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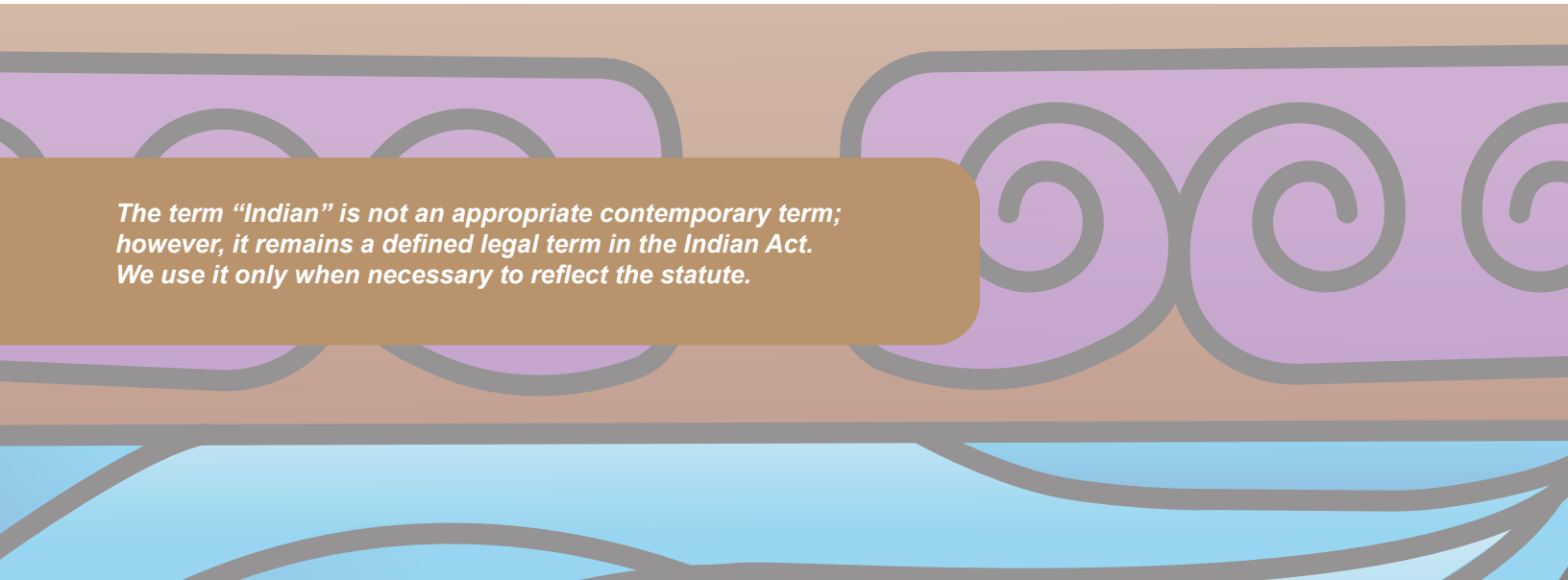
New Brunswick Law Foundation
Fondation pour le droit au Nouveau-Brunswick

ON-RESERVE HOUSING: WHAT YOU NEED TO KNOW

Housing is a basic necessity. For Indigenous people, who are the fastest-growing group in Canada, access to housing is a critical issue.

There are unique circumstances and processes around housing for Indigenous people. Notably, there are different rights associated with living **on** or **off reserve.** This document provides basic information about your housing rights and responsibilities as an Indigenous person living **on reserve.**

The term "Indian" is not an appropriate contemporary term; however, it remains a defined legal term in the Indian Act. We use it only when necessary to reflect the statute.



General Laws About Housing on Reserve

Reserve lands are unique communities in Canada, inhabited by and used for the 'benefit' of a specific First Nation community. Under Canadian law, the federal government holds **title** to reserves, meaning they are the legal 'owner' of the land. The *Indian Act* indicates that First Nations and their members cannot have legal title to reserve land.

However, First Nations and their members can exercise some control over reserve lands. Depending on the First Nation, there are specific regulations concerning land use. The two main sets of rules that can apply are:

- The *Indian Act*; or
- Your First Nation's Land Code (some First Nations communities have enacted Land Codes under the *Framework Agreement on First Nation Land Management Act* (formerly known as the *First Nations Land Management Act*)).

As of this writing, Madawaska currently has an operational Land Code, with Tobique, Woodstock, and Saint Mary's in the process of developing their own Land Codes. Contact your First Nation to confirm which set of rules applies to you.

The *Canadian Human Rights Act* also applies to on-reserve housing. If you think you are facing discrimination regarding on-reserve housing, you can consider making a complaint to the Canadian Human Rights Commission.

Individual Land *Rights Under* the *Indian Act*

Although First Nation members cannot own reserve lands, they may hold a Certificate of Possession (**CP**), a document that confirms the holder's legal and exclusive right to possess a plot of land on reserve. Only members of the First Nation can hold a CP.

How Do I Get a CP?

Typically, a Band Council or land management office will handle applications for CPs. Each First Nation has its own application process (reach out to your First Nation to apply). Once a band has approved an application for a CP, Indigenous Services Canada (**ISC**) must also approve and issue the CP.

CPS, Financing, and Transfers

On-reserve housing is subject to unique rules. Under Section 89 of the *Indian Act*, property on a reserve that belongs to an Indian or a Band cannot be mortgaged or otherwise used to secure a debt, or seized to collect a debt, by anyone other than an Indian or a Band. Similarly, CPs are typically not eligible for a mortgage. There are some exceptions or ways to get around this rule, depending on the circumstances of your case. For example, Ministerial Loan Guarantees can be used to secure loans to build, purchase or renovate on-reserve housing. The First Nations Market Housing Fund can also help First Nations get loans from financial institutions and build, buy or renovate a house on reserve lands.

Speak to your First Nation or a lawyer to explore your options.

You can put a CP in your will, divide it and give portions to others, or sell it. However, a CP can only be transferred to another member of the First Nation or back to the First Nation itself, and the Minister for ISC must approve the transfer.

If you lose the right to live on reserve (e.g. you cease to be a Band member), your right to possess the land will go back to the Band, usually within 6 months. You may be owed some compensation for any improvements you made to the lands.

What Happens to My House When I Die?

This will depend on the legal rights you have in relation to the house. If you own the house, you may be able to give the ownership rights to someone else through a will. There are special rules around what happens to the home you are living in with your spouse, as outlined below.

Oftentimes, members live in a band-owned house on-reserve based on an agreement with the Band Council or an associated housing authority. These agreements can affect what happens to the house when you pass away. First Nations may also deal with this issue through a general residency bylaw or housing policy. For specific questions regarding your situation, contact your First Nation or a lawyer.

Individual *Rights* Under My First Nation's Land Code

Through a custom Land Code, a First Nation can develop its own land laws and govern itself concerning land use, natural resources, development, and housing. Land Codes are unique to each First Nation and help meet a community's specific needs, moving away from the one-size-fits-all approach of the *Indian Act*. This includes outlining the process for using land on reserve. Contact your First Nation to find out if there is a Land Code, and what the Land Code says about housing on-reserve.



What Happens if I Am Renting Property On-Reserve?

Some First Nations have housing units that are owned by the Band but are rented to members and their families. If you have a CP and built a house on your allotted parcel (shared piece of land), you may also wish to rent out that house.

Rentals on reserve can be complicated. Provincial laws around rentals do not apply, and there is no federal law that covers rentals on reserves either. Because of this, there's no single set of rules that applies to all reserves. Instead, each community has its own approach. The rules can come from different sources, such as the *Indian Act*, a First Nation's laws (passed under the *Indian Act* or a Land Code), and contracts between a landlord and tenant.

Note that under the *Indian Act*, any lease to a non-member must be approved by the Minister. This rule may not apply if a community has passed a Land Code.

A lease may be invalid if it does not follow the requirements of the *Indian Act* or any relevant First Nation law. For instance, Canadian courts have said that if a lease on reserve land needs the Minister's approval under the *Indian Act* but that approval was not given, the lease is not valid. Such informal, non-compliant leases are often called "**buckshee leases**".

For specific questions regarding renting on reserve, contact your First Nation for more information or a lawyer for advice about your legal options.



What Happens if I'm Living on Reserve With My Spouse?

There are special rules that apply to spouses or common-law partners living on reserve. The *Family Homes on Reserves and Matrimonial Rights Act* (**FHRMIRA**) allows First Nations to use their laws about matrimonial property on reserve (such as the house, or "family home" that a couple lives in). The FHRMIRA also provides default rules that apply if the First Nation has not yet passed its own laws.

Key default rules under the FHRMIRA include:

- Equal rights to the family home:
  - Both partners have the right to live in the family home on reserve during the relationship.
  - The family home cannot be sold or transferred without both partners' written consent.
- The court can order that one person can stay in the family home:
  - If one partner is being abusive, the court can order that partner to leave the family home.
  - If the couple breaks up and cannot decide who gets to stay in the family home, the court can make that decision.
  - If one partner passes away, the other partner is automatically allowed to stay in the family home for **180 days**. If they want to stay longer, they can ask the court for an order.

These rights apply, **even if the spouse or partner is not a First Nations member or if they do not have Indian status.** Some of these rules might not be reflective of what certain First Nation communities would desire; therefore, creating a matrimonial property law to replace the default FHRMIRA may be desirable for some communities. For more information, please see the Matrimonial Property on Reserve booklet.

To note: The Centre of Excellence for Matrimonial Real Property, the producer of the booklet above, was a program hosted by the National Aboriginal Land Managers Association (NALMA) from 2013 to 2021 to help First Nation communities implement their own matrimonial real property laws. The centre is no longer operational after achieving its mandate, but the information provided in the booklet remains relevant.

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