



First Edition 2021

Housing Sustainability Program - First Nation Housing Management

# **Practice Guide: Section 95 Operating Agreement Expiry**

## Contents

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## 1. Introduction

The Housing Sustainability Project (HSP) addresses, among other things, the financial viability of First Nation housing. Prepared as part of the HSP, this Practice Guide for Section 95 Operating Agreement Expiry uses a Sample House benchmark to assess financial requirements for houses constructed under CMHC's Section 95 program, including requirements at the end of related Operating Agreements.

This Practice Guide represents the body of knowledge assembled by the HSP to June 2021 and is based on: research of relevant, available literature; input by industry leaders; and input by Naut'sa mawt Members through HSP Working and Focus Groups. Naut'sa mawt intends to update this and related Practice Guides at future HSP milestones to incorporate additional knowledge and/or expanded stakeholder input.

This Practice Guide should be read in conjunction with the companion Naut'sa mawt HSP document entitled Practice Guidance for Housing Financial Viability – First Edition 2021. That latter document also used the Sample House approach to estimate capital and operating costs for a representative First Nation house.

Where the term Sample House is used in this document it has the same meaning as in Practice Guidance for Housing Financial Viability.

## 2. CMHC Section 95 Operating Agreement (OA) – Issues at Expiry

Under the On-Reserve Non-profit Housing Program, CMHC provides subsidies for financing and operations of First Nation housing projects. These Section 95 houses are built, administered and owned by the First Nation.

Each Section 95 housing project is subject to an Operating Agreement (OA) that is signed by both the First Nation and CMHC. The OA outlines the legal obligations of both parties for the duration of the contract. The OA ends when the project loan is fully repaid.

Key features of the typical CMHC Operating Agreement (OA) are:

- a.** It is between CMHC and the First Nation;
- b.** The First Nation agrees to select house occupants according to Client Selection Criteria that are established by Band Council Resolution;
- c.** The First Nation agrees to establish, maintain and operate the Project during the OA term as not-for-profit housing accommodation;
- d.** The First Nation can determine actual occupancy charges and can satisfy CMHC minimum revenue contributions by collecting occupancy charges, contributing other Band funds or a combination of both;
- e.** The First Nation must establish a Replacement Reserve Fund for the Project, a separate bank account that accrues interest;
- f.** The First Nation commits to holding any surplus revenue in an Operating Reserve Fund for the Project, a separate bank account that accrues interest; such funds can only be used for ongoing operating costs, including future years' operating deficits. The Operating Reserve Fund can grow to a maximum of \$500/unit plus interest; any excess surplus is to be returned to CMHC.

The Section 95 program is geared to providing affordable housing for First Nation Members. Financial viability of the program, for tenants and First Nations alike, relies on the CMHC subsidy for mortgage and operating expenses during the term of the Operating Agreement.

At expiry of the Operating Agreement – usually 25 years – the CMHC subsidy expires and the following issues may arise:

- a.** There may be limited documentation as to whether a house was intended to be First Nation owned or Occupant owned (rent-to-own) on expiry of the Operating Agreement; the First Nation's legal obligations can also be unclear;

- b.** While mortgage debt is paid off, the house is 25 years old and may require significant capital investment for updating and/or renovation – both to meet tenant preferences as well as to restore safe, healthy living conditions. For example, some key house components have an estimated 25-year service life and should be replaced around the time of OA expiry. Limited maintenance and/or tenant damage will increase the level of investment required;
- c.** Rent charged may have been less than required to cover ongoing housing costs. This issue can be compounded by rent arrears which need to be reconciled at expiry of the Operating Agreement;
- d.** Ongoing housing costs beyond OA expiry may be unaffordable for tenants to assume ownership. Also, some tenants, who wish to purchase homes and borrow to pay for renovations, may not meet financial eligibility criteria (e.g. costs < 32% of income);
- e.** Some tenants may be reluctant to assume ownership until houses are restored to “acceptable” condition; other tenants may be unwilling under any circumstance to assume ownership and, instead, wish to continue as tenants;

Consequently, Section 95 homes can get “stuck in limbo” on expiry of the Operating Agreement, with ownership, financial and other responsibilities unclear between the First Nation and the tenant.

Currently, there are limited resources available to either First Nations or tenants to evaluate and manage issues arising as a result of Section 95 operating agreement expiry. This Practice Guidance is geared to addressing that gap.

### 3. Roles and Responsibilities for First Nation Housing – Legal Context

In May 2021, Woodward and Co. (WW&C) provided Naut’sa mawt with advice on clarifying roles, responsibilities and potential liabilities related to First Nation housing, with a focus on managing Section 95 homes; advice comprised WW&C’s memo to Naut’sa mawt dated May 16, 2021 (See Appendix C) plus subsequent verbal discussions to clarify specific topics.

The following represents Naut’sa mawt’s interpretation of that advice in terms of implications for managing First Nation housing; it should not be considered a legal opinion and Nations are encouraged to seek independent legal advice before acting on any of the matters presented here.

Key points from the WW&C input are:

- a.** First Nations fulfill multiple roles when owning and administering housing on-reserve including: owner, landlord and seller. Obligations and duties under these roles can overlap but generally involve ensuring that homes are safe and habitable and that deficiencies are properly disclosed and addressed.
- b.** A First Nation’s fiduciary duty underlies all roles in (a) and involves acting honestly, faithfully and in the best interests of the Nation. It also means that the Nation must exercise the care, due diligence and skill of a reasonably prudent person in carrying out the duty

More specifically:

- First Nation Councils must avoid conflicts of interest and must manage the Nation’s assets in the best interests of the Nation as a whole, treating all Members equally.
- CMHC Operating Agreements require that First Nations manage housing assets in the best interests of the Nation. This means that the Nation must care for and maintain Nation-owned homes to preserve their value over their lifetime and to reduce unnecessary expenditures that arise from neglect.

- Sale of a Section 95 house at the end of the Operating Agreement is not an “arms-length” transaction due to a Nation’s multiple roles as owner, landlord and seller and, importantly, the Nation’s fiduciary relationship with the member tenant.
- The law is not clear on the extent of a First Nation’s liability, if any, arising from transferring ownership of a home to a tenant who is known to lack the necessary financial resources and/or personal capacity to maintain the home as a homeowner.

However, a Nation can mitigate or reduce the risk of legal or financial liability by:

- » fully disclosing known defects or deficiencies in a home;
- » obtaining a signed liability waiver from the tenant;
- » advising the tenant to seek independent legal advice (even if the tenant doesn’t procure that advice); and
- » ensuring a valid and enforceable sale/transfer agreement is in place.

As part of a transition process to ownership, the Nation could also take pro-active steps to make tenants aware of the costs and obligations of ownership such that they can make a more informed decision on ownership vs. continued tenancy.

Where a new owner finds that they can’t manage home ownership – either financially or through personal capacity - the Nation may decide to provide assistance to the new owner. Appropriate assistance will vary depending on the circumstances.

For example, in some cases, a Nation might assist by providing a secured loan guarantee to a homeowner for a renovation; many such security agreements establish that the CP holder will sign over their CP to the band until they have paid the loan off in full, at which time the band transfers the CP back. Note that the Nation can’t repossess lands that have been validly transferred to a member through a CP or other permanent interest; land transfer in such circumstances can only occur through expropriation.

To avoid breaching Council’s fiduciary duty to treat all members equally, Nations should consider the nature of assistance they are prepared to provide in these situations. Nations should also establish policies that set out when the Nation will provide such assistance and clear criteria to support transparent, consistent and fair decision-making. For example, where a Nation provides a greater benefit to one member over another there needs to be a very good policy reason to justify such differential treatment. Legal advice is recommended.

- As in any purchase and sale of an older home, depreciation and a certain amount of wear and tear are to be expected as normal. The vendor and purchaser normally negotiate the allocation of responsibility and costs for correcting deficiencies.
- Failure to properly disclose known defects result in liability for the First Nation which may then be responsible for paying to correct defects and to compensate the purchaser for any injury suffered or costs incurred as a result of the failure to disclose.
- Where Nations do not maintain houses in response to rent arrears, the practice is contrary to their fiduciary duty. Such practice can create hazardous conditions for tenants, cause assets to deteriorate prematurely and increase the Nation’s costs.
- In some cases a Nation may take steps to correct hazards that are outside a landlord’s normal responsibility because of their fiduciary duty to preserve the housing asset and to act in the best interest of members. For example, the Nation may correct tenant-caused damage where it creates health and safety concerns, or where delaying repairs could give rise to increased costs – e.g. broken windows or exterior doors.
- If the tenant’s own conduct has contributed to or created the hazards or where the tenant purposely or negligently failed to report the hazard to the Nation, the tenant will have breached the tenancy agreement and will be liable to the First Nation for remediation.

The tenant has duties under the tenancy agreement, both to carry out some repairs and maintenance and to notify the landlord of such repairs as would fall to the landlord. If the tenant has not fulfilled their duties, the landlord's duty to remediate may be offset by the tenant's own failure to meet their obligations. In such cases, it is open to the First Nation to negotiate shared responsibility for the remediation with the tenant prior to any transfer of a Section 95 house.

- c.** Under the common law of landlord/tenant, a First Nation has a responsibility to ensure that its Members on-Reserve are housed in safe, habitable and appropriate housing. To promote clarity and consistency, a Nation should expressly adopt a clear definition of safe and habitable. In the absence of such definition, a court would likely consider standards in national and provincial building codes and precedents arising from prior judicial considerations.
- d.** First Nations must have clear and transparent processes in place for managing Band-owned housing in a way that supports fair treatment of Members, helps to avoid conflicts of interest and that ensures that housing administration is carried out with due care, diligence and skill. Such processes include, for example: a Residential Tenancy Law; the tenancy agreement; and relevant spousal property laws.
- e.** A Nation has a responsibility to know the status of the houses they own and to regularly inspect them for hazards. Where hazards are found, the Nation, as landlord, has a responsibility to correct them where they fall within a landlord's responsibility.
- f.** Courts have generally upheld a First Nation's rights and obligations to its Members and tenants pursuant to contractual promises made between them. While there is limited case law dealing with on-reserve housing, First Nations can look to court decisions dealing with landlord/tenant relationships for guidance.

Courts in British Columbia have established that a landlord not only has a responsibility to maintain and repair their rental premises on notification by tenants, but also has a duty to reasonably inspect the premises for hazards. So, a Nation that does not conduct reasonable inspections could be found liable for injuries stemming from unsafe conditions even if the Nation was unaware of them, on the basis that the Nation ought to have known.

To promote clarity, the tenancy agreement should set out the tenant's and landlord's responsibilities and should provide recourse where the tenant causes the damage.

In summary, where a Nation faces expiring operating agreements for houses with significant defects, and where such defects arise because the First Nation did not fulfill its fiduciary and landlord duties, then, arguably that Nation has a duty to correct those defects before transferring the house, or to reach an amicable agreement with a pending owner on how those defects will be addressed post-transfer. Where a house has been so poorly maintained that it is not habitable by the time the transfer is due, the Nation could also be liable to the tenant for not having fulfilled its fiduciary and landlord duties.

While it can be argued that a tenant, having lived in such a house for many years, is aware of the defects and is a knowing purchaser, a First Nation that transfers such a house may still face liability in their fiduciary role. This is especially the case where the Nation has not properly inspected or maintained homes such that defects arose from the Nation's improper administration of its housing programs. The Nation can mitigate this liability by disclosing deficiencies and reaching agreement with a pending owner on how to address them as part of the sale/transfer agreement.

So, in such cases, a First Nation likely should remediate such defects to a safe and habitable condition.

## 4. First Nation Home Ownership – Financial Requirements

For financial viability and sustainability, the Sample House benchmark identified the following financial requirements for a representative First Nation home, including those built under the Section 95 program; all figures are in 2021 dollars:

### a. Construction Cost - \$350,000

- New Construction – easily accessible site; good access to trades, materials and supplies; no allowance for remoteness or local conditions that increase costs;
- Excludes land costs;
- Minimum to average vs. premium quality design, finishes, appliances and fixtures;
- Serviced lot; service connections are available at the property line;
- 1,400 sq.ft, 4 bedroom, two story family home - no garage;

### a. Annual Maintenance Cost

- Planned, preventative maintenance – est. \$8,200/year
  - » Occupant component “in kind” – est. \$6,044/year
  - » Professional inputs “at cost” – est. \$2,136/year
- “Call outs” for breakdown repairs – est. \$1,600/year

### a. Annual contribution to reserves for repairs and replacements

- \$5,300/year; assumes:
  - » 75-year life expectancy for the house;
  - » Service lives for some house components are shorter than life expectancy – see Sample House assumptions;
  - » Capital reserves are only sufficient to replace house components with service lives less than 75 years – they are not sufficient to replace, for example, site services, foundations, framing and other components which are assumed to have service lives equal to life expectancy of the house (75 years);

» Full house replacement at end of life-expectancy is financed by new borrowing – not from reserves.

- Reserve balance at end of Year 25 = \$41,500

### b. Annual Costs

Sample House – Estimated Annual Costs	
<b>Mortgage – applies during Operating Agreement</b>	\$17,916*
<b>Municipal services - net of ISC funding**</b>	\$373
<b>First Nation Community Services - net of ISC funding***</b>	\$1,065
<b>Insurance</b>	\$600
<b>First Nation Housing Administration</b>	\$1,200
<b>Accounting &amp; auditing</b>	\$110
<b>Repairs &amp; maintenance</b>	
<b>Planned maintenance</b>	\$2,136
<b>Call outs &amp; repairs</b>	\$1,600
<b>Contribution to reserves</b>	\$5,300
<b>Total/year</b>	<b>\$30,300</b>
<b>Total/month during Operating Agreement</b>	<b>\$2,525</b>
<b>Total/month after expiry of Operating Agreement</b>	<b>\$1,032****</b>

\*= \$350,000 mortgage @ 2.5%; 25-year amortization

\*\*= e.g. municipal water supply, sewage treatment, fire protection, animal control

\*\*\*= First Nation supplied services – e.g. roads, grounds, drainage, water distribution, sewage collection, safety and security

\*\*\*\*= assumes no mortgage payment – i.e. reserves are sufficient to fund ongoing repairs and replacements for remaining life-expectancy



## 5. End of Operating Agreement – Restoration Scenarios

For the Sample House, estimated annual contributions to a capital reserve for repairs and replacement are as follows; also shown are estimated requirements if local conditions trend towards shorter or longer service lives for house components.

Capital Reserve – Annual Contributions (% of replacement cost)			
	Long Avg. Service Life	Short Avg. Service Life	Sample House
<b>For components with Service Lives &lt; 75 years</b>	1.24%	2.06%	1.53%
	\$4,281	\$7,116	\$5,292
<b>For components with Service Lives &lt; 25 years</b>	0.72%	1.16%	0.87%
	\$2,481	\$4,015	\$3,005

For example, if both the First Nation and the tenant take good care of a house and invest in timely repairs and replacements, the estimated annual contribution to reserve is 1.53% of replacement cost. However, where houses have been poorly constructed and maintained, houses deteriorate prematurely, resulting in shorter service lives and higher costs. Alternatively, good construction and maintenance can lead to longer service lives and lower costs.

Note that capital reserves (above) are only sufficient to replace house components with service lives less than 75 years – they are not sufficient to replace components which have service lives which match life expectancy of the house. Projections assume that the house will be replaced after 75 years.

Also note that, for Section 95 houses, the CMHC subsidy for capital reserves usually covers only components with service lives less than 25 years – estimated at 0.87% for the Sample House or about half of total reserve requirements to achieve full life expectancy.

So, it's important to clarify First Nation and tenant obligations at the outset of the Operating Agreement to minimize conflict and costs. Also, prior to expiry of the Operating Agreement, First Nations and tenants can plan for and make “end of term” arrangements. To enable such arrangements, an objective, robust and structured process for end-of-term negotiations is required. Such process would involve:

- a. Community developed policy objectives for Section 95 homes upon expiry of the operating agreement, including whether transfer of ownership to tenants is an objective of the First Nation;

Where it is a policy objective to transfer ownership to tenants, accessible community developed laws, policy, process, procedures and criteria for transferring the ownership of Section 95 homes to tenants including land tenure and establishing a purchaser's financial and personal capacity for ownership.

- b. An accepted definition of “safe and habitable” – Appendix A provides a sample for discussion:

In this case, “safe and habitable” means that the house has acceptable wear and tear, as would normally occur if the First Nation and tenant conduct maintenance and timely repairs/replacements – see Sample House assumptions.

“Safe and habitable” does not mean that the house:

- » Is “as new”;
- » Meets occupant's current living requirements (e.g. for space and room layout);
- » Meets current codes;
- » Meets modern preferences or trends for materials and finishes – e.g. stone vs. laminate countertops; wood vs. vinyl floors; regular vs. high efficiency windows or heating.

Rather, “safe and habitable” recognizes that the (say 25 years old) house is in good, used condition while providing safe, healthy living conditions for its occupants.

- c.** A structured approach to inspecting and evaluating a house at any point in time to establish condition, deficiencies and scope and cost for any restoration to make the house “safe and habitable”. Such approach would involve:
- The “safe and habitable” benchmark definition – in sufficient detail to promote consistent, comprehensive, repeatable and objective assessment by multiple independent inspectors;
  - An inspection template to be filled out at the time of inspections and related “user guide” and training to promote accuracy and consistency;
  - Up-to-date cost benchmarks for all house components – likely multiple benchmarks to reflect regional factors;
  - A structured method for quantifying “safe and habitable” gaps and related restoration costs;
  - A structured process for allocating restoration scope and cost among key deficiency drivers including: unclear First Nation and tenant obligations; delayed investment in repairs and replacements; limited maintenance; tenant damage; and external damage (e.g. tree fall, hail, ice);
  - An effective housing management regime including: clear, documented policies and practices; effective policy enforcement; routine house inspections and follow up on deficiencies; timely maintenance, repairs and replacements; and effective cost monitoring and cost control;
  - A suitable information management system to support house inspections and to enable effective housing management.

The following Scenarios represent a first step towards such a process. All Scenarios use Sample House assumptions and apply the sample “safe and habitable” benchmark in Appendix A. Appendices B1 to B4 provide the Scenario assessments on which the following summaries are based.

- a. Baseline Scenario (see Appendix B1):** Good practice life cycle funding & management by the First Nation; tenant looks after house and does all required “in kind” maintenance.
- First Nation makes all required annual contributions to the replacement reserve;
  - Tenant takes good care of the house – no excess wear and tear;
  - Both the First Nation and Tenant do all necessary planned maintenance to keep the house in good shape;
  - No extra costs are incurred to replace premature damage;
  - House components achieve their full normal service life;
  - First Nation replaces house components pro-actively at the end of their service life;
  - House is safe and habitable at end-of-term. Depreciation is normal for life expectancy - 1.53%. End of term investment only involves replacing house components with 25-year service lives according to the normal schedule; sufficient funds are available in the replacement reserve.

**b. Scenario 1 (see Appendix B2):** Insufficient funding & poor management by the First Nation; tenant looks after house and does all required “in kind” maintenance.

- First Nation makes only 50% of required annual contributions to the replacement reserve;
- Tenant takes good care of the house – does all planned maintenance; no extra costs to repair damage arising from neglect or willful acts;
- First Nation does only 50% of necessary planned maintenance to keep house in good shape;
- First Nation only invests 50% of amounts required to replace house components pro-actively at the end of their service life; some replacements are deferred, resulting in continued deterioration;
- General house condition deteriorates quickly and significantly due to limited maintenance and investment by the First Nation; some house components fail prematurely.

Due to tenant pressure, First Nation invests in replacing interior components such as painting, cabinets and flooring according to the regular, planned schedule.

Safe and habitable deficiencies arise, primarily, from limited maintenance and delayed repairs by the First Nation, including:

- » Cracks in waterproofing membrane
- » Water has entered the envelope through failed sealants and has rotted around 40% of the timber frame and roof structure
- » The roof wasn't replaced when required
- » The ventilation/HRV system wasn't replaced when required
- Annual depreciation is higher than normal – 2.0% vs. 1.53%.
- General house condition at end-of-term is poor, notwithstanding good maintenance by the tenant; significant restoration is required to make the house safe and habitable.

**c. Scenario 2 (see Appendix B3):** Insufficient funding & poor management by the First Nation; neither the First Nation nor the tenant look after the house.

- First Nation makes only 50% of required annual contributions to the replacement reserve;
- Tenant does not take good care of the house; – results in excess wear and tear; the First Nation incurs extra costs to repair damage arising from neglect or willful acts;
- First Nation and Tenant do only 50% of necessary planned maintenance;
- First Nation only invests 50% of amounts required to replace house components pro-actively at the end of their service life; some replacements are deferred, resulting in continued deterioration;
- General house condition deteriorates quickly and significantly due to limited investment and maintenance by both the First Nation and the tenant; some house components fail prematurely.
- Safe and habitable deficiencies arising from limited maintenance and delayed repairs by both the First Nation and the tenant include:
  - » Cracks in waterproofing membrane
  - » Water has entered the envelope through failed seals and has rotted around 40% of the frame and roof structure
  - » The roof wasn't replaced when required
  - » Exterior doors, light fixtures, plumbing fixtures and some finishes are damaged and/or in poor condition and either need major repairs or to be replaced
- Annual depreciation is higher than normal – 2.0% vs. 1.53%.
- General condition of the house at end-of-term is poor; significant restoration is required to make the house safe and habitable.

- d. Scenario 3 (see Appendix B3):** Sufficient funding & good management by the First Nation; tenant does not look after house.
- First Nation makes all required annual contributions to the replacement reserve;
  - Tenant does not take good care of the house; – results in excess wear and tear; the First Nation incurs extra costs to repair damage arising from neglect or willful acts;
  - Tenant does only 50% of required maintenance according to schedule;
  - First Nation does all necessary planned maintenance to keep the house in good shape;

- First Nation replaces house components pro-actively at the end of their service life but benefits are offset by poor tenant behaviour;
- Major house components achieve their full normal service life; some interior house components have failed prematurely due to poor tenant behaviour.
- Safe and habitable deficiencies generally involve damage arising from poor tenant behaviour
- Annual depreciation is slightly higher than normal – 1.7% vs. 1.53%.
- General condition of the house at end-of-term is good to fair; significant restoration is required to make the house safe and habitable.

Key results from these Scenarios are:

End of Operating Agreement Assessment	Baseline	Scenario 1	Scenario 2	Scenario 3
House construction cost	\$350,094	\$350,094	\$350,094	\$350,094
House replacement cost @ year 25*	\$574,366	\$574,366	\$574,366	\$574,366
Accumulated depreciation	(\$132,306)	(\$172,947)	(\$172,947)	(\$147,005)
Total contribution** to replacement reserves - years 1-25*	\$171,568	\$85,784	\$85,784	\$171,568
Total investment in repairs & replacements - years 1-24*	\$98,526	\$49,263	\$49,263	\$98,526
Reserve balance @ end year 25	\$93,341	\$46,671	\$46,671	\$93,341
Restoration required at year 25 - % of replacement cost	9%	29%	44%	25%
Restoration required @ year 25*	\$52,123	\$166,564	\$254,874	\$145,189
Reserve surplus/deficit @ year 25	\$41,218	(\$119,893)	(\$208,203)	(\$51,847)
Restoration required @ year 25 – current dollars***	\$31,771	\$101,526	\$155,354	\$88,497

\*= figures include yearly inflation @ 2.0%

\*\*= CMHC plus First Nation contributions to reserves, combined

\*\*\*= estimated restoration required if a house is already 25 years old in the current year

Note that the Scenarios and corresponding results simply illustrate the proposed house evaluation methodology. Nevertheless, some high-level inferences can be drawn:

- a.** Significant investment is required at year 25 for all Scenarios, including the Baseline. The extent of investment, however, is significantly impacted by the extent to which timely maintenance, repairs and replacements are conducted.
- b.** Apparently, the CMHC subsidy is only meant to cover repairs and replacements for house components with service lives < 25 years; as such, the subsidy is insufficient to fund repair and replacement requirements for year 25 and beyond.
- c.** For the Baseline, investment in year 25 is for work that would normally be done according to the established life-cycle capital plan. The corresponding replacement reserve is more than sufficient to fund that investment.
- d.** For Scenarios 1 to 3, projected restoration investment is 3 to 5 times Baseline and is significantly higher than funds available in the replacement reserve; as such, there are significant un-funded liabilities.
- e.** Underinvestment seems to have the greatest impact on the extent of restoration required at expiry of the Operating Agreement. For example, for Scenarios 1 and 2, underinvestment and limited maintenance by the First Nation gives rise to major damage to the house structure. By contrast, for Scenario 3, good First Nation practice avoids such damage; restoration for Scenario 3 arises, primarily, from poor tenant behavior.
- f.** Assuming that Scenarios 1 and 3 represent an “average” condition between the best (Baseline) and worst (Scenario 2) cases, the results suggest that typical restoration investment in year 25 could be in the order of 25% of house replacement cost – roughly \$150,000 (\$90,000 in current dollars) for the Sample House, of which about one-third is investment that would normally be required, in any case, according to the life-cycle capital plan.
- g.** The Scenario methodology and results point to the need good policy, monitoring and record keeping practices to, for example: clearly establish First Nation and tenant obligations; monitor and record house status routinely throughout the OA term; track investment in maintenance and repairs; quantify deficiencies (scope and cost); and differentiate deficiencies and costs arising from various causal factors (e.g. First Nation, tenant, or external impacts).



## 6. Conclusions and Recommendations

- a.** Given typical issues arising at expiry of Operating Agreements, it's clear that some Nations may not be meeting one or more of their fiduciary, landlord or seller duties and, so, are potentially exposed to liability.
- b.** First Nation housing programs appear to be systematically underfunded. For example, the CMHC subsidy for capital reserves usually covers only components with service lives less than 25 years – estimated at 0.87% for the Sample House, which is about half of requirements for full life expectancy.
- c.** Restoration of houses to “safe and habitable” conditions on expiry of Operating Agreements usually represents an un-funded liability for the First Nation. Underinvestment in maintenance and repairs seems to have the major influence on the extent of such unfunded liability. Impacts arising from tenant behavior can also be significant.
- d.** Scenario results suggest that, as an initial rule-of-thumb average for a housing portfolio, First Nations could assume that restoration worth about 25% of house replacement cost – about \$90,000 in current dollars – will be required at expiry of an Operating Agreement. Of course, amounts will vary from house to house with the apparent range between good and poor management practices being in the order of 9% to 45% of house replacement cost, respectively.
- e.** Scenario results demonstrate the need for and importance of effective First Nation housing management. To adequately fulfill its fiduciary, landlord and other duties, a First Nation requires a comprehensive, robust and structured approach to housing management involving:
  - Sufficient, viable, sustainable funding to meet all requirements, pro-actively over the life-cycle of a house;
  - An effective housing management regime including: clear, documented policies and practices; consistent and effective policy enforcement; routine house inspections and timely follow up on deficiencies; timely maintenance, repairs and replacements; and effective financial management, cost monitoring and cost control;
  - Effective financial and information management systems;
  - Community developed policy objectives for Section 95 homes upon expiry of the operating agreement, including whether transfer of ownership to tenants is an objective of the First Nation;
  - Where it is a policy objective to transfer ownership to tenants, accessible community developed laws, policy, process, procedures and criteria for transferring the ownership of Section 95 homes to tenants including:
    - » establishing a purchaser's financial and personal capacity for ownership;
    - » land tenure;
    - » a structured method for quantifying “safe and habitable” gaps and related restoration costs;
    - » a structured process for allocating restoration scope and cost among key deficiency drivers including unclear First Nation and tenant obligations, delayed investment in repairs and replacements, limited maintenance, tenant damage and external damage (e.g. tree fall, hail, ice).

- Consistent, transparent and accountable practices for monitoring, assessing and maintaining house performance including:
  - » A “safe and habitable” benchmark, defined in sufficient detail to promote consistent, comprehensive, repeatable and objective assessment by multiple independent inspectors;
  - » Clearly defined key housing management terms including: deficiency; defect; life expectancy; service life; safe; habitable; hazard; significant;
  - » A comprehensive and clearly specified housing maintenance program, including appropriate allocation of effort among the First Nation and their tenant;
- » An inspection template to be filled out at the time of inspections and related “user guide” and training to promote accuracy and consistency;
- » Up-to-date cost benchmarks for all house components – likely multiple benchmarks to reflect regional factors;
- » Regular house inspections and “safe and habitable” evaluations to assess scope and cost for correcting deficiencies and to allocate responsibility fairly among the First Nation and the tenant.



The background is a solid orange color with a pattern of abstract, organic shapes in various shades of orange and light beige. These shapes resemble stylized leaves, petals, or flowing liquid forms, creating a textured and layered effect.

## Appendix A

### Defining 'Safe and Habitable' Housing



House Components	Description – Safe and Habitable
Concrete foundation	<ul style="list-style-type: none"> <li>▪ No significant spalling</li> <li>▪ Cracks are within acceptable limits for structural integrity</li> <li>▪ No visible groundwater ingress</li> <li>▪ Settlement is within acceptable limits for structural integrity and livability</li> </ul>
Perimeter drainage	<ul style="list-style-type: none"> <li>▪ Functions as designed</li> <li>▪ No blockages or undue sediment buildup</li> </ul>
Framing	<ul style="list-style-type: none"> <li>▪ Structurally sound</li> <li>▪ Moisture content is within acceptable limits</li> <li>▪ No rot</li> </ul>
Insulation	<ul style="list-style-type: none"> <li>▪ Functions as designed</li> <li>▪ Vapour barrier is intact</li> <li>▪ No undesirable air leakage</li> </ul>
Roof trusses/decking	<ul style="list-style-type: none"> <li>▪ Structurally sound</li> <li>▪ Moisture content is within acceptable limits</li> <li>▪ No rot</li> </ul>
Roofing material & flashings	<ul style="list-style-type: none"> <li>▪ Functions as designed</li> <li>▪ Weather surface is intact – no water ingress</li> <li>▪ Membrane underlay, if any, is intact</li> <li>▪ Acceptable wear and tear</li> </ul>
Soffits	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Acceptable wear and tear</li> </ul>
Gutters & downspouts	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Acceptable wear and tear</li> </ul>
Windows	<ul style="list-style-type: none"> <li>▪ Frames &amp; seals are intact – no undesirable air or water ingress</li> <li>▪ Sealed units are intact</li> <li>▪ Acceptable wear and tear</li> </ul>
Exterior doors	<ul style="list-style-type: none"> <li>▪ Frames &amp; seals are intact – no undesirable air or water ingress</li> <li>▪ Acceptable wear and tear</li> <li>▪ Provides adequate security</li> </ul>

House Components	Description – Safe and Habitable
Electrical incl. light fixtures	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Switches, receptacles and fixtures are intact and in good working condition</li> <li>▪ No exposed wiring</li> <li>▪ Acceptable wear and tear</li> </ul>
Mechanical – e.g. ventilation & HRV	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Wiring &amp; connections intact</li> <li>▪ Acceptable wear and tear</li> </ul>
Plumbing	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Fixtures in good working condition</li> <li>▪ No leaks</li> <li>▪ Acceptable wear and tear</li> </ul>
Heating	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Heating units in good working condition</li> <li>▪ Acceptable wear and tear</li> </ul>
Siding	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Caulking in acceptable condition</li> <li>▪ Acceptable wear and tear</li> </ul>
Painting	<ul style="list-style-type: none"> <li>▪ Acceptable wear and tear</li> </ul>
Decks & railings	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ No leaks at penetrations</li> <li>▪ Acceptable wear and tear</li> </ul>
Drywall	<ul style="list-style-type: none"> <li>▪ Acceptable wear and tear</li> </ul>
Interior doors	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Acceptable wear and tear</li> </ul>
Finishing trim	<ul style="list-style-type: none"> <li>▪ Acceptable wear and tear</li> </ul>
Flooring	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ No trip hazards</li> <li>▪ Acceptable wear and tear</li> </ul>
Kitchen cabinets & counters	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Caulking in acceptable condition</li> <li>▪ Acceptable wear and tear</li> </ul>

House Components	Description – Safe and Habitable
Bathroom cabinets & counters	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Caulking in acceptable condition</li> <li>▪ Acceptable wear and tear</li> </ul>
Mirrors & shower doors	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Caulking in acceptable condition</li> <li>▪ Acceptable wear and tear</li> </ul>
Appliances	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ No safety issues</li> <li>▪ Acceptable wear and tear</li> </ul>
Window coverings	<ul style="list-style-type: none"> <li>▪ Acceptable wear and tear</li> </ul>
Landscaping	<ul style="list-style-type: none"> <li>▪ No safety issues</li> <li>▪ No unacceptable pooling</li> <li>▪ Acceptable wear and tear</li> </ul>
Driveways & pathways	<ul style="list-style-type: none"> <li>▪ Function as designed</li> <li>▪ Acceptable wear and tear</li> </ul>
Safety Hazards	<ul style="list-style-type: none"> <li>▪ None</li> </ul>
Health hazards	<ul style="list-style-type: none"> <li>▪ None</li> </ul>

## Appendix B1

### **Baseline Scenario - End of Operating Agreement Assessment**

Sufficient life cycle funding and good management by the First Nation; tenant looks after the house and does all required 'in kind' maintenance.

## Appendix B1: Baseline Scenario – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Site preparation - clearing, constructing access, etc.	\$10,000	S&H	0%	\$0	No issues
Foundations	\$34,000	S&H	0%	\$0	No issues
Framing	\$28,000	S&H	0%	\$0	Structure is sound & dry
Insulation	\$8,750	S&H	0%	\$0	Insulation is intact & dry
Roof trusses	\$12,000	S&H	0%	\$0	Structure is sound & dry
Roofing	\$5,168	S&H	0%	\$0	Roofing is 5 years old
Windows	\$7,600		100%	\$9,068	Due for replacement
Exterior doors (3)	\$2,400	S&H	0%	\$0	Doors only 5 years old
Electrical incl. light fixtures	\$16,500	S&H	10%	\$1,969	Replace light fixtures
Plumbing - rough-in plus fixtures	\$14,000	S&H	15%	\$2,506	Replace fixtures
Heating	\$10,000		100%	\$11,932	Due for replacement
Ventilation/HRV	\$5,000	S&H	0%	\$0	HRV 5 years old
Siding - hardi board	\$39,150	S&H	5%	\$2,336	Replace sealants
Soffits	\$1,568	Fair	0%	\$0	Replace in 5 years
Painting	\$4,200	S&H	0%	\$0	Paint is 1 year old
Gutters & downspouts	\$1,100	Fair	0%	\$0	Replace in 5 years
Decks & railings	\$7,250	Fair	0%	\$0	Replace in 5 years
Drywall	\$28,608	S&H	0%	\$0	No issues

## Appendix B1: Baseline Scenario – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Interior doors	\$3,000		100%	\$3,580	Due for replacement
Finishing trim	\$4,800	S&H	0%	\$0	No issues
Flooring	\$11,200	S&H	0%	\$0	Flooring is 5 years old
Kitchen cabinets & counters	\$10,000	S&H	0%	\$0	Replace in 10 years
Mirrors & shower doors	\$2,500	S&H	0%	\$0	Good - 5 years old
Appliances	\$4,700	S&H	0%	\$0	Good - 5 years old
Window coverings	\$2,000	S&H	0%	\$0	Good - 1 year old
Site services & utilities	\$1,500	S&H	0%	\$0	No issues
Landscaping	\$7,400	S&H	0%	\$0	No issues
Driveways & pathways	\$5,000	S&H	0%	\$0	No issues
Cleanup	\$2,500	S&H	0%	\$0	No issues
<b>Sub-total</b>	<b>\$289,894</b>			<b>\$31,389</b>	<b>Total restoration</b>
General costs, contractor project management; site wide labour, permits etc.	\$56,000			9%	% Construction cost
	19%				
<b>Total cost – construction cost</b>	<b>\$345,894</b>				

## Appendix B2

### **Scenario 1 – End of Operating Agreement Assessment**

Insufficient life cycle funding and poor management by the First Nation; tenant looks after the house and does all required 'in kind' maintenance.

## Appendix B2: Scenario 1 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Site preparation - clearing, constructing access, etc.	\$10,000	S&H	0%	\$0	No issues
Foundations	\$34,000	FFP/Fair	5%	\$2,028	Fix cracks & waterproofing
Framing	\$28,000	Fair/poor	50%	\$16,704	40% of structure impacted by moisture; rot in framing, insulation and trusses
Insulation	\$8,750	Fair/poor	50%	\$5,220	
Roof trusses	\$12,000	Fair/poor	50%	\$7,159	
Roofing	\$5,168	Poor	100%	\$6,166	Overdue for replacement
Windows	\$7,600		100%	\$9,068	Due for replacement
Exterior doors (3)	\$2,400	S&H	100%	\$2,864	Doors only 5 years old
Electrical incl. light fixtures	\$16,500	S&H	10%	\$1,969	Replace light fixtures
Plumbing - rough-in plus fixtures	\$14,000	S&H	15%	\$2,506	Replace fixtures
Heating	\$10,000		100%	\$11,932	Replace heating system
Ventilation/HRV	\$5,000	Poor	100%	\$5,966	Overdue for replacement
Siding - hardi board	\$39,150	Fair/poor	50%	\$23,356	Replace sealants; replace areas around rotted structure
Soffits	\$1,568	Fair	0%	\$0	Replace in 5 years
Painting	\$4,200	S&H	0%	\$0	Paint is 1 year old
Gutters & downspouts	\$1,100	Fair	0%	\$0	Replace in 5 years
Decks & railings	\$7,250	Fair	0%	\$0	Replace in 5 years
Drywall	\$28,608	S&H	0%	\$0	No issues



## Appendix B2: Scenario 1 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Interior doors	\$3,000		100%	\$3,580	Replace doors
Finishing trim	\$4,800	S&H	0%	\$0	No issues
Flooring	\$11,200	S&H	0%	\$0	Flooring is 5 years old
Kitchen cabinets & counters	\$10,000	S&H	0%	\$0	Replace in 10 years
Mirrors & shower doors	\$2,500	S&H	0%	\$0	Good - 5 years old
Appliances	\$4,700	S&H	0%	\$0	Good - 5 years old
Window coverings	\$2,000	S&H	0%	\$0	Good - 1 year old
Site services & utilities	\$1,500	S&H	0%	\$0	No issues
Landscaping	\$7,400	S&H	0%	\$0	No issues
Driveways & pathways	\$5,000	Fair	30%	\$1,790	Fix cracks & settlement
Cleanup	\$2,500	Fair	0%	\$0	No issues
<b>Sub-total</b>	<b>\$289,894</b>			<b>\$100,308</b>	<b>Total restoration</b>
General costs, contractor project management; site wide labour, permits etc.	\$56,000			29%	% construction cost
	19%				
<b>Total cost - construction cost</b>	<b>\$345,894</b>				

## Appendix B3

### **Scenario 2 – End of Operating Agreement Assessment**

Insufficient life cycle funding and poor management by the First Nation; neither the First Nation nor the tenant looks after the house.

## Appendix B3: Scenario 2 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Site preparation - clearing, constructing access, etc.	\$10,000	S&H	0%	\$0	No issues
Foundations	\$34,000	FFP/Fair	5%	\$2,028	Fix cracks & waterproofing
Framing	\$28,000	Fair/poor	50%	\$16,704	40% of structure impacted by moisture; rot in framing, insulation and trusses
Insulation	\$8,750	Fair/poor	50%	\$5,220	
Roof trusses	\$12,000	Fair/poor	50%	\$7,159	
Roofing	\$5,168	Poor	100%	\$6,166	Replace roof - overdue
Windows	\$7,600		100%	\$9,068	Due for replacement
Exterior doors (3)	\$2,400	Poor	100%	\$2,864	Damaged - replace
Electrical incl. light fixtures	\$16,500	FFP/Fair	10%	\$1,969	Replace damaged light fixtures
Plumbing - rough-in plus fixtures	\$14,000	FFP/Fair	15%	\$2,506	Replace damaged fixtures
Heating	\$10,000		100%	\$11,932	Due for replacement
Ventilation/HRV	\$5,000	Poor	100%	\$5,966	Replace - overdue
Siding - hardi board	\$39,150	Fair/poor	50%	\$23,356	Replace sealants; replace areas around rotted structure
Soffits	\$1,568	Fair	30%	\$561	Major repairs; replace in 5 years
Painting	\$4,200	Poor	100%	\$5,011	
Gutters & downspouts	\$1,100	Fair	15%	\$197	Major repairs; replace in 5 years
Decks & railings	\$7,250	Fair	30%	\$2,595	Fix damage - replace in 5 years
Drywall	\$28,608	Fair	20%	\$6,827	Fix damage

## Appendix B3: Scenario 2 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Interior doors	\$3,000		100%	\$3,580	Replace doors
Finishing trim	\$4,800	Fair	30%	\$1,718	Fix damage
Flooring	\$11,200	Poor	100%	\$13,364	Replace
Kitchen cabinets & counters	\$10,000	Poor	100%	\$11,932	Replace
Mirrors & shower doors	\$2,500	Poor	100%	\$2,983	Replace
Appliances	\$4,700	Poor	100%	\$5,608	Replace
Window coverings	\$2,000	Poor	100%	\$2,386	Replace
Site services & utilities	\$1,500	Fair	0%	\$0	No issues
Landscaping	\$7,400	Fair	0%	\$0	No issues
Driveways & pathways	\$5,000	Fair	30%	\$1,790	Fix cracks & settlement
Cleanup	\$2,500	Fair	0%	\$0	No issues
<b>Sub-total</b>	<b>\$289,894</b>			<b>\$153,490</b>	<b>Total restoration</b>
General costs, contractor project management; site wide labour, permits etc.	\$56,000			44%	% construction cost
	19%				
<b>Total cost - construction cost</b>	<b>\$345,894</b>				

## Appendix B4

### **Scenario 3 – End of Operating Agreement Assessment**

Sufficient life cycle funding and good management by the First Nation; tenant does not look after the house.

## Appendix B4: Scenario 3 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Site preparation - clearing, constructing access, etc.	\$10,000	S&H	0%	\$0	No issues
Foundations	\$34,000	S&H	0%	\$0	No issues
Framing	\$28,000	S&H	0%	\$0	Structure is sound & dry
Insulation	\$8,750	S&H	0%	\$0	Insulation is intact & dry
Roof trusses	\$12,000	S&H	0%	\$0	Structure is sound & dry
Roofing	\$5,168	S&H	0%	\$0	Roofing is 5 years old
Windows	\$7,600		100%	\$9,068	Due for replacement
Exterior doors (3)	\$2,400	Poor	100%	\$2,864	Replace due to damage - only 5 years old
Electrical incl. light fixtures	\$16,500	FFP/Fair	10%	\$1,969	Replace light fixtures
Plumbing - rough-in plus fixtures	\$14,000	FFP/Fair	15%	\$2,506	Replace fixtures
Heating	\$10,000		100%	\$11,932	Replace heating system
Ventilation/HRV	\$5,000	S&H	0%	\$0	HRV 5 years old
Siding - hardi board	\$39,150	S&H	5%	\$2,336	Replace sealants
Soffits	\$1,568	Fair	30%	\$561	Major repairs; replace in 5 years
Painting	\$4,200	Poor	100%	\$5,011	
Gutters & downspouts	\$1,100	Fair	15%	\$197	Major repairs; replace in 5 years
Decks & railings	\$7,250	Fair	30%	\$2,595	Replace in 5 years
Drywall	\$28,608	Fair	20%	\$6,827	Fix damage

## Appendix B4: Scenario 3 – End of Operating Agreement Assessment

Component construction Costs	Construction Cost	Condition	Restoration to make house safe and habitable (S&H)		
			% Constr Cost	Cost	Comments
Interior doors	\$3,000		100%	\$3,580	Replace doors
Finishing trim	\$4,800	Fair	30%	\$1,718	Fix damage
Flooring	\$11,200	Poor	100%	\$13,364	Replace
Kitchen cabinets & counters	\$10,000	Poor	100%	\$11,932	Replace
Mirrors & shower doors	\$2,500	Poor	100%	\$2,983	Replace
Appliances	\$4,700	Poor	100%	\$5,608	Replace
Window coverings	\$2,000	Poor	100%	\$2,386	Replace
Site services & utilities	\$1,500	Fair	0%	\$0	No issues
Landscaping	\$7,400	Fair	0%	\$0	No issues
Driveways & pathways	\$5,000	S&H	0%	\$0	No issues
Cleanup	\$2,500	S&H	0%	\$0	No issues
<b>Sub-total</b>	<b>\$289,894</b>			<b>\$87,435</b>	<b>Total restoration</b>
General costs, contractor project management; site wide labour, permits etc.	\$56,000			25%	% construction cost
	19%				
<b>Total cost – construction cost</b>	<b>\$345,894</b>				

The background is a solid orange color with a complex, organic pattern of lighter orange and white shapes. These shapes resemble stylized leaves, petals, or abstract organic forms, creating a textured, layered effect. The shapes are scattered across the entire page, with some larger and more prominent than others.

## **Appendix C**

**Woodward & Co Legal Memo**



