Text Size: [A](#) [A](#) [A](#)



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Dealing with **family issues**
in Supreme Court?

British Columbia's [Legal Services Society](#) maintains this site. If you're having a family problem, you may qualify for a lawyer to advise you or take your case. Contact [Legal Aid](#) to find out.

How to represent yourself in a family law trial

Supreme Court

- Fact sheets
- Court forms
- Guides
- Videos



Fact sheets

[Making an offer to settle](#)

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Your home on reserve

The laws have changed. If you break up with your partner or your partner dies, you may be able to stay in your home.

[Learn more](#)

Helping Aboriginal people across BC understand their legal rights.



Is this site for you?

This website is for anyone who identifies themselves as **Aboriginal**.

[Learn more »](#)

Do you know about First Nations Court?

There are now four First Nations Courts in BC. You may be able to have your



Find out more in a publication

We have free publications. See if we have one that's right for you

Community events



2015-10-15
Conference

**Accommodating FASD:
Strategies, Skills &
Support 2015 Conference**

For front-line and primary care professionals working in Vancouver's Downtown Eastside

[Read more »](#)

Vancouver Aboriginal Friendship Centre, 1607 East Hastings Street
Vancouver, BC



Your family's rights

The ministry and your kids

If a social worker from the [Ministry of Children and Family Development](#) or an [Aboriginal delegated agency](#) contacts you or visits your home, this means that they think your child might be at risk and are looking into it. This is part of the **child protection** process. (This is also called an **investigation**.) An **investigation** is when a social worker checks if your child is safe. It may result in the social worker **taking your child from your home**.

Your child is placed in foster care.

You, your family, and your community have rights. The law says the ministry should respect your child's family ties and **Aboriginal** identity.



What is child protection?

BC law says that if the ministry gets a report about your child, the ministry (or an [Aboriginal delegated agency](#)) must look into it. If the ministry believes your child is at risk, they must:

- go to court to get an [order that supervises your child's care](#), or
- if necessary, take your child from your home.

This process is called **child protection**.

Child protection and Aboriginal families

BC law also says that:

- Aboriginal cultural ties are very important to the well-being of Aboriginal children.

Find out more

Understanding Aboriginal Child Protection/Removal Matters



Explains what Aboriginal parents can do during a child protection investigation

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Family Homes on Reserve and Matrimonial Interests or Rights Act

In force December 16, 2014

by Ardith Walkem and Halie Bruce
(Cedar and Sage Law)



Why might family law processes for Indigenous Peoples may be different

- Location of property (on reserve)
- Indian status of one or more parties
- Treaty (lands or laws)
- Need to account for Indigenous heritage of children
- Indigenous Laws



Prior to the Act:

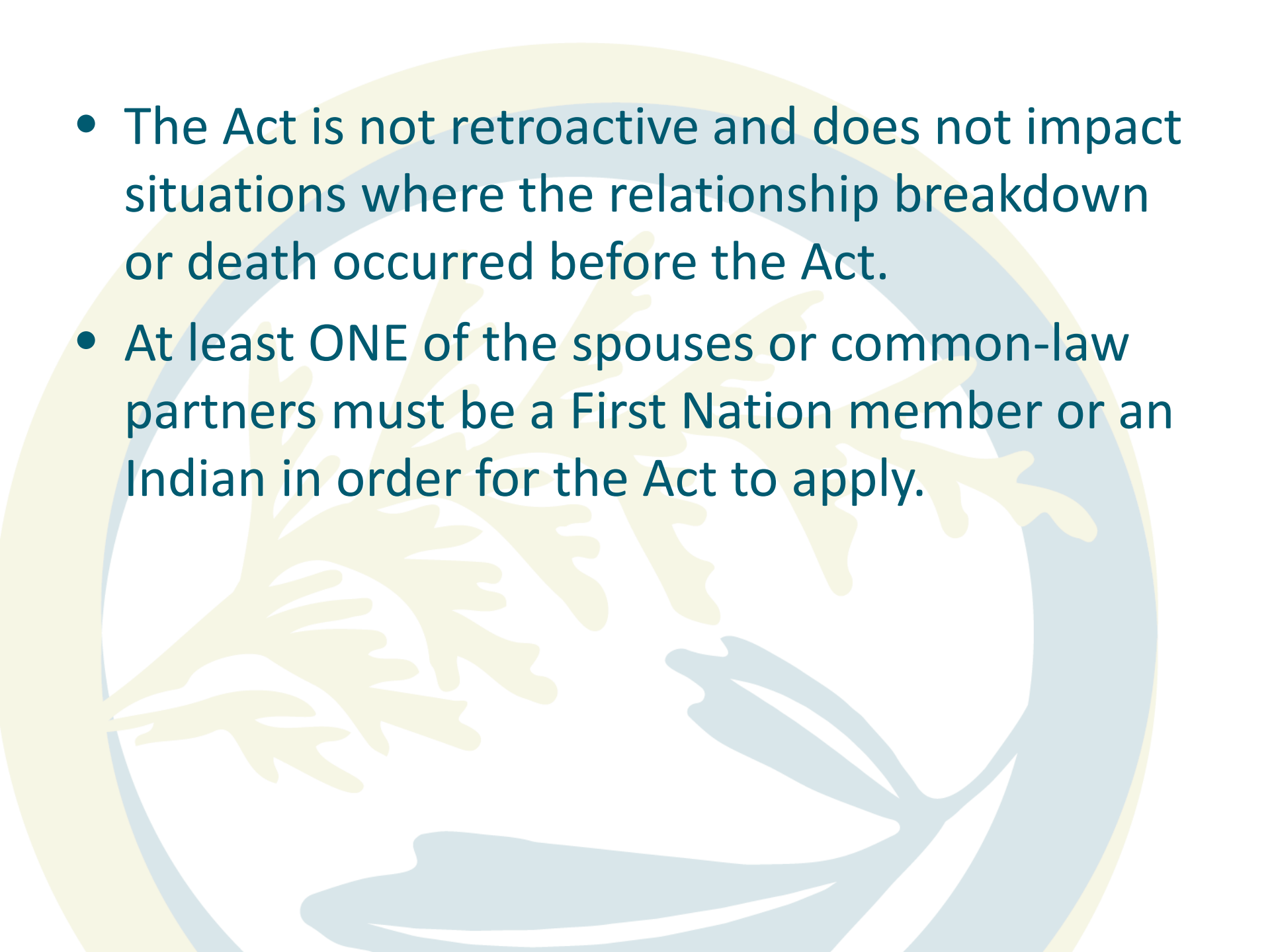
- Indigenous laws regarding matrimonial property were not recognized.
- Provincial laws regarding matrimonial property did not apply on reserve.
- Exclusion intended to preserve a land base for the use and benefit of Indigenous Peoples.

Result:

- No recognized law that applied to determine rights to, or in, matrimonial property on reserve upon breakdown of a relationship, or rights of non-members upon death or relationship breakdown.
- Derickson v. Derickson
- Considerable hardship - primarily to Indigenous women and children.

Family Homes on Reserves and Matrimonial Interests Act applies:

- In the event of a relationship breakdown or death of one of the partners in a marriage or common law relationship,
- Where at least one of the spouses is a status Indian or member of a First Nation,
- To the matrimonial home, and other real property interests on reserve, acquired during the course of (or in contemplation of) their relationship.

- 
- The Act is not retroactive and does not impact situations where the relationship breakdown or death occurred before the Act.
 - At least ONE of the spouses or common-law partners must be a First Nation member or an Indian in order for the Act to apply.

Under the Act, First Nations can:

- 1) Pass their own matrimonial property law; or
- 2) Provisional federal rules will apply.

First Nations under the *First Nations Land Management Act* or with separate self-government agreements may be subject to different rules or timelines.

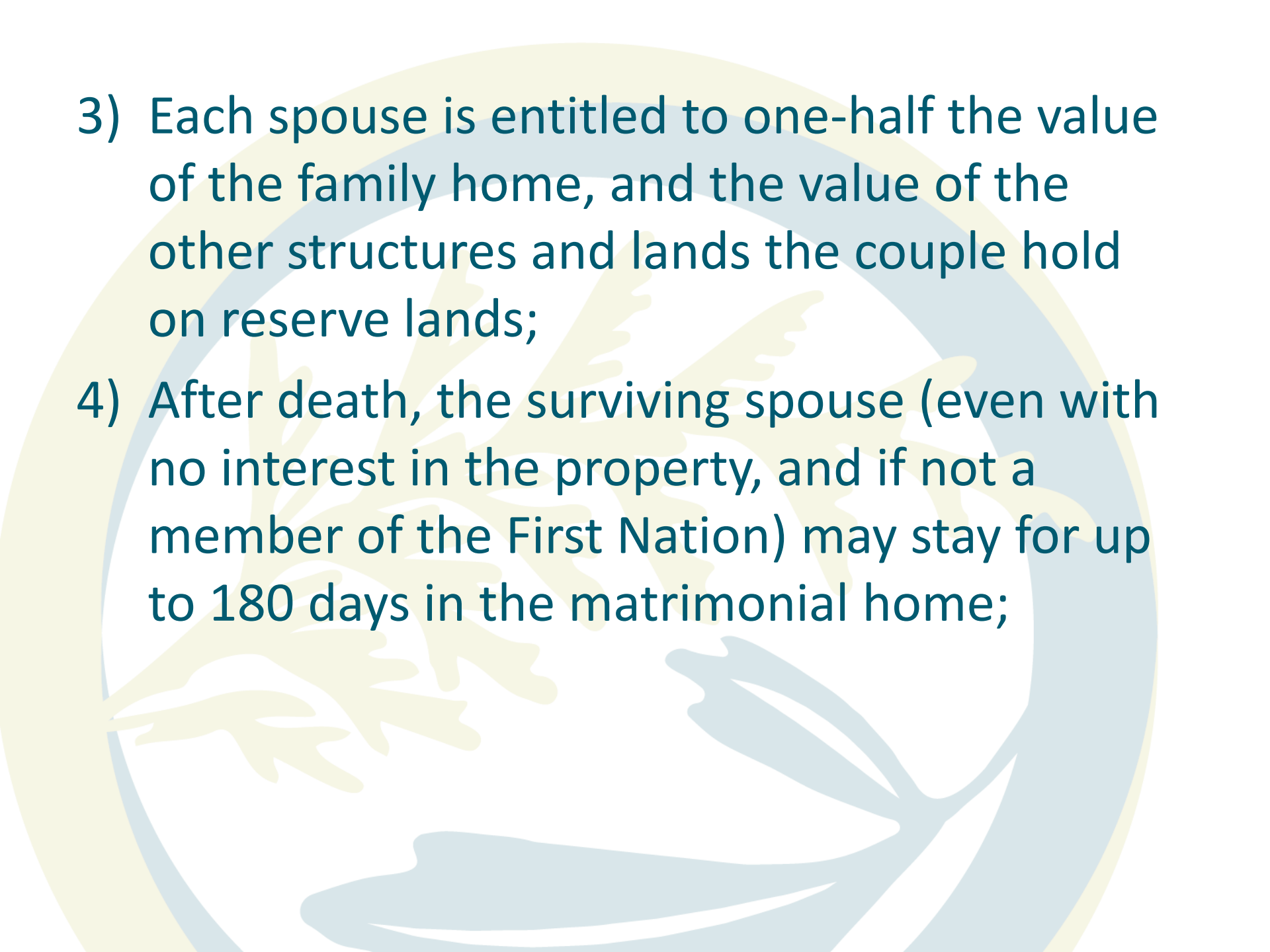
Provisional Federal Rules

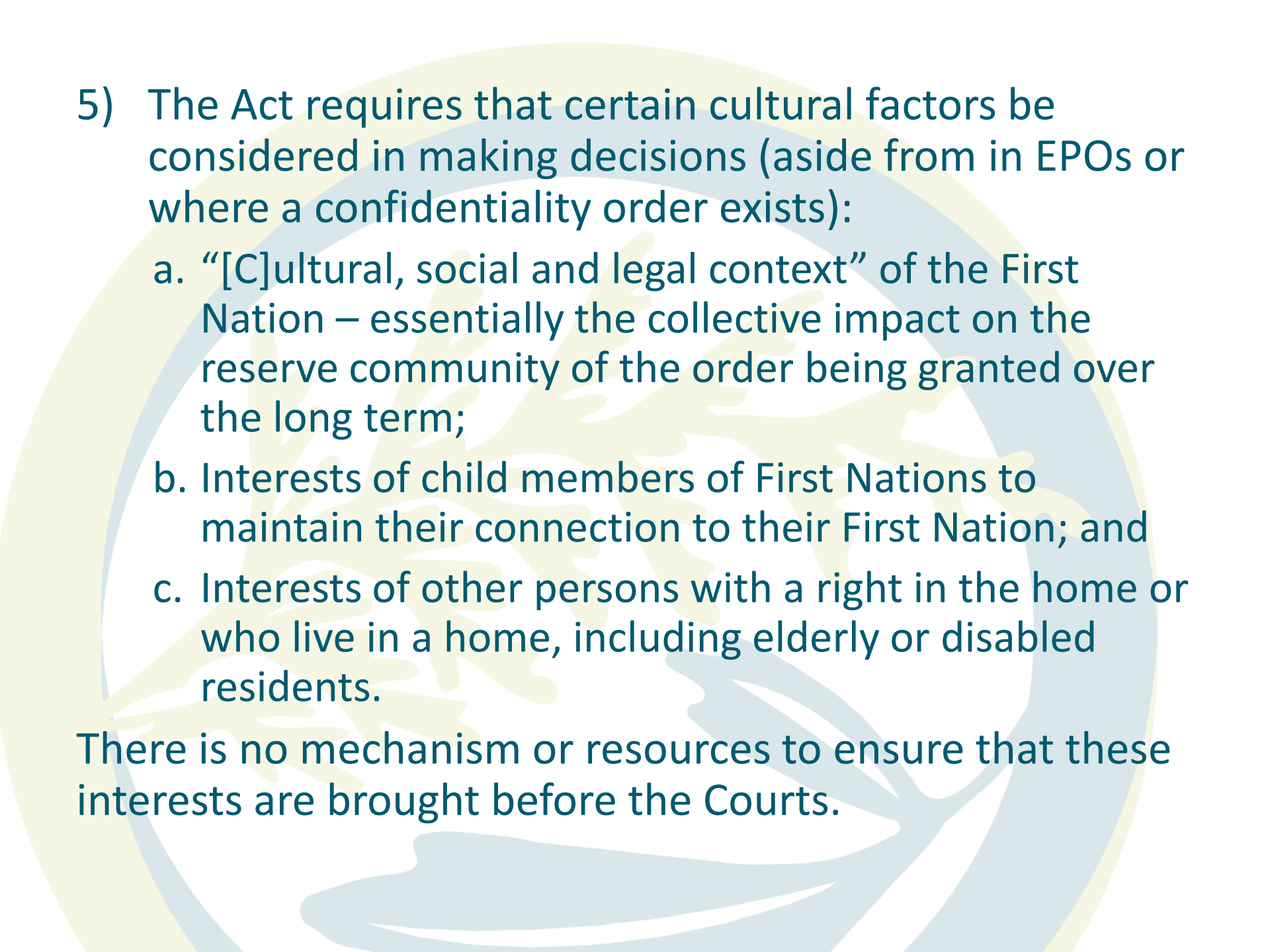
Apply unless or until a First Nation passes its own law



General

- 1) A spouse or common law partner will not be able to sell or otherwise encumber (for example: mortgage) an on-reserve family home without the written consent of the other spouse;
- 2) One spouse cannot block the other spouse or from their on-reserve family home – it does not matter if the other spouse is not a status Indian or member of the First Nation;

- 
- 3) Each spouse is entitled to one-half the value of the family home, and the value of the other structures and lands the couple hold on reserve lands;
 - 4) After death, the surviving spouse (even with no interest in the property, and if not a member of the First Nation) may stay for up to 180 days in the matrimonial home;

- 
- A background graphic featuring a stylized globe with a blue and yellow color scheme. Overlaid on the globe are several hands in yellow and blue, reaching out and holding each other, symbolizing global unity and support.
- 5) The Act requires that certain cultural factors be considered in making decisions (aside from in EPOs or where a confidentiality order exists):
- a. “[C]ultural, social and legal context” of the First Nation – essentially the collective impact on the reserve community of the order being granted over the long term;
 - b. Interests of child members of First Nations to maintain their connection to their First Nation; and
 - c. Interests of other persons with a right in the home or who live in a home, including elderly or disabled residents.

There is no mechanism or resources to ensure that these interests are brought before the Courts.

Emergency Protection Order (EPO)

An **Emergency Protection Order (EPO)** allows a court to order the exclusive occupation of the family home for up to 90 days (time can be extended) to either spouse, whether or not they are a member of the First Nation.

- A party can make an application for an EPO, without other spouse knowing or making submissions.

Emergency Protection Order (EPO)

can:

- 1) Grant the applicant exclusive occupation and access to the home
- 2) Require spouse and others specified to vacate at a time the judge orders, and prohibiting re-entry
- 3) Give instructions for a Peace Officer to remove a person and keep the person away from the home
- 4) Any other necessary provisions to protect the family at risk

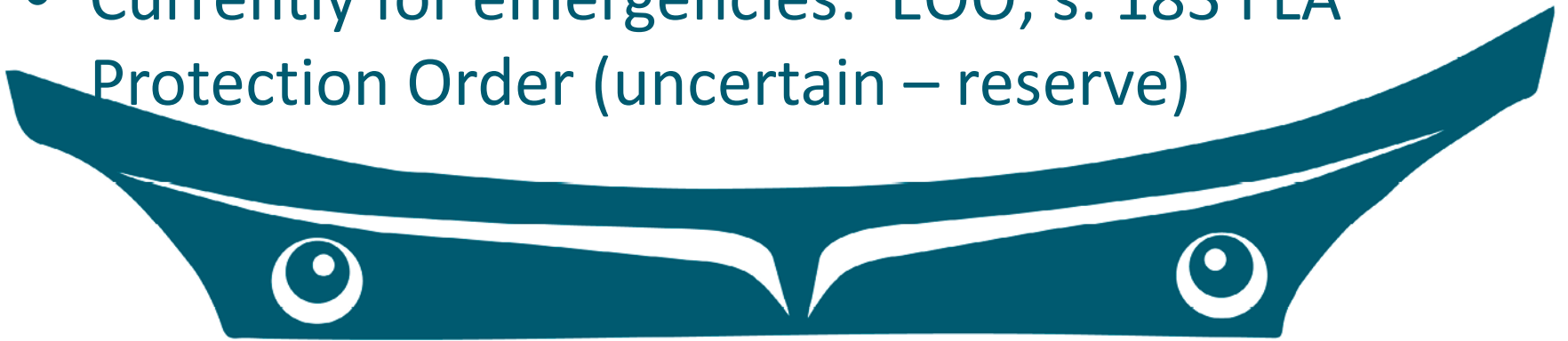
In deciding whether to grant an EPO, the judge should consider:

- History and nature of family violence, and risk of immediate danger;
- Best interests of any children involved (including their right to maintain their connection to the First Nation that they are part of);
- Interests of any elderly or disabled persons who reside in the family home, or others who have an interest in the home;
- Period of residence on the reserve; and
- Exceptional circumstances that require removing a person other than the applicant's spouse.

Any person named in the EPO can appeal. An order can extend beyond the initial 90-day period. The Court decides confidentiality issues and whether the information on which the order was granted will be made public.

Generally – BC Supreme Court Jurisdiction

- Justices of the Peace or designated judges of the provincial court sometimes (EPO) under the Act
- Reference to having matters referred to Provincial court – BC has said it will not appoint provincial judges to do the review
- Currently for emergencies: EOO; s. 183 FLA Protection Order (uncertain – reserve)

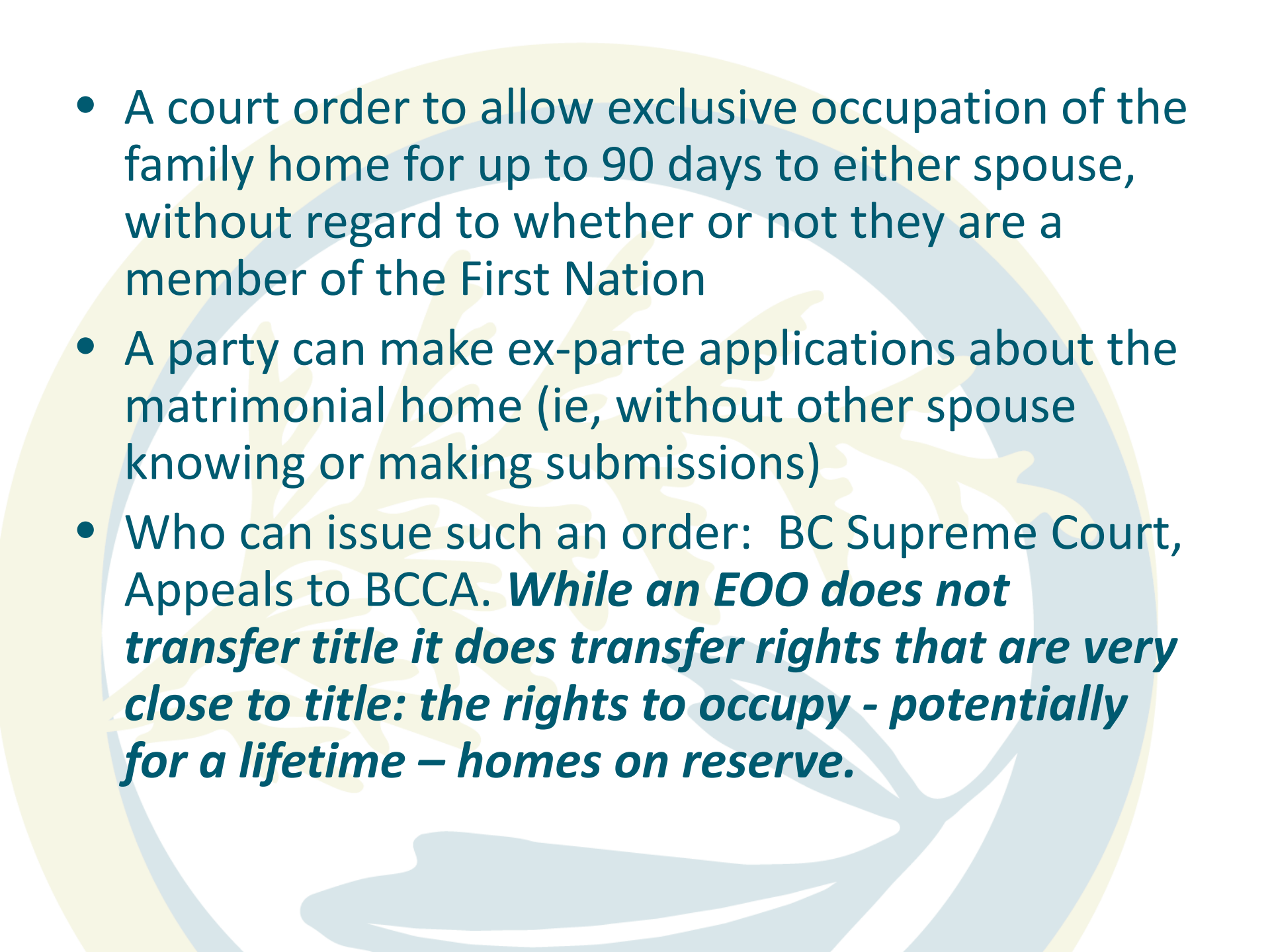


Exclusive Occupation Order (EOO)

A court can make an **exclusive occupation order (EOO)** for the family home to one spouse upon the death of a spouse or breakdown of a relationship.

An EOO could:

- Require a spouse and other persons to vacate the matrimonial home;
- order a spouse to make payments to the other spouse toward the cost of accommodation;
- require one spouse to preserve the condition of the home (or contribute toward repairs and maintenance); or,
- order a spouse to make payment of all or part of the repair and maintenance of the home.

- 
- A court order to allow exclusive occupation of the family home for up to 90 days to either spouse, without regard to whether or not they are a member of the First Nation
 - A party can make ex-parte applications about the matrimonial home (ie, without other spouse knowing or making submissions)
 - Who can issue such an order: BC Supreme Court, Appeals to BCCA. ***While an EOO does not transfer title it does transfer rights that are very close to title: the rights to occupy - potentially for a lifetime – homes on reserve.***

Exclusive Occupation Order:

A court can order exclusive occupation of, and access to the family home to one spouse.

When can this judge make such an order?

- Death of a spouse [An Exclusive Occupation Order does NOT change who holds an interest or right in the home or prevent an Executor/Administrator from transferring this interest.]
- Break-up of a conjugal relationship
- For removal of disruptive person(s)

What does the judge consider in deciding to grant an EOO?

- Best interests of any children involved
- Terms of any agreement between the spouses
- Terms of any wills
- Medical condition of the survivor
- Financial situation and/or medical issues of spouses
- Any existing orders made on the matter
- History of any family violence or psychological abuse
- Any exceptional circumstances
- Collective interests of the First Nation (it is not clear how this will get before the Court in every instance though a First Nation has a right to be notified of the proceeding)
- Interests of other persons with a right in the home or who live in the home, including elderly or disabled occupants (again it is not clear how this information will get before the Court in each instance)

An Exclusive Occupation Order could:

- 1) Require spouse and others specified to vacate at a time the judge orders, and prohibiting re-entry
- 2) Preserve the condition of the home
- 3) Make payments to the other spouse toward the cost of other accommodation
- 4) Payment of all or part of the repair and maintenance of the home

Revoking an Exclusive Occupation Order:

On Application an EOO can be revoked or varied, only if there are changes in circumstances, and the other party must be given notice of the application.

Exclusive Occupation Order could include:

- Conditions to preserving the condition of the home;
- Requiring someone to vacate the home and not re-enter it;
- Having a Peace Officer deliver notice to certain persons; or
- Having the executor of the will or the administrator of the estate pay for repairs and maintenance.

Notice to First Nation Council

- For any order other than an EPO, or order where a Court has granted a Confidentiality Order, an applicant must send a copy to the First Nation.
- The Court must allow the First Nation to make representation at the hearing about the cultural, social and legal context surrounding the application and to present the community's views about whether the order should be made.
- There is no direction in the Act for how these submissions must be considered or weighed in decision making
- If the First Nation does not appear, there is no process or factors set out for how the Court must consider the collective interests of the First Nation.

Notice to First Nation Council required:

- No notice: where there is an Emergency Protection Order or there is a Confidentiality Order [Section 19: The Court will weigh the balance between making the information public and the need to protect affected parties, especially children.]
- The successful applicant must send a copy of the Court Order to the First Nation Council

Division of Value on Breakdown:

- Each spouse is entitled to one half of the value of the family home; and, the evaluation of other structures and lands they hold on reserve, considering the appreciation in value during the time of the relationship, and the difference in payments each made for maintenance/improvements.
- Assessed according to what a buyer would reasonably pay minus debts/liabilities or any agreement between the parties.

Division of Value – Relationship Breakdown

Courts may make changes...

...if it is considered unconscionable, given:

- 1) needs of caring for children
- 2) the debts or liabilities of each spouse
- 3) a significant change in value of the interests
- 4) other pertinent factors

Division of Value – Relationship Breakdown

Can the Order be revoked?

On Application it can be revoked or varied...

- ... only if there are changes in circumstances, and
- ... the other party must be given notice

Division of Value – Death of a Spouse

Surviving **First Nation member spouse** is entitled, on application, to:

- $\frac{1}{2}$ of the value of the interest of the deceased in the family home, plus
- $\frac{1}{2}$ of the value of the interest of the deceased in the land on which the family home is situated, plus
- Amount = $\frac{1}{2}$ of the value of interest of the deceased of other on-reserve structures and lands

Division of Value – Death of a Spouse

Surviving **non-First Nation member spouse** is entitled, on application, to:

- $\frac{1}{2}$ of the value of the interest of the deceased in the family home, plus
- Amount = $\frac{1}{2}$ of the value of interest of the deceased of other on-reserve structures (NOT land), plus
- The greater of: $\frac{1}{2}$ appreciation, or, the difference between survivor payments minus debts

Division of Value – Death of a Spouse

Can the amounts be changed?

On application by the survivor, the Court may vary the amount owed if it is considered unconscionable

- ... given the needs of caring for children, and
- ... if the spouses had previously resolved the consequences of a breakdown

Division of Value – Death of a Spouse

If survivor makes an application within 10 months of the death of the spouse...

The court may make changes with respect to...

- The amount payable to the survivor
- The method of payment (lump sum, installments)
- If the survivor is an FN member, the transfer of any interests or rights in any structure or land situated on the reserve
- Extension of the 10-month period due to special circumstances
- Permitting the executor of a will to vary the terms under the will to allow for the amounts due to be paid to the survivor
- Ensuring that proper notice is given



Centre of Excellence for Matrimonial Real
Property at www.coemrp.ca (forms,
information)

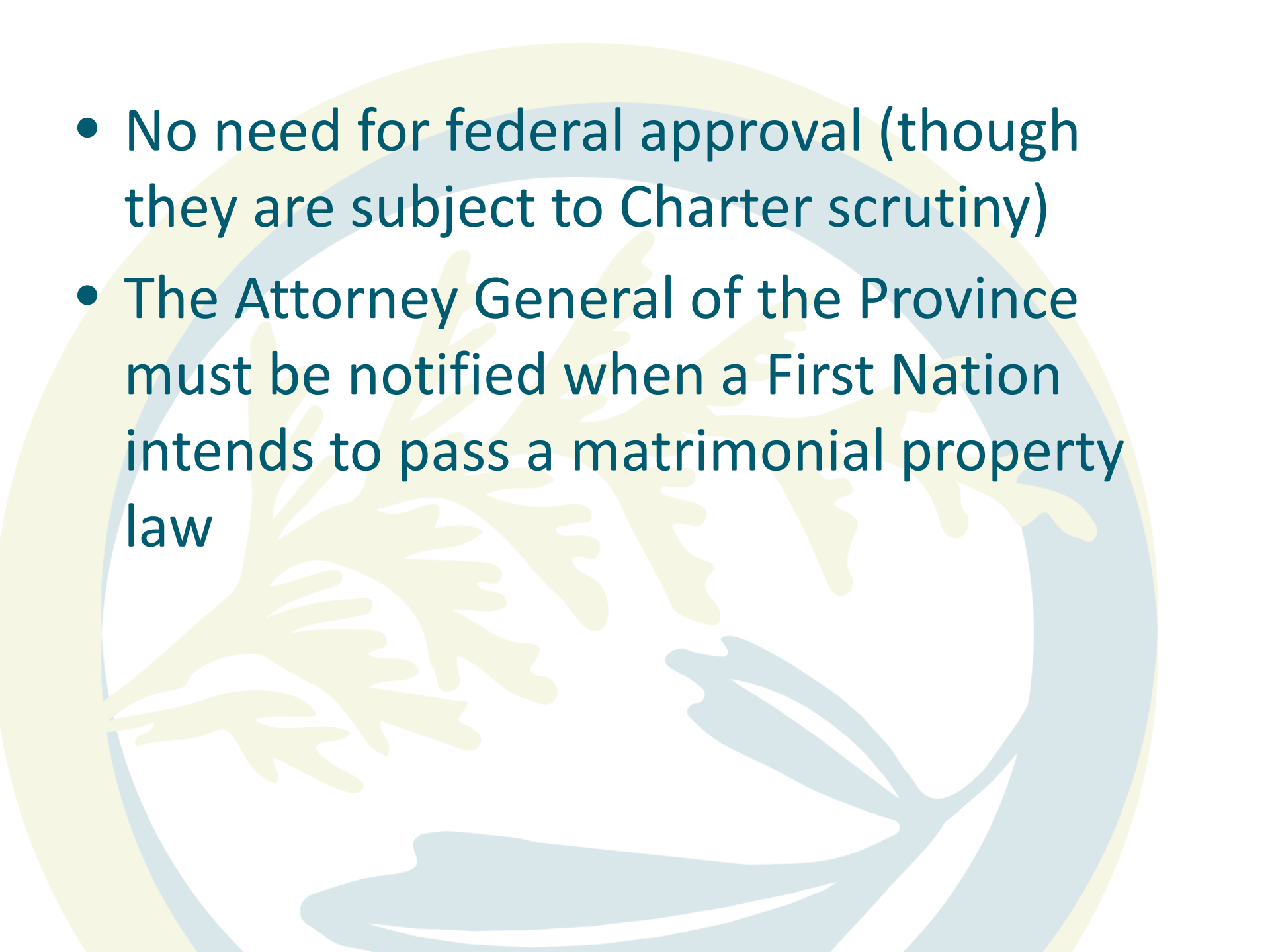
First Nation Law-Making






First Nations can pass their own laws in this area

- Required support: 25% of members must participate in the vote, and majority of those who vote must approve

- 
- No need for federal approval (though they are subject to Charter scrutiny)
 - The Attorney General of the Province must be notified when a First Nation intends to pass a matrimonial property law

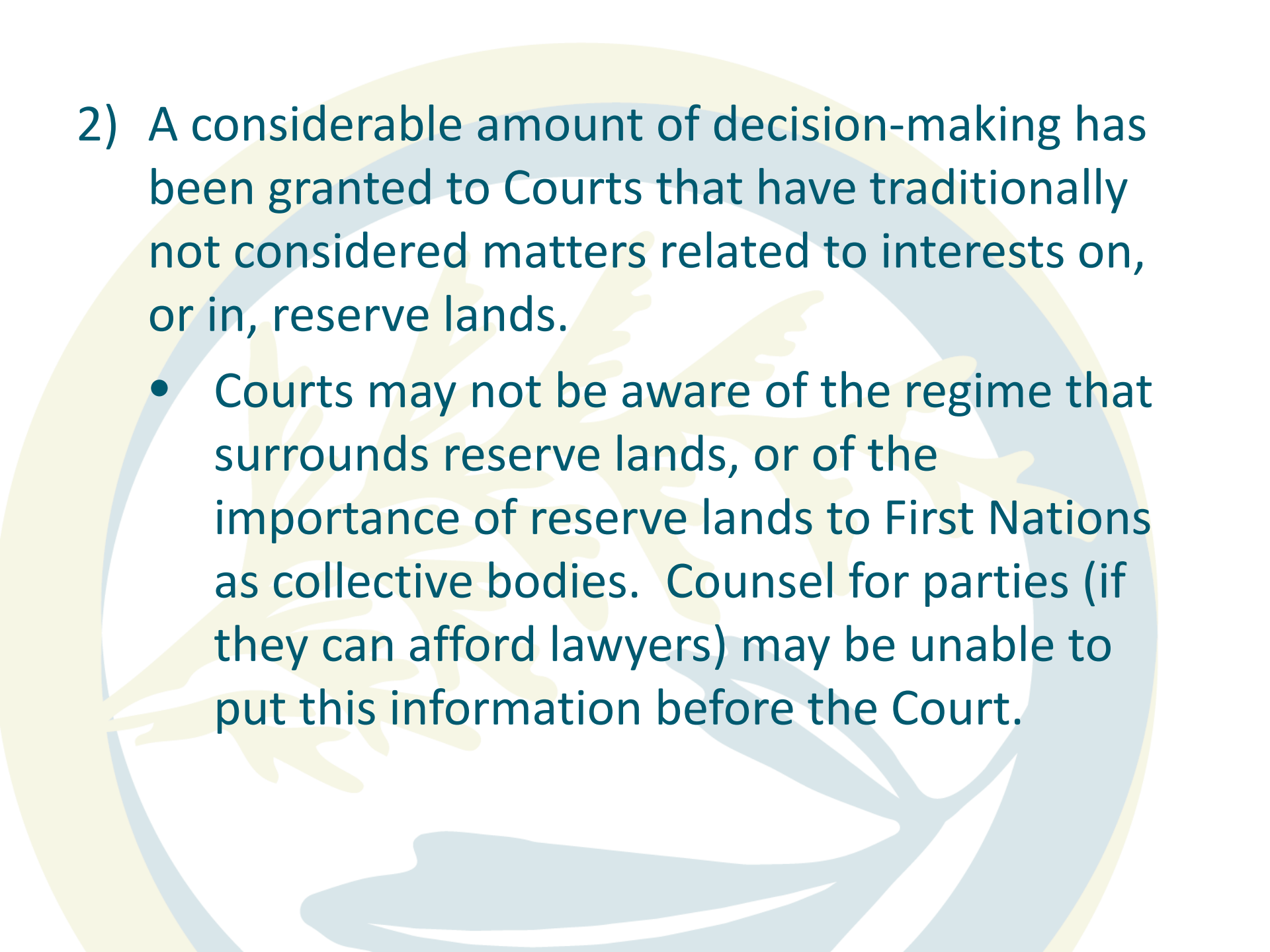
Significant Areas of Concern

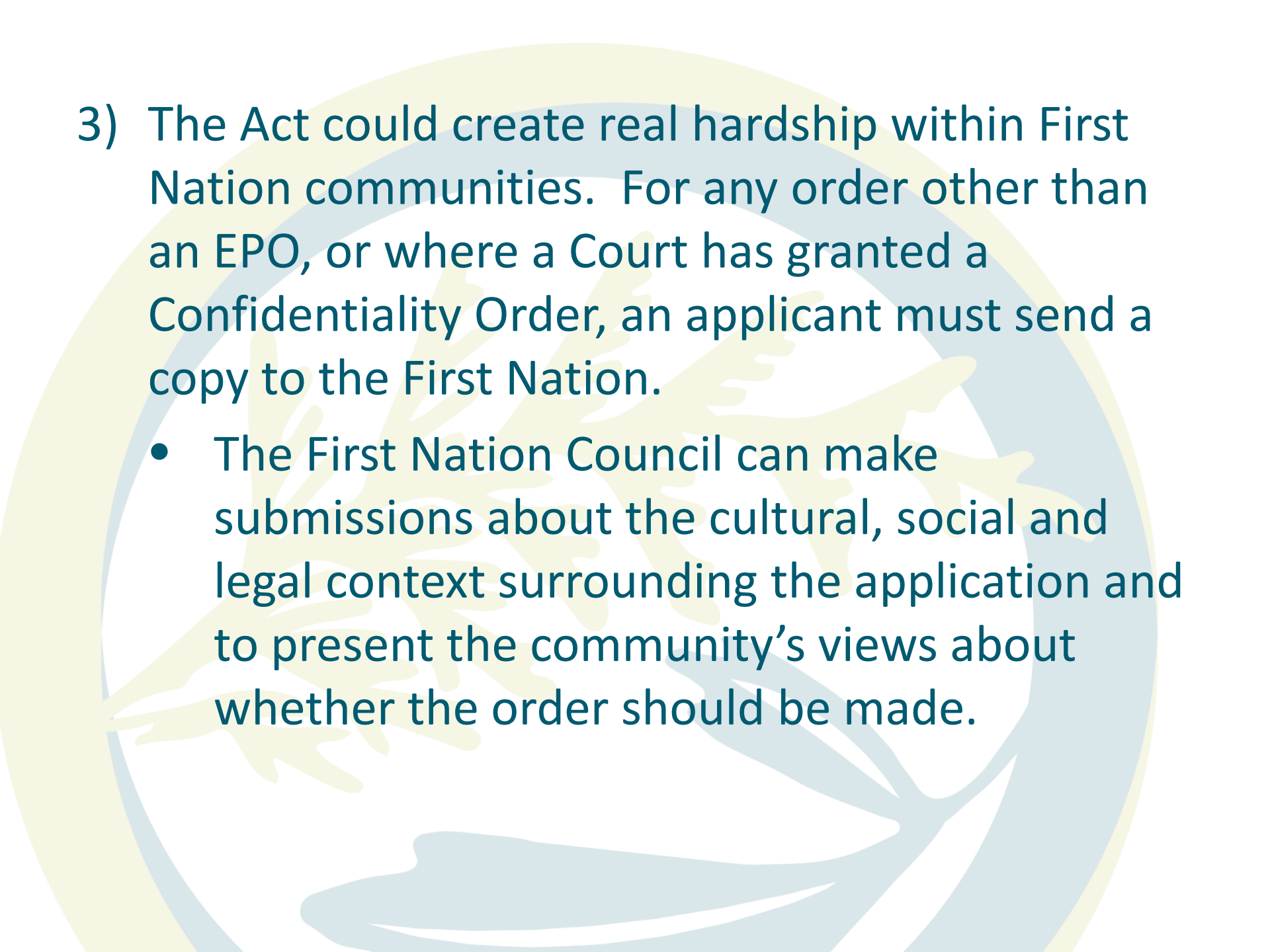




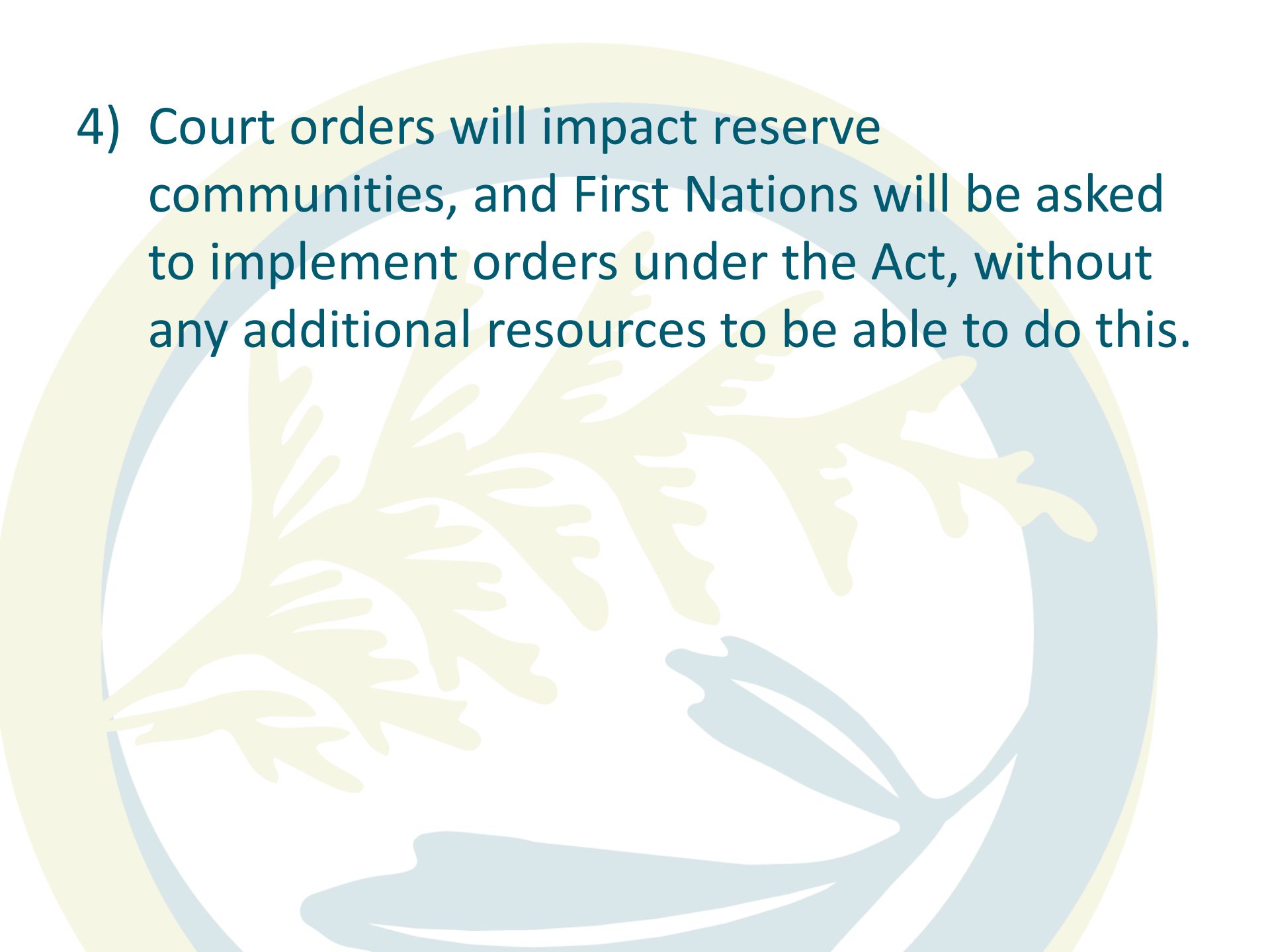
1) Access to justice (to lawyers, to courts) is a significant issue for Indigenous Peoples.

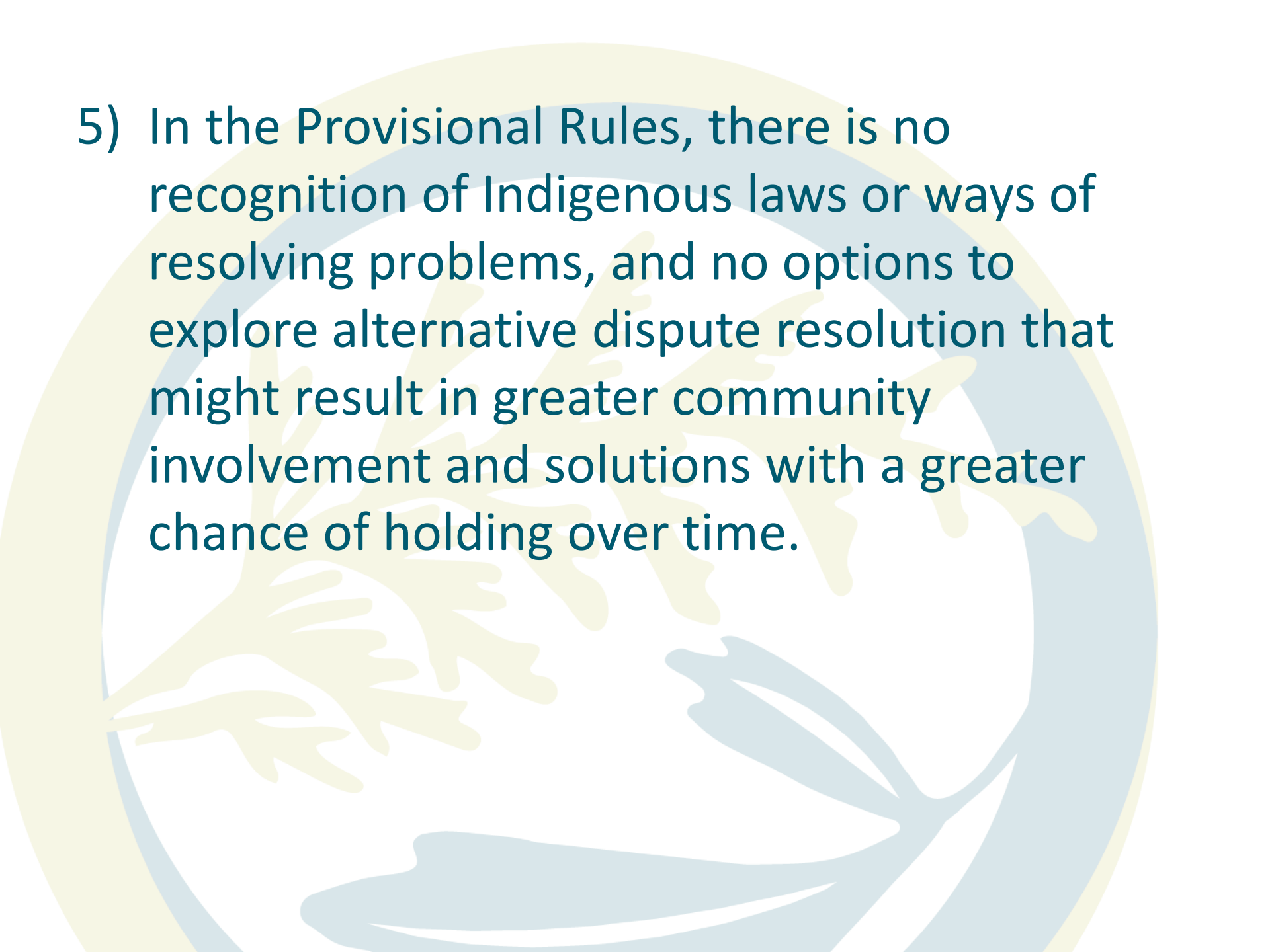
- The Act moves more decisions to the court process.
- Without legal representation, and without access to courts, peoples' rights may be seriously impacted or denied.
- Forms require parties to say that they give their “full and informed consent” .
- Decisions may be made with one party being self-represented or not appearing at all.

- 
- 2) A considerable amount of decision-making has been granted to Courts that have traditionally not considered matters related to interests on, or in, reserve lands.
- Courts may not be aware of the regime that surrounds reserve lands, or of the importance of reserve lands to First Nations as collective bodies. Counsel for parties (if they can afford lawyers) may be unable to put this information before the Court.

- 
- A background graphic featuring a stylized globe with a blue and yellow color scheme. Overlaid on the globe are several hands in yellow and blue, reaching out and holding each other, symbolizing unity and support.
- 3) The Act could create real hardship within First Nation communities. For any order other than an EPO, or where a Court has granted a Confidentiality Order, an applicant must send a copy to the First Nation.
- The First Nation Council can make submissions about the cultural, social and legal context surrounding the application and to present the community's views about whether the order should be made.

4) Court orders will impact reserve communities, and First Nations will be asked to implement orders under the Act, without any additional resources to be able to do this.





5) In the Provisional Rules, there is no recognition of Indigenous laws or ways of resolving problems, and no options to explore alternative dispute resolution that might result in greater community involvement and solutions with a greater chance of holding over time.

6) Complexities of housing situations on reserve:

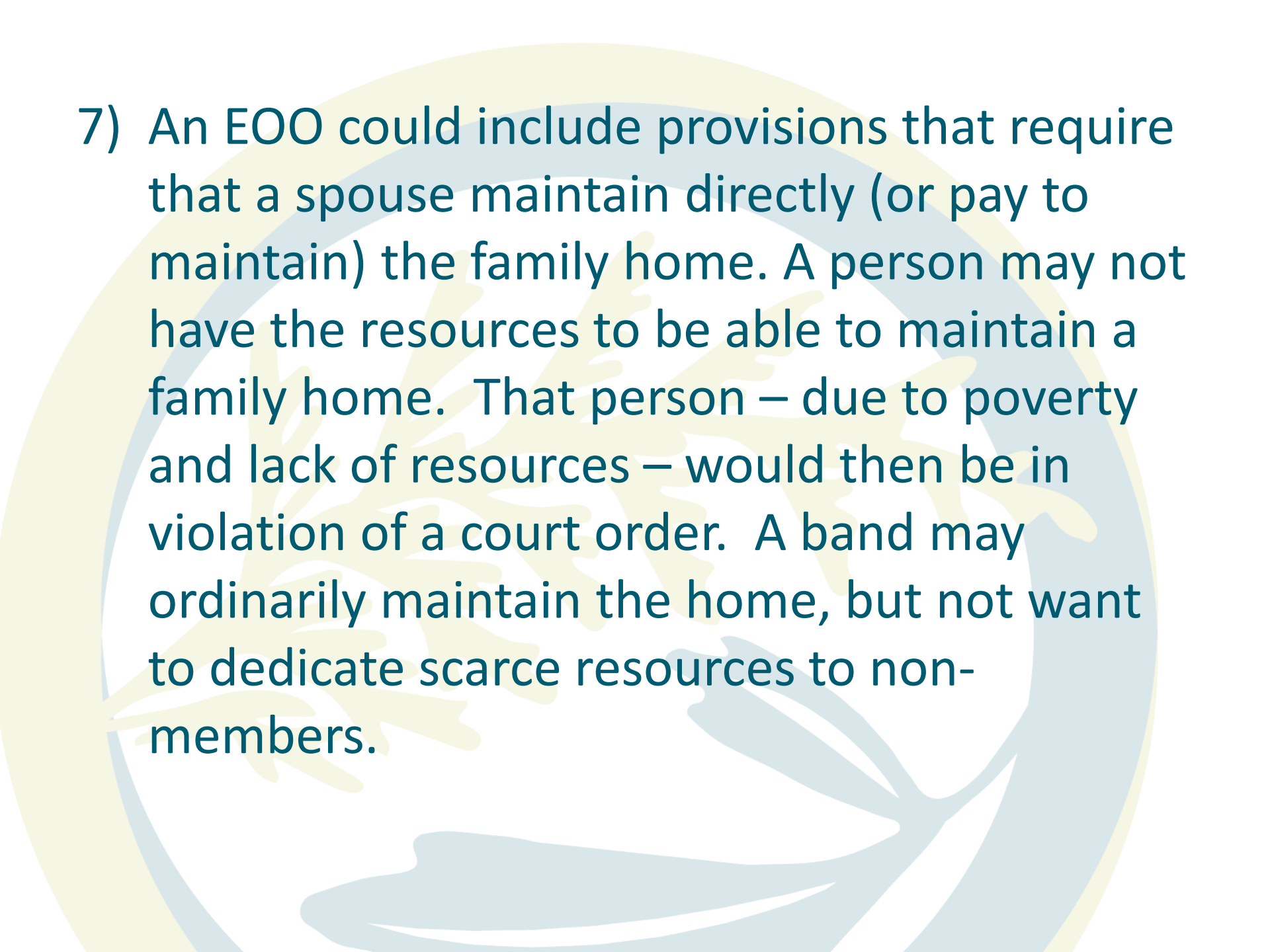
The “matrimonial home” of a couple whose relationship has broken down, might simultaneously be the home of an aging grandparent; an unemployed aunt; or, a barely-adult teenager starting their own family. Decisions made under the Act have the potential to consider only the interests of one couple, and not others who live within the home.

Different reserves have very complex systems of land ownership. Some interests are held under Certificate of Possession, some are held under custom, there are combinations of these interests; many people live in social housing which is owned and maintained by the First Nation.

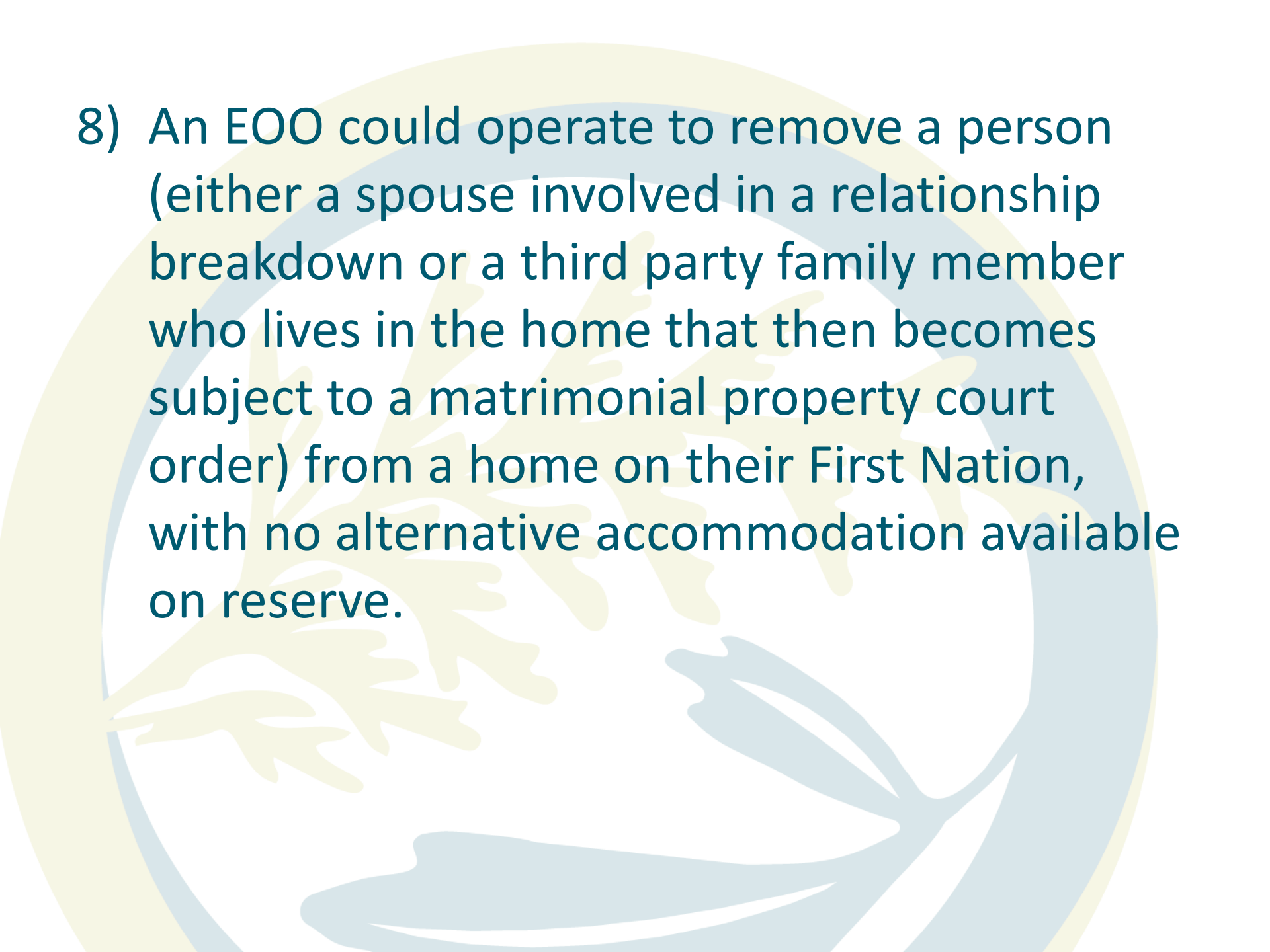


For example:

A couple may live in a house but have no right to the house itself (for example, band owned social housing, or a home that they are borrowing from a family member). An EPO could grant temporary occupation of social housing on reserve to a non-member. The First Nation might be in a position of having to maintain the home, but have no way of forcing the occupant to pay rent, or, the EPO might displace others on a housing waiting list who have the next right of occupation.



7) An EOO could include provisions that require that a spouse maintain directly (or pay to maintain) the family home. A person may not have the resources to be able to maintain a family home. That person – due to poverty and lack of resources – would then be in violation of a court order. A band may ordinarily maintain the home, but not want to dedicate scarce resources to non-members.

A stylized background graphic featuring a large, light blue circular shape. Inside the circle, there is a yellow tree-like structure on the left and a light blue fish-like shape on the right, both rendered in a simple, abstract style.

8) An EOO could operate to remove a person (either a spouse involved in a relationship breakdown or a third party family member who lives in the home that then becomes subject to a matrimonial property court order) from a home on their First Nation, with no alternative accommodation available on reserve.

First Nation Councils asked to enforce orders?

- Councils may be asked to enforce orders – if they do not enforce, the party who has the order can go to court and seek to have a monetary payment made instead by the party against whom the order was made
- Penalties include fines and prison

Will Provincial law apply?

- Provincial laws can be used to determine how to divide the overall value of all matrimonial property (house, cash, cars, etc.)
- Either spouse can ask a court to determine their share of the matrimonial property
- Court can order one spouse or common-law partner to pay the other a sum of money to make an equal division of the matrimonial property

Gladue After Twenty Years

Halie (Kwanxwa'logwa)
Bruce



Background: Aboriginal People and the Criminal Justice System

- 1989: "Locking Up Natives In Canada," UBC Professor Michael Jackson
- 1991: Manitoba Justice Inquiry
- 1996: Royal Commission on Aboriginal Peoples
(*Bridging The Cultural Divide: A Report on Aboriginal People and Criminal Justice In Canada, RCAP 1995*)



Other Inquiries | Commissions | Reports:

- Alberta Task Force Report (1991);
- Saskatchewan Indian Justice Review Committee and Metis Justice Review Committee (1991);
- The Law Commission of Canada (1991);
- Ontario Commission on Systemic Racism in the Criminal Justice System (1995).

Canada's response: 1996 Amendments to the 1996 *Criminal Code of Canada*

- S. 718: Sentencing considerations apply to **ALL** offenders -- Calls for the **courts** to limit the reliance on imprisonment for all offenders;
- S.718.2(e) specifically mentions Aboriginal offenders:

A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions or options other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

- **S. 718.2(e): A Call to Action?**
 - Included to address the over incarceration of Aboriginal offenders
 - Specifically directs the courts to bear in mind the **unique** circumstances of Aboriginal offenders.



SCC: *R. v. Gladue*, [1999] 1 S.C.R. 688

- Called the overrepresentation of Aboriginal peoples in prison “a crisis”;
- Recognized discrimination faced by Aboriginal people in the justice system (and other systemic factors) contribute to over-representation;
- Said s. 718.2(e) means that:
 - Sentencing judges can look at **restorative justice** options; and
 - It applies to **all** Aboriginal people (at very least, Indian, Inuit and Metis);

WHY?:

SCC, *R. v. Gladue* (1999)

- The different treatment of Aboriginal people historically has manifested in a broad range of adverse circumstances affecting Aboriginal people generally and contribute to the incidence of Aboriginal offending.
- Recognized that, Aboriginal offenders are:
 - More likely to be negatively impacted by detention, and
 - Less likely to be rehabilitated because incarceration is frequently culturally inappropriate and can lead to even further discrimination towards Aboriginal people.

How?

- HOW should Courts take into account the unique circumstances of the Aboriginal offender before the court?

WHAT is unique about Aboriginal Offenders (or Aboriginal Accused)?

The SCC said:

- Judges have **a statutory duty** to consider the unique systemic and background factors in sentencing an Aboriginal offender, including systemic bias and discrimination against Aboriginal people;
- **Factors** to be considered include (but not limited to):
 - Low income
 - Unemployment
 - Lack or irrelevance of education
 - Lack of opportunities and options
 - Substance use
 - Loneliness
 - Community Fragmentation
 - Systemic/direct discrimination

How?

SCC :

- S 718.2(e) requires the judge to use a “different methodology” in deciding a fit sentence for an Aboriginal offender before the court, including that a judge must:
 - Consider the role of systemic factors in bringing a particular Aboriginal accused before the court. (para. 69);
 - Get information about systemic factors with the help of counsel, or probation officers (in PSRs), **or other means**. (para. 83); and
 - Get information on restorative options (**community resources and treatment**) that may be alternatives to incarceration (para. 84)

R v Kakekagamick, (2006), 81 OR (3d) 664

Ontario Court of Appeal said:

- "Counsel" in *Gladue* means that both **Crown and defence counsel have a positive duty** to provide information about Gladue factors where appropriate (para 53.)

R. v. Ipeelee, 2012 SCC 13

- Reaffirmed s. 718.2(e) and *Gladue*;
- Recognized the Aboriginal incarceration rate has gone up, not down, since 1996 and *Gladue*.
- There was a "fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."
- Explained further how s. 718.2(e) operates:
 - There **is no discretion** about whether or when s. 718.2(e) applies;
 - A **causal link does not need to be made** between the background factors and the offence;

R. v. Ipeelee, [2012] cont'd

- Failure to consider Gladue principles is a breach of the sentencing judge's duty and the principle of proportionality in sentencing (fundamental justice).
- Strongly supported the use of "*Gladue* reports" to assist the court in fulfilling its statutory duty.
- Affirmed that *Gladue* applies to **all** sentencing decisions involving Aboriginal people unless there is an explicit waiver.

S. 718.2(e) applies:

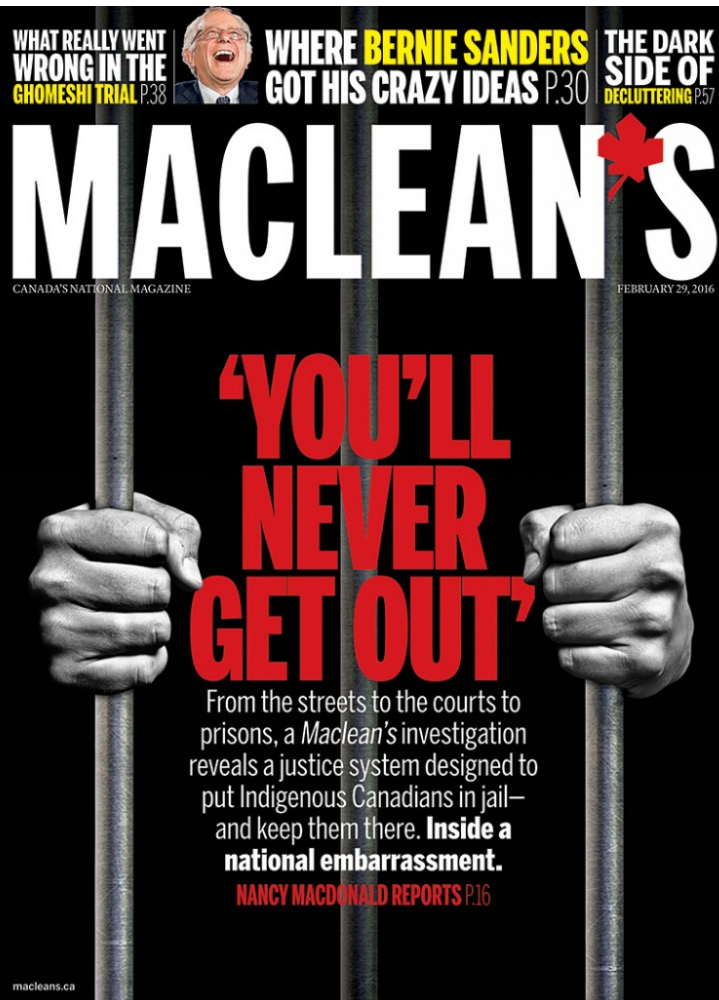
- **To all Aboriginal people** (First Nation, Status/Non-Status, on/off reserve, rural/urban)
- **Every time an Aboriginal persons liberty is at stake**, including at, for example:
 - Bail, and
 - Sentencing
- The sentencing judge **must weigh the *Gladue* factors presented** (whether submitted orally or in a written report) **along with the other fundamental principles of sentencing** (denunciation, deterrence) while keeping in mind the concept of proportionality of the sentence to the gravity of the offence and the degree of responsibility of the offender.

- **Only the Aboriginal offender can waive** their right to have 718.2(e) considered (i.e. it is not up to the judge, Crown or defense counsel);
- Even if an offender waives the right to having their background considered, a **judge must still take judicial notice** of the history of colonization;
- The outcome of s. 718.2(e) **adjusts the method of analysis** sentencing judges must use to decide an appropriate sentence for an Aboriginal offender;
- The lack of alternative sentencing programs particular to an Aboriginal community **does not eliminate the obligation of a sentencing judge to impose a sanction that takes into account principles of restorative justice.**

Summary/Key features of SCC's interpretation of s. 718.2(e):

- Purpose: To address the problem of overrepresentation of Aboriginal people in prisons by encouraging judges to consider a **restorative justice approach** to sentencing;
- In some cases, the goals of deterrence, denunciation, and separation may be less relevant, and the **goal of restorative justice** may be more appropriate and given greater weight;
- There is **a judicial duty** to give the provision's remedial purpose real force;





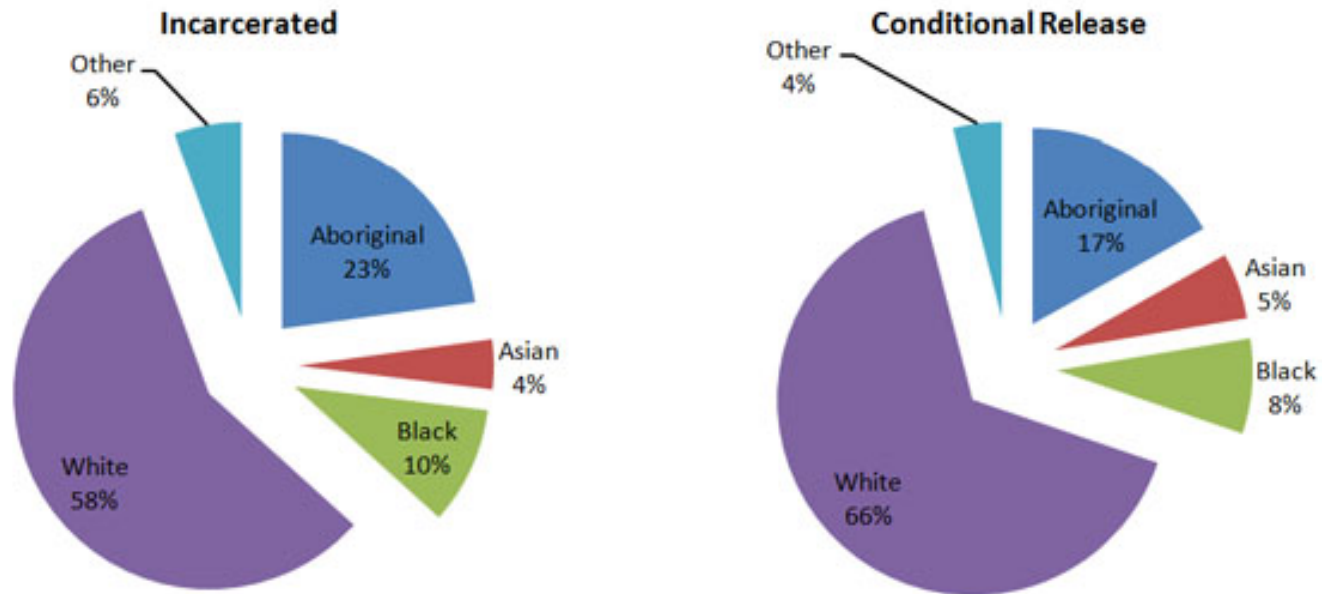
Impact of s.718.2(e) in last 20 years?

2013: “High and Growing Incarceration Rates for Aboriginal Peoples”

- Aboriginal people = about **4%** of the Canadian population, but make up about **23.2%** of the federal inmate population
- 2011: The federal incarceration rate of Aboriginal adults is about **10 times higher** than that of non-Aboriginal adults.
- From 2001 to 2013, the over-representation of Aboriginal people continued to grow, from **17.0% to 23.2%**. = a **56.2% increase**

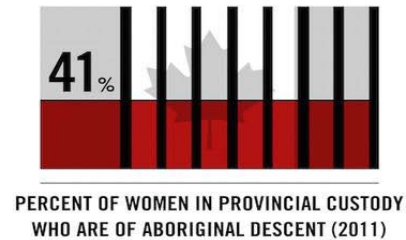
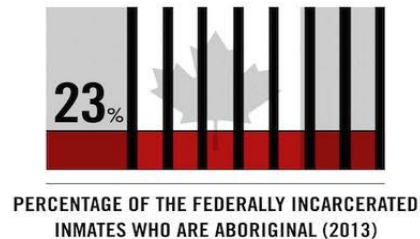
2014...

Figure 5. Federal Incarcerated and Conditional Release Populations by Aboriginal and Race (as of April 13, 2014)



Aboriginal Women

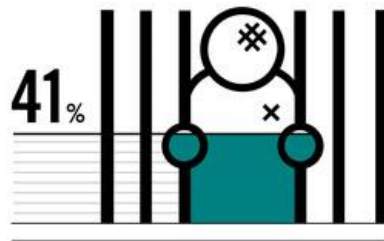
POPULATION VS. INCARCERATION



Source: Geraldine Malone, Vice.com: *Why Indigenous Women Are Canada's Fastest Growing Prison Population* (Feb. 2016)

Aboriginal Youth

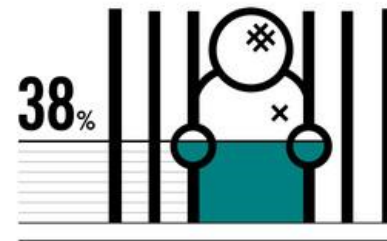
YOUTH BETWEEN THE AGES OF 12 AND 17 ADMITTED TO CANADA CORRECTIONS SYSTEM (2013-14)



PERCENTAGE OF TOTAL WHO WERE
ABORIGINAL YOUTH



PERCENTAGE WHO WERE
ABORIGINAL GIRLS



PERCENTAGE WHO WERE
ABORIGINAL MALES

Source: Geraldine Malone, Vice.com: *Why Indigenous Women Are Canada's Fastest Growing Prison Population* (Feb. 2016)

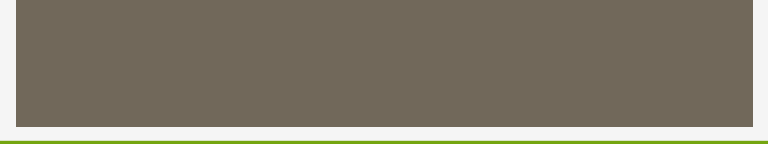
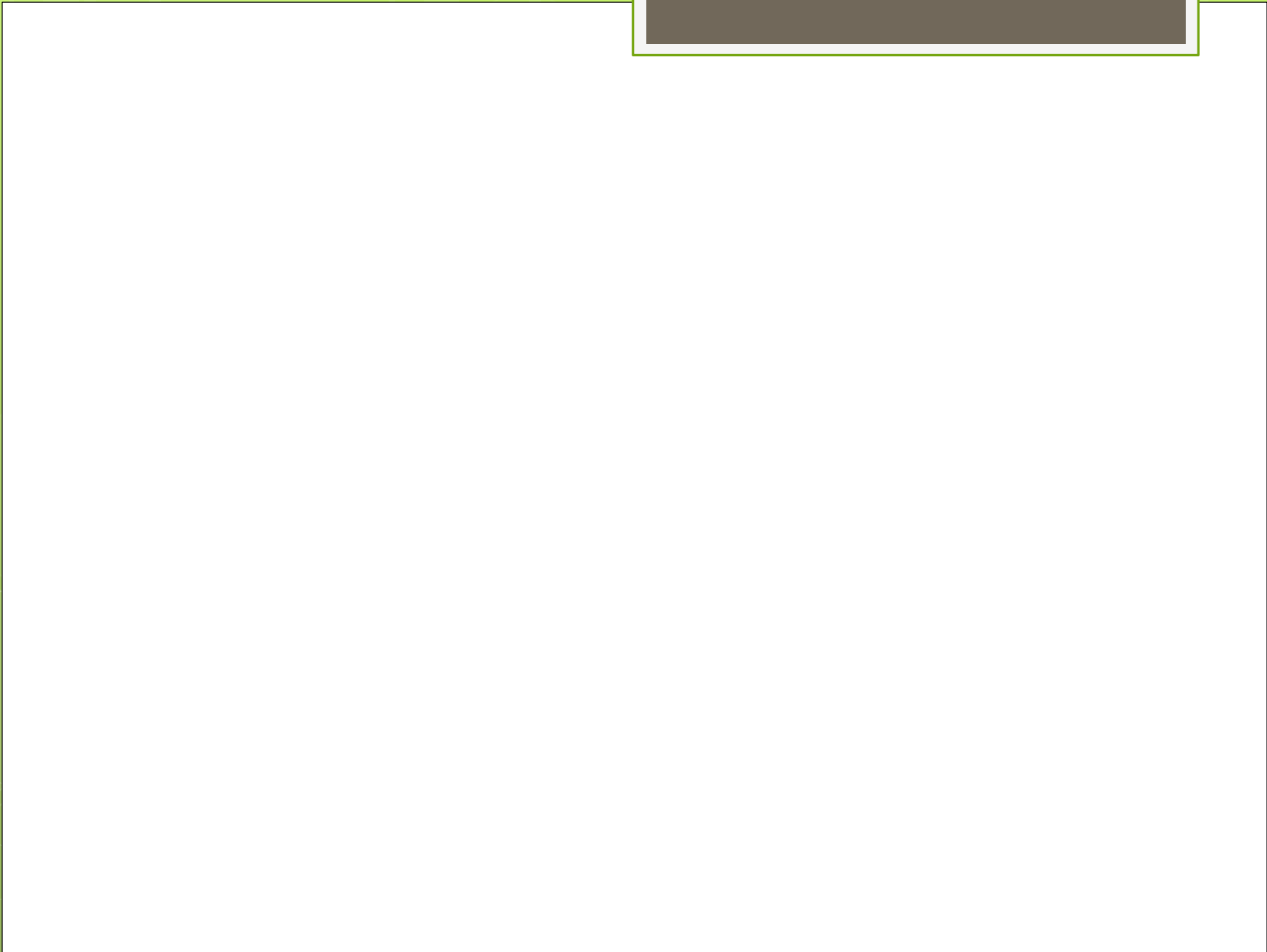


"Myth-Conceptions"

- *Gladue* and *Ipeelee* **do not call for shorter jail terms** for Aboriginal offenders, but requires judges to explore restorative justice as an option to incarceration;
- If there is no alternative to incarceration available, the length of the jail term imposed on the offender must be carefully considered.
- The "Aboriginal Community?" is not just on-reserve. In *Gladue*, the SCC said it is the Aboriginal offenders **community of support**

Some Challenges Applying Gladue

- Judges are required to take judicial notice of the history of colonization, dislocation, and systemic discrimination, but **few have received this as part of their education**;
- Courts continue to struggle to understand how s. 718.2(e) applies to the day-to-day operation of the courts = **inconsistency**;
- Lack of meaningful alternatives. Not enough programs and services to address the various needs of Aboriginal offenders, despite importance of restorative justice options;
- “Tough on crime” legislation
- Lack of education about Aboriginal historical and current circumstances (TRC)
- **Time** constraints: A typical Gladue report takes about 8 weeks to prepare.
- **Little to no funding available** to produce such reports. In BC, LSS has taken on part of this task since 2011, but there is no provincial or federal program to pick up this task;



Indigenous Restorative Justice



- In *Justice as Healing: Indigenous Ways*, McCaslin (2005) states that restorative principles refer to the mending process needed to renew damaged personal and communal relationships.

Restorative Justice, Specialized Courts

- Restorative Justice approach – look at the Aboriginal offenders community for the **source**;
- Based on **restoring** balance to the community, victim, and holds the Aboriginal offender accountable and responsible;
- Often more **onerous** than “just doing time”;
- BC: First Nations Courts (New Westminster, North Vancouver, Kamloops, and Duncan).

Restorative Justice, Specialized Courts

Ontario: “Gladue Courts”.

- Judges, caseworkers, support and resource people, Gladue writers, work together;
- Some programs developing “expedited” reports, focusing on “key historical and background factors and future goals and commitment to wellness” (London, Ont), so less emphasis on biographical.
- Yet to be seen if change in Government will result in change in laws, policies, funding for Gladue and restorative justice.

First Nations Courts, BC



"Garry"

- 35 year old Non-status Indian (Culturally Cree, but not legally recognized)
- Aboriginal (maternal) Great Grandparents were hunters/trappers who were on the trapline when treaty and reserve created, so were not recognized as Status/treaty Indians under the *Indian Act*
- Family not allowed to live on reserve and did not receive any treaty or other benefits
- Family lived on outskirts of reserve in non-Aboriginal town
- Impacted by alcoholism and family violence
- His maternal grandfather marries Cree Status woman who loses her Status. Family is poor, suffers from alcoholism. No longer hunts or traps, lacks education. Move to the city.
- His mother taken into foster care at 2 and has no contact with family. Becomes addicted to heroin at 14, involved in the sex trade. Meets his father, (non-Aboriginal), and has Garry at age 19. Family impacted by alcoholism, violence, periods of neglect.

Garry cont'd

- Garry and 3 siblings taken into care when he was 4. Has little contact with mother, and no contact with father.
- He and one sister adopted to non-Aboriginal family, after living in several foster homes.
- He's exposed to alcohol and marijuana at 12, cocaine and first contact with CJS at 13.
- He has lengthy adult record of property crimes to support his drug addiction.
- He has never been to treatment and knows little about his Aboriginal family or Cree culture.

"Patricia"

- 22 Year old Status Indian
- Raised on remote reserve with maternal grandparents
- Parents and all grandparents attended Indian Residential School
- Family impacted by lack of education, lack of opportunity, poverty, alcohol and sexual abuse.
- Patricia begins drinking at 9. Introduced to cocaine at 12 by older cousin who sexually abuses her.
- She moves into town at 15 with 30 year old boyfriend. Has child at 16 who she tries to keep but is eventually taken into care.
- She is homeless, suffers from substance abuse, untreated trauma, etc.