

**CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY**



**Family Homes on Reserves
and Matrimonial Interests or
Rights Act**

**Aboriginal Financial Officers Association
March 26, 2015**



AGENDA

1. Introduction to the **Centre of Excellence for Matrimonial Real Property**
2. What is the *Family Homes on Reserves and Matrimonial Rights or Interest Act*?
3. Why legislation?
4. Rights and Powers conferred by the Act.
 - Powers of the First Nation to enact laws;
 - Provisional Federal Rules.
5. Who is affected by the Provisional Federal Rules?
6. Balancing Collective and Individual Rights
7. Pro's and Con's (Federal Provisional Rules/MRP law)
8. Questions??

THE ROLE OF THE CENTRE OF EXCELLENCE FOR MATRIMONIAL REAL PROPERTY

- **The Centre of Excellence: operates at arm's length from the Government of Canada, funded to support First Nations in:**
 - developing their own matrimonial real property laws;
 - effectively implementing the provisional federal rules once in force; and
 - provide assistance with creating alternative dispute resolution mechanisms.
- **The Centre will focus on disseminating knowledge to First Nation individuals, communities and organizations to assist them in understanding and implementing the legislation.**
- **The Centre will not provide legal advice or opinions.**

WHAT IS THE FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT?

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the Act) is a piece of federal legislation parts of which came into force on December 16th, 2013.
- It was enacted to ensure that people living on reserves have similar protections and rights as other Canadians when it comes to the family home and the division of interests or rights.

WHY DID WE DID WE NEED LEGISLATION?

- In 1986, the Supreme Court of Canada ruled that courts cannot apply provincial or territorial family laws respecting Matrimonial Real Property on reserves.
- The *Indian Act* does not address this issue.
- As a result, many of the legal protections and rights relating to Matrimonial Real Property applicable off reserves are not available to individuals living on reserves (a legislative gap).

WHAT DOES THE LEGISLATION PROVIDE?

1. An enabling provision for First Nations to enact their own **Matrimonial Real Property laws**.
2. **Provisional Federal Rules** which will provide individuals living on reserve with basic protections and rights.

ENACTMENT OF FIRST NATION LAW

- Since December 16th, 2013, a First Nation has the power to enact their own law related to :
 - Use, Occupation, and Possession of the Family Home; and
 - Division of the Value of any interests or rights held by spouses and common law partners in or to structures and lands on its reserves.
- The Act is not prescriptive so that laws can be designed to respect a First Nation's particular needs, values and customs.

ENACTMENT OF FIRST NATION LAW

- First Nation must provide notice to the Provincial Attorney General of its intention to enact its own MRP law.
- The content and acceptability of any law is determined between a First Nation government and its members.
- The First Nation Law cannot be disallowed, altered, or cancelled by the Minister or any government official.

ENACTMENT OF FIRST NATION LAW

- Enactment of a First Nation Law requires Community Approval.
- Every member of the First Nation, 18 years and over, resident or non-resident on the reserve is eligible to vote in the approval process.
- Council is obligated to take reasonable measures to locate voters and inform them of their right to vote, how they can exercise that right, and the contents of the proposed law.

ENACTMENT OF FIRST NATION LAW

- **The proposed First Nation law is approved if:**
 - **at least 25 percent of eligible voters participated in the vote; AND**
 - **a majority of those members who participated in the vote, voted to approve it.**

ENACTMENT OF FIRST NATION LAW

- Once the law is approved, Council must inform the Minister, without delay of the result of the vote, and send a copy of the approved law to:
 - the Minister of Aboriginal Affairs and Northern Development Canada;
 - the Centre of Excellence for Matrimonial Real Property; and
 - the Attorney General of the Province in which a reserve of the First Nation is located.

PROVISIONAL FEDERAL RULES

- The provisional federal rules provide a set of interim rules that allow parties to determine what they are entitled to when a marriage or common-law (C/L) relationship breaks down or upon the death of a spouse.
- The Act applies to married couples and common law partners living on reserve where at least one of them is a First Nation member.
- These rules would no longer apply to a First Nation that, at any time, enacts its own law under the legislation.

WHO IS AFFECTED BY THE PROVISIONAL FEDERAL RULES?

- On December 16th, 2014, the federal provisional rules began applying to all First Nations automatically with the following exceptions:
 - First Nations that have enacted their own Matrimonial Real Property laws under this legislation;
 - First Nations with land codes or Matrimonial Real Property laws in place under the First Nation Land Management Act;
 - First Nations with reserve lands and a Self Government Agreement in effect who have jurisdiction over land management. (Self governing First Nations may ask the Minister to make a declaration that the legislation will apply to them.)

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- Under the Act, the provisional federal rules provide basic rights and protections to individuals on reserves:
 - during a marriage or common-law relationship;
 - in the event of a relationship breakdown; and
 - on the death of a spouse or common-law partner.

PROVISIONAL FEDERAL RULES

KEY ELEMENTS

- Rights and protections regarding the family home including:
 - right of each spouse or C/L partner to occupy the family home during the conjugal relationship (s. 13);
 - right of a non-interest holding survivor to remain in the family home automatically for 180 days after the death of their spouse or common-law partner (s. 14);
 - requirement for consent of spouse or C/L partner to dispose of or encumber the family home (s. 15);

PROVISIONAL FEDERAL RULES

KEY ELEMENTS (CONT.)

- EPOs in the case of family violence to ensure the immediate protection of a person who is at risk of harm or a property that is at risk of damage (s.s 16-19);
- temporary exclusive occupation of the family home (s.s 20-21);
- division of the value of matrimonial interests or rights (s.s 28-31); and
- entitlement of a survivor on the death of a spouse or common-law partner (s.s 34-40).

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Emergency protection order:**
 - allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (in situations of family violence);
 - **Should a spouse or common-law partner not be able to apply for an emergency protection order in person, a peace officer or other person may apply on behalf of that spouse or partner to ensure the immediate protection of the person or property at risk of harm.**

RIGHTS AND PROTECTIONS WHERE FAMILY VIOLENCE BY INTEREST HOLDER

Before

- Interest holder may remain in the home;
- Victim and children may be required to vacate the home;
- May result in homelessness or living at a temporary shelter off-reserve;
- No legal recourse.

After

- S.16 allows victim to apply for an Emergency Protection Order (up to 90 days);
- Order can require the applicant's spouse to vacate the family home;
- Victim may also apply for Exclusive Occupation of the family home (s.20).

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Exclusive occupation order:**
 - Enables courts to provide short to long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners;
 - The duration of this order could range from a set number of days to a longer period, such as until dependent children reach the age of majority.

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Exclusive occupation order:**
 - **Either spouse could apply to the courts for exclusive occupation and in making the order, the courts must consider among other things;**
 - **Collective interests of the First Nation members;**
 - **Best interests of the children;**
 - **Terms of any agreements;**
 - **Period of time the applicant has habitually resided on the reserve;**
 - **Financial situation and the medical condition;**
 - **Availability of other suitable accommodations; or**
 - **Family violence, etc.**

APPLICATIONS FOR AN EXCLUSIVE OCCUPATION ORDER

- **Applications for Exclusive Occupation – Ss. 20 and 21**
- **Copy of Application sent to FN Council – s. 41(1)**
- **First Nation Council's input – s. 41(2)**
- **Procedures:**
 - Receipt, filing and storage of applications
 - Review and decision
- **Policy:**
 - Access and privacy considerations
 - When and how a FN Council provides its input

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- Entitlement of each member spouse or common-law partner to an equal division of the value of the family home and any other matrimonial interests or rights:
 - ensures that the proven value of a couple's matrimonial interests or rights in, or to, the family home and other structures and lands on the reserve are shared equally on the breakdown of a relationship.

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Entitlement of surviving spouses or common-law partners.**
 - ensures that when a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for a specified period of time (minimum 180 days)

MEMBER SPOUSE HOLDING THE INTEREST TO THE “FAMILY HOME” DIES

Before

- Regardless of the circumstances the survivor can be asked to leave;
- No legal recourse available.

After

- s. 14 provides survivor, whether or not they are a First Nation member or an Indian, may occupy the family home for a minimum of 180 days;
- Survivor can then apply for Exclusive Occupation for a fixed period (s.20);
- Court takes various considerations into account (s.20(3)).

WHAT RIGHTS AND PROTECTION DO THE PROVISIONAL FEDERAL RULES PROVIDE?

- **Enforcement of agreements on the division of the value of the matrimonial property.**
 - **Allows a court to make an order that can be used to enforce a free and informed written agreement made by spouses or common law partners that is not unconscionable and that sets out the amount to which each is entitled and how to settle the amount.**

COLLECTIVE AND INDIVIDUAL RIGHTS

- This Act is intended to balance:
 - The collective interest of the First Nation in its reserve lands (where existing Aboriginal rights are recognized under section 35 of the *Constitution Act, 1982* and are referred to in section 25 of the *Canadian Charter of Rights and Freedoms (Charter)*;
 - Individual rights where spouses and common-law partners have access to rights and protections similar to those in provincial family laws (Equality rights are guaranteed under sections 15 and 28 of the *Charter*).

COLLECTIVE AND INDIVIDUAL RIGHTS

- Non-members are not permitted to hold an interest or right to land on reserve. The legislation respects the principle of non-alienation of reserve lands.
- The rules will not lead to non-Indians or non-members acquiring permanent interests in reserve land either through relationship breakdown or survivorship that they were incapable of acquiring prior to this Act.

FEDERAL PROVISIONAL RULES

Pro

- Complete
- Comprehensive MRP rules
- Less \$ outlay required by the First Nation
- No requirement for community engagement
- Addresses a longstanding issue
- First Nation representation
- Federal legislation and rules

Con

- Imposed
- No direct input from a FN's members
- Not reflective of any specific community's values
- Definitions may not be acceptable
- Resources required for implementation (FN representation)
- First Nation policies not consistent
- No community awareness

FIRST NATION MRP LAW

Pro

- Community taking responsibility for longstanding issue
- Reflects community values and customs
- MRP templates and training
- Tailored to fit First Nation policies and community by-laws
- Community buy-in
- Federal law status
- No ministerial discretion to disallow

Con

- Costly
- Imposed
- Time consuming
- Complex legal process
- Getting to an agreement on content
- Voting and engagement requirements
- Community resources
- FN law subject to challenge

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CENTRE OF EXCELLENCE FOR MATRIMONIAL REAL PROPERTY



Questions??