



Law Society
of Saskatchewan

Matrimonial Real Property Rights on Reserve

***An Overview of the *Family Homes on Reserves and
Matrimonial Interests or Rights Act****

May 1, 2019
Saskatoon

LAW SOCIETY OF SASKATCHEWAN

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PROGRAM:

8:30 **Registration**

9:00 **Overview of FHRMIRA Legislation**

Andrew Ouchterlony, *Department of Justice, INAC Legal Services*
Kathy McCue, *Centre of Excellence for Matrimonial Real Property*
Shayne McDonald, *Centre of Excellence for Matrimonial Real Property*

10:30 Refreshment and Networking Break

10:45 **Scenario Based Presentation & Discussion**

Andrew Ouchterlony, *Department of Justice, INAC Legal Services*
Kathy McCue, *Centre of Excellence for Matrimonial Real Property*

12:15 Lunch

1:00 **A Saskatchewan Perspective**

Kimberly Stonechild, *Lavoie Stonechild Law Office*

2:00 **Adjournment**

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Kimberly Stonechild

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ABOUT THE PRESENTERS:

The professionals who are presenting at this Law Society of Saskatchewan seminar are all volunteers who have donated their valuable time to contribute to continuing professional development.

Kathy McCue, *Centre of Excellence for Matrimonial Real Property*

Kathy McCue is a member of the Curve Lake First Nation in Ontario. Kathy has over 30 years of experience in various aspects of First Nation administration and governance. She maintains a strong commitment to community development and enjoys the opportunity to provide technical support that improves capacity and furthers the objectives of First Nation communities.

Kathy joined the Centre of Excellence for Matrimonial Real Property in November of 2013 as the Administration and Communication Coordinator. She now holds the position of MRP Specialist – East providing support for the Maritime provinces, English Quebec, Ontario and Manitoba.

Shayne McDonald, *Centre of Excellence for Matrimonial Real Property*

Shayne McDonald is an indigenous lawyer with the Law Firm of McDonald White located on the Miawpukek Reserve at Conne River Newfoundland and Labrador. Shayne is a member of the Miawpukek First Nation which is a small Mi'kmaq community located in Newfoundland's south west coast.

Shayne specializes in indigenous law and has been practicing since 1993. In addition to his work with McDonald White law firm, Shayne oversees Miawpukek's Community Restorative Justice Department which includes a healing and sentencing circle program, family mediation, court worker program, alternate dispute resolution, a crime prevention program and community policing.

Andrew Ouchterlony, *Department of Justice, INAC Legal Services*

Andrew Ouchterlony is a Legal Counsel with the federal Department of Justice, in the Legal Services Unit serving both Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada. He is located in Ottawa/Gatineau. For several years he has participated in the development and implementation of legislative and regulatory initiatives relating to First Nations.

Kimberly Stonechild, *Lavoie Stonechild Law Office (Prince Albert)*

Kimberly Stonechild is currently a partner at Lavoie Stonechild Law Office in Prince Albert, which was established in 2015. Kimberly attended the University of Saskatchewan, graduating with a LL.B in 2007 and was called to the bar in 2008. Her practice is focused on mediation and litigation, and she has spent 10 years of her career as a lawyer practicing in child advocacy and children's law. Kimberly currently represents five First Nation Child Protection Agencies across Southern and Northern Saskatchewan.

Kimberly's passion has always drawn her to work at a grass roots level for the advancement, economic growth and strengthening of her community. A large part of her practice is also in administrative law within First Nation Band law, working closely with chief and council as well as governing boards of First Nation governance. Kimberly has represented First Nations for negotiations on economic development, gaming, education, and lands and resources with the provincial and federal levels of government, focusing on reciprocity and partnership.

Kimberly is a proud resident of the R.M. of Prince Albert, living about 14 kilometers south of the city of Prince Albert, with her husband, Dane, and her two daughters, Gwen and Evelyn.



DEPARTMENT OF JUSTICE

Matrimonial Real Property Rights on Reserve

*An Overview of the **Family Homes on Reserves and Matrimonial Interests or Rights Act***

Law Society of Saskatchewan

May 1, 2019





Background – constitutional issue

Supreme Court of Canada identified constitutional issue –

- *Derrickson v. Derrickson* (1986) and *Paul v. Paul* (1986) - provincial laws relating to matrimonial real property (MRP) cannot apply to alter individual interests in reserve lands, as these are within the jurisdiction of Parliament (“Indians, and Lands reserved for the Indians” - s. 91(24) *Constitution Act, 1867*).
 - The majority of First Nations and their reserve lands continue to be guided by the *Indian Act* and its land management provisions. The federal Indian Act does not prescribe rules respecting matrimonial real property (MRP) on reserve.
 - Result – spouses were unable to obtain family law relief regarding MRP located on reserve –
 - orders still available for division of personal property and MRP located off-reserve (under provincial legislation), and support and custody (under the Divorce Act and/or provincial legislation).
 - Similar constitutional concerns about provincial civil family violence protection orders.
 - A number of tragic personal situations.
-



***Derrickson v. Derrickson*, [1986] 1 S.C.R. 285**

Paragraph 20:

“Section 91(24) of the *Constitution Act, 1867* confers exclusive legislative authority on the Parliament of Canada in ‘all Matters’ coming within the subject ‘Indians, and lands reserved for the Indians’.”

Paragraph 41:

“The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. [91\(24\)](#) of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.”

Paragraph 80:

“In the result, even assuming that s. 88 of the *Indian Act* applies to lands reserved for the Indians, the provisions of the *Family Relations Act* would, in my opinion, fall within that exception of s. 88 [(inconsistency with the provisions of the *Indian Act*)] and would not be applicable to lands reserved for the Indians.”





Studies and Consultations

- From 1986 on – a number of studies and reports recommended that federal legislation fill the legislative gap and provide equal protection under the law for spouses living on reserve, including –
 - House of Commons, Standing Committee on the Status of Women;
 - House of Commons Standing Committee on Aboriginal Affairs and Northern Development;
 - Senate Standing Committee on Human Rights.
 - Extensive consultations –
 - report of the Ministerial Representative (Wendy Grant-John);
 - consultation on possible legislative solutions.
 - Among the major recommendations was the rejection of an option that would have seen provincial MRP legislation applied on reserves.
-



INAC's Overview graphic:

1986	<ul style="list-style-type: none"> ➤ The Supreme Court of Canada confirmed that provincial or territorial laws cannot apply in the division of matrimonial real property (MRP) on reserve. ➤ The <i>Indian Act</i> is silent on the issue.
2000-2001	<ul style="list-style-type: none"> ➤ Special Representative appointed to study the issue of MRP & recommend possible legislative and/or policy solutions however, none were made in the final report.
2002-2004	<ul style="list-style-type: none"> ➤ The Department held focus groups, presentations and information sessions across Canada to raise awareness of the issue.
2005-2007	<ul style="list-style-type: none"> ➤ Led by a Ministerial Representative, over \$8.5 million was spent to support a consultation process. 103 consultation sessions held across Canada, at the National, Regional and local levels, including consultations by the AFN, NWAC, & other organizations. <p style="text-align: center;">The final report: 33 of the recommendations concerned the content of the legislation. 30 are addressed in this bill as recommended & the remaining 3 were addressed with some modification.</p>
2003-2011	<ul style="list-style-type: none"> ➤ Reports relating to matrimonial real property on Reserves produced by the Standing Senate Committee on Human Rights, the Standing Committee on Aboriginal Affairs and Northern Development, and the Standing Committee on the Status of Women
2011-2013	<ul style="list-style-type: none"> ➤ The Standing Senate Committee on Human Rights and the Standing Committee on the Status of Women heard evidence from a combined total of 64 witnesses over 9 committee meetings regarding Bill S-2, which received Royal Assent in 2013.

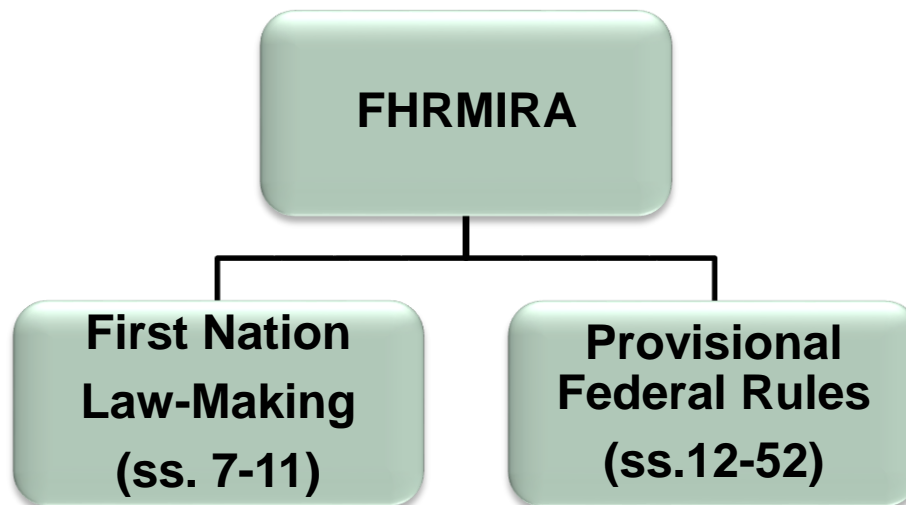


Federal Objective and Legislative Initiative

- Fill the legislative gap:
 - with basic rights and protections similar to those found in provincial/territorial legislation;
 - respecting the unique situation of reserve communities and the collective interest in their reserve lands; and
 - in a way which compliments the existing jurisdiction of the provincial/territorial superior courts, so that applications under this Act could be heard and determined as part of other family law applications.



Legislative Response: FHRMIRA



- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) was given Royal Assent in June 2013, and is structured in two main parts:
 - **law-making authority for First Nations (ss. 7 to 11)** with reserve lands (in force December 16, 2013); and
 - **federal provisional rules (ss. 12 to 52)** that came into force December 16, 2014, and apply until a First Nation enacts its own law.
-



Legislative Response: *First Nations Land Management Act (FNLMA)*

Rules on Breakdown of Marriage

Obligation of First Nation

- **17 (1)** A First Nation shall, in accordance with the Framework Agreement and following the community consultation process provided for in its land code, establish general rules and procedures, in cases of breakdown of marriage, respecting the use, occupation and possession of First Nation land and the division of interests or rights in First Nation land.

Establishment of rules and procedures

- (2) The First Nation shall, within twelve months after its land code comes into force, incorporate the general rules and procedures into its land code or enact a First Nation law containing the general rules and procedures.

Disputes

- (3) The First Nation or the Minister may refer any dispute relating to the establishment of the general rules and procedures to an arbitrator in accordance with the Framework Agreement.

1999, c. 24, s. 17; 2007, c. 17, s. 6; 2012, c. 19, s. 652(E).





Recent Amendment: *First Nations Land Management Act (FNLMA)*

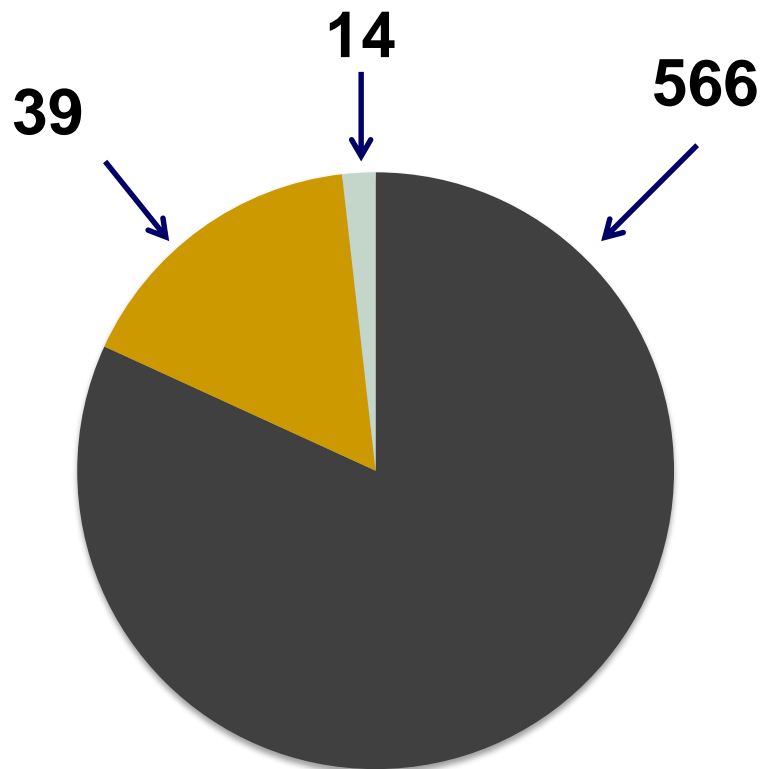
- Amendments to the FNLMA provisions relating to matrimonial real property were made as part of the *Budget Implementation Act, 2018, No. 2*
 - In force December 13, 2018 on Royal Assent of *BIA, 2018, No. 2*, S.C. 2018, c. 27.
 - Repeal of para. 6(1)(f) and s. 17 of the FNLMA
 - Replaced with First Nation law-making provisions closely mirroring the FHRMIRA:
 - 20 (1) The council of a First Nation has, in accordance with its land code, the power to enact laws respecting
 - ...
 - (c) the rules and procedures that apply, during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, with respect to
 - (i) the use, occupation and possession of family homes on First Nation land,
 - (ii) the division of the value of any interests or rights held by spouses or common-law partners in or to First Nation land or structures on First Nation land, and
 - (iii) the period of cohabitation in a conjugal relationship required for an individual to be a common-law partner; ...

[See all subsections 20(2.1), 20(2.2), 20(2.3), and 20(5)]





Addressing the Gap



CIRNAC/ISC's sense of the breakdown of MRP laws in First Nation communities

- First Nation matrimonial real property laws enacted pursuant to the Act (14)
- Matrimonial real property is addressed under the First Nations Land Management Regime (39)
- Subject to the Provisional Federal Rules (approx. 566)

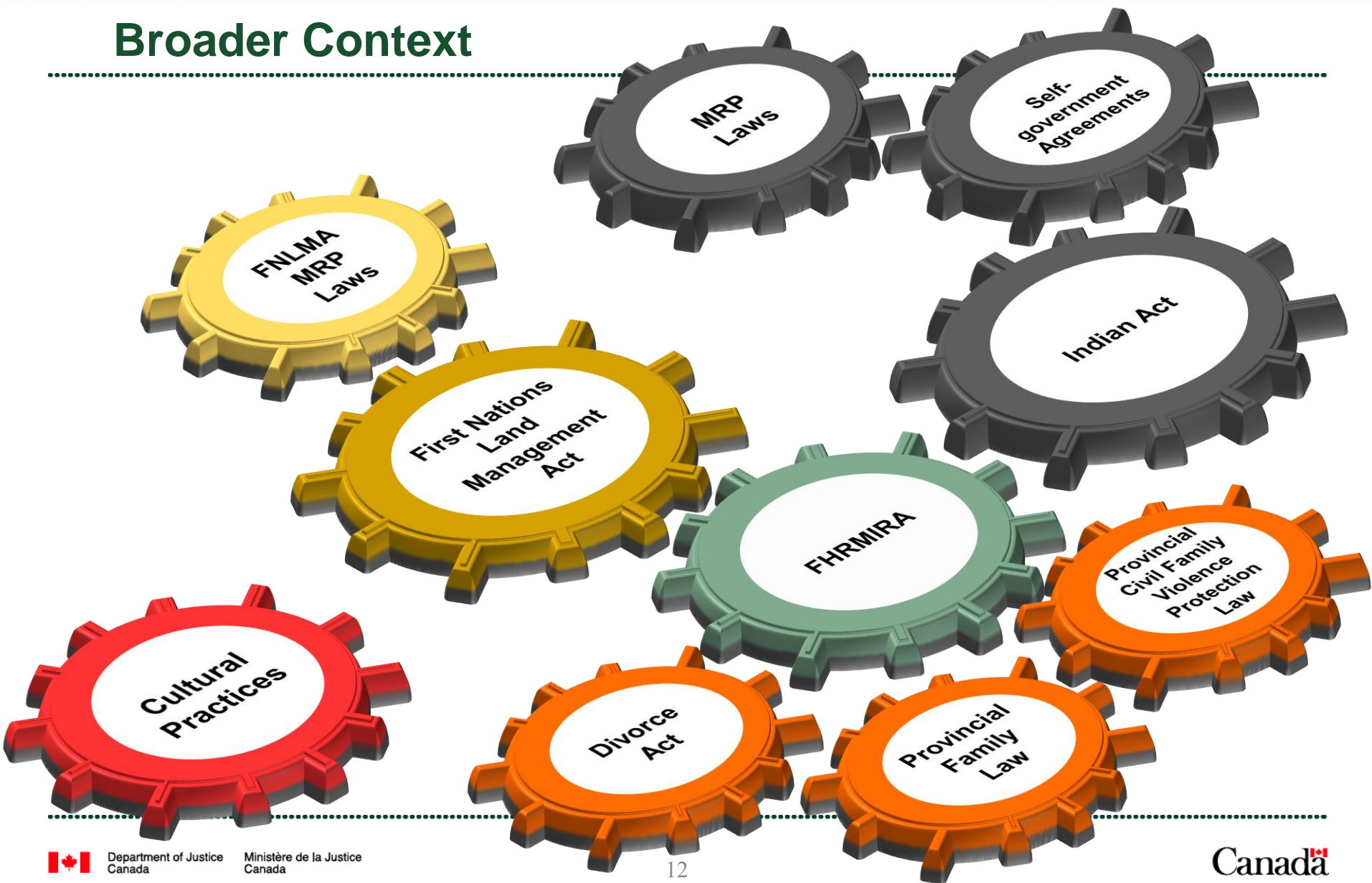


FHRMIRA Context: federal laws

- As the Act applies to reserve lands, it operates within the network of laws governing “Lands reserved for the Indians”, including the *Indian Act* and the *First Nations Land Management Act*.
 - For example, several of the definitions in the *Indian Act* are adopted in the FHRMIRA –
 - “Unless the context otherwise requires, words and expressions used in this Act have the same meaning as in the *Indian Act*” - s. 2(2).
 - The Act applies to “Indians” [defined in the *Indian Act*] and “First Nation members” [defined in the FHRMIRA].
 - Consistent with other federal law, remedies are open equally to married “spouses” [given an extended meaning in the FHRMIRA] and to “common-law partners” [defined in the *Indian Act* as after one year of cohabitation], and some remedies are available to “survivors” [defined in the *Indian Act*].
-



Broader Context





An Overview of Land Holding under the *Indian Act*

- Indian reserve lands are held by the federal Crown “for the use and benefit” of the Band [s. 18 of the *Indian Act*].
 - As a result, Indian reserve lands cannot be bought or sold by individuals, seized by legal process, or mortgaged or pledged to non-members of that First Nation [s. 29 and s. 89(1) of the *Indian Act*].
 - Members of a First Nation may obtain certain individual interests or rights in portions of that land or in structures built on that land in two ways:
 - under the *Indian Act* [as a Certificate of Possession (s. 20); permit (s. 28(2)); lease of designated lands (s. 53); or lease at the request of Certificate of Possession holder (s. 58(34))]; and
 - outside the *Indian Act* (known as customary allotments, which form as much of 80% of individual interests in reserve lands).
 - While the FHRMIRA does not automatically apply to customary land-holdings, it does permit (i) First Nations to recognize such interests in structures, and (ii) courts to order that such interests in structures or lands are held. In this way, the Act may apply in cases of customary allotments.
-



Land Holding under the *Indian Act* (cont'd)

- Individual interests and rights in reserve lands held under the *Indian Act* are recorded in the Indian Lands Registry System.
- As of April 2018, there are 63,198 active Evidence of Titles (e.g. Certificates of Possession, Certificates of Occupation, Notices of Entitlement):

British Columbia	15,356	Quebec	15,179
Alberta	167	New Brunswick	1,168
Saskatchewan	453	NFLD & Labrador	213
Manitoba	1,228	Nova Scotia	449
Ontario	28,863	Prince Edward Island	122

- Similar documents issued under FNLMA land codes may be included in the First Nations Lands Registry System, and those issued concerning self-governed First Nations lands may be included in the Self-Governing First Nations Land Register.



Purpose of the FHRMIRA

- The purpose of the Act is to provide for
 - the enactment of **First Nation laws**; and
 - the establishment of **provisional rules and procedures**

that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting

- the **use, occupation and possession of family homes** on First Nation reserves; and
- the **division of the value** of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.



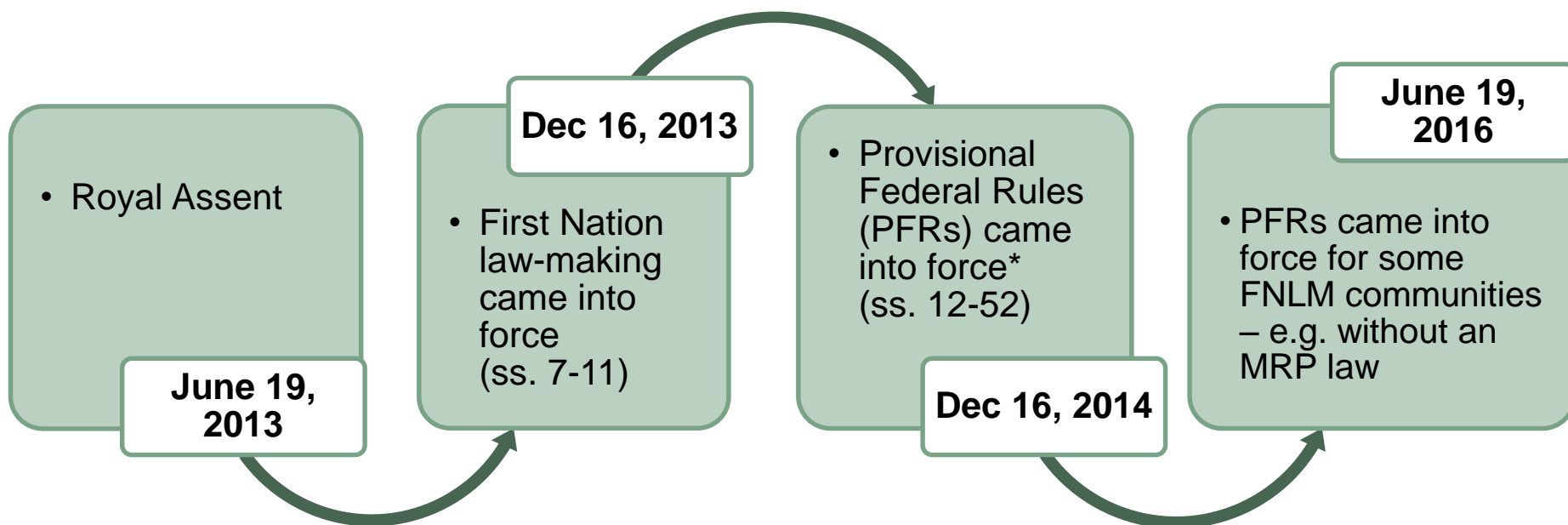
Application of the Act

- Applies on First Nation reserves [defined in s. 2(1) of the *Indian Act*], with the proviso that:
 - Title to reserve lands cannot be affected by determinations made under the legislation;
 - Reserve lands continue to be lands set apart for the use and benefit of the respective First Nation; and
 - Reserve lands continue to be lands reserved for the Indians within the meaning of Class 24 of section 91 of the *Constitution Act, 1867*.
 - The FHRMIRA applies only where at least one of the spouses or common-law partners is a First Nation member or an “Indian” (as defined by Indian Act). [s. 6]
 - The Provisional Federal Rules (in force December 16, 2014) apply to First Nations whose lands are managed pursuant to the *Indian Act* or the FNLMA, until such time as they enact their own laws under this legislation, or under the FNLMA, or where they take on land management powers through a negotiated comprehensive self-government agreement. [s. 12]
-





Application of the Act (key dates)



* Provisional federal rules only apply if no MRP law or FNLM land code was brought into force by a First Nation before this date.





Application of the Act - some particulars

- The Provisional Federal Rules (PFRs) do not apply to a First Nation that had a land code in force when the PFRs came into force on December 16, 2014. [s. 12(2)]
- Transitional provisions also delayed the application of the PFRs until June 19, 2016 for First Nations on the Schedule to the FNLMA when the FHRMIRA received Royal Assent (June 19, 2013). [s. 55]
- Self-governing First Nations with the power to manage their reserve lands under a self-government agreement may request that the Minister issue a declaration that the federal provisional rules will apply. [s. 12(3)]





Key Definitions

Definitions are found in s. 2(1)

- Court
- Designated Judge
- Family Home
- Interest or Right
- Matrimonial Interests or Rights
- Words and expressions not defined in FHRMIRA have the same meaning as in the *Indian Act* – e.g. “band”, “common-law partner”, “reserve” and “survivor” [s. 2(2)]





Key definitions - “Family Home”

family home means a structure — that need not be affixed but that must be situated on reserve land — where the spouses or common-law partners habitually reside or, if they have ceased to cohabit or one of them has died, where they habitually resided on the day on which they ceased to cohabit or the death occurred. If the structure is normally used for a purpose in addition to a residential purpose, this definition includes only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.

(s. 2(1) FHRMIRA).





Key definitions - “Interest or Right”

“*interest or right*” means

(a) the following interests or rights referred to in the *Indian Act*:

- (i) a right to possession, with or without a Certificate of Possession or a Certificate of Occupation, allotted in accordance with section 20 of that Act,
- (ii) a permit referred to in subsection 28(2) of that Act, and
- (iii) a lease under section 53 or 58 of that Act;

(b) an interest or right in or to reserve land that is subject to any land code or First Nation law as defined in subsection 2(1) of the *First Nations Land Management Act*, to any First Nation law enacted under a self-government agreement to which Her Majesty in right of Canada is a party, or to any land governance code adopted, or any Kanesatake Mohawk law enacted, under the *Kanesatake Interim Land Base Governance Act*; and

(c) an interest or right in or to a structure – that need not be affixed but that must be situated on reserve land that is not the object of an interest or right referred to in paragraph (a) — which interest or right is recognized by the First Nation on whose reserve the structure is situated or by a court order made under section 48.

(s. 2(1) FHRMIRA).





Key definitions - “Matrimonial Interests or Right”

matrimonial interests or rights means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners

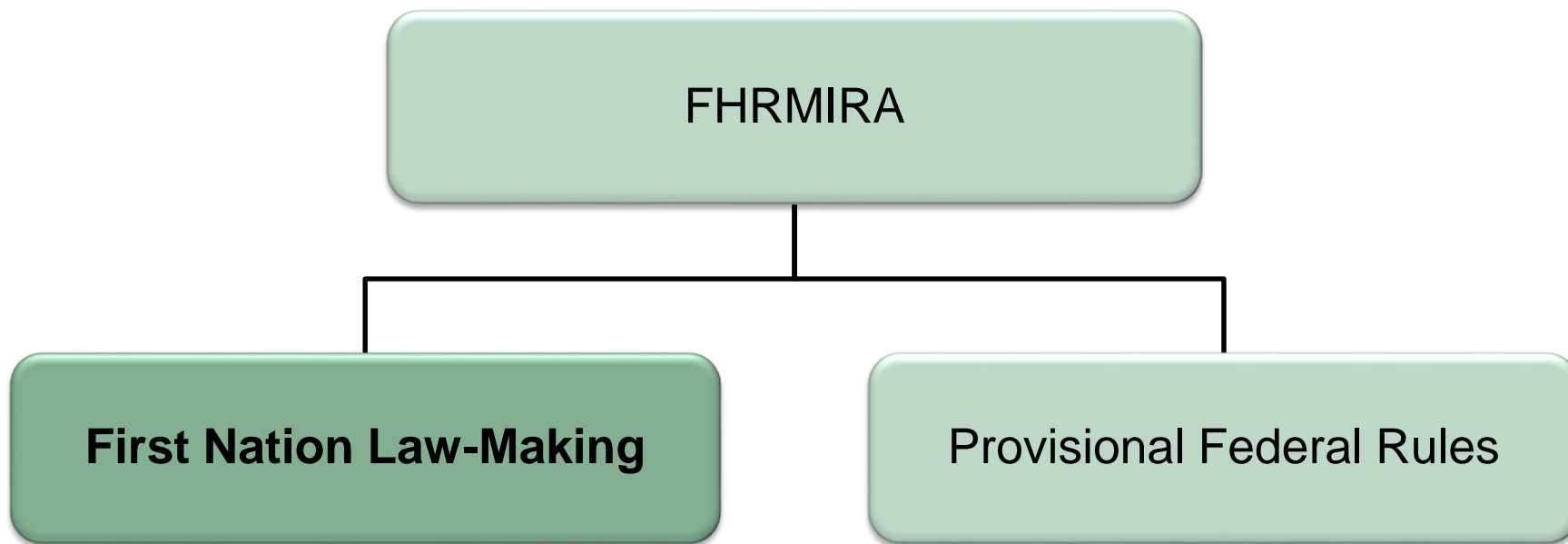
- (a) that were acquired during the conjugal relationship;
- (b) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or
- (c) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship.

It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights.

(s. 2(1) FHRMIRA).



Key Components





Key Component of the Act – First Nation Law-Making

The First Nation law-making provisions (ss. 7-11) came into force December 16, 2013 – 1 year before the Provisional Federal Rules (PFRs) – in order to allow those First Nations interested in passing their own laws in this area to do so before the application of the default rules (PFRs).

Power to enact First Nation laws

7 (1) A First Nation has the power to enact First Nation laws that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves.

Contents

- (2) The laws must include procedures for amending and repealing them and may include
- (a) provisions for administering them; and
 - (b) despite subsection 89(1) of the *Indian Act*, provisions for enforcing, on a reserve of the First Nation, an order of a court that includes one or more provisions made under the laws or a decision made or an agreement reached under the laws.

Notice to provincial Attorney General

(3) When a First Nation intends to enact laws, the council must so notify the Attorney General of any province in which a reserve of the First Nation is situated.

Non-application of *Statutory Instruments Act*

(4) The *Statutory Instruments Act* does not apply in respect of the laws.





First Nation Law-Making (ss. 7-11)

Content of Laws and Community Approval

- **The content of a community-specific law is determined and approved by the members of the First Nation. Neither the Minister nor the Department (INAC) have a role in reviewing, cancelling, disallowing or altering First Nation laws.**
 - Community approval required (majority of votes) with at least 25% participation of eligible voters (members 18 yrs or older, whether or not resident on reserve).
 - Laws come into force on the day they are approved, or on a later date identified in the approved law.
 - Council must make a copy of the laws available for public inspection.
 - Judicial Notice must be taken of laws once in force.
 - Minister receives notice of the results of the vote and must publish a list of First Nations with laws in force.
-





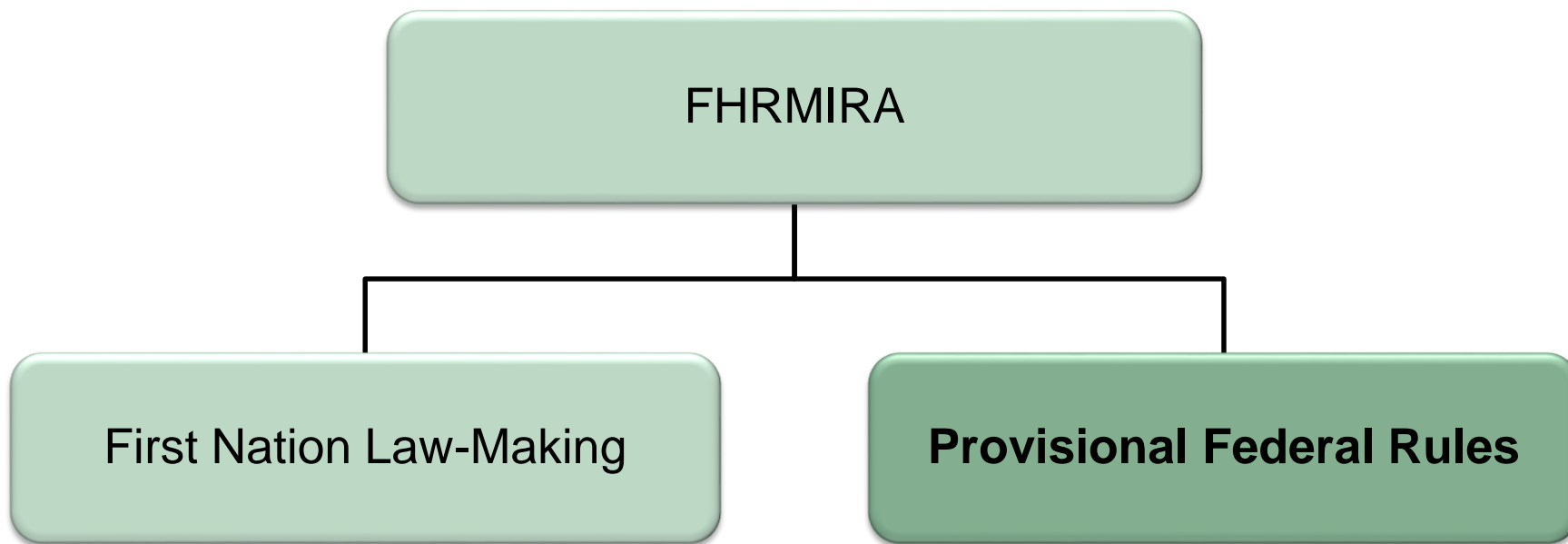
First Nation Law-Making (ss. 7-11)

Process of Enactment

- Notify the Attorney General of the province of intent to enact MRP law.
- Take reasonable steps in accordance with the First Nation's practices to locate voters, both on and off reserve, and inform voters of their right to vote, the means of exercising the right and the content of the proposed laws.
- Publish a notice of the date, time and place of the vote.
- Conduct vote.
- If law is approved, council must notify the Minister in writing of the result of the vote.
- Send a copy of the approved laws (as well as amendments or notice of repeal) to the Minister, the MRP Centre of Excellence, and the Attorney General of relevant province.



Key Components





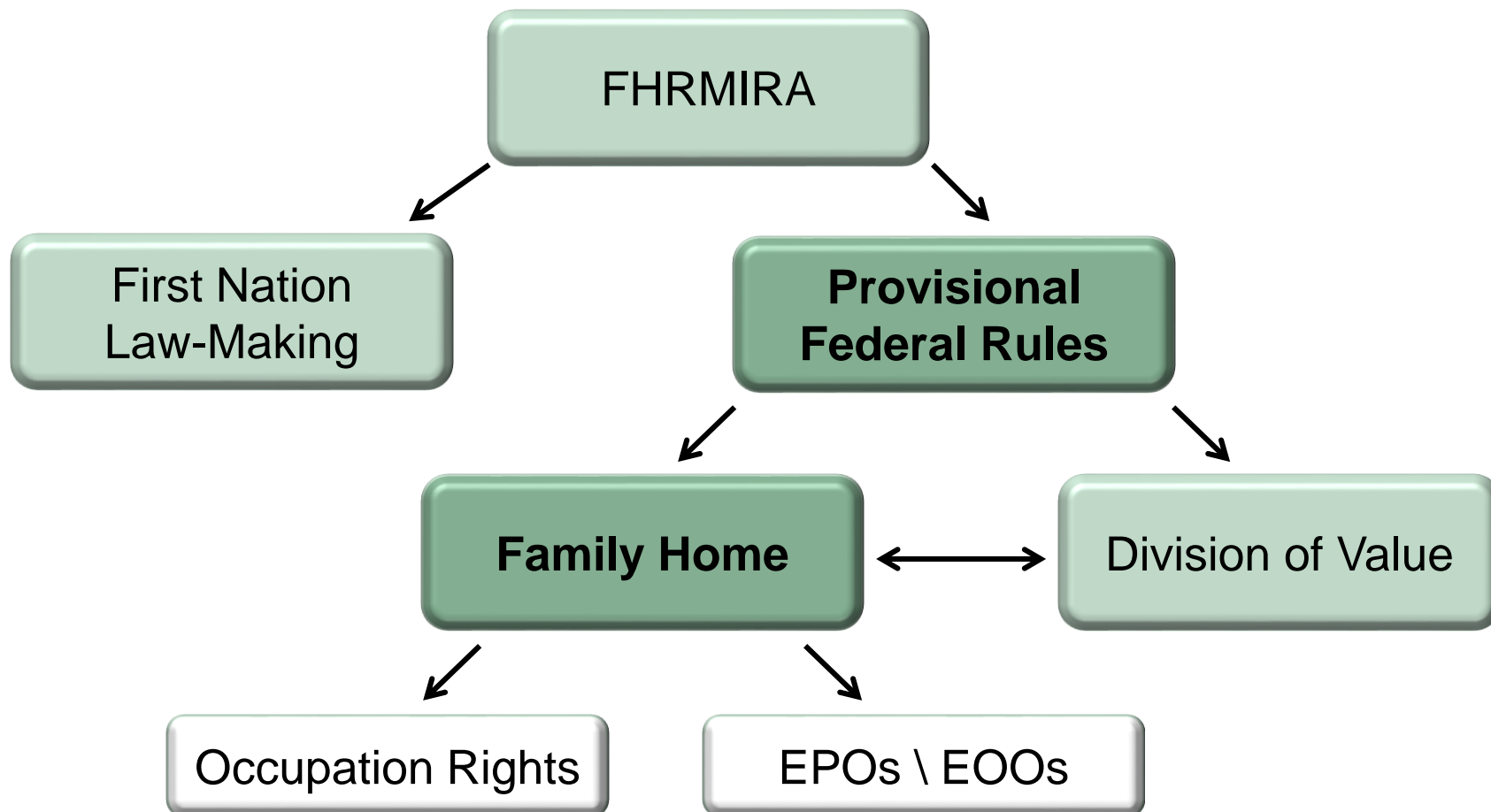
Key Component of the Act – Provisional Federal Rules

- **The PFRs establish a set of default rules which provide rights and protections on reserves until a First Nation develops and enacts its own law.**
- Occupation of the Family Home
- Emergency Protection Order (EPO)
- Exclusive Occupation Order (EOO)
- Division of the Value of the Family Home and other Matrimonial Interest or Rights on:
 - Relationship Breakdown, and
 - Death of a Spouse or a Common-Law Partner





Key Components





PFRs and the Family Home

- Family homes are addressed in several ways by the PFRs:
 - **General Rights of Occupation** during the relationship and after the death of the spouse or common-law partner
 - Court Ordered time-limited exclusive occupation rights
 - **Emergency Protection Order** in the case of family violence (s. 16), or
 - **Exclusive Occupation Order** following relationship breakdown (s. 20) or death (s. 21))
 - **Division of the Value** of the family home following relationship breakdown or death.
 - The Act deliberately reflects the diversity of living situations that may be present with regard to family homes on reserve.
-



Provisional Federal Rules and the Family Home

General Rights of Occupation [sections 13-15]



- Equal right to occupy the family home
- Right of a surviving spouse or common-law partner to occupy the family home for 180 days after a death occurs
- Requirement for the consent of a spouse or common-law partner prior to the disposition or encumbrance of an interest or right in or to the family home



Exclusive Occupation Orders (ss. 20 and 21)

- A spouse or common-law partner may apply for a time-limited exclusive occupation order (EOOs) (including interim orders) following relationship breakdown (s. 20) or death (s. 21).
 - Before issuing an EOO, the court must consider an open-ended list of 13 factors (s. 20(3)) reflecting the balance between the collective interests of Band members in their reserve lands and the protection of vulnerable spouses or common-law partners, survivors, and children, including:
 - the best interests of any child residing in the home;
 - the interests of any elderly person or person with a disability;
 - the period the applicant habitually resided on the reserve; and
 - any representations by the First Nation council with respect to the cultural, social and legal context.
-



Exclusive Occupation Orders (cont'd)

- EOOs are subject to conditions and time-periods specified by the court.
 - Sections 20(4) and 21(4) set out some possible content for an EOO, including:
 - requiring a spouse or common-law partner (or other specified persons) to vacate the home;
 - requiring the applicant to make payments toward the cost of alternate accommodation for the excluded spouse or common-law partner;
 - requiring either spouse or common-law partner (or an estate) to contribute to the upkeep of the home. [ss. 20(4) and 21(4)]
 - EOOs may be varied or revoked where an applicant can demonstrate a “material change in circumstances”. [s. 20(6)]
-



Emergency Protection Orders (ss. 16 to 19)

- A time-limited *ex parte* Emergency Protection Order (EPOs) is available where a “designated judge” is satisfied that:
 - family violence has occurred; and
 - the order should be made without delay because of the seriousness or urgency of the situation, to ensure the immediate protection of a person who is at risk of harm or property that is at risk of damage.
 - The initial *ex parte* order is for up to 90 days (s. 16(1)), and may be extended by the superior court following a rehearing or on application for a variation or a revocation (s. 17(8)).
 - As with the EOOs, before issuing an EPO, the judge must consider a similar open-ended list of factors (s. 16(4)).
 - A definition of “family violence” in s. 16(9) also includes acts or omissions involving a child or other person in the home.
 - Orders may also include confidentiality where necessary (s. 19).
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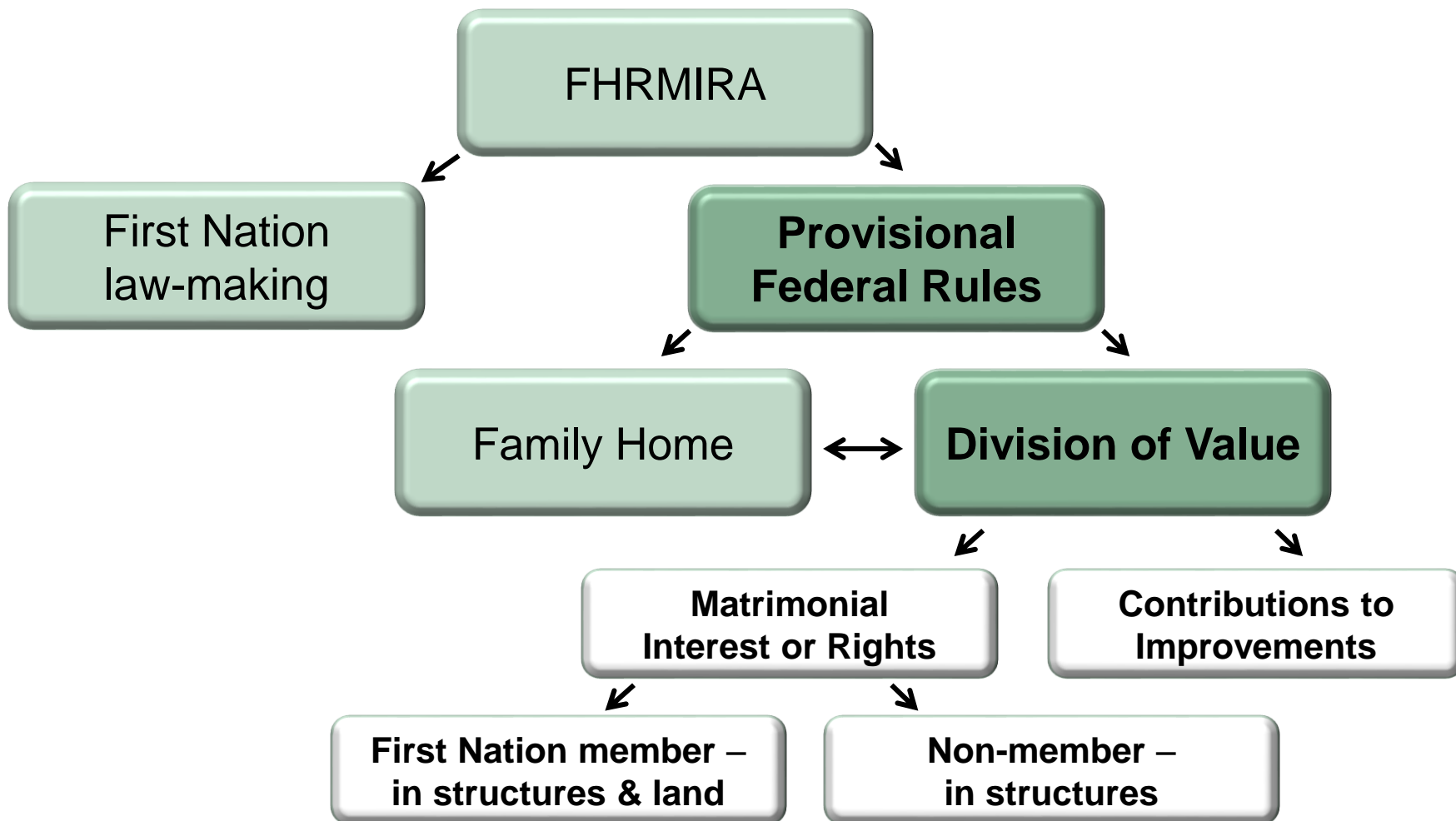
Emergency Protection Orders (ss. 16 to 19)

- These provisions fill a legislative gap in provincial civil family violence protection legislation – order could be under both statutes.
 - For maximum flexibility to adapt current procedures, the lieutenant governor in council of each province authorizes who may issue the initial EPO:
 - a justice of the peace;
 - a provincial court judge; or
 - a superior court judge. [see FHRMIRA defined term “designated judge”]
 - Where the initial order is not made by a superior court judge, the superior court is required to review the order and materials within short order, and confirm the order or direct a rehearing. [s. 17]
 - A person in whose favour the order is made, or against whom an order is made, may also apply to have the order varied or revoked. [s. 18]
 - Federal regulations have been made under s. 53 for jurisdictions that do not have civil family violence protection legislation, but choose to use the EPO provisions of the Act.
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Key Components





Provisional Federal Rules – Division of Value

PFRs respecting Division of the Value of the Family Home and other Matrimonial Interests or Rights

- Each spouse or common-law partner (or survivor) is entitled to a presumptive equal share of the value of the “family home”.
- The Act provides different entitlements, however, with regard to the division of value of “matrimonial interests or rights”.
 - As reserve lands are set aside for the use and benefit of a specific First Nation, each spouse or common-law partner (or survivor) is entitled to a division of the value of matrimonial interests or rights in or to **structures** on reserves, including consideration of appreciation in value and compensation for improvements made during the relationship; while only **members** of that First Nation are entitled to a division of the value of the matrimonial interests or rights in or to **land** on reserve held by the other spouse or common-law partner (or estate).



Division of value – First Nation members

- A member spouse or common-law partner (or survivor) is entitled to:
 1. a presumptive equal share of the value of “matrimonial interests or rights” – acquired *during the relationship* and those acquired *before the relationship in specific contemplation of the relationship* – held by the other spouse or common-law partner in or to **structures and lands** situated on the reserve;
 2. the greater of –
 - one-half of the appreciation in value of the “matrimonial interests or rights” –*acquired before the relationship not in specific contemplation of the relationship and that appreciated in value* – to **structures and lands** situated on the reserve, AND
 - payments made by that person toward improvements of **structures and lands** *acquired before the relationship not in specific contemplation of the relationship and that appreciated in value*, less outstanding debts and other liabilities assumed to make the payments; and
 3. the difference between, the amount of any payments made by that person toward improvements to **structures and lands** held by the other person that were *acquired before the relationship not in specific contemplation of the relationship* and that did not appreciate during the relationship, and any outstanding debts and other liabilities assumed to make those payments.

[s. 28 (relationship breakdown) and s. 34 (death)]





Division of value – non-First Nation members

- A non-member spouse or common-law partner (or survivor) is entitled to:
 1. a presumptive equal share of the value of “matrimonial interests or rights” – *acquired during the relationship* and those *acquired before the relationship in specific contemplation of the relationship* – held by the other spouse or common-law partner in or to **structures** situated on the reserve;
 2. the greater of –
 - one-half of the *appreciation in value* of the “matrimonial interests or rights” – *acquired before the relationship not in specific contemplation of the relationship and that appreciated in value* – to **structures** situated on the reserve, AND
 - payments made by that person toward improvements of **structures** *acquired before the relationship not in specific contemplation of the relationship and that appreciated in value*, less outstanding debts and other liabilities assumed to make the payments; and
 3. the difference between, the amount of any payments made by that person toward improvements to the following **structures and lands** held by the other person, and any outstanding debts and other liabilities assumed to make those payments for:
 - lands that are matrimonial interests or rights held by the other person, and
 - structures *acquired before the relationship not in specific contemplation of the relationship* that did not appreciate during the relationship.

[s. 28 (relationship breakdown) and s. 34 (death)]



Provisional Federal Rules – Division of Value

- **Variation** of the amount payable is possible where the court is satisfied that the amount would be unconscionable, on the basis of an open-ended list of criteria, including:
 - the duration of the conjugal relationship;
 - any agreement between the spouses or common-law partners; and
 - the availability of comparable accommodation on the same reserve. [ss. 29, 35]
- The court may make orders for preservation of the family home and matrimonial interests or rights to protect them from **improvident depletion**. [s. 32]
- Because of the context, there is no provision for a forced sale; however, the court may, in certain circumstances, order the **transfer of interests or rights** in or to lands and structures between member spouses or common-law partners (or to a member survivor).

[ss. 31, 36]



Division of value - Valuation

- As there is no “open market” on reserve, valuation is not what a buyer would pay were the property to be sold, but rather the difference between the amount a buyer would reasonably be expected to pay for comparable interest or rights on the same reserve – for example, to obtain a similar family home – and the amount of any outstanding related debts. [ss. 28(4) and 34(4)]
- Alternatively, the couple may agree to determine the value on another basis. [ss. 28(5) or 34(5)]





Division of value – Additional aspects

- The court may determine whether an “interest or right” is held in or to any structures or lands situated on a reserve on application by a spouse, common-law partner, survivor, executor, administrator or the council on whose reserve the land or structure is located. [s. 48]
 - A First Nation may recognize an “interest or right” in or to a structure on its reserve. [s. 2(1) – para. (c) of “interest or right”]
 - In the context of an estate, where there are two survivors – i.e. a married, separated spouse and a subsequent common-law partner – the executor or administrator must pay the common-law partner first as the spouse would have had at least one year prior to the death – i.e. the time required for the establishment of a subsequent common-law partnership – to resolve the consequences of the breakdown of their relationship. [s. 38(3)]
-



Notice of Applications/Orders, and First Nations representations

- Applicants must send notices of applications made under the Act to the council of the relevant First Nation (except the initial EPO application under s.16 or applications or orders under s. 19 (confidentiality in EPO situations). [s. 41(1)]
- On request, the court must allow the council of the First Nation to make representations regarding the cultural, social and legal context of the application, and their views about whether or not an order should be made. [s. 41(2)]
- Copies of orders (except confidentiality orders) must be sent by the person in whose favour it is made, or by the applicant, to:
 - the First Nation, and
 - to the Minister, except where the order concerns a First Nation (to which the provisional federal rules apply) that is:
 - listed on the Schedule of the FNLMA;
 - subject to a self-government agreement that has the power to manage its reserve lands; or
 - the Kanesatake Mohawk interim land base. [ss. 42 and 50]



Enforcement of orders

- There are additional difficulties in enforcing some orders on reserves due to s. 89 of the *Indian Act*.
 - The federal provisional rules permit a person who is not an Indian to apply to the First Nation to have them enforce the order on his or her behalf, “as if the order had been made in favour of the First Nation”.
[s. 52(1)]
 - Where this is not possible, the Act permits the court, on application by that person, to vary the order to require the person against whom it was made to pay the amount into court.
[s. 52(2)]
 - The First Nations law-making authority specifies that a First Nation may include in their law provisions for enforcing an order of a court on reserve, despite s. 89(1).
[s. 7(2)]
-



Civil Procedure

- The superior court of the province (judges appointed under s. 96 of the *Constitution Act, 1867*) has jurisdiction (s. 16 a potential exception).
[s. 2(1) – definition of “court”]
 - If structures and lands are located in more than one province, the couple may agree, or jurisdiction is provided to the superior court in the province of habitual residence at the time the couple ceased to cohabit.
[ss. 43(4) and 44(2)]
 - The court where a divorce or other related proceeding is pending has jurisdiction to hear and determine an application under this legislation, and the proceedings may be joined. The same principle applies to proceedings relating to the distribution of property on the death of a spouse or common-law partner.
[ss. 43(2), 43(3), 45]
-



Civil Procedure

- As with the *Divorce Act*, provincial rules of evidence apply. [s. 51]
- As with the *Divorce Act*, the FHRMIRA provides that the “competent authority” meaning
 - “the body, person or group of persons ordinarily competent under the laws of that province to make rules regulating the practice and procedure in that court”;
 - “may make rules applicable to any proceedings under this Act”;
 - “in the like manner and subject to the like terms and conditions, if any, as the power to make rules conferred on that authority by the laws of the province”.

[s. 47]



Transitional provisions

- If the Federal Provisional Rules begin to apply to a First Nation, they apply to spouses and common-law partners who ceased to cohabit on or after that date, or to survivors if the death occurred on or after that date. [s. 54(1)]
 - If the Federal Provisional Rules cease to apply to a First Nation:
 - proceedings that had already been commenced must be completed as if the federal provisional rules continued to apply;
 - rights in the federal provisional rules concerning the disposition or encumbrance of the family home without consent are preserved if the disposition or encumbrance happened on a date when the federal provisional rules applied;
 - the division of value provisions of the federal provisional rules continue to apply if the cohabitation ceased while the federal provisional rules still applied; and
 - rights for survivors in the federal provisional rules are preserved if the death occurred while the federal provisional rules still applied. [s. 54(2)]
-



FHRMIRA Caselaw

***McMurter v. McMurter*, [2016] O.J. No. 3798, 2016 ONSC 1225 (Ont. S.C.J.).**

- members of the Mohawks of the Bay of Quinte First Nation and former spouses who divorced in 2010
 - ongoing dispute between the parties over spousal support and jointly held property, including one property on a reserve
 - the Court confirmed that s. 2(4) of the FHRMIRA provides the ability for *former* spouses to obtain resolution of the division of their on-reserve matrimonial real property in accordance with ss. 28 to 31 of the Act
 - the Court granted leave to either party to bring a motion to determine whether to join the *Divorce Act* and the *Family Law Act* proceedings with an application under the FHRMIRA for a division of the value of the on-reserve property
 - the judge does not appear to have considered the effect of s. 54(1)(a) of the FHRMIRA (that ss. 28 to 33 of the Act only apply where the spouses ceased to cohabit on or after the day on which those sections began to apply to the First Nation)
 - Sections 28 to 33 began to apply to the Mohawks of the Bay of Quinte First Nation on December 16, 2014. Not clear from the reasons for judgment, but it appears that the parties ceased to cohabit before December 16, 2014.
 - **Subsequently, in *McMurter v. McMurter*, 2018 ONSC 2626 (Ont. S.C.J.), MacLeod-Beliveau J. clarifies that the FHRMIRA does not apply in the circumstances as they are no longer spouses and have been separated since 2007**
-





FHRMIRA Caselaw

Droit de la famille – 162829, 2016 QCCS 5685 (CanLII)

- the parties sought an order for divorce and a division of the family assets
 - only issue in dispute was whether the home, situated on the reserve of the Huron Wendat Nation, should be included in the division of the family assets
 - due to an outstanding loan from the council of the First Nation, the respondent claimed that the council owned the home until the loan was completely repaid and argued that the home should be exempt from the division of the family assets
 - the Court rejected this argument – situation was similar to the situation of any homeowner who obtains a mortgage from a financial institution
 - the Court held that the family home should be included in the division of the family assets and appears also to have ruled that the respondent held a value in the home which was subject to, or at least could be informed by, the provisions respecting division of value under s. 28 of the FHRMIRA - with no reason to vary the amount (unconscionability – s. 29)
 - the Court ordered the respondent to pay amount previously agreed to by parties
 - however, the Court does not appear to have considered the effect of s. 54(1)(a) of the Act (that ss. 28 to 33 of the Act only apply where the spouses ceased to cohabit on or after the day on which those sections began to apply to the First Nation)
 - The decision states that the parties separated on August 28, 2012, and never resumed cohabitation. Sections 28 to 33 began to apply to the Huron Wendat Nation on December 16, 2014 – more than two years after the parties had ceased to cohabit.
-





FHRMIRA Caselaw

***Bradfield v. Brydges*, [2016] B.C.J. No. 215, 2016 BCSC 189 (B.C.S.C.).**

- the plaintiff was the son and executor of the estate of his mother, Cecelia Bradfield, who died on October 31, 2014, who was an Indian and a member of the Tsartlip First Nation, and who at the time of her death lived with the defendant, Mr. Brydges, in a home on the South Saanich Indian Reserve #1 on Vancouver Island, B.C. in a common-law partnership going back many years (Mr. Brydges was not an Indian nor a member of the Tsartlip First Nation)
- the plaintiff sought a declaration of trespass against the defendant and an order that the defendant vacate the home
- the defendant counterclaimed that he was entitled to live in the family home until his death and to share in the division of the value of Ms. Bradfield's estate pursuant to ss. 14, 21(1) and 34(1) of the FHRMIRA
- the Court dismissed the defendant's counterclaim and confirmed that, in accordance with s. 54 of the FHRMIRA, ss. 14, 21(1) and 34(1) did not apply to Mr. Brydges because they came into force after Ms. Bradfield had died
 - The PFRs began to apply to the Tsartlip First Nation on December 16, 2014. Ms. Bradfield died on October 31, 2014.
- the Court granted the plaintiff's request for a declaration of trespass and, *inter alia*, issued an injunction restraining the defendant from entering or occupying the property.

For a similar case: see *Poitras v. Khan*, 2016 SKQB 346 (CanLII)



FHRMIRA Caselaw

***Toney v. Toney Estate*, 2018 NSSC 179.**

- the applicant – a non-member widow of a former chief of a band (who, together with her late husband, had occupied the family home for over 30 years; had been active within the reserve community until her health deteriorated; and is of limited financial means) – sought an order for indefinite exclusive occupation of the family home on reserve, and a division of value of the MRP in her late husband’s estate pursuant to sections 21 and 34 of the FHRMIRA, respectively
 - the decision is the first substantial judicial interpretation and application of the FHRMIRA and contains 5 parts: (i) a discussion of the law respecting MRP on reserve prior to the FHRMIRA; (ii) description of the FHRMIRA, and the most relevant provisions to this case; (iii) the evidence in this case; (iv) a discussion of how the FHRMIRA affects tradition, custom, the *Indian Act* and other First Nation property laws; and (v) application of the FHRMIRA to the facts of this case
 - the Annapolis Valley First Nation made representations to the court providing helpful context; in particular the First Nation requested that exclusive occupation be limited to 12 months (citing among other things housing shortages), and made submissions that assisted with the court’s valuation of the MRP
 - after considering the 11 factors set out in s. 21(3) and applying s. 34 to the facts, Warner J. awarded:
 - indefinite exclusive occupation of the family home on the condition that the applicant not cohabit with anyone other than her children or grandchildren and that she maintain the home and not commit waste; and
 - an amount equal to one-half of the value of the family home (\$70,000) based on what he considered the most reliable, fair and appropriate valuation at the time of Mr. Toney’s death (no entitlement for the applicant was found respecting a second Certificate of Possession)
-



If the Council wishes to provide its views on a pending application, Council may wish to:

- designate a writer to draft a written response, and
- ensure the designate is familiar with the applicable Provincial family court rules, and
- designate a band representative in the event a court appearance is required. This individual should be well prepared for the hearing with a written summary of the First Nation's views.

When might the Council support or oppose an application for exclusive occupation?

Community input may be required in developing principles to guide the Council on the issue of applications for exclusive occupation and when they will be either supported or opposed. Council has the final discretion in how it will proceed. Important considerations may include; whether the homes on the reserve are owned by the Band, whether the land is owned by an individual or whether it is part of a family land holding, whether the homes are subject to a lease, mortgage, or a Ministerial Guarantee, etc.

ENFORCEMENT OF ORDERS

The Act also provides, the Council may enforce the following orders on request by a person who is not a First Nation member or an Indian:

- orders on the amount payable to the spouse, common-law partner or survivor [ss. 30(1) & 36(1)]
- orders on how the amount will be paid [ss. 30(1) & 36(1)];
- orders enforcing a written agreement on the amount payable and the methods for paying it [s. 33 & 40].

If Council does not enforce the order, the court may require the person against whom the order was made to pay the amount into court.

ADDITIONAL INFORMATION AND ASSISTANCE

If First Nation residents have specific questions regarding rights and protections available to them, they should be referred to a family law lawyer for legal advice. A list of provincial legal resources is available at www.coemrp.ca.

For general issues and questions regarding the *Family Homes on Reserves and Matrimonial Interests or Rights Act* you may refer them to the Centre of Excellence for Matrimonial Real Property.



ROLE OF CHIEF & COUNCIL

**Under the Provisional Federal Rules
as contained in the Family Homes on
Reserves and Matrimonial Interests
or Rights Act**



Support Available for You & Your Community

Centre of Excellence for Matrimonial Real Property
A Centre of Excellence for Matrimonial Real Property, hosted by the National Aboriginal Lands Managers Association (NALMA), is now available to assist First Nation Communities.

Contact the centre today!

Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Lands Managers Association
1024 Mississauga Street, Curve Lake, ON K0L 1R0

Phone: 1-855-657-9992 or 705-657-9992

Fax: 705-657-2999

E-mail: info@coemrp.ca

Website: www.coemrp.ca



SUMMARY OF THE LEGISLATION

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the Act) applies to married couples and common-law partners living on reserve, where at least one of them is a First Nation member or an Indian. It seeks to provide basic protections and rights to individuals living on reserves regarding the family home and other matrimonial interests and rights, during a conjugal relationship, in the event of a breakdown of that relationship, and on the death of their spouse or common-law partner.

In the event a community does not enact its own matrimonial real property (MRP) law by December 16, 2014, **Provisional Federal Rules** will be applied, with some exceptions, until a First Nation develops their own matrimonial real property law. These provisional rules provide the following rights and protections:

- equal right to occupancy of the family home (S.13)
- requirement of spousal consent for the sale or disposal of the family home (S.15)
- emergency protection order (S.16-19)
- exclusive occupation order (S.20)
- 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 (S.28)
- order for the transfer of matrimonial real property between member spouses or common-law partners (S.31)
- entitlement of surviving spouses or common-law partners (S.34-38)
- enforcement of agreements on the division of the value of the matrimonial property (S.52).

LEARNING MORE ABOUT THE LEGISLATION

Chief and Council should familiarize themselves with the Act and how it applies to the First Nation. Arrangements can be made with your First Nation's legal advisor to provide a clearer understanding of the Council's role and responsibilities. The Council may also contact the Centre of Excellence for Matrimonial Real Property for a presentation.

In the event a First Nation has not enacted its own MRP law by December 16, 2014, preparations should be made to respond to applications filed under the Provisional Federal Rules.

IMPORTANCE OF FIRST NATION VIEWS

The Act recognizes the diverse values and practices among First Nations concerning individual interests in reserve lands. For this reason, the Provisional Federal Rules included in the Act provides for First Nations to be notified in regard to any proceedings under this Act, except in the case of emergency protection and confidentiality orders. Where a community's collective interests in lands are engaged, the First Nation may make representations to the courts about the cultural, social and legal context relevant to the proceedings.

Section 41 specifies that an applicant for an order under the Act **must without delay**, send a copy of the application to the Council of any First Nation on whose reserve the structures and lands in question are situated.

Section 41(2) further states that **on the Council's request**, the court that is seized of the application must, before making its decision, allow the Council to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made.

APPLICATIONS FOR EXCLUSIVE OCCUPATION

What to do before any applications arrive at the Band Office.

In order to ensure fairness and transparency in proceedings, it would be a best practice for the First Nation to develop a policy and procedures for responding to any applications under this legislation. Including:

- designation of an individual to receive applications, and
- establish an internal file management system.

As an alternative, a First Nation might consider the formation of an internal management committee, framed by Terms of Reference, to develop the required policies and procedures.

What to do when an application for exclusive occupation arrives at the band office.

Each time an application is copied to the First Nation, the designate should open a new file. Applications for exclusive occupation are sensitive files containing personal information and should be kept in a secure filing location.



A Quick Reference to the
*Family Homes on Reserves and
Matrimonial Interests or
Rights Act*

Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Lands Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0

Website: www.coemrp.ca

Email: info@coemrp.ca

Phone: 1-855-657-9992 or 1-705-657-9992

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Introduction

This Quick Reference to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* was produced by the Centre of Excellence for Matrimonial Real Property (COEMRP) under the auspices of the National Aboriginal Lands Managers Association (NALMA) to provide an illustration of the provisions contained within the *Act*.

This booklet is provided strictly for informational, not legal, purposes. Always refer to the *Act* itself in all legal matters and seek the advice of a lawyer should you require a legal interpretation of the legislation.

Provincial laws already address some aspects of family law, such as laws applying to personal property. However, there was no law in place to protect interests and rights related to matrimonial real property on reserves, thus this *Act* was enacted to address those issues.

We invite you to visit the COEMRP website for more information:

www.coemrp.ca

CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY



Terminology & Acronyms

Act	Abbreviated form of the <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i> . (may also be referred to as <i>FHRMIRA</i>)
Common-law partners	Persons who have been living together in a conjugal relationship for at least one year.
CP	Certificate of Possession, document giving evidence of a member's right to lawful possession of reserve lands pursuant to the <i>Indian Act</i> .
Domestic agreement	A signed document made by the spouses where they agree on their rights and obligations.
EPO	Emergency Protection Order, issued by the courts to protect the family members from violence, and the home from damage.
Exclusive Occupation Order	An order providing for the sole occupancy of the home to one of the spouses for a set period of time. It does not involve a change in ownership.
Family home	The family matrimonial home (the structure only, not the land) situated on a reserve where the family normally lives. It will also be referred to as the "home".
MRP	Matrimonial Real Property, the immovable property used by a couple and their family, the most common example being a family home and the land it is situated on.
Personal property	Refers to movable assets, such as cars, money in the bank, and household goods.
PFR	Provisional Federal Rules are interim rules defined in sections 12-52 and 54-55 of the <i>Act</i> , which took effect on December 16, 2014 for those First Nations without their own MRP law.
Real property	Refers to immovable property, the most common example being a house and the land it is situated on.
Spouse	An individual who is one of the married partners or common-law partners living in a conjugal relationship or family unit.

Who is this booklet for?

If you are in a position of leadership in your First Nation community; or if you are a First Nation staff member or technician providing information and support to community members and residents, and you require:

- A general understanding of *FHRMIRA*;
- A quick reference to the various clauses contained in the legislation;
- Information regarding an individual's rights and protections in situations of separation or divorce;
- Information regarding individuals' rights and protections in situations of family violence;
- Information about an individual's right to remain in the family home after separation or divorce;
- Information about the division of assets upon separation, divorce, or the death of a partner;
- Clarification of the role of the Courts, the Chief & Council, and the Police with respect to the *Act*;

then this booklet was created for you.

While it cannot answer all of your questions, it may prove to be useful to your understanding of the legislation.

NOTE

- If your First Nation is signatory to either the *First Nation Land Management Act* or to a *Self-Government Agreement*, then this *Act* may NOT apply to you.
- If your First Nation has enacted its own MRP law under *FHRMIRA*, the Provisional Federal Rules contained in this *Act* no longer apply.

A General Overview of *FHRMIRA*

The *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)* was developed to address a long-standing legislative gap regarding matrimonial real property on reserves.

Developed through collaboration with:

First Nation
Communities

First Nation
Groups

Indigenous and
Northern Affairs
Canada (INAC)

This Act received Royal Assent:

- June 19, 2013

First Nation Law Making Provisions took effect:

- December 16, 2013

The Provisional Federal Rules came into force:

- December 16, 2014

As of December 16, 2013, First Nations have the authority to pass their own MRP law. If your First Nation has not yet enacted its own MRP law, the provisional federal rules apply (with some exceptions- see the note on page 5).

With the PFRs now in force, members and residents within your community have specific rights and protections under the Act, which will be detailed in the following pages.

THE MRP LEGISLATIVE TIMETABLE

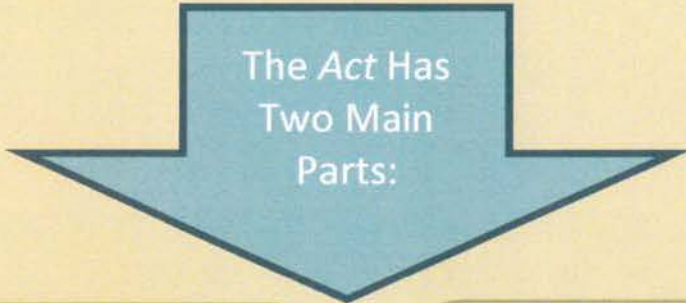


Purpose of the Act

(Sections 1-6 of the Act)

***FHRMIRA* provides rights to spouses or common law partners resident on reserve, during a relationship, upon relationship breakdown, and/or on the death of a spouse or common-law partner with respect to 2 major issues:**

1. Use, possession and occupation of family homes on reserve
2. Division of value of any interests that they hold in structures and lands on reserve



The Act Has
Two Main
Parts:

First Nation Law-Making Mechanism *(Sections 7-11)*

Effective Dec 16, 2013

First Nations may choose to enact their own MRP law. To enact this law:

- First Nation submits proposed law to members for approval
- Provides proper notice to members voting
- At least 25% of First Nation members must vote
- Law approved if majority of those voting approved the law

Provisional Federal Rules

(Sections 12-52, 54 and 55)

Effective Dec 16, 2014

Provides mechanisms for dealing with matrimonial real property until the First Nation passes its own MRP law. Fills the legislative gap in the absence of a First Nation's own law.

Occupation of the Family Home

(Section 13-15 of the Act)

During the Conjugal Relationship:

- Each spouse has the right to occupy the family home, **whether or not they are a First Nation member or an Indian**

After Death:

- A surviving spouse (even if they do not have a formal interest or right in the family home) may remain in that home for **180 days** after the death of their spouse, whether or not they are a First Nation member or an Indian

Consent:

One party **may not** dispose of, or encumber the family home without the other's free and informed consent:

- If a spouse does sell or encumber the property against the will or knowledge of the other spouse, the court can set aside (nullify) the transaction and impose conditions and damages. However, this cannot happen if the other contracting party acquired it for value and acted in good faith
- If the court is satisfied that the other spouse cannot be found, is not capable of consenting, or is unreasonably withholding consent, a court may authorize the disposal of that spouse's interest

What happens if the relationship breaks down?

[View the following pages...]

Family Home: Emergency Protection Order (EPO)

(Sections 16 to 19 of the Act)

What is an EPO?

- A court order
 - That can last up to **90 days**, where family violence has occurred, where the situation is urgent, and there is a need for immediate protection
 - See pg. 10 to review the provisions an EPO may contain

And as such, there is no requirement to notify the Council of the First Nation (s.40)

Who can issue such an order?


- A **designated judge** of the province in which the family home is situated

What does the judge consider in deciding?

- History and nature of family violence
- Risk of immediate danger
- Best interests of any children involved
- Interests of any elderly or disabled persons who habitually reside in the family home
- Rights of others who may have an interest in the home
- Period of residence on the reserve
- Existence of exceptional circumstances that require removing a person other than the applicant's spouse



Family Home: Emergency Protection Order (EPO) (Cont.)



The EPO
May
Contain
Provisions:

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

Follow-on Matters

Section 17: A judge from the appropriate level of court must review within 3 days to confirm, re-hear, or revoke the order

Section 18: Person named in EPO may appeal

Section 19: The court decides the level of confidentiality necessary to protect the affected parties

Family Home: Exclusive Occupation Order (EEO)

(Section 20-21 of the Act)

What is an EEO?

- A court order
 - To allow exclusive occupation of, and reasonable access to the family home, subject to any conditions imposed by the court and for the period that the court specifies

Who can issue such an order?

- A judge referred in s.2(1) of the Divorce Act

When can this judge make such an order?

- Following the break-up of a conjugal relationship
- Following the death of a spouse

What does the judge consider in deciding?

- Best interests of any children involved
- Terms of any agreement between the spouses
- Collective interests of the First Nation
- Financial situation and/or medical issues of spouses
- Any existing orders made on the matter
- History of any family violence or psychological abuse
- Interests of any elderly or disabled occupants
- Any exceptional circumstances

An Exclusive Occupation Order does not change who holds an interest or right in the family home.

Family Home: Exclusive Occupation Order (Cont.)

The Order
May Contain
Provisions:

- 1) Requiring spouse and others specified to vacate at a time the judge orders, and prohibiting re-entry
- 2) Preserving the condition of the home
- 3) Payment of all or part of the repair and maintenance of the home
- 4) Making payments to the other spouse toward the cost of other accommodation
- 5) Other provisions such as:
 - To have a Peace Officer deliver notice to certain persons
 - To have the executor of the will or the administrator of the estate pay for repairs and maintenance

On Application to the court, an exclusive occupation order can be revoked or varied if there has been a material change in circumstances [s.20(6)]

Family Home: Exclusive Occupation Order after Death of a Spouse

The *Act* provides that a surviving spouse who does NOT hold an interest or right in the family home may occupy that home for **180 days** after the death of their spouse (s.14).

A surviving spouse may also choose to make an application to the court (s.21) for Exclusive Occupation of the family home for a fixed period of time. This may be granted along with reasonable access.

An Exclusive Occupation Order does not change who holds an interest or right in the family home or prevent an executor from transferring this interest

What does the judge consider in deciding?

- The best interests of any children involved
- The terms of the will
- The terms of any agreement between the spouses
- The collective interests of the First Nation
- The medical condition of the survivor
- The time the survivor has habitually lived on reserve
- The significant value of the home
- The interests of any other person with rights in the home
- Any exceptional circumstances

For a more in-depth understanding of the provisions relating to Exclusive Occupation Orders, see Sections 20-27 of the *Act*.

Division of Value: Relationship Breakdown

(Section 28 of the Act)

Each spouse is entitled to one half of the value of the family home AND other matrimonial interests or rights.

- This is intended to ensure that the proven value of a couple's matrimonial interests or rights in, or to, the family home and other structures on the reserve are shared equally on the breakdown of a relationship
- If both spouses are members, the value of interests or rights to land may also be considered for the purposes of division (s.28)

Determining the entitlement of each spouse is a complicated calculation, dependent on a number of factors. Spouses should obtain independent legal advice to determine their entitlements

Determination of value:

- On what a buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question less any outstanding debts or liabilities assumed for acquiring those rights. [s.28(4)]
- On the terms of an agreement made by the spouses [s.28(5)]



Division of Value: Relationship Breakdown

Domestic Agreements

The Court May
Make Changes
to a Domestic
Agreement:

A court may, by order, vary the amount if it is considered unconscionable (i.e. unfair), given:

- 1) the need for caring of 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

Other Provisions (Section 30 to 33):

- On application by one of the spouses, made within **three years** (this period may be extended) after cohabitation ended, the court may **determine the amount payable** by one spouse to the other, and set the conditions for how the amount is to be settled (s.30)
- On application by a spouse who is a First Nation member, the court may order that the interest or right in or to the **family home** and/or any **structure** or **land** specified, be transferred to the applicant (s.31)
- The court may make orders as it considers necessary to protect value of property (s.32)
- The court may make orders to enforce the terms of an agreement, including payments (s.33)

NOTE: Application to Determine Entitlement (s.30)

Limitation Period:

After Separation: The application for division must be made within three years after the day on which the parties ceased to cohabit (s.30)

After Death: The surviving spouse must apply within 10 months after the day on which the death of their spouse or common-law partner occurred (s.36)

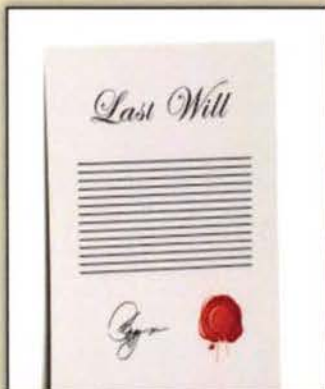
Division of Value: Death of a Spouse

(Section 34-36 of the Act)

In relation to matrimonial real property, the surviving spouse may choose to inherit under the will or, (if there is no will, under the Intestacy provisions of the *Indian Act*), **OR** make an application to the courts under Section 36 of *FHRMIRA*. This application must be made within 10 months after the day on which the death of the spouse occurred.

A Survivor May Choose To:

Inherit under the will:



No will, Inherit under Intestacy provisions (s.48):



OR

Make Application under Section 36 of *FHRMIRA*:



Can the amounts be changed?

Section 35: 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 by agreement or judicial decision

Division of Value: Death of a Spouse (Cont.)

(Section 34-36 of the Act)

Section 34 of the Act:

On the death of a spouse, the survivor is entitled, on Application made under section 36, to one half of the value of the interest that was held by the deceased in the family home and to other amounts described in s.34(2).

If the surviving spouse is a **member**, the value of interests or rights to land may also be considered for the purposes of division.

Section 34(3) spells out the similar survivor rights for **non-members**, however only using the value of the structures on the land, not the value of the land itself.

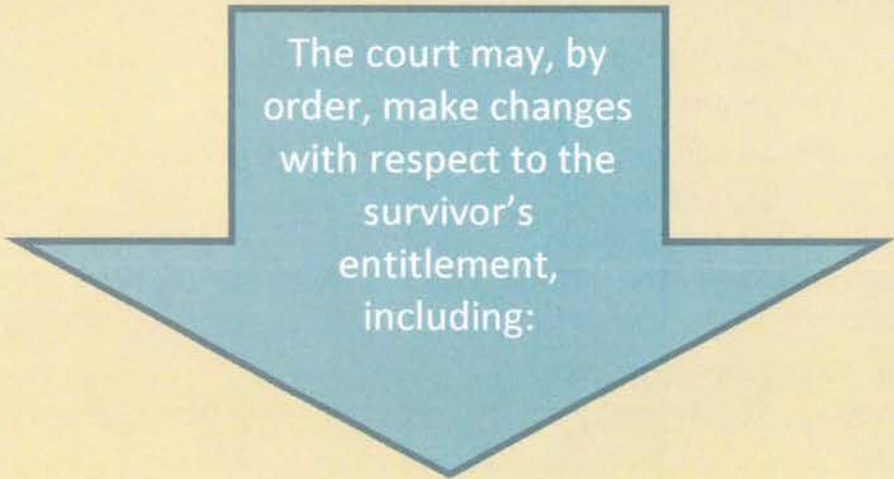
NOTE: Determining amounts on division is a specific and complex exercise. Obtaining legal advice is strongly recommended.



Division of Value: Death of a Spouse (Cont.)

(Section 36 of the Act)

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



The court may, by order, make changes with respect to the survivor's entitlement, including:

- The amount payable to the survivor
- The method of payment (lump sum, installments)
- If the survivor is a First Nation 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

Distribution of Estate

(Section 38-40 of the Act)

The executor of a will or the administrator of an estate must NOT proceed with the distribution of an estate until one of the following occurs:

- The survivor consents in writing to the proposed distribution
- The period of 10 months or any extended period granted has expired

Section 38(2) and (3)

- Reasonable advances to survivors or other dependents may be made for their support
- If there are two survivors, (a common-law partner, and a spouse with whom the deceased was no longer cohabiting the estate) must pay the common-law survivor before paying the survivor who was the spouse

Section 39: A court may make any order that it considers necessary to restrain the improvident depletion of the interest or right in the family home.

Section 40: If an executor and a survivor enter into a written agreement that sets out the amount and terms of payment that is not unconscionable, the court may make order to enforce that agreement.



Notice to Council and Views of Council

Section 41: An applicant for any order other than an EPO, must send a copy of the application to the Council of any First Nation on whose reserve the structures and lands in question are situated

On the Council's request, the Court must allow the Council to make representation at the hearing with respect to the cultural, social and legal context that pertains to the application and present its views as to whether or not the order should be made

Section 42: The successful applicant must send a copy of the Court Order to the First Nation Council



Where can residents look for help?

The first potential source of help should be found in the community.

The Band Office should be able to direct residents to sources of support within the community, such as social services, a list of approved mediators, property records and other information.

Encourage residents to obtain legal advice on matrimonial real property matters.

Each province has a variety of services to put residents in touch with a lawyer. Some provinces provide Legal Aid to help pay for legal services.

Help is available from the police and the courts.

Residents should be encouraged to check online or by phone with the provincial government to get specific assistance.

The Centre of Excellence for Matrimonial Real

Property provides information, resources, and training to assist First Nations to understand their rights and obligations under *FHRMIRA*. (www.coemrp.ca)

Indigenous and Northern Affairs Canada websites also provide information in this regard. (www.aandc-aadnc.gc.ca)

Training

COEMRP provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the COEMRP Centre at:
(705) 657-9992 or toll free **1-855-657-9992**

Other Reference Material

MRP Toolkit

The COEMRP has published a comprehensive Toolkit to guide First Nation professionals in MRP matters and the development of their own MRP law.

Role of Chief & Council

This pamphlet outlines their responsibilities under the Provisional Federal Rules.

On-Reserve Matrimonial Real Property Rights

This pamphlet outlines the rights and protections available to residents under the Provisional Federal Rules.

Understanding Estates Management

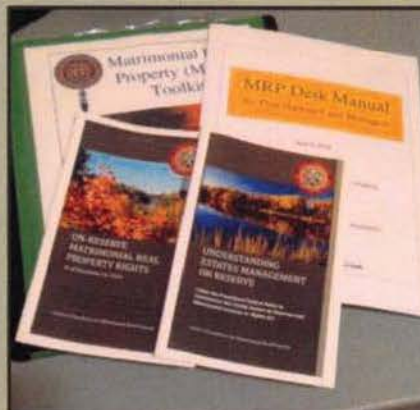
This pamphlet provides information to residents to gain an understanding of survivorship rights.

Desk Book for Land Managers

This desk book can assist First Nations technicians to understand the MRP requirements for the registration of documents in ILRS.

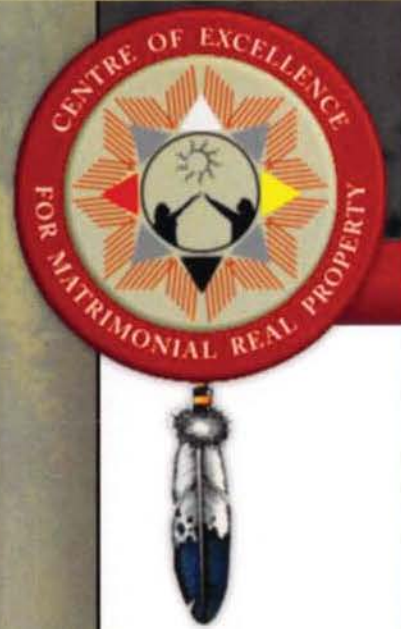
A Toolkit for Matrimonial Real Property Dispute Resolution

This toolkit provides information on dispute resolution to assist communities in the development of their own processes.



Centre of Excellence for Matrimonial Real Property

Hosted by the National Aboriginal
Lands Managers Association (NALMA),
COEMRP is available to assist First
Nation communities and their
members in matters related to
Matrimonial Real Property Rights and
to First Nations' MRP law making



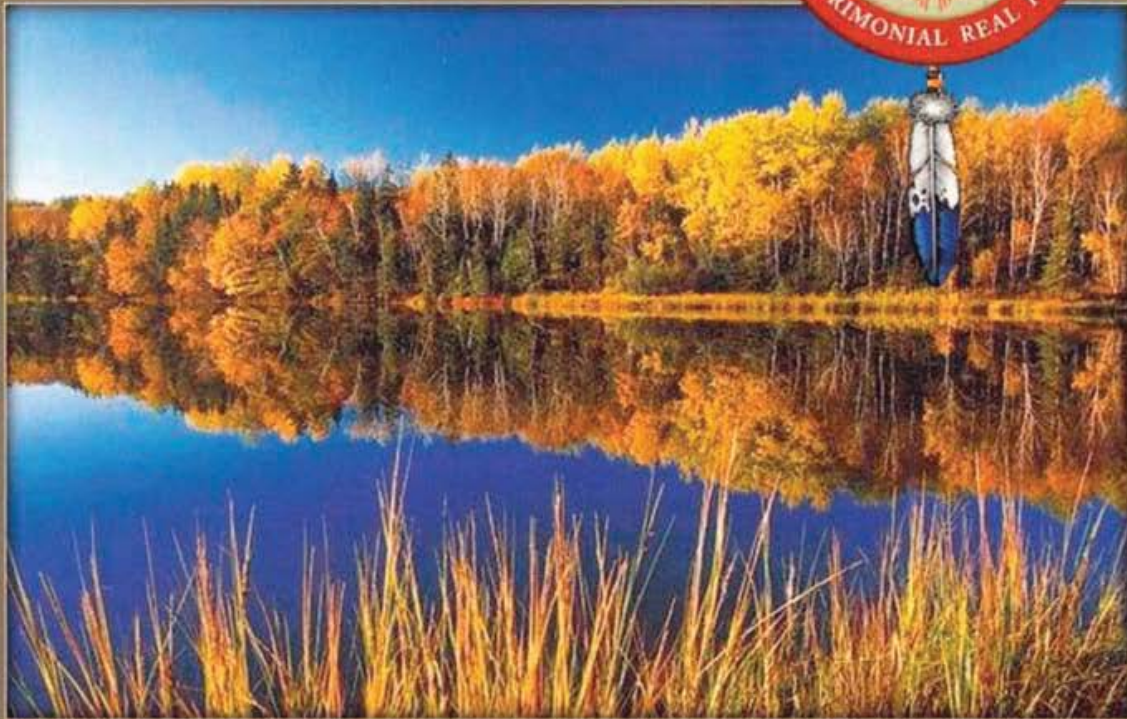
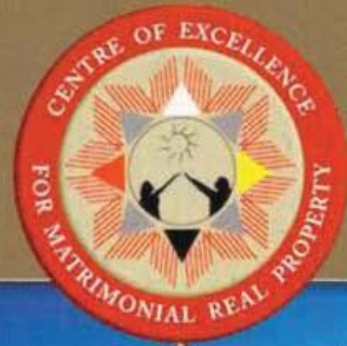
Centre of Excellence for Matrimonial Real Property
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Association

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www.coemrp.ca



UNDERSTANDING ESTATES MANAGEMENT ON RESERVE

Under the Provisional Federal Rules as
contained in the *Family Homes on Reserves and
Matrimonial Interests or Rights Act*

Centre of Excellence for Matrimonial Real Property

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Introduction

This booklet on Understanding Estates Management on Reserve was produced by the Centre of Excellence for Matrimonial Real Property (COEMRP) under the auspices of the National Aboriginal Land Managers Association (NALMA) to help you understand your survivorship rights under the recent *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*.

FHRMIRA has two main components:

- First Nations can enact their own community-specific matrimonial real property laws which can be applied in provincial and territorial courts; and
- *FHRMIRA* contains a set of interim Provisional Federal Rules (PFRs) which provide MRP rights and protections to residents living on reserves until a First Nation develops and enacts its own laws under the *FHRMIRA* or other federal legislation.

If your First Nation is signatory to either the ***First Nation Land Management Act*** or to a ***Self-Government Agreement***, then *FHRMIRA* may not apply to you. If your First Nation has enacted its own MRP Law pursuant to *FHRMIRA*, the Provisional Federal Rules no longer apply.

Find out from the Band Office which rules apply to your circumstance. If the First Nation has enacted its own MRP Law pursuant to *FHRMIRA*, obtain a copy to determine what survivorship and occupancy rights may be available to you.

This booklet is provided strictly for informational, not legal, purposes. In all legal matters, refer to the *Indian Act*, and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, or any similar legislation your First Nation may have developed and seek the advice of a lawyer to understand your rights as a survivor.

CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY



Terminology & Acronyms

FHRMIRA	Abbreviated form of the <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i> .
Common-law partners	Persons who have been living together in a conjugal relationship for at least one year (as defined in the <i>Indian Act</i>)
CP	Certificate of Possession, document giving evidence of a member's right to lawful possession of reserve lands pursuant to the <i>Indian Act</i> .
Estates	All of the assets you own when you die, including land, bank accounts, personal property, after all of your debts are paid (funeral, hydro, etc.).
Exclusive Occupation Order	An order providing for the sole occupancy of the home to one of the spouses for a set period of time. It does not involve a change in ownership.
Family home	The family matrimonial home (the structure only, not the land) situated on a reserve where the family normally lives. It will also be referred to as the "home".
Intestate	A person who has died without having made a Will.
MRP	Matrimonial Real Property, the immovable property used by a couple and their family, the most common example being a family home and the land it is situated on.
Personal property	Refers to movable assets, such as cars, furniture, boats, money in the bank, or household goods.
PFRs	Provisional Federal Rules are interim rules defined in sections 12-52 and 54-55 of <i>FHRMIRA</i> , which took effect on December 16, 2014 for those First Nations without their own MRP law.
Real property	Refers to immovable property, the most common example being a house and the land it is situated on.
Spouse	An individual who is one of the married partners or common-law partners living in a conjugal relationship or family unit.
Succession	Entitlement to the deceased's property by kinship.

Who is this booklet for?

If you are living on reserve in a marriage or common-law partnership, and at least one of you is a member of the First Nation, and

- you are concerned with what happens to your property on the First Nation if you or your spouse dies;
- you are concerned about the administration of your estate or that of your spouse;
- you are concerned about your rights and those of your spouse if one of you dies;
- you are uncertain of the role of the Courts and the Chief & Council on the death of you or your spouse

then this booklet was created for you.

While it cannot answer all of your questions, it may prove to be useful to you. Settling an estate on-reserve can be complicated. We recommend that you seek the guidance of a lawyer to assist you in understanding your rights and responsibilities.

NOTE

- If your First Nation is signatory to either the *First Nation Land Management Act* or to a **Self-Government Agreement**, then *FHRMIRA* may NOT apply to you.
- If your First Nation has enacted its own MRP law under *FHRMIRA*, the Provisional Federal Rules no longer apply.

A General Overview of Estates

When does the Indian Act apply to an estate?

The *Indian Act's* rules on Estates do not apply to everyone. For the *Indian Act's* Estate rules to apply, the deceased individual must be a First Nation member who is registered in the Indian Registry pursuant to the *Indian Act*. The deceased individual must be residing in their home, which is located on reserve, at the time of their death.

The rules also apply to people who live on-reserve, but are away for a period of time to go to school, for seasonal employment, or who had to leave to go into a care facility off-reserve.

For First Nations individuals with Indian status who live **off-reserve** and do not have an interest in reserve land, **their estates** are subject to the estate laws of the province where they are residing and their assets are located.

Similarly for people who live on-reserve but **do not have Indian status**, **their estates** are also subject to the estate laws of the province where they are residing and their assets are located.

For individuals with Indian Status who live off-reserve but who have an interest in land on reserve, please contact the Regional AANDC office to determine if there will be any follow-up necessary. In most cases, any transfer of property must be approved by the Minister.



A Review of the Minister's Role in Estates Management

According to Section 42 of the *Indian Act*, all jurisdiction and authority in relation to the estates of deceased Indians, who die ordinarily resident on reserve, is vested exclusively in the Minister of Aboriginal Affairs and Northern Development Canada (AANDC).

The Minister's role is to approve Wills; to confirm the appointments of executors or administrators named in the Will; to settle the estates of First Nation members who have no Will or where no one wishes to act as administrator or executor of the estate. AANDC has an oversight role to ensure the proper management of the estates of on-reserve members of a First Nation.

In order for a Will to be approved, it must meet certain requirements set out in the *Indian Act* and its regulations. The Will must be in writing (typed or handwritten), must be signed and dated by the deceased, must express the deceased's wishes, and must be intended to take effect on death. Although not required, the Will should also be dated.

The Minister may void all or part of a Will if:

- It was made under duress or influence;
- The person making it lacked testamentary capacity (the inability to understand what a Will is, or what it says at the time it is signed);
- The terms of the Will create undue hardship for dependents;
- The Will provides for the disposition of reserve land contrary to the interest of the Band or the *Indian Act*;
- It is vague or uncertain;
- The terms of the Will are against the public interest.

If the entire Will is voided, or if an individual dies without a Will, AANDC applies the provisions as contained in Section 48 of the *Indian Act*.

The Administration of Estates

Notifying AANDC of a death (usually by providing an original death certificate) starts the estate administration process. AANDC can be notified by family members, the Indian Registration System, the Band Administrator or a Band Council Employee.

An estate administrator is the person named in your Will, or appointed by AANDC, to take control of your assets, pay your final bills, and distribute your assets to your beneficiaries. Once appointed, the estate administrator must generally carry out the duties set out by the *Indian Act*, the estate regulations, or the Minister. They must also consider the rights of a survivor pursuant to either *FHRMIRA* or similar legislation the First Nation of the deceased may have adopted.

An interest in land on reserve cannot be transferred to heirs who are not band members of that First Nation. Where a right to possession or occupation of land on a reserve passes to a non-band member either through a Will or through intestacy, Section 50 of the *Indian Act* applies.

Section 50 provides that:

- The right of the land that has been gifted to a non-member shall be sold by the “superintendent” (Departmental employee) to the highest bidder among those entitled to reside on that reserve and the proceeds shall go to the devisee or descendant
- Unsold interest in lands revert to the band
- No sale is final until approved by the Minister

The Rights of the Surviving Spouse under *FHRMIRA*

Prior to the enactment of *FHRMIRA*, it was possible that a surviving spouse or common-law partner would not inherit or be entitled to an equal division of the matrimonial interests or rights on reserves. The PFRs came into force on December 16th, 2014 and provide new rights for survivors.

Under the PFRs, a surviving spouse or common-law partner (whether or not they are a member of the First Nation) who does not hold an interest or right in or to the family home has an automatic right to occupy the family home for 180 days after the death of their spouse or common-law partner. That right can be extended beyond 180 days with a court order.

A survivor also has the right to apply to the court for exclusive occupation of the matrimonial home beyond the 180-day period. Various considerations will be taken into account by the court to determine whether to grant exclusive occupation and the period of such occupation.

FHRMIRA requires that an applicant for exclusive occupation order beyond the 180 days send a copy of the application to the First Nation. The Chief and Council may then request an opportunity to present its views to the court regarding the social, legal, and cultural context that pertains to the application.

PFRs do not lead to non-Indians or non-members acquiring a permanent interest in reserve land. Exclusive occupation is temporary and for a fixed period of time.

With respect to settling the estate, a surviving spouse or common-law partner has two options:

- They may choose to apply to court for an amount equal to half the value of the deceased spouse's or common-law partner's interest or right in the family home and of other matrimonial interests or rights; or
- They may choose to inherit from the deceased's Will or under the estates provisions of the *Indian Act* in respect of the family home and other matrimonial interests.

The Rights of Surviving Spouse under *FHRMIRA* (Cont'd)

In relation to the MRP, the surviving spouse or common-law partner will have to choose between receiving an amount or right under *FHRMIRA* or an amount or right under the Will or the *Indian Act*.

To claim rights and interests under the PFRs, a survivor must make an application to the court within 10 months of the death of their spouse or common-law partner. Once the family home and matrimonial rights or interests have been distributed, the remainder of the estate will be distributed to the remaining heirs or beneficiaries as per the Will or Section 48 of the *Indian Act*.

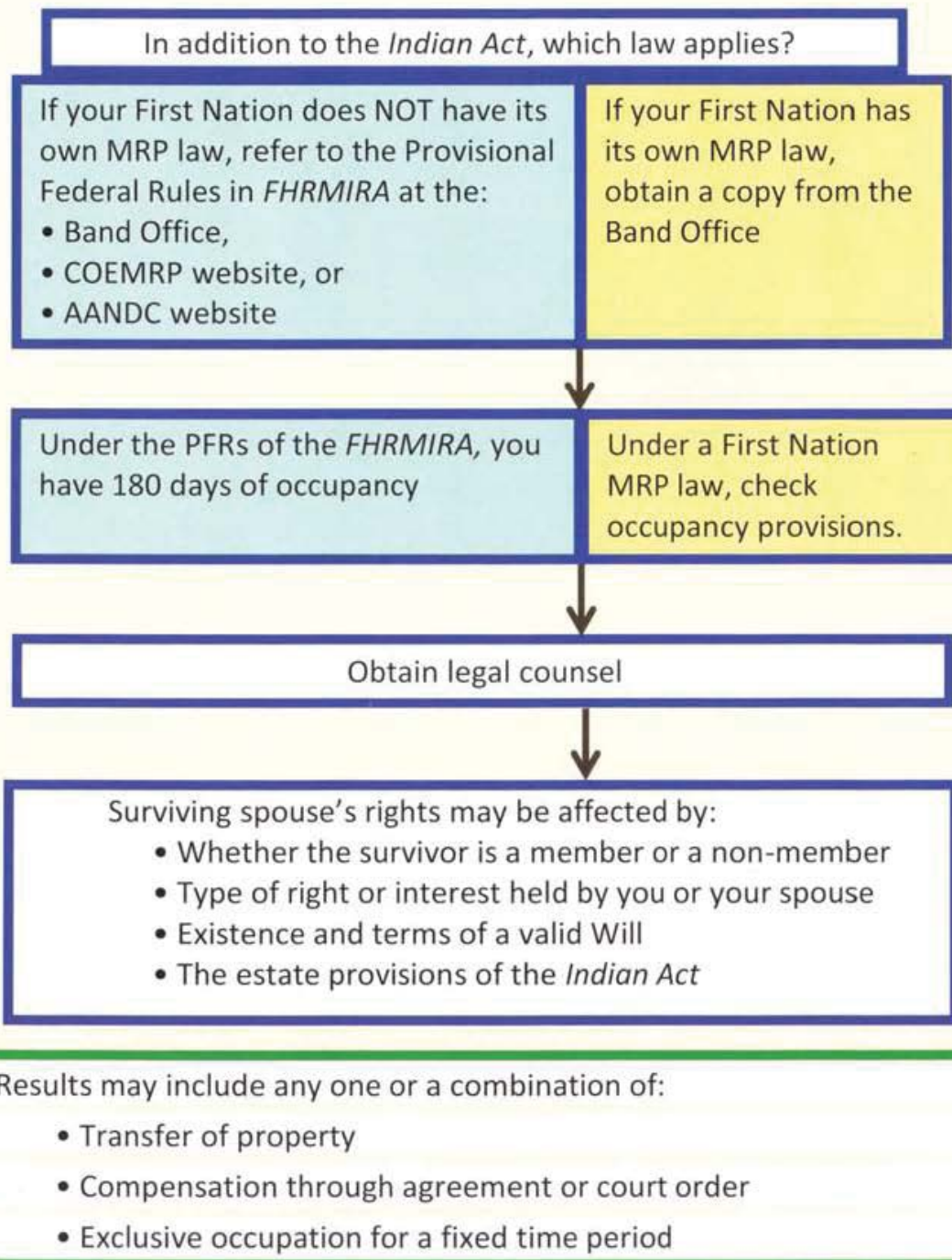
If a survivor chooses instead to inherit pursuant to the deceased's Will or estate, the *Indian Act* process must withhold distribution of assets until the 10 month period expires unless the survivor indicates in writing that he or she elects to inherit under the Will and not under *FHRMIRA*.

The options above are specific to the matrimonial home or other matrimonial rights or interests. It does not preclude the survivor from inheriting other assets from the deceased such as personal items.



What do I do if my spouse dies?

When a spouse dies, it is a time of tremendous stress. You may feel overwhelmed and even helpless. The chart below and the following pages may help you to organize your thoughts and help you understand your options for the future.



What do I do if my spouse dies? (Cont'd)

Regardless of any of the factors listed below, under the Provisional Federal Rules, surviving spouses have an automatic right to remain in the home for 180 days.

If you are living on a First Nation reserve and the PFRs apply, you have rights upon the death of your spouse. Those rights may vary depending on these factors:

- Whether or not you are a member of that First Nation.
- The type of right or interest, if any, in the matrimonial real property.
- Whether or not there is a valid Will.

The three factors are explained below.

Factor 1: Are you a member of the First Nation?

Whether or not you are a member of the First Nation, you are entitled to share in the value of the interest or right that was held by your spouse in or to the family home, as well as certain other matrimonial rights or interests, despite any directives in the Will.

If you are a member of the First Nation, on whose reserve the matrimonial real property is located, you may also be entitled to share in the value of the right or interest in land that was held by your spouse, even if the CP is in your spouse's name alone.

If you are **not** a member of the First Nation, there can be no transfer of real property to you. However, you may be entitled to compensation. The value of such compensation will be determined by a number of factors. You should obtain the advice of a lawyer.

In either case, you may be entitled to exclusive occupation beyond the 180 days, particularly if there are children or other dependents. Your lawyer will be able to assist you in determining and applying for any occupation of the matrimonial home.

What do I do if my spouse dies? (Cont.)

Factor 2: Type of right or interest

One of the factors affecting succession (transfer of deceased's property in sequence) of the matrimonial real property is the type of right or interest that the spouses had in the property.

(A) Lawful possession (CP or lease)

The possession could be

- as joint tenants
- as tenants in common
- with sole possession by the surviving spouse
- with sole possession by the deceased

Joint Tenants (both were in lawful possession, wholly and indivisibly)
If you and the deceased held the property as joint tenants, you now assume full possession of the real property (land and house).

Tenants in Common (both were in lawful possession of a divisible percentage of the property)

You retain your original interest in the property; the remaining portion becomes part of the assets of the deceased and will be disposed of according to a valid Will if any, or by the Intestacy section (48) of the *Indian Act*.

Sole lawful possession by the surviving spouse

No transfer of the property, however, there may be a settlement payment to anyone specified in a Will.

Sole lawful possession by the deceased

You may be entitled to all or part of the property, or to a settlement payment. The terms or percentage will be determined by the Will if any, or by the Intestacy section (48) of the *Indian Act*.

In any of the cases above where the result is a transfer of the property, the executor or administrator is responsible for submitting the appropriate documents to AANDC.

What do I do if my spouse dies? (Cont.)

(B) Custom allotments

Many First Nations do not subscribe to the provisions of the *Indian Act* or other legislation in allotting land to members. They have their own ways of determining where families will live and follow their own customs and traditions for dealing with land on reserve.

The Provisional Federal Rules will not apply to the value of the lands that have been allotted according to custom (not recognized by federal government). However, they will apply to structures on custom allotments that are recognized by the First Nation or the courts.

It is important for you to understand the policies involving land allotment on your reserve.

Factor 3: Is there a Will?

The existence of a valid Will is another factor affecting succession of the matrimonial real property.

If the deceased left a valid Will, disposition of the property will follow the dictates of the Will, or the survivor may apply, under the PFRs, for a court order to determine entitlement.

Once the matrimonial share has been distributed, the remainder of the assets will be distributed to the remaining heirs or beneficiaries as per the Will, or where there is no Will, Section 48 of the *Indian Act*.

If the survivor is a member of the First Nation, there may be a transfer of property.

Both members and non-members may be entitled to compensation, and/or to a provision for exclusive occupation of the matrimonial home beyond the 180 days for a fixed period of time.

Where can I get help?

When a spouse dies, it is a time of tremendous stress for all involved. You may feel overwhelmed and even helpless. Your family and friends can often provide the quickest assistance, at least until you have an opportunity to sort things out. The Band Office or Health Centre may be able to direct you to sources of support within the community, such as counselling or grief support groups. The Band Office may be able to assist you with obtaining property records and put you in touch with the AANDC Estates Officer in your region.

In legal matters you should have a lawyer who represents you. Each province has a variety of services to put you in touch with a lawyer. You should discuss your situation and ask any questions before you make a decision to engage a lawyer. You need to feel comfortable with and have confidence in your lawyer.

The Centre of Excellence for Matrimonial Real Property and the Aboriginal Affairs and Northern Development Canada websites also provide information. The websites are:

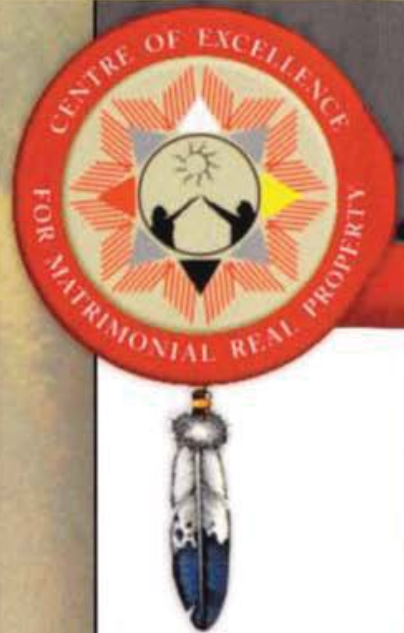
- www.coemrp.ca
- www.aandc-aadnc.gc.ca

As discussed elsewhere in this booklet, if the PFRs apply, the provincial courts have the power to issue court orders related to protection and property matters. Under *FHRMIRA*, you have access to a court to protect yourself and your property interests. The court can issue instructions to the police to enforce its orders.

FHRMIRA gives you certain rights. It is important to understand these rights and to be diligent in pursuing them. If you do not understand them, talk to a lawyer. Carefully follow your lawyer's advice and keep proper records of important matters. It is important to be timely in responding to instructions or requests from authorities to keep the process moving. It may take time to sort everything out. Your lawyer may be able to help you understand how long the process might take in your specific situation.

Centre of Excellence for Matrimonial Real Property

Hosted by the National Aboriginal Land Managers Association (NALMA), COEMRP is available to assist First Nations communities and their members in matters related to Matrimonial Real Property Rights and to First Nations' MRP law making



Other Reference Material

Role of Chief & Council

The COEMRP has prepared a brochure, "Role of Chief & Council," that outlines and defines their responsibilities under the Provisional Federal Rules as contained in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

On-Reserve Matrimonial Real Property Rights

The COEMRP has prepared a booklet outlining the rights and protections available under the Provisional Federal Rules of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

MRP Toolkit

The COEMRP has published a comprehensive Toolkit to guide First Nations professionals in MRP matters and the development of their own MRP law.

Training

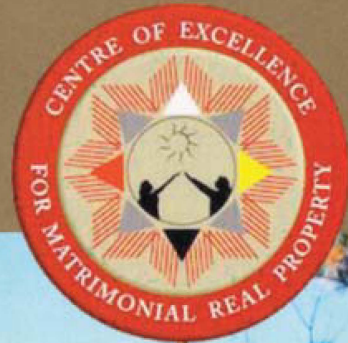
The Centre also provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the Centre at:

**Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Land Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0**

Website: www.coemrp.ca

Email: info@coemrp.ca

Phone: 1-855-657-9992 or 1-705-657-9992



ON-RESERVE MATRIMONIAL REAL PROPERTY RIGHTS

As of December 16, 2014

Under the Provisional Federal Rules as
contained in the *Family Homes on Reserves and
Matrimonial Interests or Rights Act*

Centre of Excellence for Matrimonial Real Property

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Introduction

This booklet on Matrimonial Real Property (MRP) was produced by the Centre of Excellence for Matrimonial Real Property (COEMRP) under the auspices of the National Aboriginal Land Managers Association (NALMA) to help you understand your rights under the recent *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the Act).

This booklet is provided strictly for informational, not legal, purposes. Refer to the Act itself in all legal matters and seek the advice of a competent lawyer should you find yourself in the kind of situation covered by the Act.

Provincial laws already address some aspects of family law, such as laws applying to personal property. However, there was no law in place to protect interests and rights related to matrimonial real property on reserves, thus this Act was enacted to address those issues.

We invite you to visit the COEMRP website for more information:

www.coemrp.ca

CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY



Terminology & Acronyms

Act	Abbreviated form of the <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i> .
Common-law partners	Persons who have been living together in a conjugal relationship for at least one year.
CP	Certificate of Possession, document giving evidence of a member's right to lawful possession of reserve lands pursuant to the <i>Indian Act</i> .
Domestic agreement	A signed document made by the spouses where they agree on their rights and obligations.
EPO	Emergency Protection Order, issued by the courts to protect the family members from violence, and the home from damage.
Exclusive Occupation Order	An order providing for the sole occupancy of the home to one of the spouses for a set period of time. It does not involve a change in ownership.
Family home	The family matrimonial home (the structure only, not the land) situated on a reserve where the family normally lives. It will also be referred to as the "home".
MRP	Matrimonial Real Property, the immovable property used by a couple and their family, the most common example being a family home and the land it is situated on.
Personal property	Refers to movable assets, such as cars, money in the bank, household goods.
PFR	Provisional Federal Rules are interim rules defined in sections 12-52 and 54-55 of the <i>Act</i> , which took effect on December 16, 2014 for those First Nations without their own MRP law.
Real property	Refers to immovable property, the most common example being a house and the land it is situated on.
Spouse	An individual who is one of the married partners or common-law partners living in a conjugal relationship or family unit.

Who is this booklet for?

If you are living on reserve in a marriage or common-law partnership, and at least one of you is a member of the First Nation, and

- you have questions about your rights to live in the family home on the reserve,
- you are facing divorce or separation issues,
- you are concerned about possible abuse to you and/or other family members or property destruction,
- you are worried about where and how you will live after separation,
- you are concerned with what happens financially after marriage breakdown or the death of your spouse,
- you are confused about your rights, either as a member or non-member,
- you are uncertain how to protect your rights and interests,
- you are uncertain of the role of the Courts, the Chief & Council, and the Police,

then this booklet was created for you.

While it cannot answer all of your questions, it may prove to be useful to you.

NOTE

- If your First Nation is signatory to either the *First Nation Land Management Act* or to a **Self-Government Agreement**, then this *Act* may NOT apply to you.
- If your First Nation has enacted its own MRP law under this *Act*, the Provisional Federal Rules contained in this *Act* no longer apply.

What are my rights under the New Law?

Family Homes on Reserves and Matrimonial Interests or Rights Act (the Act) is now in effect.

This Act applies to married couples and common-law spouses living on reserve, where at least one of them is a First Nation member or an Indian as defined in the *Indian Act*. It seeks to provide basic protections and rights to individuals living on reserves regarding the family home and other matrimonial interests and/or rights, during a conjugal relationship, in the event of a breakdown of that relationship, and on the death of a spouse.

Does this new Act apply to you?

If you are living on a reserve and are married or in a common-law relationship where at least one of you is a member of the First Nation or an Indian, then you should know your rights.

The Act deals with what is referred to as Matrimonial Real Property (MRP). The family home is the most common type of MRP, and it is usually the most valuable asset.

What are your rights to the family home in the event that the relationship ends or your spouse dies? What if there are children or elders involved?

If your First Nation is signatory to either the **First Nation Land Management Act** or to a **Self-Government Agreement**, then this Act may not apply to you. If your First Nation has enacted its own MRP law under this Act, the Provisional Federal Rules contained in this Act no longer apply.

It is important that you determine which rules apply in your circumstances. You may wish to obtain that information directly from the Band Office, or your lawyer may do so on your behalf. Be proactive. Make yourself aware of the rules **BEFORE** you need them.

What are my rights under the New Law? (Cont'd)

Consider this scenario from the past:

A mother and her children are homeless in the city. They lived in their First Nation community for 15 years. Before leaving for the city, they had endured ongoing abuse by the father and husband. Because he was the only one who held the right to the family home, they are now living in a shelter miles away from their friends, family and support system, leaving behind a comfortable home and prosperous business.

Now, the Act addresses these issues.

With the Provisional Federal Rules (PFRs) defined in the Act, the woman described above could make application for a court order to obtain exclusive occupation of the home for a fixed amount of time, allowing her to consider the social and educational needs of the children. As an alternative, under the PFRs, she could also apply for a determination of a fair financial settlement for the family real property.

Any matrimonial personal property (such as cars, clothing, etc.) is dealt with in accordance with the family laws of the province.

If you are married or in a common-law relationship on reserve where the Provisional Federal Rules apply, you should understand that you have these rights under the Act, whether you are a member or a non-member of the First Nation. When in doubt, consult your lawyer.



When does this law apply?

First Nation members who are married or in a common-law union and living off reserve are governed by the laws of the province in which they live. They have the same rights and responsibilities as any other couple in that province.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* aims to ensure that families living on reserve have access to similar rights as those living off reserve

The *Act* has two major parts:

- 1) The First Nation Law-Making Mechanism sections came into effect as of the 16th of December 2013. These sections grant authority to First Nation Councils to enact their own MRP law.
- 2) The Provisional Federal Rules came into effect as of the 16th of December 2014. These interim rules provide a means for individuals to deal with their MRP matters.

With some exceptions, as described on page 6, the *Act* and its Provisional Federal Rules apply to all First Nations who have not yet passed their own Matrimonial Real Property law. Even if your First Nation intends to pass its own law, the *Act* and its rules apply in the meantime.

Consult with your Band Office to determine if your First Nation has enacted an MRP law. If so, request a copy.

You can obtain a copy of the *Act* from the Aboriginal Affairs and Northern Development Canada website: www.aandc-aadnc.gc.ca or from the COEMRP website: www.coemrp.ca

When does this law apply?

As of December 16, 2013, First Nations have the authority to pass their own MRP law and some have already done so. You should check with your Band Office to see if your First Nation has such a law and, if so, obtain a copy of it.

Some First Nations have not yet enacted their own MRP law. As a result, you may have rights and protections under the Provisional Federal Rules of the Act.

THE MRP LEGISLATIVE TIMETABLE

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

**Royal Assent :
19 June 2013**

**First Nation Law-Making
Mechanism Sections**

**In Effect:
16 December 2013**

**ALL SECTIONS OF THE ACT
GO INTO EFFECT**

16 December 2014

**and
Remain In Effect Until Such Time
as the First Nation Passes Its
Own MRP LAW**



**KNOW YOUR
RIGHTS!
CONSULT A
LAWYER WHEN
CONCERNED.**

What do I do if we separate or divorce?

The breakdown of a marriage or common-law partnership is rarely without complication or anxiety.

Consider this hypothetical situation:

A man lived in a common-law relationship in his First Nation community for 18 years and is now separating. He contributed to building the family home and made payments on the housing loan, but his name is not on the Certificate of Possession. Upon separation he was asked to leave the home he helped build for 18 years.

What are his rights with respect to the Matrimonial Property?

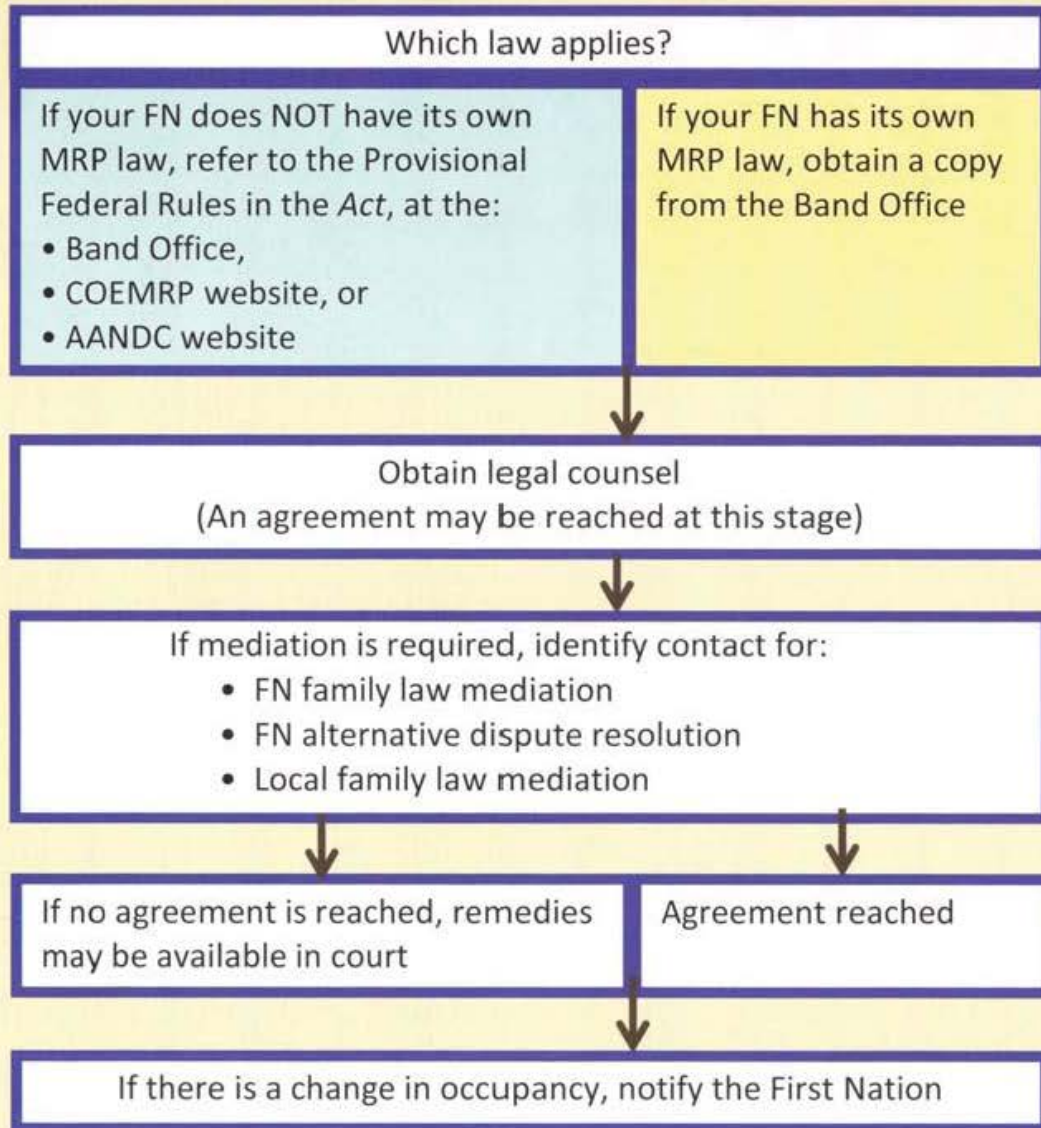
Under the rules of the Act, the spouses may choose to apply for

- *a division of assets, or*
- *exclusive occupation of the matrimonial home*

Courts across Canada consider marriages and common-law unions to be economic unions, not unlike a business partnership. Should the union fail, the assets should be divided fairly. The courts make no judgment as to who was at fault.

Of course there are many different scenarios. The flowchart on the following page may help guide you through the issues should you find yourself dealing with a breakdown in your family.

What do I do if we separate or divorce?



Results may be no change, or may include any one or a combination of:

- Transfer of property
- Financial compensation
- Exclusive occupation for a fixed time period

What do I do if we separate or divorce? (Cont.)

Resolving the issues

In the event of a marriage breakdown, questions arise about who gets to live where, about the division of property, and the resolution of disputes. The parties involved may be able to work out these issues themselves, for instance, if there was a domestic or inter-spousal agreement, while often it may be necessary to bring in third parties to arrive at an acceptable solution.

If you have questions about your legal rights under the Act, you should consult your own lawyer. Legal counsel may be able to assist in reaching an agreement.



It is important to note that going to court should be your last option. Resolving any issues out of court is always a better first choice.

Mediation

Mediation may work very well and should be considered as a first step whenever possible. Some First Nations provide family law mediation, where a neutral mediator meets with representatives from both parties and tries to find common ground between them. Sometimes, a First Nation will encourage the parties to agree to a traditional Alternative Dispute Resolution, such as a committee involving members and elders who are experienced in family law and understand property rights on reserve.

If the meetings prove successful, a separation agreement is made in writing, signed by the parties, and witnessed. This agreement might be used by the courts to formalize family matters.

What do I do if we separate or divorce? (Cont.)

Legal recourse

If traditional dispute resolution approaches do not resolve matters in a way that you think is fair or acceptable, you may decide that a legal approach is required. However, it is advisable, when possible, to use other methods before going to court to resolve matters. With your lawyer, you may seek to obtain court orders with respect to both occupancy of the family home and/or division of family assets and a financial settlement.

An Exclusive Occupation Order for the matrimonial home for one of the spouses could result from the divorce or separation; and this Order can be issued to a First Nation member or non-member, although it does **not** change the ownership of the property.

Some of the matters that the court will take into consideration in issuing an Exclusive Occupation Order include:

- the best interests of any children involved
- the terms of any domestic agreement between spouses
- the collective interest of the First Nation
- financial and/or medical issues of the spouses
- the history of family violence
- the relevant property rights and interests

Protecting the collective interests of the First Nation

This *Act* requires that an applicant for an order send a copy of the application to the First Nation (**except in the case of EPOs or where the judge has made a Confidentiality Order**). The Band Council may then request an opportunity to present its views to the court regarding the cultural, social and legal context that pertains to the application.

What do I do if there is violence or abuse?

Family violence is not tolerated

All individuals have the right to feel safe in their home and community. Both women and men can be victims of family violence. It can have lasting harmful effects on victims and a tragic impact on children.

Threatening, hitting, kicking, punching, stalking and harassing another person are crimes. Having sex with a person against that person's will is also a crime. Being married does not change this. A person committing these acts can be arrested, charged, convicted and jailed. Psychological, emotional and financial abuse should also not be tolerated by the affected spouse.

The Act specifies the use of Emergency Protection Orders (EPO) and Exclusive Occupation Orders to enforce these principles and rights.

If you feel that you are in danger...

If you or your children are experiencing family violence, you are not alone. There is help available to you.

If you are being threatened, or physically or sexually assaulted, call the police.

Once safety has been ensured, there are additional steps you may want to take to organize your life over the longer term. You may make application for:

- an Emergency Protection Order (described on page 16), and/or
- an Exclusive Occupation Order (described on pages 13 and 17).

Again, you do not need to feel alone; there are community resources to help you along the way.

What do I do if there is violence or abuse?

If violence has occurred, or if your household is in imminent danger, call the police. You may also decide to temporarily leave your home to ensure safety

Which law applies?

If your FN does NOT have its own MRP law, refer to the Provisional Federal Rules in the *Act*, at the:

- Band Office,
- COEMRP website, or
- AANDC website

If your FN has its own MRP law, obtain a copy from the Band Office

If your FN does NOT have its own MRP law, under the PFR, the EPO may keep the abuser away for 90 days.

Under FN MRP law, check for EPO provisions.

Apply for an Emergency Protection Order

Obtain legal counsel

Results may include either or a combination of:

- Application for an Emergency Protection Order
- Application for exclusive occupation

What do I do if there is violence or abuse? (Cont.)

Emergency Protection Orders

If the PFRs apply, an Emergency Protection Order (EPO) allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (usually in situations of family violence). An EPO can increase the protection to families on reserve by making it possible to remove the offending spouse from the home for up to 90 days.

For example, an EPO can be used to do the following:

- Keep an abuser away from a home, workplace, school, or other premises where specific family members might be present.
- Remove another person from the home if needed.
- Prohibit an abuser from making contact with specific family members.
- Direct the police to remove an abuser, and/or supervise the removal of the abuser's personal belongings.
- Direct police to seize (and store) weapons from the family home.
- Specify any other provision for the immediate protection of family members.

Obtaining an EPO

- You can apply to the courts directly for an EPO.
- You can apply whether or not you have left your home.
- If you need assistance or are not able to apply for an EPO in person, a peace officer or other trusted third party may apply on your behalf to ensure the immediate protection of your person or your property at risk of harm.

NOTE: Under the Provisional Federal Rules, an EPO can last up to 90 days. Before the order expires, you may also apply for an Exclusive Occupation Order so that you can continue residing in the family home for a longer term if no further resolution has been reached.

What do I do if there is violence or abuse? (Cont.)

Exclusive Occupation Order

An Exclusive Occupation Order allows a court to provide short or long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners. The duration of the order could range from a set number of days to a much longer period, such as until dependent children reach the age of majority.

Each province has its own court system, and some have special courts of Family Law, with judges who specialize in such matters. The Act provides you with access to these courts and spells out provisions to issue and enforce court orders.

You should understand that these provisions are now available to help you protect your rights, your family, and your family home. Obtain professional legal advice to determine if you need such court orders and how to exercise these rights in your province.

NOTE

If a First Nation has its own MRP law, it may or may not include provisions for Emergency Protection Orders or for Exclusive Occupation Orders.

It is important for you to obtain a copy of your FN's MRP law to determine what rights and protections are available to you.

Spousal Consent to Transfer of Assets

The Provisional Federal Rules affirm that consent is required for the sale, transfer, or encumbering of the family home. If you have not given free and informed written consent, you (whether an FN member or not), should obtain legal advice immediately.

What do I do if my spouse dies?

Regardless of any of the factors listed below, under the Act's Provisional Federal Rules, you have an automatic right to remain in your home for 180 days.

If you are living on a First Nation reserve and the Act's PFRs apply, you have rights upon the death of your spouse. Those rights may vary depending on these factors.

- 1) Whether or not you are a member of that First Nation.
- 2) The type of right or interest, if any, in the matrimonial real property.
- 3) Whether or not there is a valid will.

The three factors are explained below.

Factor 1: Are you a member of the First Nation?

Whether or not you are a member of the First Nation, you are entitled to share in the value of the interest or right that was held by your spouse in or to the family home, as well as certain other matrimonial rights or interests, despite any directives in the will.

If you are a member of the First Nation, on whose reserve the matrimonial real property is located, you may also be entitled to share in the value of the right or interest in land that was held by your spouse.

If you are **not** a member of the First Nation, there can be no transfer of real property to you. However, you may be entitled to compensation. The value of such compensation will be determined by a number of factors. You should obtain the advice of a lawyer.

In either case, you may be entitled to exclusive occupation beyond the 180 days, particularly if there are children or other dependents. Your lawyer will be able to assist you in determining and applying for any occupation of the matrimonial home.

What do I do if my spouse dies?

Which law applies?

If your FN does NOT have its own MRP law, refer to the Provisional Federal Rules in the Act, at the:

- Band Office,
- COEMRP website, or
- AANDC website

If your FN has its own MRP law, obtain a copy from the Band Office

Under the PFRs of the Act, you have 180 days of occupancy

Under a FN MRP law, check occupancy provisions.

Obtain legal counsel

Surviving spouse's rights may be affected by:

- Whether the survivor is a member or a non-member
- Type of right or interest held by you or your spouse
- Existence and terms of a valid will
- The estate provisions of the *Indian Act*

Results may include any one or a combination of:

- Transfer of property
- Compensation through agreement or court order
- Exclusive occupation for a fixed time period

What do I do if my spouse dies? (Cont.)

Factor 2: Type of right or interest

One of the factors affecting succession (transfer of deceased's property in sequence) of the matrimonial real property is the type of right or interest that the spouses had in the property.

(A) Lawful possession (CP or lease)

The possession could be

- a) as joint tenants
- b) as tenants in common
- c) with sole possession by the surviving spouse
- d) with sole possession by the deceased

Joint Tenants (both were in lawful possession, wholly and indivisibly)
If you and the deceased held the property as joint tenants, you now assume full possession of the real property (land and house).

Tenants in Common (both were in lawful possession of a divisible percentage of the property)
You retain your original interest in the property; the remaining portion becomes part of the assets of the deceased and will be disposed of according to a valid will if any, or by the Intestacy section (48) of the *Indian Act*.

Sole lawful possession by the surviving spouse

No transfer of the property, however, there may be a settlement payment to anyone specified in a will.

Sole lawful possession by the deceased

You may be entitled to all or part of the property, or to a settlement payment. The terms or percentage will be determined by the will if any, or by the Intestacy section (48) of the *Indian Act*.

In any of the cases above where the result is a transfer of the property, the executor or administrator is responsible for submitting the appropriate documents to AANDC.

What do I do if my spouse dies? (Cont.)

(B) Custom allotments

Many First Nations do not subscribe to the provisions of the *Indian Act* or other legislation in allotting land to members. They have their own ways of determining where families will live and follow their own customs and traditions for dealing with land on reserve.

The PFRs in the *Act* will not apply to the value of the lands that have been allotted according to custom (not recognized by federal government). However, they will apply to structures on custom allotments that are recognized by the First Nation or the courts.

It is important for you to understand the policies involving land allotment on your reserve.

Factor 3: Is there a will?

The existence of a valid will is another factor affecting succession of the matrimonial real property.

If the deceased left a valid will, disposition of the property will follow the dictates of the will, or the survivor may apply, under the PFR, for a court order to determine entitlement.

Once the matrimonial share has been distributed, the remainder of the assets will be distributed to the remaining heirs or beneficiaries as per the will, or where there is no will, section 48 of the *Indian Act*.

If the survivor is a member of the FN, there may be a transfer of property.

Both members and non-members may be entitled to compensation, and/or to a provision for exclusive occupation of the matrimonial home beyond the 180 days for a fixed period of time.



Where can I get help?

Whenever a family breaks up or there is a death of a spouse, it is a time of stress for all involved. In the worst of circumstances, you may feel overwhelmed and even helpless.

The first potential source of help may be found in your own community. Your family and friends can often provide the quickest assistance, at least until you have an opportunity to sort things out. The Band Office should be able to direct you to sources of support within the community, such as social services, a list of approved mediators, property records and other information to assist you.

Of course, sometimes you may get too much advice from uninformed sources. Much of this advice may even be conflicting and it is best to keep in mind that not everyone is unbiased. Not everyone is necessarily looking out for your best interests.

In legal matters you should have a lawyer who represents you. How do you find such a lawyer that is qualified in matters of family law and family property? Each province has a variety of services to put you in touch with a lawyer. You may also be able to get Legal Aid to help you pay for legal services.

Check online or by phone with your provincial government to get specific assistance. The Centre of Excellence for Matrimonial Real Property and the Aboriginal Affairs and Northern Development Canada websites also provide information in this regard.

The websites are:

www.coemrp.ca

www.aandc-aadnc.gc.ca

You should discuss your situation and ask any questions before you make a decision to engage a lawyer. You need to feel comfortable with and have confidence in your lawyer.

Where can I get help? (Cont.)

Help is available from the police and the courts. If violence, real or threatened, is part of the situation, the police have a serious role to play to ensure your safety and protect the community peace.

As discussed elsewhere in this booklet, if the PFR apply, the provincial courts have the power to issue court orders related to protection and property matters. Under the *Act*, you have access to a court to protect yourself and your property interests. The court can issue instructions to the police to enforce its orders.

For example, if you and your ex-spouse agree to a 50-50 split of the value of the family home under a court order, and a payment schedule, but some months later, your spouse doesn't honour the agreement, you may request that the court take action on your behalf.

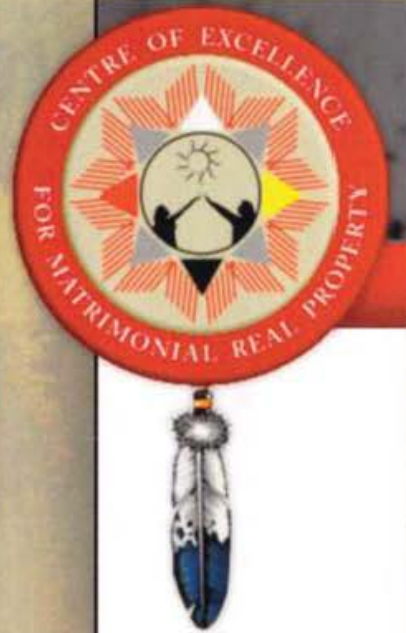
With rights come responsibilities. The *Act* gives you certain rights but it is your responsibility to understand these rights to the best of your ability and to be diligent in pursuing them. If you don't understand them, talk to your lawyer. Carefully follow your lawyer's advice and keep proper records of important matters. Be timely in responding to instructions or requests from authorities.

It may take time to sort everything out. Be patient. Stay involved. And keep a positive attitude towards the future.



Centre of Excellence for Matrimonial Real Property

Hosted by the National Aboriginal Land Managers Association (NALMA), COEMRP is available to assist First Nations communities and their members in matters related to Matrimonial Real Property Rights and to First Nations' MRP law making



Other Reference Material

Role of Chief & Council

COEMRP has prepared a brochure, "Role of Chief & Council", that outlines and defines their responsibilities under the Provisional Federal Rules as contained in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

MRP Toolkit

The COEMRP has published a comprehensive Toolkit to guide First Nations professionals in MRP matters and the development of their own MRP law.

Training

The Centre also provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the Centre at:

**Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Land Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0**

Website: www.coemrp.ca

Email: info@coemrp.ca

Phone: 1-855-657-9992 or 1-705-657-9992



Saskatchewan

Applying for an Exclusive Occupation Order for a Family Home on Reserve



A guide to navigating the Family Court rules of Saskatchewan when applying for Exclusive Occupation of the family home under section 20 of the Family Homes on Reserves and Matrimonial Interests or Rights Act

Notice of Application

The applicant must also complete **Form 15-19, Notice of Application**, indicating when the other spouse or common-law partner should come to court, and **Form 15-26B, Property Statement**. The applicant should also prepare his/her affidavit, including information about:

- their relationship, including whether they have children;
- property owned by the couple, both on and off reserve;
- the family home on reserve;
- who else lives in the family home;
- whether there was any agreement between them, or previous court order;
- how long the applicant has resided on the reserve;
- whether either spouse or common-law partner has any medical condition;
- whether other suitable housing is available to either the applicant or the respondent; and
- whether there has been any family violence.

Next Steps: Service of Documents

The applicant must serve a copy of the application on anyone who might be affected by the order, including any adult living in the home, and the Chief and Council.

To serve a copy of the application in Saskatchewan:

- service of a document must be effected by personal service of that document on the person to be served except where an enactment or order of the court provides otherwise; or these rules authorize service by an alternative or special mode of service
- Personal service of a document is effected by leaving a copy of the document with the person to be served
- Must be accompanied by an acknowledgement of service document, a request that the person served return the signed and completed acknowledgement of service without delay and a postage prepaid envelope addressed to the person serving the document (except where service is

Next Steps

1. The person who has been served with a copy of the application is known as a respondent. A respondent can reply to the application by preparing his/her own affidavit, containing the same type of information. The Respondent may also want to complete **Form 15-15, Answer and Counter-Petition**.
2. The applicant may prepare a second affidavit, but only to reply to anything new in the Respondent's affidavit.
3. Attend court and present the application to the court. If the applicant is successful, he or she should provide a copy of the order to the Chief and Council of the First Nation and the Minister of Indigenous and Northern Affairs Canada.

This pamphlet is provided for informational purposes only and should not be considered as legal advice.

Legal Assistance

The applicant or the respondent may choose to have a lawyer assist them at any point during the application. He or she would be responsible to pay the legal costs.

Legal Aid may be able to assist in this process. Contact Legal Aid Saskatchewan at :

<http://www.legalaid.sk.ca/>

For more information, contact:

The Centre of Excellence For Matrimonial Real Property
c/o National Aboriginal Lands Managers Association
1024 Mississauga Street, Curve Lake ON
KOL IRO

Phone: 1-855-657-9992 or 705-657-9992
Fax: 1-705-657-2999



Background

The *Family Home on Reserves and Matrimonial Interests or Rights Act* (the “Act”) came into force on **December 16, 2013**. The Provisional Federal Rules (PFR’s) contained in the Act came into force **December 16, 2014** and apply (with some exceptions) to all First Nations with reserve lands. The PFR’s no longer apply to First Nations who have passed their own matrimonial real property (MRP) law, under this *Act*, or under the *First Nations Land and Management Act*. **It is important to determine which rules apply in your circumstances.**

NOTE: This Act only applies where the breakdown of the relationship occurred on or after December 16, 2014.

As per Clause 2.1 of the Definitions of the *Act*, a **family home** means a structure – that need not be affixed but that must be situated on reserve land — where the spouses or common-law partners, habitually reside or, if they have ceased to cohabit or one of them has died, where they habitually resided on the day on which they ceased to cohabit or the death occurred. If the structure is normally used for a purpose in addition to a residential purpose, this definition includes only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.

Purpose of this Pamphlet

This pamphlet is to provide information on how a spouse or common-law partner can apply for an order for exclusive occupation of the **family home** on a reserve in Saskatchewan. An exclusive occupation order may:

- Be for a short or long period of time
- Allows for one spouse or common-law partner to exclusively stay in the family home on reserve and
- Excludes the other spouse or common-law partner from coming to the family home on reserve or only allows them on the premises under certain conditions.

Application for Exclusive Occupation

In certain communities, the Chief and Council or its delegated authority has the ability to make decisions regarding the occupancy of homes on its reserve. Notwithstanding this recognized authority, a spouse or common-law partner resident on reserve retains the right to apply for exclusive occupation of the family home under section 20 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.



Section 20(1) of the Act states:

“A court may, on application by a spouse or common-law partner whether or not that person is a First Nation member or an Indian order that the applicant be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.”

Cultural, familial, and political issues may face the spouse or common-law partner before he or she decides to apply for exclusive occupation. For example, the parent taking care of the children may need a stable home to raise the children until they reach the age of 18. Before beginning a court application, it is recommended that the couple try using alternative dispute resolution such as mediation.

Note: S. 41(2) states “On the council’s request, the court that is seized of the application must, before making its decision, allow the council to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made.”

Application to the Family Court

All court forms for family law applications in the Court of Queen’s Bench for Saskatchewan can be found on the Law Society website:

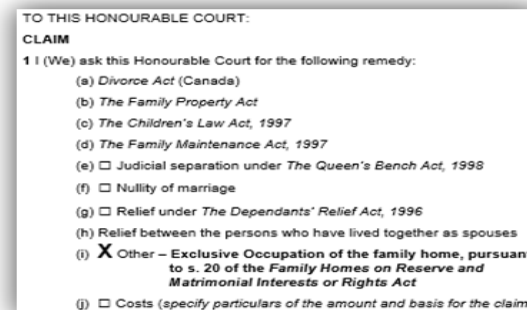
<http://www.lawsociety.sk.ca/for-lawyers-and-students/practice-resources/queens-bench-forms-2016.aspx>

To apply for an order for exclusive occupation, use the **Petition, Form 15-6**.



PETITION FORM

On the second page of the petition, the applicant should check the “other” box near the bottom, and state that he/she is applying for an order for exclusive occupation under section 20 of the *Act*.





The Centre of Excellence for Matrimonial Real Property

A Pocket Guide

to the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Frequently Referenced Clauses)

This document is **NOT** an official statement of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. For all purposes of interpreting and applying the law, users should consult the authoritative text of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.



The *Family Homes on Reserves and Matrimonial Interests or Rights Act* is federal legislation. Sections 7-11 contain the law-making provisions, which came into force December 16, 2013. The Provisional Federal Rules contained in sections 12-52 came into effect December 16, 2014. The Provisional Federal Rules remain in force until the First Nation enacts its own MRP Law (with some exceptions).



Sections 7-9

Enacting a First Nation MRP Law:

Enactment of a First Nation MRP law requires Community Approval. Every member of the First Nation, 18 years and over, resident or non-resident on reserve is eligible to vote in the approval process. The proposed First Nation matrimonial real property law is approved if:

- o At least 25% of eligible voters participated in the vote; AND
- o A majority of those members who participated in the vote, voted to approve it

The Provisional Federal Rules (Section 15-52 of the Act) no longer apply to a First Nation that enacts its own matrimonial real property law under this Act.



Section 13:

Occupation of the Family Home During the Conjugal Relationship:

Each spouse has the right to occupy the family home during the conjugal relationship, whether or not they are a First Nation member or an Indian.



Section 14

Rights Available after the Death of a Spouse/Common-law Partner:

The Act provides the right of a non-interest holding surviving spouse or common-law partner (whether or not the survivor is a First Nation member or an Indian) to remain in the family home automatically for 180 days after the death of their spouse or common-law partner.

In the event that a survivor wishes to remain in the family home for a further period of time, they have the option of applying for an Exclusive Occupation Order using Section 21 of the Act. A survivor may also apply for division by using Section 36.



Section 15:

Consent of Spouse or Common-law Partner:

The consent of the spouse/common-law partner for the sale or disposal of the family home is required.

This provides spouses/common-law partners with protection that the home cannot be sold, or otherwise disposed of, or encumbered during the marriage or common-law relationship without the free and informed written consent of the spouse/common-law partner, whether or not that spouse is a First Nation member or an Indian.



Sections 16-19

Emergency Protection Order (EPO):

Enables a court to make an order granting one spouse/common-law partner exclusive occupation of the family home, whether or not they are a First Nation member or an Indian.

This application is heard without notice to the council, on an urgent basis and for a short duration in situations of family violence (Section 16). The court order can last up to 90 days.

A designated judge of the province in which the family home is situated can issue this order. **Note: EPOs are not available in all provinces.**



Section 20

Exclusive Occupation Order (EOO) on Relationship Breakdown:

A court order that provides one spouse or common-law partner (whether or not they are a First Nation member or an Indian) short to long-term occupancy of the family home to the exclusion of the other spouse/common-law partner. This could apply even if the home is owned by the First Nation or is a rental unit. The duration of this order could range from a set number of days to a longer period. An EOO does not change who holds an interest or right in or to the family home.

When a spouse or common-law partner makes application for an order under the provisional federal rules (except under sections 16-19) they must provide a copy to the First Nation.

The First Nation can present to the courts its views whether or not the order should be made. However, their view does not veto the court decision.



Section 21

Exclusive Occupation Order (EOO) after Death of a Spouse/Common-law Partner:

A court order that provides a surviving spouse/common-law partner (whether or not they are a First Nation member or an Indian) short to long-term occupancy of the family home. This could apply even if the home is owned by the First Nation or is a rental unit. The duration of this order could range from a set number of days to a longer period. An EOO does not change who holds an interest or right in or to the family home or prevent an executor from transferring this interest to the heir.

When a spouse or common-law partner makes application for an order under the provisional federal rules (except under sections 16-19) they must provide a copy to the First Nation.

The First Nation may present its views to the court on whether or not the order should be made.



Section 28:

Division of Value after a Relationship Breakdown:

Each spouse is entitled, on application, to one half of the value of the family home AND other matrimonial interests or rights.

If both spouses are members, the value of interests or rights to land may also be considered for the purposes of division.

On application by one of the spouses, (which must be made within three years after cohabitation ended), the court may determine the amount payable by one spouse to the other and set the conditions for how the amount is to be settled.



Sections 34-36

Division of Value after the Death of a Spouse/Common-law Partner:

The surviving spouse may, within 10 months after the date of the death of their spouse, make an application to the court under section 36 of *FHRMIRA* for half the value of the MRP. In relation to the MRP, the surviving spouse or common-law partner would have to choose between receiving an amount under this Act OR an amount or right under the will or the *Indian Act*.



Section 54

Non-retroactivity:

The provisional federal rules cannot be applied retroactively.

They only apply where the relationship breakdown or the death of the spouse occurred on or after the coming into force of the provisional federal rules. In most First Nations, this is December 16th, 2014. First Nations on the schedule for FNLMA, on the date of Royal Assent, received an extension. Their coming into force date is June 19th, 2016.

It is important for you to know which date applies in your community.



About the Centre of Excellence for Matrimonial Real Property and its Host

The **National Aboriginal Lands Managers Association (NALMA)** is a non-profit, non-political organization with an elected Regional Board of Directors. NALMA is host to the **Centre of Excellence for Matrimonial Real Property**. The Centre operates at arm's length from the Government of Canada, and provides the following services:

1. Guide First Nations who are opting to develop their own MRP laws
2. Provide information on protections and rights available to individuals & families living on reserve
3. Assist with implementing the provisional federal rules
4. Provide research on alternative dispute resolution mechanisms

For more information about the services provided by NALMA, contact:

National Aboriginal Lands Managers Association

1024 Mississauga Street

Curve Lake ON K0L 1R0

Toll-Free: 1-877-234-9813

Email: info@nalma.ca

Phone: 705-657-7660

Website: www.nalma.ca

Fax: 705-657-7177



For more information, contact us at:

The Centre of Excellence for Matrimonial Real Property

1024 Mississauga Street

Curve Lake, ON K0L 1R0



Website: www.coemrp.ca

Email: info@coemrp.ca

Toll Free: 1-855-657-9992

Phone: (705) 657-9992

Fax: (705) 657-2999

Find us on  



The Centre of Excellence for Matrimonial Real Property

Flip Facts

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

1024 Mississauga Street
Curve Lake, ON K0L 1R0
Website: www.coemrp.ca
Phone: 1-855-657-9992 or (705) 657-9992
Facsimile: (705) 657-2999



These Flip Facts should not be used as a substitute for a careful reading of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. Users must refer to the *Act* for a more detailed understanding of the provisions contained therein. This document should not be considered legal advice.



Did You Know?

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1-855-657-9992

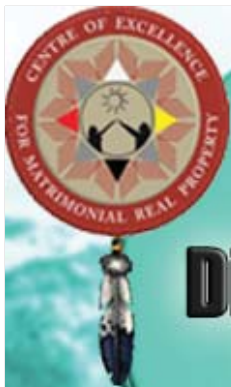
The Family Homes on Reserves and Matrimonial Interests or Rights Act (the Act) came into force December 16th, 2013

The Act provides rights to spouses or common-law partners living on reserve during:

1. A relationship,
2. Upon relationship breakdown,
3. And/or on the death of a spouse or common-law partner

with respect to two major issues:

1. Use, possession, and occupation of the family home on reserve
2. Division of value of any interests that they hold in structures and lands on reserve



Did You Know?

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The *Family Homes on Reserves and Matrimonial Interests or Rights Act* contains two main parts:

1. First Nation Law Making Mechanism

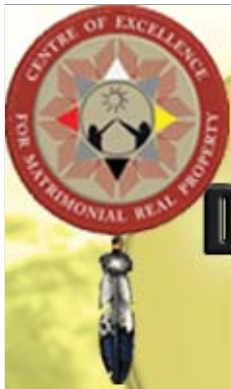
(Effective December 16th, 2013)

A First Nation may choose to enact their own Matrimonial Real Property Law

2. Provisional Federal Rules (PFR's)

(Effective December 16th, 2014)

The Provisional Federal Rules provide interim rules for dealing with matrimonial real property until the First Nation passes its own Matrimonial Real Property law.



Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act provides:

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Provisional Federal Rules that came into force December 16th, 2014 which:

1. Contains a set of interim rules that allow parties to determine what they are entitled to with respect to lands, the family home, and other structures on reserve when a marriage or common-law relationship breaks down or upon the death of a spouse
2. Apply to married couples and common-law partners living on reserve where at least one of them is a First Nation member or an Indian as defined by the *Indian Act*



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For the purposes of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* a common-law partner is defined as a person who has cohabited with an individual in a conjugal relationship for a period of at least one year

The Provisional Federal Rules in the *Act* treat married and common-law relationships the same



Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act requires:

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The consent of the spouse or common-law partner for the sale or disposal of the family home:

This provides spouses with protection that the family home cannot be sold, or otherwise disposed of, or encumbered during the marriage or common-law relationship without the free and informed written consent of the spouse or common-law partner, whether or not that spouse is a First Nation member or an Indian

Remember: Common-law is defined by the *Indian Act* Section 2(1) as a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year



Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act provides for:

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Emergency Protection Orders (EPO):

That enable a court to make an order granting one spouse exclusive occupation of the family home whether or not they are a First Nation member or an Indian. This application can be heard without notice to the council, on an urgent basis and for a short duration in situations of family violence (s.16). A designated judge of the province in which the family home is located can issue an EPO.

The court order can last up to 90 days.

Note: This may not be available in every province at this time.



Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act provides:

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For survivors on the death of their spouse or common-law partner:

(Section 14 of the Act)

The provisional federal rules provide the right of a non-interest holding surviving spouse or common-law partner whether or not the survivor is a First Nation member or an Indian to remain in the family home automatically for 180 days after the death of their spouse or common-law partner (s.14)



Did You Know?

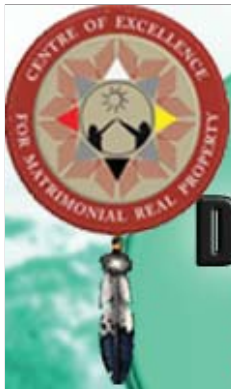
The Family Homes on Reserves and Matrimonial Interests or Rights Act provides for:

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Exclusive Occupation Orders (EOO):

A court order that provides one spouse or common-law partner (whether or not they are a First Nation member or an Indian) short to long-term occupancy of the family home to the exclusion of the other spouse or common-law partner. This could apply even if the home is owned by the First Nation.

The duration of this order could range from a set number of days to a longer period, e.g., until dependent children reach the age of majority.

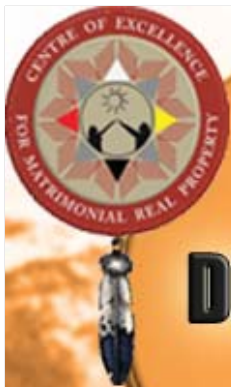


Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act provides:

On application by a spouse or common-law partner, a court can issue an **Exclusive Occupation Order** even if the family home is band-owned or a rental unit

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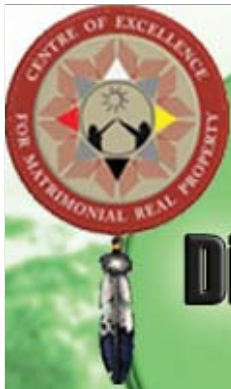


Did You Know?

An Exclusive Occupation Order does not change who holds an interest or right in or to the family home.

The provisional federal rules do not allow for non-Indians or non-members to acquire permanent interests in reserve land

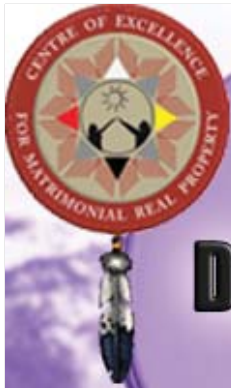
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Did You Know?

Sections 28-31 and 34-36 of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* describe how matrimonial real property is shared between the spouses or common-law partners on the breakdown of the relationship or death of a spouse

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Did You Know?

When a spouse or common-law partner makes application for an order under the provisional federal rules (except under sections 16-19), they must provide a copy to the First Nation.

The First Nation can present to the courts its views on whether or not the order should be made.

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Did You Know?

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The Provisional Federal Rules (Section 12-52 of the Act)

No longer apply to a First Nation that enacts its own matrimonial real property law under this Act.



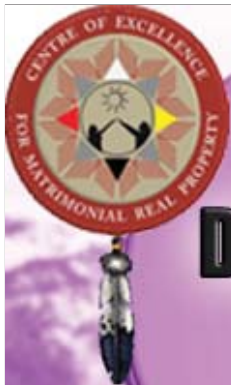
Did You Know?

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For more information visit www.coemrp.ca or call us at
1-855-657-9992

Enactment of a First Nation matrimonial real property 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.



Did You Know?

The Family Homes on Reserves and Matrimonial Interests or Rights Act provides that:

- The proposed First Nation matrimonial real property 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

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For more information

The Centre of Excellence for Matrimonial Real Property
1024 Mississauga Street
Curve Lake, ON K0L 1R0

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Phone: 1-855-657-9992 or (705) 657-9992

Facsimile: (705) 657-2999

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Law Society of Saskatchewan
Matrimonial Real Property Rights on Reserve
SASKATCHEWAN PERSPECTIVE

PRESENTED BY: KIMBERLY STONECHILD



LAVOIE STONECHILD
Barristers, Solicitors and Mediator

Acknowledgment

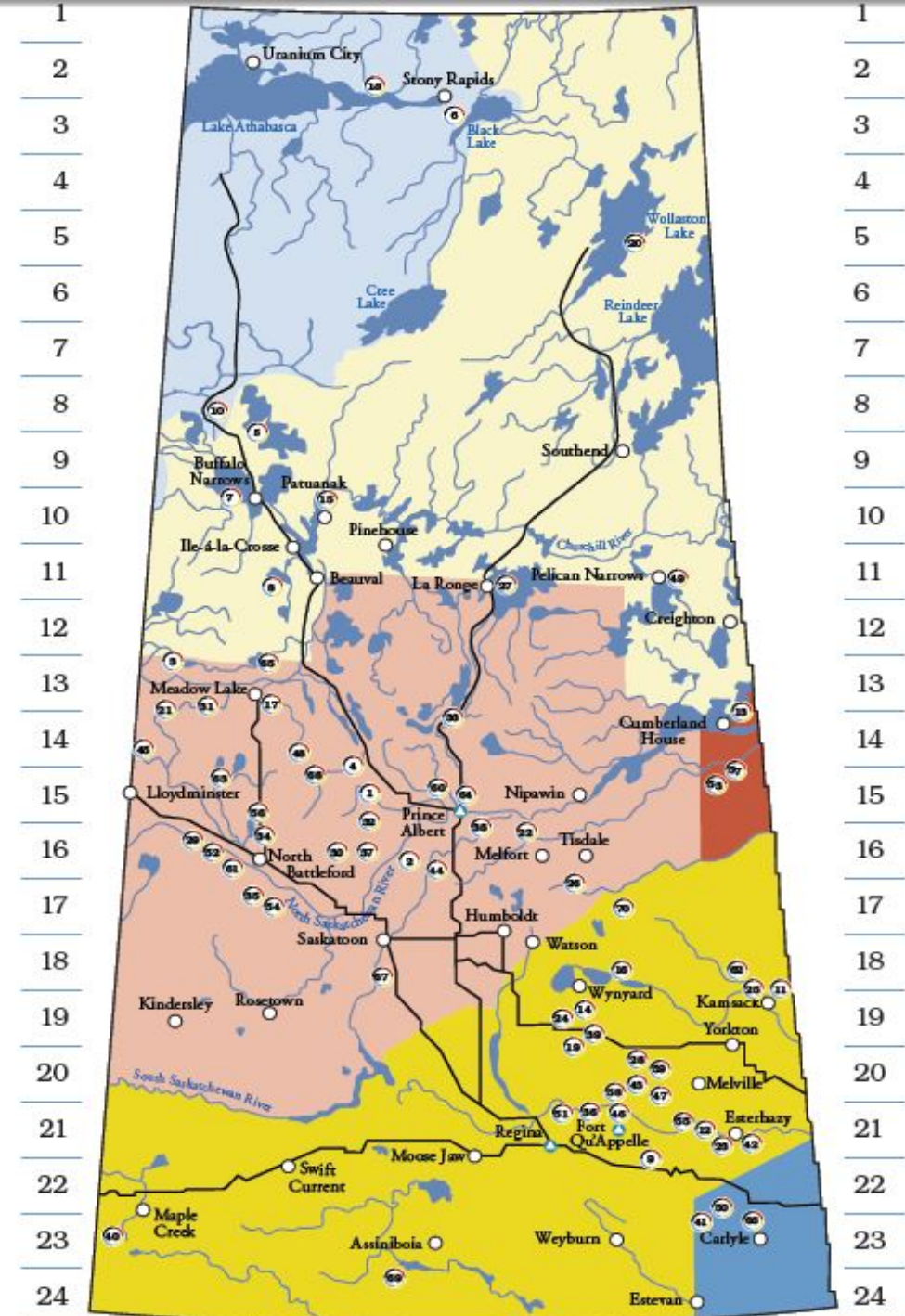
We are on the traditional lands, referred to as Treaty 6 Territory

Saskatchewan First Nations (As of 2014 Published Information)

- ▶ There are 70 First Nations in Saskatchewan.
- ▶ 63 of which are affiliated to one of the nine Saskatchewan Tribal Councils
- ▶ Total registered Indian population of Saskatchewan First Nations as of February 28, 2014 is 144,995
- ▶ Treaties 2, 4, 5, 6, 8 and 10 cover the Province of Saskatchewan.

- 1 Ahtahkakoop Cree Nation (6) E-15
- 2 Beardy's and Okemasis First Nation (6) F-16
- 3 Big Island Lake Cree Nation (6) B-13
- 4 Big River First Nation (6) E-15
- 5 Birch Narrows First Nation (10) C-8
- 6 Black Lake First Nation (8) G-2
- 7 Buffalo River Dene Nation (10) C-9
- 8 Canoe Lake Cree First Nation (10) C-12
- 9 Carry The Kettle First Nation (4) J-22
- 10 Clearwater River Dene First Nation (8) B-8
- 11 Cote First Nation (4) L-19
- 12 Cowessess First Nation (4) K-21
- 13 Cumberland House Cree Nation (5) L-14
- 14 Day Star First Nation (4) I-19
- 15 English River First Nation (10) D-9
- 16 Fishing Lake First Nation (4) J-18
- 17 Flying Dust First Nation (6) C-14
- 18 Fond du Lac Denesuline First Nation (8) E-2
- 19 George Gordon First Nation (4) I-20
- 20 Hatchet Lake First Nation (10) J-5
- 21 Ministikwan Lake Cree Nation (6) B-14
- 22 James Smith Cree Nation (6) H-16
- 23 Kahkewistahaw First Nation (4) L-21
- 24 Kawacatoose First Nation (4) I-19
- 25 Keeseekoose First Nation (4) L-19
- 26 Kinistin Saulteaux Nation (4) I-17
- 27 Lac La Ronge First Nation (6) H-10
- 28 Little Black Bear First Nation (4) J-20
- 29 Little Pine First Nation (6) B-16
- 30 Lucky Man Cree Nation (6) E-16
- 31 Makwa Sahgaiehcan First Nation (6) C-14
- 32 Mistawasis First Nation (6) E-16
- 33 Montreal Lake Cree Nation (6) G-14
- 34 Moosomin First Nation (6) C-16
- 35 Mosquito, Grizzly Bear's Head, Lean Man First Nation (6) C-17

- 36 Muscowpetung First Nation (4) I-21
- 37 Muskeg Lake Cree Nation (6) E-16
- 38 Muskoday First Nation (6) G-16
- 39 Muskowekwan First Nation (4) I-19
- 40 Nekaneet First Nation (4) B-23
- 41 Ocean Man First Nation (4) K-23
- 42 Ochapowace First Nation (4) L-21
- 43 Okanese First Nation (4) J-20
- 44 One Arrow First Nation (6) F-17
- 45 Onion Lake Cree Nation (6) A-15
- 46 Pasqua First Nation (4) J-21
- 47 Peepeekisis Cree Nation (4) J-21
- 48 Pelican Lake First Nation (6) D-15
- 49 Peter Ballantyne Cree Nation (6) J-10
- 50 Pheasant Rump Nakota First Nation (4) K-23
- 51 Plapot Cree Nation (4) I-21
- 52 Poundmaker Cree Nation (6) C-16
- 53 Red Earth First Nation (5) K-15
- 54 Red Pheasant First Nation (6) D-17
- 55 Sakimay First Nations (4) K-21
- 56 Saulteaux First Nation (6) C-16
- 57 Shoal Lake Cree Nation (5) K-15
- 58 Standing Buffalo First Nation (non) J-21
- 59 Star Blanket Cree Nation (4) J-20
- 60 Sturgeon Lake First Nation (6) G-15
- 61 Sweetgrass First Nation (6) C-17
- 62 The Key First Nation (4) L-18
- 63 Thunderchild First Nation (6) C-15
- 64 Wahpeton Dakota Nation (non) G-15
- 65 Waterhen Lake First Nation (6) D-13
- 66 White Bear First Nation (4) L-23
- 67 Whitecap Dakota First Nation (non) F-19
- 68 Witchehan Lake First Nation (6) D-15
- 69 Wood Mountain First Nation (non) F-24
- 70 Yellow Quill First Nation (4) J-17



Special Laws Affecting Each First Nation

First Nation Bands may be affected by instruments issued pursuant to several sections of the ***Indian Act***, such as:

1. the ***First Nations Land Management Act***;
2. the ***First Nations Fiscal Management Act***;
3. the ***First Nations Goods and Services Tax Act***;
4. **by self governing legislation**; and
5. Effective June 19th, 2013, the ***FHRMIRA***

with the potential effect of each First Nation Band being in a unique legal position.

First Nation Land Management

First Nation Bands have the power and authority to obtain land management powers in accordance with the following:

1. Orders made under s. 53 or 60 of the ***Indian Act***, by our Minister of of Crown-Indigenous Relations and Northern Affairs Canada;
2. the ***First Nations Land Management Act***; and/or
3. **Self-Governing legislation** – i.e. ***Framework Agreement*** ratified by each signatory First Nation.

Boyer v. Canada, 1986 CarswellNat 49, 1986 CarswellNat 49F,
[1986] 2 F.C. 393 (F.C.A.). [***Boyer***]

**set out an individual band member's interest in reserve
land, as follows:**

The Band for whose use and benefit a "tract of land" has been set apart by Her Majesty no doubt has an interest in those lands, since it has the right to occupy and possess them. It is an interest which belongs to the Band as a collectivity, and the right to occupy and possess them. The Band acting through its council has the power to allot, with the approval of the Minister, parcels of the land in its reserve to Band members. There is nothing in the legislation that could be seen as "subjugating" his right to another right of the same type existing simultaneously in the band council. To me the "allotment" of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended.

Boyer speaks to the challenges that First Nations face when turning their mind to division of MRP, as follows:

1. Title to reserve land is held with the Crown and interest to that reserve land is held by the First Nation collectively, for the primary benefit of the whole community as opposed to individual band members;
2. First Nation lands are invaluable to the community and the people and is a very limited resource;
3. The division of MRP on reserves does not collectively benefit the First Nation community, as a whole – Not in keeping with the "collective view" behind First Nations perspectives.
4. The recognition of individual interest of MRP on First Nation lands requires a balancing of the traditional practice of holding lands for a communal benefit and the rights of individual First Nations people;
5. The interest is a transferrable from Band/ “communal” to individual with the right to occupy and possession.

Prior to the *FHRMIRA* an individual First Nations person could legally hold interest to reserve land, as follows:

Certificates of Possession

1. The most common means for a First Nation person to hold interest in reserve land;
2. Application is submitted to Chief and Council to obtain "lawful possession" of reserve land for the exclusive benefit of the individual;
3. The **previous** Minister of Indian and Northern Affairs now the Minister of Crown-Indigenous Relations and Northern Affairs Canada must approve the proposed allotment of the land; and if approved;
4. A Certificate of Possession is issued to the First Nation;
5. The Interest holder is prohibited from transferring possession, dividing the property, leasing/assigning the Interest to the property; and
6. Utilizing the land as a security;

Individual First Nations Person's interest in reserve land, continued:

Customary Interests on Reserve

1. Ratified Customary Law unique to each individual First Nation – asserting right to lead, design, ratify and implement treatment of reserve lands and MRP;
2. Development of Customary Laws addressing treatment of on-reserve matrimonial property which distinguishes the drastic difference from off-reserve MRP, following the Supreme Court of Canada in ***Guerin v. Canada***; [1984] 2 S.C.R. 335 (S.C.C.) [***Guerin***] at page 382:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a

Customary Interests on Reserve continued...

distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title, which goes beyond these two features, is both unnecessary and potentially misleading

Formation of Legislation

Upon the lobbying of First Nation Government, affiliated groups, committees and task forces with a focus on disadvantaged First Nation women and children, the Federal Government outlined the following practical goals for the ***Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*** legislation:

1. To establish a federal regime that will ensure that Matrimonial Real Property (MRP) rights and remedies are available to on-reserve residents; and
2. To provide a mechanism for First Nations to develop their own community-specific laws.

FHRMIRA Formalization

The ***Family Homes on Reserve and Matrimonial Interests or Rights Act***, received Royal Ascent on June 19th, 2013.

1. S. 4 of the ***FHRMIRA*** outlines its Purpose and Application:

The purpose of this Act is to provide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.

FHRMIRA Statutory Process

The ***FHRMIRA*** applies to spouses or common law partners provided that one spouse is an “Indian” residing on-reserve.

Power to enact First Nation laws

Under s. 7(1), a First Nation has the power to enact First Nation laws that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves.

FHRMIRA Statutory Process ***Just Kidding...***

A First Nation has the power to enact First Nation laws; but...

The Enacted First Nation Legislation Must Contain:

7(2) The laws must include procedures for amending and repealing them and may include

- (a) provisions for administering them; and
- (b) despite subsection 89(1) of the ***Indian Act***, provisions for enforcing, on a reserve of the First Nation, an order of a court that includes one or more provisions made under the laws or a decision made or an agreement reached under the laws.

... And...

FHRMIRA Statutory Process ...

A First Nation has the power to enact First Nation laws; but...

Notice to be provided to the Provincial Attorney General:

7(3) When a First Nation intends to enact laws, the council must so notify the Attorney General of any province in which a reserve of the First Nation is situated.

FHRMIRA Ratification

The final ratification process for customary laws under the ***FHRMIRA***, is directly outlined, at paras:

Community Approval: Submission to Members

8(1) If a First Nation intends to enact First Nation laws under section 7, the council of the First Nation must submit the proposed First Nation laws to the First Nation members for their approval.

Eligibility to vote

8(2) Every person who is 18 years of age or over and a member of the First Nation, whether or not resident on a reserve of the First Nation, is eligible to vote in the community approval process.

FHRMIRA Ratification, continued

Information to be provided

8(3) The council must, before proceeding to obtain community approval, take reasonable measures that are in accordance with the First Nation's practices to locate voters and inform them of their right to vote, the means of exercising that right and the content of the proposed laws.

Publication of notice

8(4) The council must publish a notice of the date, time and place of a vote.

Approval by members

9(1) The proposed First Nation laws that have been submitted for community approval are approved if a majority of those who participated in the vote voted to approve them.

FHRMIRA Ratification, continued

Minimum participation

9(2) Despite subsection (1), the proposed laws are not approved unless at least 25 per cent of the eligible voters participated in the vote.

Increased percentage

9(3) A council may, by resolution, increase the percentage of eligible voters required under subsection (2).

Approved laws

10 When a First Nation approves the proposed First Nation laws, its council must, without delay after the vote, inform the Minister in writing of the result of the vote and send a copy of the approved laws to the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

FHRMIRA: Customary Laws Coming into Force

1. The language and procedure within the *FHRMIRA* is in keeping with language utilized by many Saskatchewan First Nations upon the drafting of customary by-laws;
2. Should a First Nation breach the procedural fairness or natural justice guaranteed to a member of the First Nation, the individual will have recourse for Judicial Review at the Federal Court of Canada;
3. Currently in Saskatchewan, we do not have decided matters illustrating how judicial review will interact with ratified customary law;
4. I did locate the following examples of ratified customary law from public record:
 - https://labrc.com/wp-content/uploads/2014/03/Whitecap_Dakota_Matrimonial_Law.pdf
 - https://labrc.com/wp-content/uploads/2014/03/Muskoday_Matrimonial_Real_Property_Law.pdf

Thank You!



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WHITECAP DAKOTA FIRST NATION

MATRIMONIAL REAL PROPERTY LAW

WHEREAS the Whitecap Dakota First Nation has inherent rights, customs and traditions, including Aboriginal rights such as the right to self-determination;

AND WHEREAS the Whitecap Dakota First Nation has taken control of its reserve lands and resources pursuant to the *Framework Agreement on First Nation Land Management*, and has enacted the *Whitecap Dakota First Nation Land Code* (the “*Land Code*”) which came into force and effect on December 1, 2003;

AND WHEREAS, pursuant to section 21.6 of the *Land Code*, the Whitecap Dakota First Nation is required to enact rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of Whitecap Dakota Land, and the division of Interests in that land within twelve (12) months of the coming into force of the *Land Code*;

AND WHEREAS the Whitecap Dakota First Nation intends to honour its undertaking to provide rights and remedies, without discrimination on the basis of sex, with respect to Spouses who have or claim Interests in Whitecap Dakota Land upon the breakdown of their marriage;

AND WHEREAS the Whitecap Dakota First Nation is enacting this law without prejudice to its inherent aboriginal rights in relation to jurisdiction over its people and its lands;

IT IS THEREFORE ENACTED AS A LAW OF THE WHITECAP DAKOTA FIRST NATION:

PART ONE
APPLICATION OF LAW

1. This law may be cited as the *Whitecap Matrimonial Real Property Law*.
2. This law applies only to Interests in, or claimed pursuant to this law in, First Nation Land as that term is defined in the *Land Code*.
3. Subject to its terms, this law shall not be construed as limiting or precluding any right or remedy otherwise available to persons who are or may be affected by it pursuant to any other law applicable on the breakdown of a marriage with respect to any property other than Interests in Whitecap Dakota Land, or other entitlements or obligations of Spouses.

4. For the purposes of this law, the following definitions shall apply:
- (1) “**Child**” includes a legally adopted Child and a Child adopted in accordance with Indian custom.
 - (2) “**Interspousal Contract**” means an agreement between two Spouses:
 - (a) that is in writing and signed by each Spouse in the presence of a witness;
and
 - (b) that deals with the possession, ownership or distribution of Family Property;
 - (3) “**Interest**” means any interest, right or estate of any nature in or to Whitecap Dakota Land, including a lease, easement, right of way, servitude or profit-a-prendre, but does not include title to the land;
 - (4) “**Family Home**” means real property to which an Interest has been granted by the First Nation pursuant to the *Land Code* and the *Land Law* in which one or both Spouses have an Interest and to which it has been occupied by both Spouses as the Family Home or that is mutually intended by the Spouses to be occupied by one or both of them as the Family Home.
 - (5) “**Member**” means a person whose name appears or is entitled to appear on the Whitecap Dakota First Nation Band Membership List.
 - (6) “**Spouse**” means either of a man and woman who,
 - (a) are married to each other, or
 - (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right under this law.
5. This law applies only with respect to Interests as granted in accordance with the *Land Code* and the *Land Law*.
6. This law does not apply to an Interest in Whitecap Dakota Land held by either Spouse, or both Spouses, where neither Spouse is a Member.
7. For greater certainty, a Spouse does not have an election, on the death of the other Spouse, to claim, take or pursue an Interest in Whitecap Dakota Land held by the other

Spouse under this law, and his or her Interest will be determined by the will or administration of the estate of the other Spouse.

PART TWO **INTERSPOUSAL CONTRACTS**

8. It is the purpose and intention of this law to respect the agreement of the parties to a marriage as to the use, possession, occupancy, disposition or partition of an Interest in Whitecap Dakota Land, including an Interest that is a Family Home.
9. Subject to this Part, a provision in an Interspousal Contract that reflects the agreement of the parties with respect to an Interest in Whitecap Dakota Land, including an Interest that is a Family Home, is valid, binding and enforceable.
10. (1) Notwithstanding section 9 and the terms of any lease agreement, a provision in an Interspousal Contract that would give, award, acknowledge or create an Interest in Whitecap Dakota Land greater than a life estate to occupy or possess an Interest in Whitecap Dakota Land, in favour of a Spouse who is not a Member, is void.

(2) In applying this section, a valid life estate to possess or occupy an Interest in First Nation must be delimited by the life of the person intended to enjoy it.

PART THREE **ACCESS TO A COURT OF COMPETENT JURISDICTION**

A: GENERAL RULES

11. For the purposes of this Part, “**court of competent jurisdiction**” and “**court**” refer to the Saskatchewan Court of Queen’s Bench Family Law Division.
12. For greater certainty, no court other than a court of competent jurisdiction shall exercise jurisdiction under this law in respect of Interests in Whitecap Dakota Land.
13. In the event of the breakdown of his or her marriage, a Spouse may apply to a court of competent jurisdiction to determine disputes in relation to Interests in Whitecap Dakota Land.
14. Subject to this law, a court of competent jurisdiction may deal with Interests in Whitecap

Dakota Land held by either Spouse, or both Spouses, in manner consistent with the provisions of the *Family Property Act* (Saskatchewan) relevant to the ownership, possession or occupancy of real property, the division of Interests in real property, and net Family Property representing the value of Interests in real property.

15. Notwithstanding section 14, the fact that an Interest in Whitecap Dakota Land does not include future or contingent Interests in Whitecap Dakota Land shall not be taken to confer jurisdiction upon a court over such Interests under this law.
16. An Interest in Whitecap Dakota Land received by way of gift or inheritance by one Spouse only from a third person who is a family Member, or by one Spouse only together with one or more Members of that family, shall be deemed, subject to proof to the contrary, to have been transferred with the intention that the Interest should continue to be held within that family exempt from any claim of the other Spouse, and subject to the intention that the Interest, the income from the Interest and the value of the Interest are to be excluded from the transferee Spouse's net Family Property.
17. Section 16 does not apply with respect to an Interest in Whitecap Dakota Land that is a Family Home.
18. Subject to this law, the court may make any order in relation to Interests in Whitecap Dakota Land held by a Spouse, or by both Spouses, that the court could make in respect of real property situated in the province of Saskatchewan, but not on Whitecap Dakota Land, including, in appropriate circumstances:
 - (a) an order that an Interest in Whitecap Dakota Land be transferred to a Spouse absolutely, where permitted under this law, or
 - (b) an order that an Interest in Whitecap Dakota Land be subject to a lease by one Spouse to the other for a term of years subject to such conditions as the court deems just in all the circumstances.
19. An order shall not be made under paragraph 18 (a) in favour of a Spouse who is not a Member.
20. Subject to this law, a Spouse may apply to the court for determination of a question between him or her and his or her Spouse in relation to the right to possession of an Interest in Whitecap Dakota Land, and the court may make:
 - (a) an order declaring the right of possession to the Interest in Whitecap Dakota Land, and

(b) any order that could be made under section 18 in respect of that Interest in Whitecap Dakota Land.

21. Where a proceeding has been commenced under this Part, and either Spouse dies before all issues relating to Interests in Whitecap Dakota Land have been disposed of by the court, the surviving Spouse may continue the proceeding against the estate of the deceased Spouse.
22. For greater certainty, a “Spouse” for the purposes of applying for relief from a court includes a former Spouse after the marriage has been dissolved by decree absolute of divorce or by judgment of nullity.
23. Nothing in this law limits the application of valid laws of Saskatchewan and Canada in respect of Family causes, except to the extent that such laws deal expressly or implicitly with Interests in Whitecap Dakota Land and to that extent this law applies.
24. It is the intention of this law that all rights, entitlements and obligations of Spouses be dealt with equitably on the basis of the totality of their circumstances, including rights, entitlements and obligations in respect of Interests in Whitecap Dakota Land, but subject to the special provisions set out in this law.

B. FAMILY HOME

25. Whether or not an Interest in Whitecap Dakota Land is a Family Home is a question of fact and, for greater certainty, the provisions of the *Family Property Act* (Saskatchewan) dealing with the designation of a Family Home do not apply in respect of Interests in Whitecap Dakota Land.
26. Subject to the limitations inherent in the nature of Whitecap Dakota Land, both Spouses have an equal right to possession of a Family Home.
27. When only one Spouse holds an Interest in Whitecap Dakota Land that is a Family Home, the other Spouse’s right of possession is
 - (a) personal against the Spouse who holds the Interest, and
 - (b) ends when they cease to be Spouses, unless a domestic contract or court order provides otherwise.
28. No Spouse shall dispose of or encumber an Interest in Whitecap Dakota Land that is a Family Home unless:

- (a) the other Spouse joins in the instrument or consents to the transaction;
- (b) the other Spouse has released all rights in respect of that Interest by interspousal contract; or
- (c) A court order has authorized the transaction or has released the Interest in Whitecap Dakota Land from the application of this section.

29. The court may, on the application of a Spouse or a person claiming an Interest in Whitecap Dakota Land that is a Family Home:

- (a) make a declaration whether or not the Interest in Whitecap Dakota Land is a Family Home;
- (b) authorize a disposition or encumbrance of the Interest in First Nation Land, provided that such disposition or encumbrance is otherwise authorized under First Nation law, if the court finds that the Spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the court may prescribe conditions including the provision of other comparable accommodation, or payment in place of it, that the court considers appropriate;

30. Regardless of which Spouse holds an Interest in Whitecap Dakota Land that is a Family Home, the court may on application:

- (a) order the delivering up, safekeeping and preservation of the Interest in Whitecap Dakota Land that is a Family Home;
- (b) direct that one Spouse be given exclusive possession of the Interest in Whitecap Dakota Land that is a Family Home, or part of it for such period as the court may direct consistent with this law, and release any other Interests in Whitecap Dakota Land that is a Family Home from the application of this Part;
- (c) authorize a disposition or encumbrance consistent with First Nation law of a Spouse's Interest in Whitecap Dakota Land that is a Family Home, subject to the other Spouse's right of exclusive possession as ordered;
- (d) where it appears that a Spouse has disposed of or encumbered an Interest in Whitecap Dakota Land that is a Family Home in a fraudulent manner calculated to defeat the rights of the other Spouse under this law, or has falsely and knowingly represented in connection with a disposition or encumbrance that the Interest in Whitecap Dakota Land is not a Family Home, direct the other Spouse

to substitute other Interests he or she holds in Whitecap Dakota Land for the Family Home subject to such conditions as the court considers appropriate;

(e) make any interim or temporary order to give effect to the purposes of this law or to protect the rights of a Spouse; or

(f) make any ancillary order which the court deems necessary to give effect to this law.

31. A court, in considering whether to direct that one Spouse have exclusive possession of an Interest in Whitecap Dakota Land that is a Family Home, shall be guided by the principle that the custodial parent of a Child should have exclusive possession of the family residence for a period sufficient to ensure that the Child, or the youngest Child if there is more than one Child, reaches the age of majority and has the opportunity to complete his or her education, provided that observance of this principle is consistent with the best Interests of the Child.
32. Where both parents share joint custody of a Child or children, the principle set out in section 31 shall be adapted to favour the Spouse with whom the Child or children principally reside, and if the Child or children reside substantially equal periods of time with both Spouses, then the principle shall be neutral as between them.

PART FOUR
GENERAL PROVISIONS

33. This law shall not abrogate or derogate the inherent Aboriginal rights of the Whitecap Dakota First Nation, including the rights of self-determination.
34. The Whitecap Dakota First Nation, by enacting this law, do not affirm that this law reflects the full extent of its inherent Aboriginal rights and jurisdiction over its Members and its lands and, therefore, this law is enacted on a without prejudice basis to those inherent Aboriginal rights.
35. This law may be amended in accordance with the process outlined in the *Land Code*.
36. This law shall come into force and effect on the ____ day of December, 2004.

BAND COUNCIL CONSENT

We, the undersigned, being a quorum of the Band Council, acknowledge and declare that we have at a duly convened Band Council meeting, approved this Matrimonial Real Property Law effective the ____ day of _____, 2004.

DATED this ____ day of _____, 2004.

Chief

Councilor

Councilor

A Quorum for this Council is two (2).

MUSKODAY FIRST NATION

MATRIMONIAL REAL PROPERTY LAW

WHEREAS the Muskoday First Nation has taken control of its reserve lands and resources pursuant to the *Framework Agreement on First Nation Land Management*, and has enacted the *Muskoday First Nation Land Management Code* which came into force and effect on January 1, 2000;

AND WHEREAS, pursuant to the *Framework Agreement*, the Muskoday First Nation agreed to enact rules and procedures, applicable on the breakdown of a marriage, to the use, occupancy and possession of Muskoday Land, and the division of interests in that land;

AND WHEREAS the Muskoday First Nation intends to provide rights and remedies, without discrimination on the basis of sex, with respect to spouses who have or claim interests in Muskoday Land upon the breakdown of their marriage;

AND WHEREAS the Muskoday First Nation intends to respect the following principles with respect to the use, occupancy or possession of matrimonial real property on Muskoday Land, and the division of interests in that land on the breakdown of a marriage:

Firstly, the right of the parties to a marriage to make their own agreement as to the disposition of interests in Muskoday Land in the event that their marriage does, or has, broken down;

Secondly, the value of mediation where the parties have not or are unable to reach their own agreement as described above; and

Thirdly, the right of the parties to have access to a court of competent jurisdiction to deal with all of their property rights, entitlements and obligations on the breakdown of their marriage, subject to Muskoday law where their property includes an interest in Muskoday Land.

IT IS THEREFORE ENACTED AS A LAW OF THE MUSKODAY FIRST NATION:

PART ONE
APPLICATION OF LAW

1. This law may be cited as the *Muskoday First Nation Matrimonial Real Property Law*.
2. This law applies only to interests in, or claimed pursuant to this law in, Muskoday Land as that term is defined in the *Muskoday First Nation Land Management Code*.
3. Subject to its terms, this law shall not be construed as limiting or precluding any right or remedy otherwise available to persons who are or may be affected by it pursuant to any other law applicable on the breakdown of a marriage with respect to any property other than interests in Muskoday Land, or other entitlements or obligations of spouses.
4. For the purposes of this law, the following definitions shall apply:
 - (1) “**child**” includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom.
 - (2) “**Council**” means the Chief and Council of the Muskoday First Nation.
 - (3) “**interspousal contract**” includes:
 - (a) a “**marriage contract**” entered into between a man and a woman who are married to each other, or intend to marry, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in Muskoday Land; and
 - (b) a “**separation agreement**” entered into between a man and a woman who are married to each other and are living separate and apart, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in Muskoday Land.
 - (4) “**interest in Muskoday Land**” includes any legal or equitable interest held in possession by either spouse, or both spouses, in Muskoday Land.
 - (5) “**Lands Advisory Board**” means the Lands Advisory Board established under the *Framework Agreement on First Nation Land Management*.
 - (6) “**Lands Manager**” means the Lands Manager of the Muskoday First Nation.

- (7) “**matrimonial home**” means an interest in Muskoday Land that is or, if the spouses have separated, was at the time of separation, occupied by one or both spouses as the family home or that is mutually intended by the spouses to be occupied by one or both of them as the family home, and, where an interest in Muskoday Land for purposes of this law includes a matrimonial home and is normally used for a purpose other than residential, the matrimonial home is only the part of the interest in Muskoday Land that may reasonably be regarded as necessary to the use and enjoyment of the family residence.
- (8) “**member**” means a person who is a member or who is entitled as a right to be enrolled as a member of the Muskoday First Nation.
- (9) “**spouse**” means either of a man and woman who:
- (a) are married to each other; or
 - (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right under this law.
5. This law does not apply to an interest in Muskoday Land held by either spouse, or both spouses, where neither spouse is a Member.
6. For greater certainty, a spouse does not have an election, on the death of the other spouse, to claim, take or pursue an interest in Muskoday Land held by the other spouse under this law, and his or her interest will be determined by the will or administration of the estate of the other spouse.

PART TWO

INTERSPOUSAL CONTRACTS

7. It is the purpose and intention of this law to respect the agreement of the parties to a marriage as to the use, possession, occupancy, disposition or partition of an interest in Muskoday Land, including an interest that is a matrimonial home.
8. Subject to this Part, a provision in an interspousal contract that reflects the agreement of the parties with respect to an interest in Muskoday Land, including an interest that is a matrimonial home, is valid, binding and enforceable.
9. (1) Notwithstanding section 8, a provision in an interspousal contract that would give, award, acknowledge or create an interest in Muskoday Land greater than a life

estate to occupy or possess an interest in Muskoday Land, in favor of a spouse who is not a Member, is void.

- (2) In applying this section, a valid life estate to possess or occupy an interest in Muskoday Land must be measured by the life of the person intended to enjoy it.
10. Subject to this law, a court of competent jurisdiction may, on application under Part Four, set aside a provision of an interspousal contract with respect to an interest in Muskoday Land:
 - (a) if a party failed to disclose to the other all of his or her interests in Muskoday Land, or any material information in respect of those interests;
 - (b) if a party did not understand the nature or consequences of the provision; or
 - (c) otherwise in accordance with the law of contract.
 11. This Part applies whether the interspousal contract was entered into by the parties on, before or after the date that this law comes into force and effect.

PART THREE **MEDIATION**

12. It is the intention of this Part that spouses who, on the breakdown of their marriage, do not have and are unable to conclude an interspousal contract with respect to interests in Muskoday Land, submit to mediation in respect of interests in Muskoday Land.
13. A member of Council will meet with the spouses to explain the mediation process.
14. For the purposes of this Part, the Lands Advisory Board is authorized to:
 - (a) prescribe rules and procedures applicable to the conduct of mediation;
 - (b) develop any forms, certificates, and other documents or instruments deemed necessary or advisable; and
 - (c) determine fees, costs and consequential relief in respect of the provision of mediation services.
 - (d) create and maintain a roster of qualified mediators available to spouses to assist them in resolving disputes about interests in Muskoday Land, and a current copy of that roster shall be posted in the office of the Lands Manager of the Muskoday

First Nation.

15. Spouses who do not have or are unable to conclude a domestic agreement may initiate their own mediation with respect to interests in Muskoday Land and it is recommended that they use the services of a mediator whose name appears on the roster of qualified mediators.
16.
 - (1) A spouse who does not have and is unable to conclude a domestic agreement with the other spouse may request mediation by filing a notice of request for mediation, in the designated form and with proof of service on the other spouse, with the Lands Manager.
 - (2) The Lands Manager may assist the spouse in completing the notice of request.
17. It is the responsibility of the spouse requesting mediation to ensure that the notice referred to in section 15 is served on the other spouse before it is delivered to the Lands Manager. For greater certainty, service may be effected by personal service, by delivery to a solicitor representing the other spouse in the matter of the breakdown of the marriage, as provided in an interspousal contract, or by registered mail to the address where the other spouse is known or believed to be residing. Service by registered mail shall be deemed to be effected four days after the day the notice is mailed.
18. Upon receipt of a notice of request for mediation, the Lands Manager shall forthwith deliver it to the Lands Advisory Board, which is authorized to arrange for a qualified mediator to be available to the parties within 30 days after the notice referred to in section 15 is filed. That period may be extended by the Board:
 - (a) at the joint request of the parties: or
 - (b) where the Board is unable to secure the services of a qualified mediator to be available to the parties within the 30 day period.
19. Notice of an appointment for mediation shall be delivered to both spouses by the Lands Advisory Board no later than 10 days before the date of the appointment, and a copy of the notice shall also be delivered to the Lands Manager.
20. A spouse who receives a notice of appointment with a mediator has a duty to attend the mediation.
21. Each spouse is obliged to pay his or her equal share of the costs of mediation.
22. The mediator shall proceed expeditiously with the mediation and use best efforts to assist the parties in resolving any and all issues with respect to interests in Muskoday Land.

23. Where the mediation is successful, the agreement of the parties with respect to interests in Muskoday Land shall be reduced to writing in a separation agreement, and that agreement shall expressly provide that each party waives all rights to challenge its provisions pursuant to section 10.
24. A separation agreement for the purposes of section 23 shall include provision for all interests in Muskoday Land held by either spouse, or both spouses, and shall be a sufficient interspousal contract for purposes of this law if it deals only with those interests.
25. Where a mediation is successful, the mediator shall report this fact to the Lands Advisory Board, which in turn shall notify the Lands Manager of the successful mediation.
26. Where the mediation is unsuccessful, the mediator shall deliver a confidential report to the parties and to the Lands Advisory Board upon the mediation and the points remaining in dispute between the parties with respect to interests in Muskoday Land.
27. At the conclusion of an unsuccessful mediation under this Part, the Lands Advisory Board shall provide a certificate to the parties and to the Lands Manager, which may be:
 - (a) a certificate of compliance with this Part; or
 - (b) a certificate of waiver in favor of the spouse requesting the mediation in circumstances where the Board reasonably concludes that the other spouse cannot be located, is avoiding or ignoring service of documents or otherwise refused to participate in the mediation.
28. For greater certainty, nothing in this Part is intended to deprive or limit the right of a spouse to seek any other or further alternate dispute resolution on the breakdown of his or her marriage in relation to any matter other than interests in Muskoday Land, or to restrict the parties from otherwise reaching agreement with respect to interests in Muskoday Land, provided that such agreement results in a separation agreement that meets the requirements set out in this law.

PART FOUR
ACCESS TO A COURT OF COMPETENT JURISDICTION

A: GENERAL RULES

29. For the purposes of this Part, “**court of competent jurisdiction**” and “**court**” refer to the Family Law Division of the Saskatchewan Court of Queen’s Bench.
30. For greater certainty, no court other than a court of competent jurisdiction shall exercise

jurisdiction under this law in respect of interests in Muskoday Land.

31. In the event of the breakdown of his or her marriage, a spouse may apply to a court of competent jurisdiction to determine disputes in relation to interests in Muskoday Land provided that he or she has first complied with Part Three or is specifically relieved of such compliance by a provision of this Part.
32. No court shall take or exercise jurisdiction under this Part without first enquiring whether or not the spouses have pursued and participated in mediation pursuant to Part Three and, if there has been no mediation, the court may direct that there be mediation pursuant to the rules of the court or pursuant to Part Three, or the court may proceed to deal with an application under this Part where the requirement for mediation may result in an injustice.
33. Subject to this law, a court of competent jurisdiction may deal with interests in Muskoday Land held by either spouse, or both spouses, in manner consistent with the provisions of the *Matrimonial Property Act, 1997* (Saskatchewan) relevant to the ownership, possession or occupancy of real property, the division of interests in real property, and net family property representing the value of interests in real property.
34. Notwithstanding section 33, the fact that an interest in Muskoday Land does not include future or contingent interests in Muskoday Land shall not be taken to confer jurisdiction upon a court over such interests under this law.
35. An interest in Muskoday Land received by way of gift or inheritance by one spouse only from a third person who is a family member, or by one spouse only together with one or more members of that family, shall be deemed, subject to proof to the contrary, to have been transferred with the intention that the interest should continue to be held within that family exempt from any claim of the other spouse, and subject to the intention that the interest, the income from the interest and the value of the interest are to be excluded from the transferee spouse's net family property.
36. Section 35 does not apply with respect to an interest in Muskoday Land that is a matrimonial home.
37. Notwithstanding section 35, the court may make any appropriate and equitable order on the ground of unconscionability where a spouse has intentionally, recklessly or fraudulently depleted his or her net family property that is an interest in Muskoday Land and that would otherwise be subject to the presumption set out in section 40.
38. Subject to this law, the court may make any order in relation to interests in Muskoday Land held by a spouse, or by both spouses, that the court could make in respect of real property situated in the province of Saskatchewan, but not on Muskoday Land, including, in appropriate circumstances:

- (a) an order that an interest in Muskoday Land be transferred to a spouse absolutely, where permitted under this law;
 - (b) an order that an interest in Muskoday Land be subject to a lease by one spouse to the other for a term of years subject to such terms and conditions as the court deems just in all the circumstances; or
 - (c) an order that an interest in Muskoday Land held by both spouses be partitioned or partitioned and sold.
39. An order shall not be made under paragraph 38 (a) in favor of a spouse who is not a Member.
40. Where an order is made under paragraph 38(c) for the partition of an interest in Muskoday Land, the Council shall direct the transaction and the Lands Manager may make provision for a survey and for the allocation of the costs of the transaction unless the court has already made an order with respect to costs.
41. Where an order is made under paragraph 38(c) for the sale of an interest in Muskoday Land, that sale shall be by auction directed by the Council, which shall by resolution make provision for a reserve bid representing a fair sale price for the interest, and for the allocation of costs of the transaction unless the court has already made an order to that effect.
42. Subject to this law, a spouse may apply to the court for determination of a question between him or her and his or her spouse in relation to the right to possession of an interest in Muskoday Land, and the court may make:
- (a) an order declaring the right of possession to the interest in Muskoday Land; and
 - (b) any order that could be made under section 38 in respect of that interest in Muskoday Land.
43. Where the interest of a spouse in Muskoday Land is held through a corporation, the court may order that he or she transfer shares in the corporation to the other spouse or have the corporation issue shares in the corporation to the other spouse.
44. An order shall not be made under this Part so as to require the sale of an operating business or farm on Muskoday Land, or so as to impair seriously its operation, unless there is no reasonable alternative method of achieving an equitable result between the parties.

45. Where a proceeding has been commenced under this Part, and either spouse dies before all issues relating to interests in Muskoday Land have been disposed of by the court, the surviving spouse may continue the proceeding against the estate of the deceased spouse.
46. For greater certainty, a “spouse” for the purposes of applying for relief from a court includes a former spouse after the marriage has been dissolved by decree absolute of divorce or by judgment of nullity.
47. Nothing in this law relieves a party of the requirement to observe the rules and procedures of a court of competent jurisdiction in relation to matrimonial causes.
48. Nothing in this law limits the application of valid laws of Saskatchewan and Canada in respect of matrimonial causes, except to the extent that such laws deal expressly or implicitly with interests in Muskoday Land and to that extent this law applies.
49. It is the intention of this law that all rights, entitlements and obligations of spouses be dealt with equitably on the basis of the totality of their circumstances, including rights, entitlements and obligations in respect of interests in Muskoday Land, but subject to the special provisions set out in this law.

B. MATRIMONIAL HOME

50. Whether or not an interest in Muskoday Land is a matrimonial home is a question of fact.
51. Subject to the limitations inherent in the nature of Muskoday Land, both spouses have an equal right to possession of a matrimonial home.
52. When only one spouse holds an interest in Muskoday Land that is a matrimonial home, the other spouse’s right of possession is:
 - (a) personal against the spouse who holds the interest; and
 - (b) ends when they cease to be spouses, unless a domestic contract or court order provides otherwise.
53. No spouse shall dispose of or encumber an interest in Muskoday Land that is a matrimonial home unless:
 - (a) the other spouse joins in the instrument or consents to the transaction;
 - (b) the other spouse has released all rights in respect of that interest by interspousal contract; or

- (c) a court order has authorized the transaction or has released the interest in Muskoday Land from the application of this section.
54. If a spouse disposes of or encumbers an interest in Muskoday Land that is a matrimonial home in contravention of section 53, the transaction may be set aside on an application to the court, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home.
55. When a person proceeds to realize upon an encumbrance or execution against an interest in Muskoday Land that is a matrimonial home, the spouse who has a right of possession under section 52 has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization.
56. The court may, on the application of a spouse or a person claiming an interest in Muskoday Land that is a matrimonial home:
- (a) make a declaration whether or not the interest in Muskoday Land is a matrimonial home;
 - (b) authorize a disposition or encumbrance of the interest in Muskoday Land, provided that such disposition or encumbrance is otherwise authorized under Muskoday law, if the court finds that the spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the court may prescribe conditions including the provision of other comparable accommodation, or payment in place of it, that the court considers appropriate; or
 - (c) make an order under section 53, subject to such terms and conditions as the court determines to be equitable and just in all the circumstances.
57. Regardless of which spouse holds an interest in Muskoday Land that is a matrimonial home, the court may on application:
- (a) order the delivering up, safekeeping and preservation of the interest in Muskoday Land that is a matrimonial home;
 - (b) direct that one spouse be given exclusive possession, consistent with this law, of the interest in Muskoday Land that is a matrimonial home, or part of it for such period as the court may direct, and release any other interest in Muskoday Land that is a matrimonial home from the application of this Part;

- (c) authorize a disposition or encumbrance consistent with Muskoday law of a spouse's interest in Muskoday Land that is a matrimonial home, subject to the other spouse's right of exclusive possession as ordered;
 - (d) where it appears that a spouse has disposed of or encumbered an interest in Muskoday Land that is a matrimonial home in a fraudulent manner calculated to defeat the rights of the other spouse under this law, or has falsely and knowingly represented in connection with a disposition or encumbrance that the interest in Muskoday Land is not a matrimonial home, direct the other spouse to substitute other interests he or she holds in Muskoday Land for the matrimonial home subject to such conditions as the court considers appropriate;
 - (e) make any interim or temporary order to give effect to the purposes of this law or to protect the rights of a spouse; or
 - (f) make any ancillary order which the court deems necessary to give effect to this law.
58. A court, in considering whether to direct that one spouse have exclusive possession of an interest in Muskoday Land that is a matrimonial home, shall be guided by the principle that the custodial parent of a child should have exclusive possession of the family residence for a period sufficient to ensure that the child, or the youngest child if there is more than one child, reaches the age of majority and has the opportunity to complete his or her education, provided that observance of this principle is consistent with the best interests of the child.
59. Where both parents share joint custody of a child or children, the principle set out in section 58 shall be adapted to favor the spouse with whom the child or children principally reside, and if the child or children reside substantially equal periods of time with both spouses, then the principle shall be neutral as between them.
60. In applying the principles set out in sections 58, the court may have regard to the fact that one or more of the children are not members.

PART FIVE
GENERAL PROVISIONS

61. An interest in Muskoday Land received by way of gift or inheritance by one spouse only from a third person who is a family member, or by one spouse only together with one or more members of that family, shall be deemed, subject to proof to the contrary, to have been transferred with the intention that the interest should continue to be held within that family exempt from any claim of the other spouse, and subject to the intention that the

interest, the income from the interest and the value of the interest are to be excluded from the transferee spouse's net family property.

62. The possession of an interest in Muskoday Land under this law by a person who is not a Member is not assignable and shall be deemed to terminate when that person ceases to use or occupy that interest personally.
63.
 - (1) A person who contravenes an order made by a court of competent jurisdiction pursuant to this law in relation to an interest in Muskoday Land is guilty of an offence and liable, on summary conviction, to a fine of not more than \$5,000 or to imprisonment for a term of not more than three months, or to both.
 - (2) A fine payable under this section shall be remitted to the Muskoday First Nation by the court, after reasonable court costs have been deducted.
64. **This law shall come into force and effect on the 30th day of June, 2001.**



DEPARTMENT OF JUSTICE

Matrimonial Real Property Rights on Reserve

*An Overview of the **Family Homes on Reserves and Matrimonial Interests or Rights Act***

Law Society of Saskatchewan

May 1, 2019



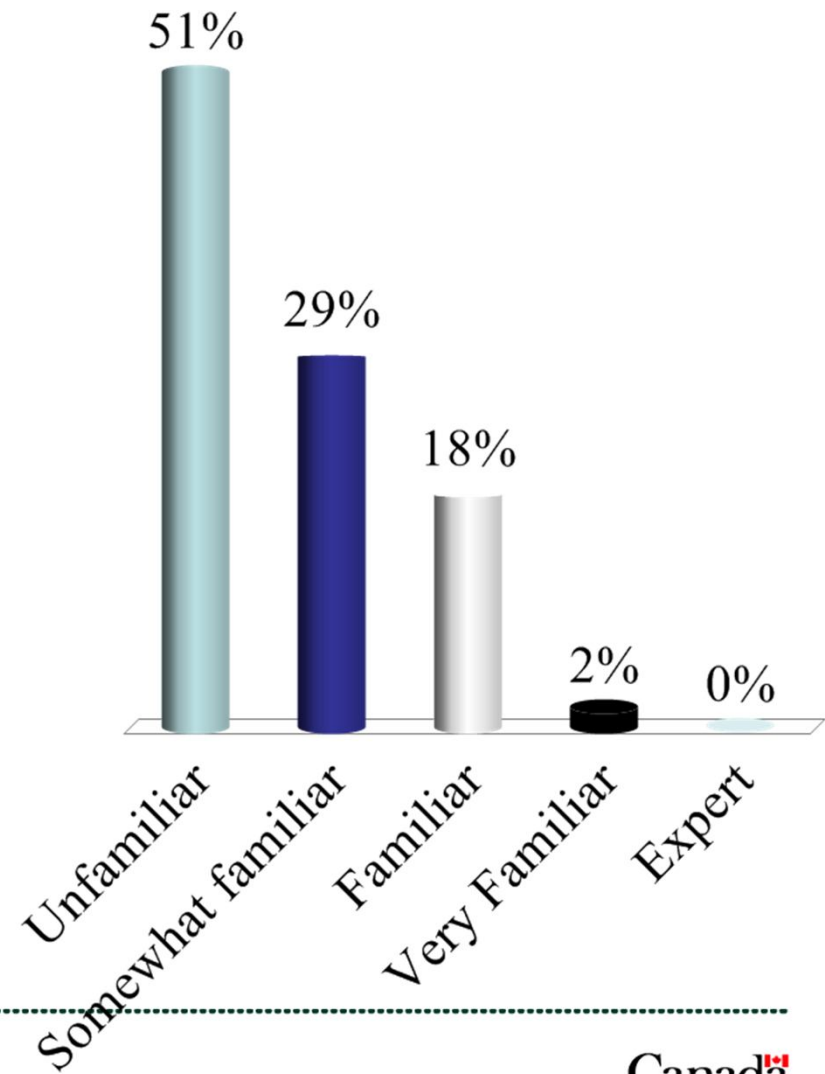


PRE-COURSE SURVEY



Please rate your current familiarity with the issue of matrimonial real property on-reserve?

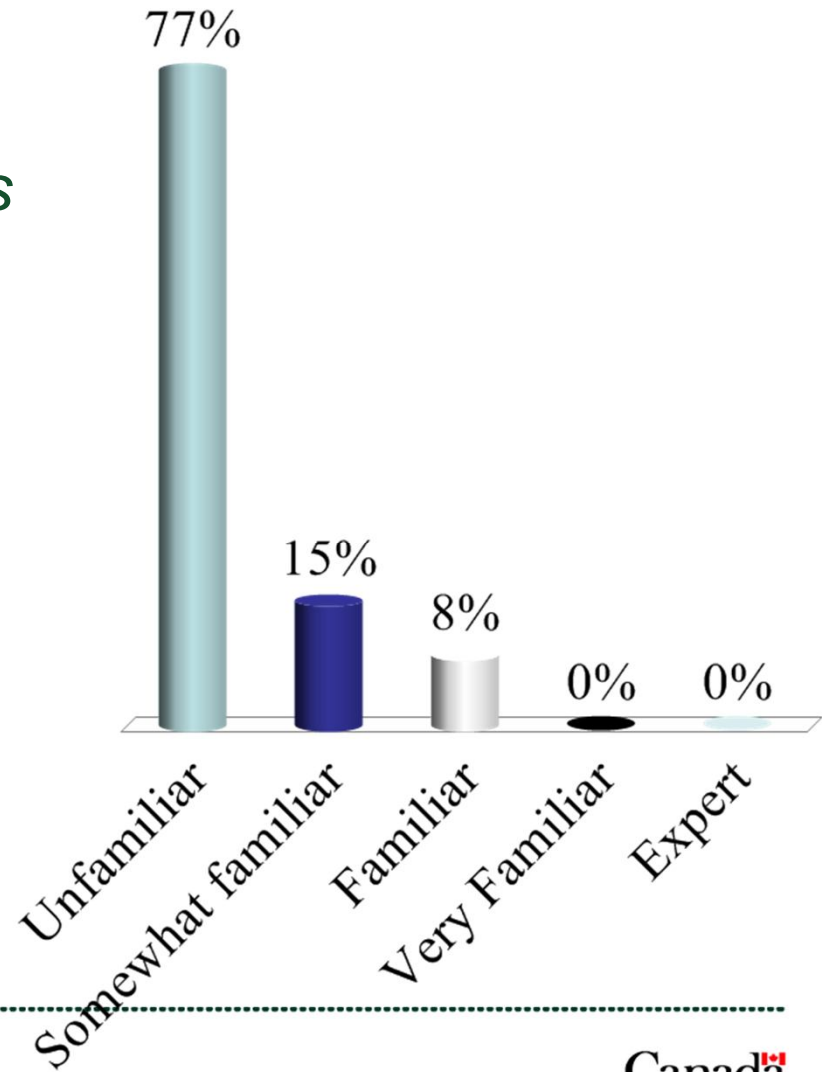
- A. Unfamiliar
- B. Somewhat familiar
- C. Familiar
- D. Very Familiar
- E. Expert





Please rate your current familiarity with the *Family Homes on Reserves and Matrimonial Interests or Rights Act*?

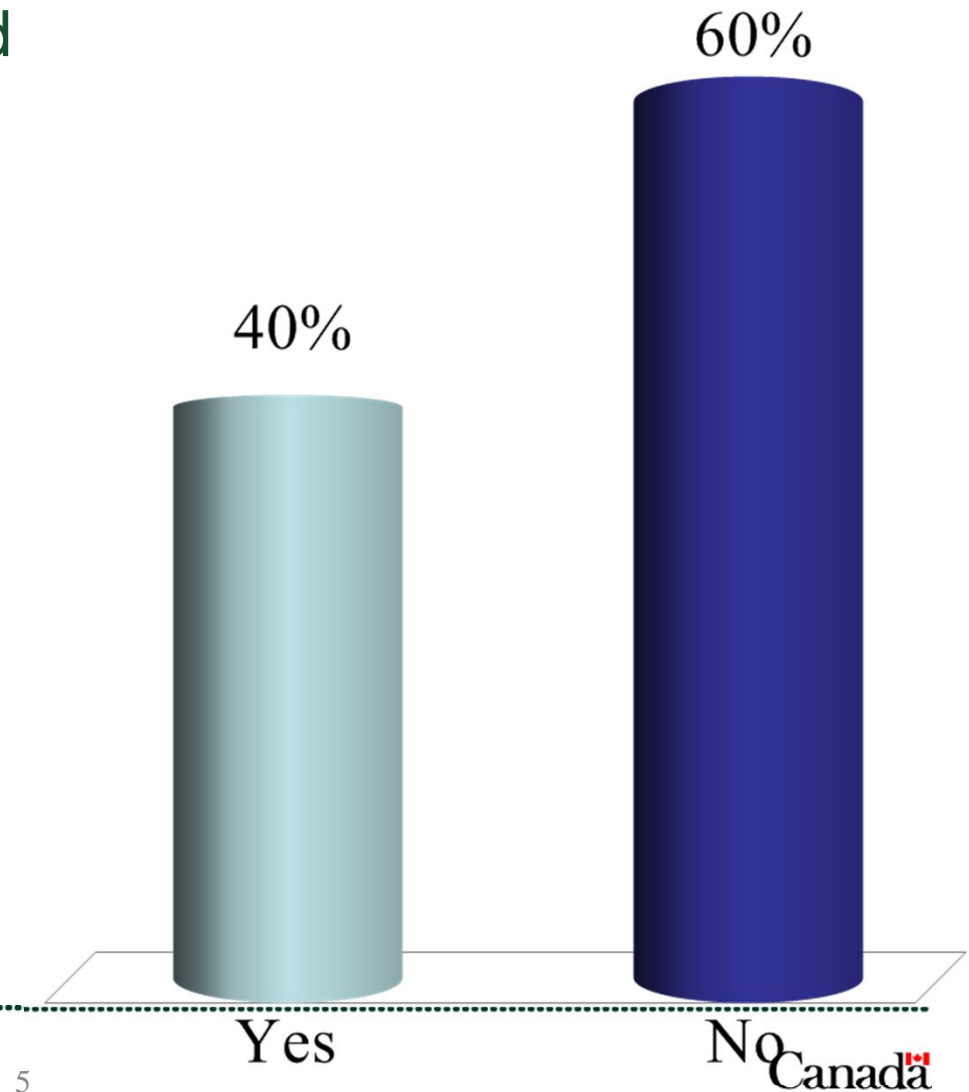
- A. Unfamiliar
- B. Somewhat familiar
- C. Familiar
- D. Very Familiar
- E. Expert





Have you ever been consulted by an individual regarding matrimonial real property on-reserve?

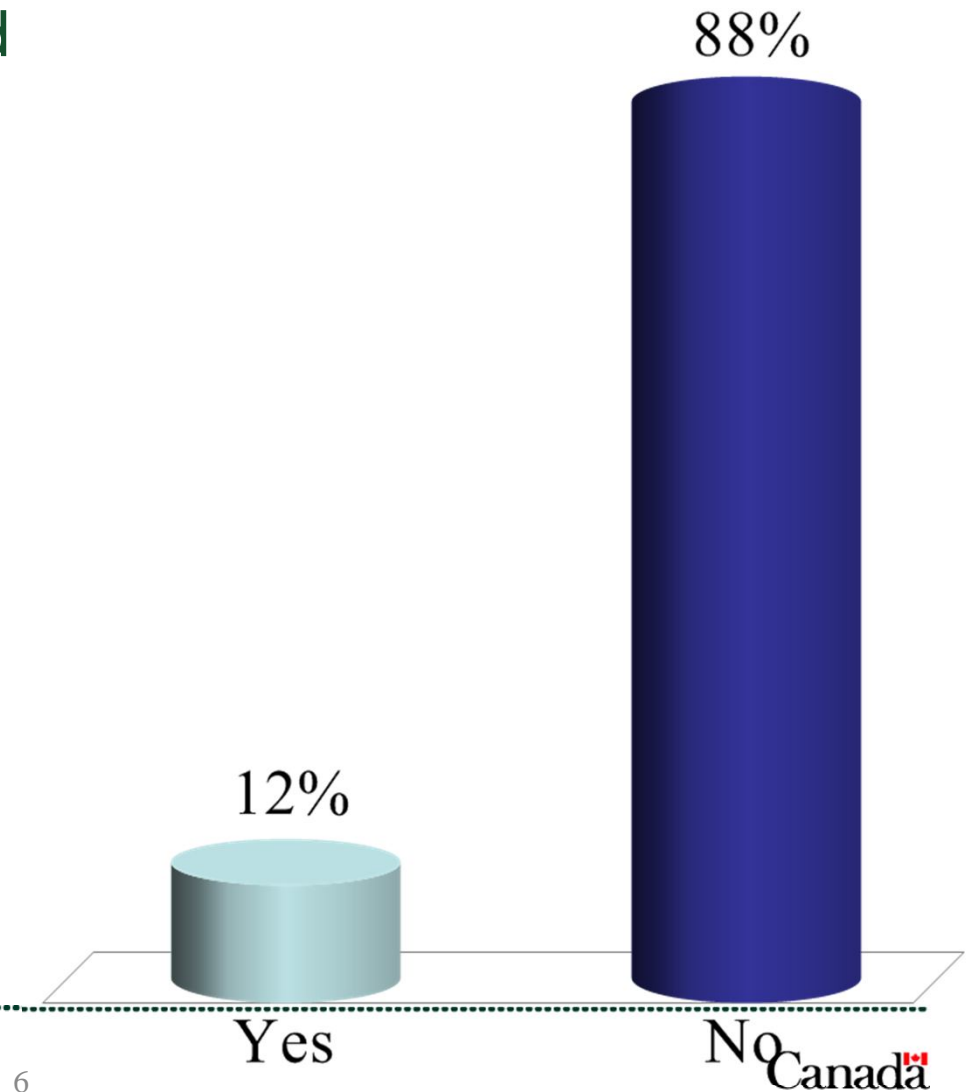
- A. Yes
- B. No





Have you ever been consulted by a First Nation Community regarding matrimonial real property on-reserve?

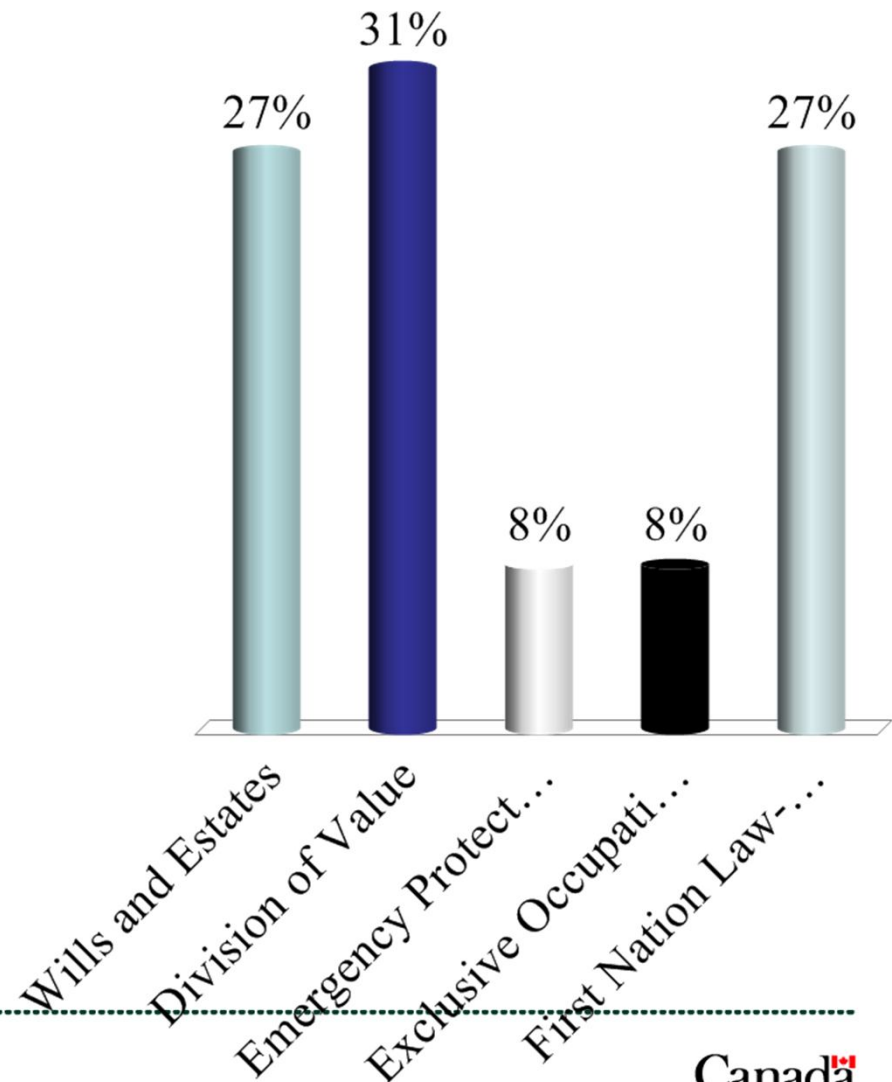
- A. Yes
- B. No





For those who have had inquiries about MRP on-reserve, what topics were they in regards to? (choose all that apply)

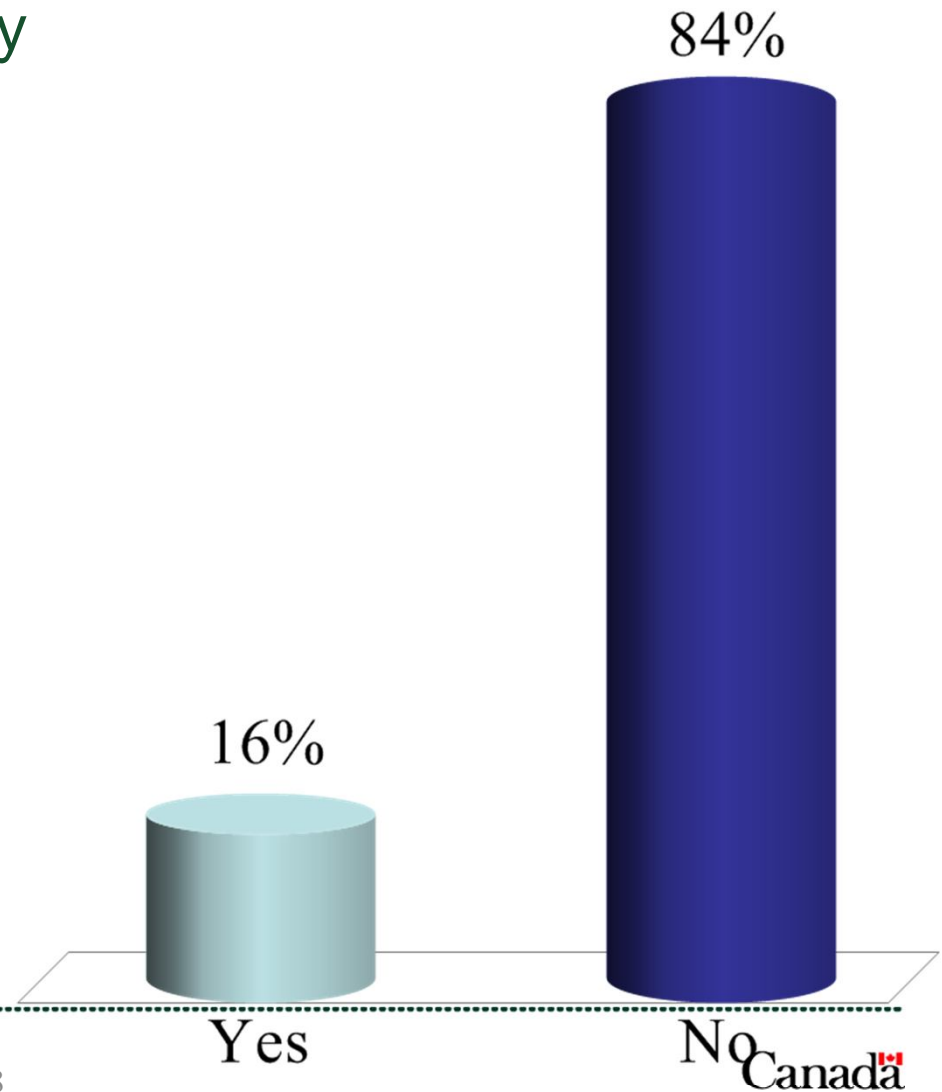
- A. Wills and Estates
- B. Division of Value
- C. Emergency Protection Order
- D. Exclusive Occupation Order
- E. First Nation Law-Making





Have you ever been retained by a client on a matter which involved the *Family Homes on Reserves and Matrimonial Interests or Rights Act*?

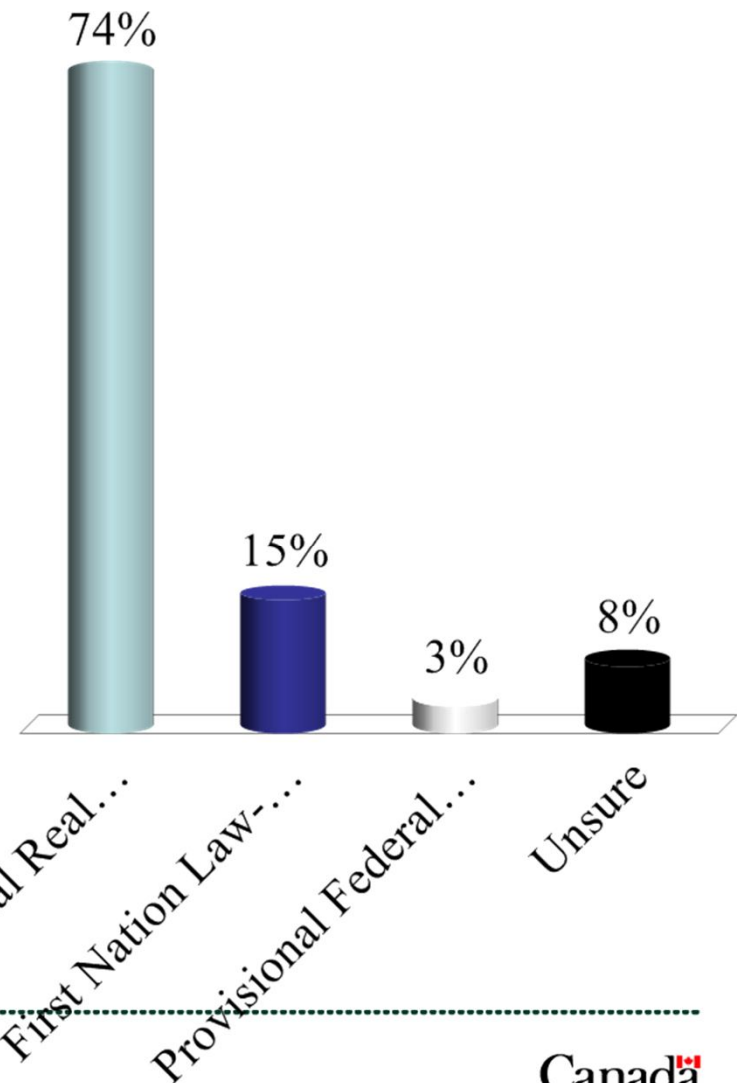
- A. Yes
- B. No





What are you most looking forward to learning about in this session?

- A. Matrimonial Real Property on-reserve generally
- B. First Nation Law-Making
- C. Provisional Federal Rules
- D. Unsure





THE FAMILY HOMES ON RESERVES AND MATRIMONIAL INTERESTS OR RIGHTS ACT



Background

- Matrimonial Real Property refers to the family or matrimonial home and other structures or land that a couple owns or occupies while they are married or in a common-law relationship.
- *Derrickson v. Derrickson* (1986) and *Paul v. Paul* (1986) - provincial laws relating to matrimonial real property cannot apply to alter individual interests in reserve lands, as these are within the jurisdiction of Parliament.
- Numerous studies, reports, recommendations
- Extensive consultations:
 - report of the Ministerial Representative; and
 - consultation on possible legislative solutions.



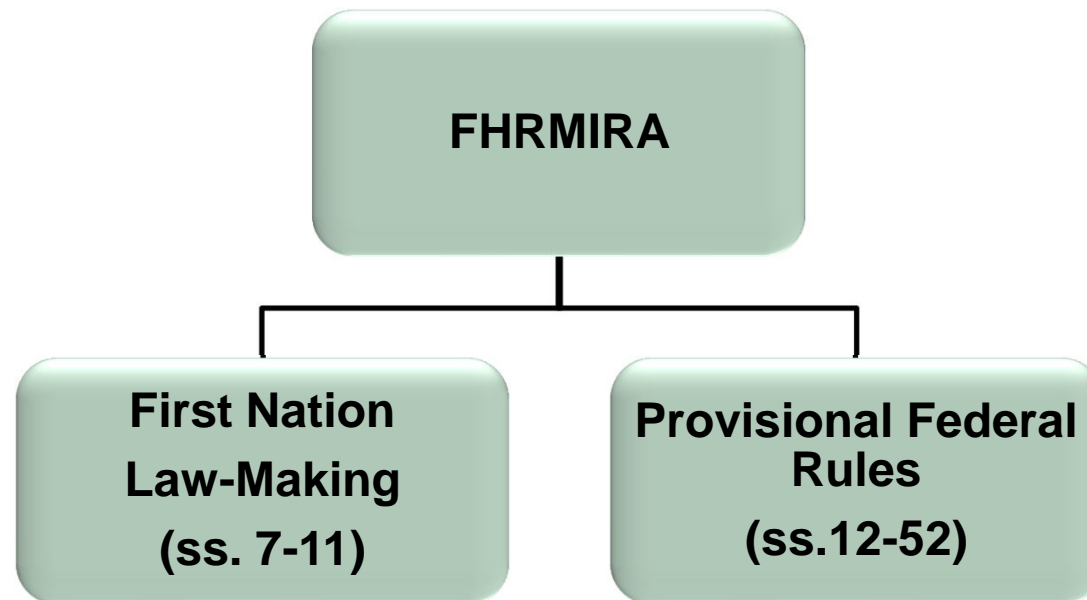
Federal Objective and Legislative Initiative

- Fill the legislative gap:
 - with basic rights and protections similar to those found in provincial/territorial legislation;
 - respecting the unique situation of reserve communities and the collective interest in their reserve lands; and
 - in a way which compliments the existing jurisdiction of the provincial/territorial superior courts, so that applications under this Act could be heard and determined as part of other family law applications.



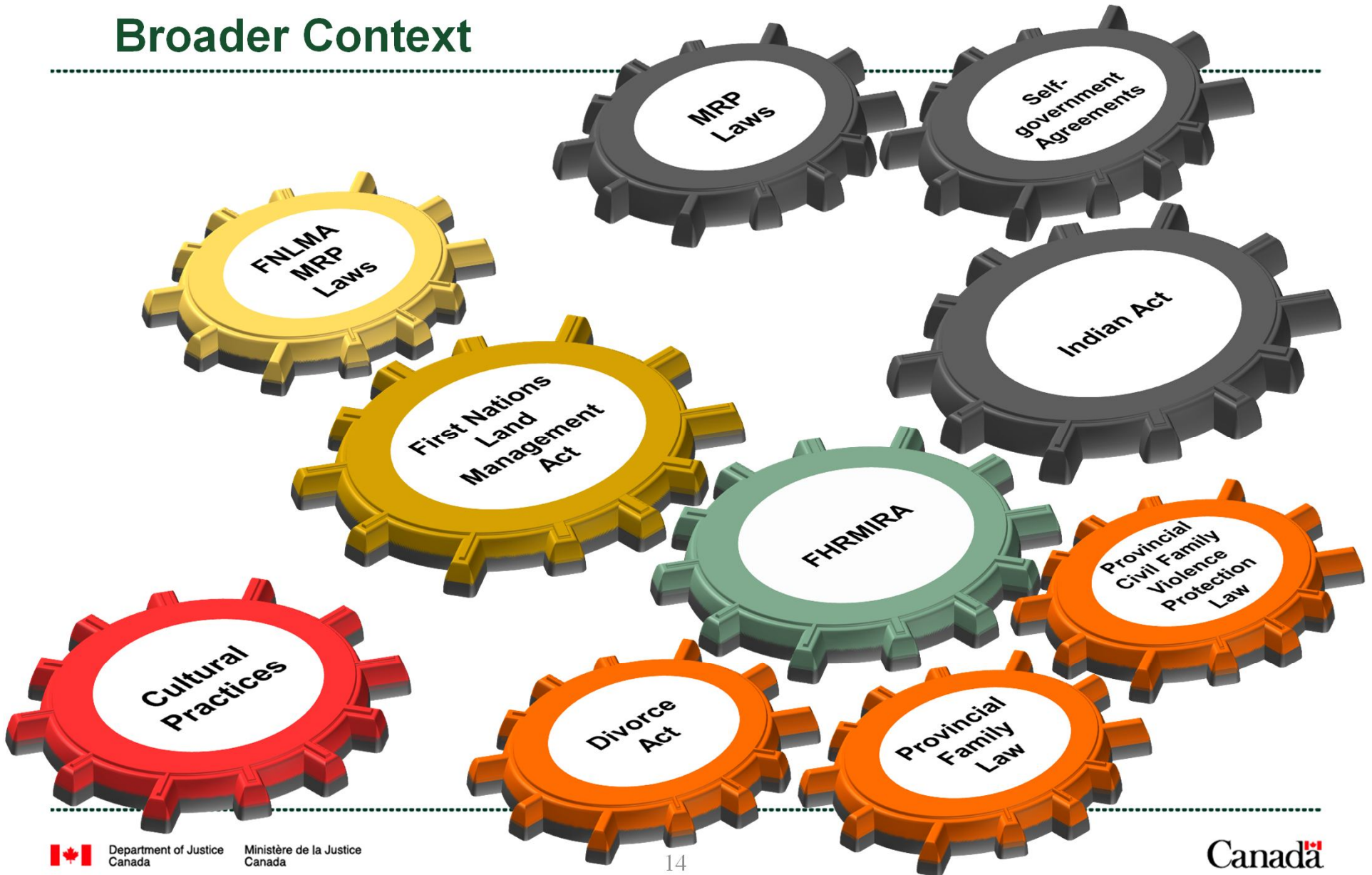
Legislative Response

- Framework Agreement on First Nations Land Management and *First Nation Land Management Act*
- *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*



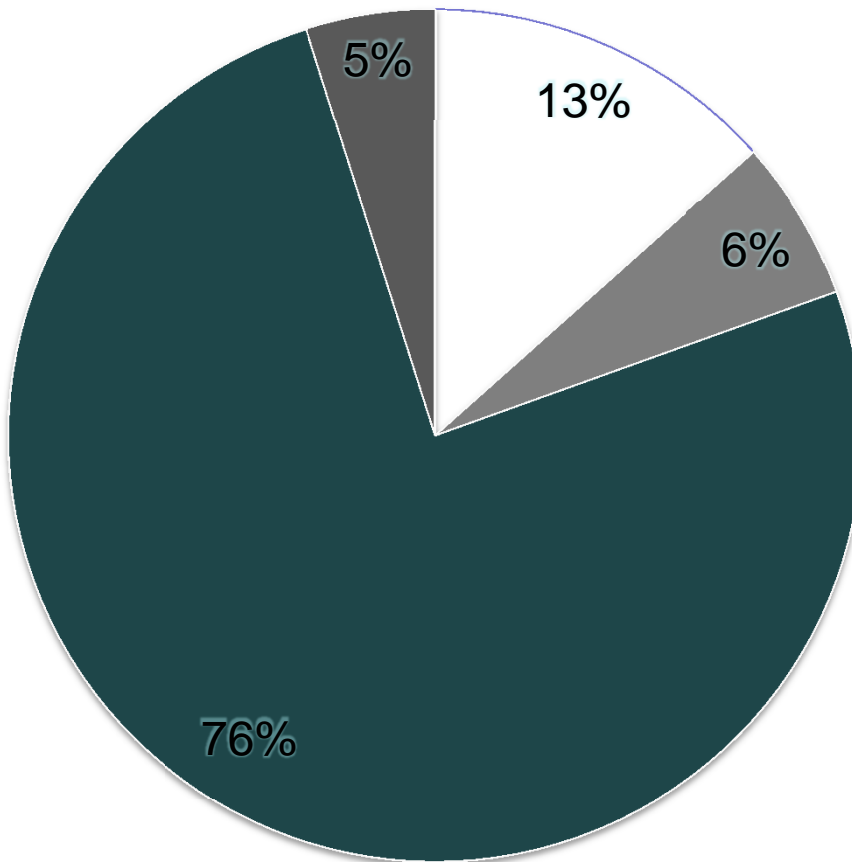


Broader Context





Land Holdings in Saskatchewan under the *Indian Act*

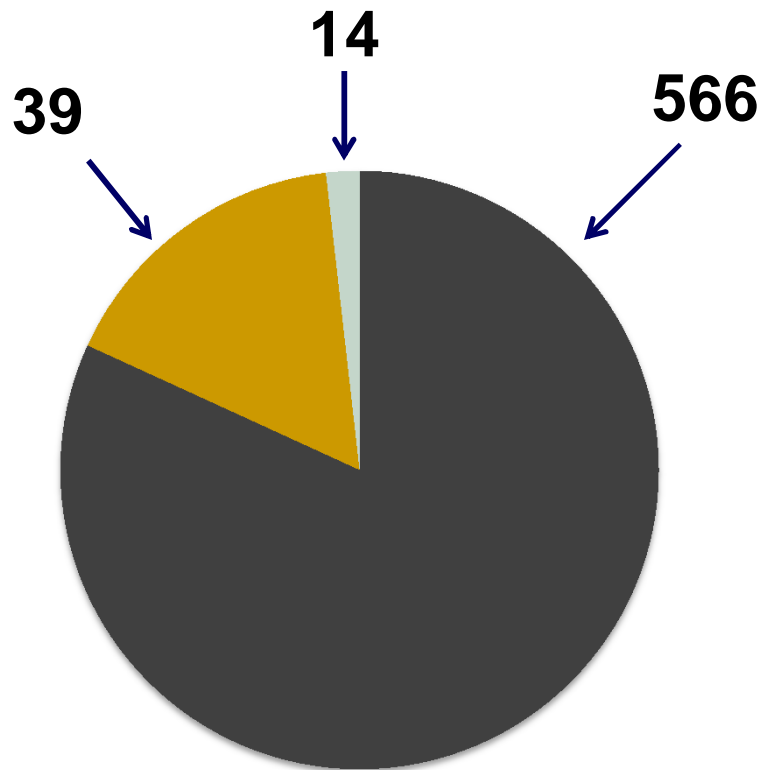


- Have some evidence of title in the Indian Land Registry System
- Have evidence of title in the First Nations Land Registry System or Self-Governing First Nations Land Register System
- Have no evidence of title* or no longer registering in Indian Land Registry System
- Have no evidence of title* in the First Nations Land Registry System

* Evidence of Title may include Certificates of Possession, Certificates of Occupation, Notices of Entitlement, No Evidence of Title Issued or Location Tickets. All are indicative of individual land holdings.



Addressing the Gap



CIRNAC/ISC's sense of the breakdown of MRP laws in First Nation communities

- First Nation matrimonial real property laws enacted pursuant to the Act (14)
- Matrimonial real property is addressed under the First Nations Land Management Regime (39)
- Subject to the Provisional Federal Rules (approx. 566)



Application of the Act

Title to First Nation land

- Applies on First Nation reserves, but does not change status of reserve lands. [s. 5]

Spouses or common-law partners

- The FHRMIRA applies only where at least one of the spouses or common-law partners is a First Nation member or an “Indian”, as defined by the *Indian Act*. [s. 6]

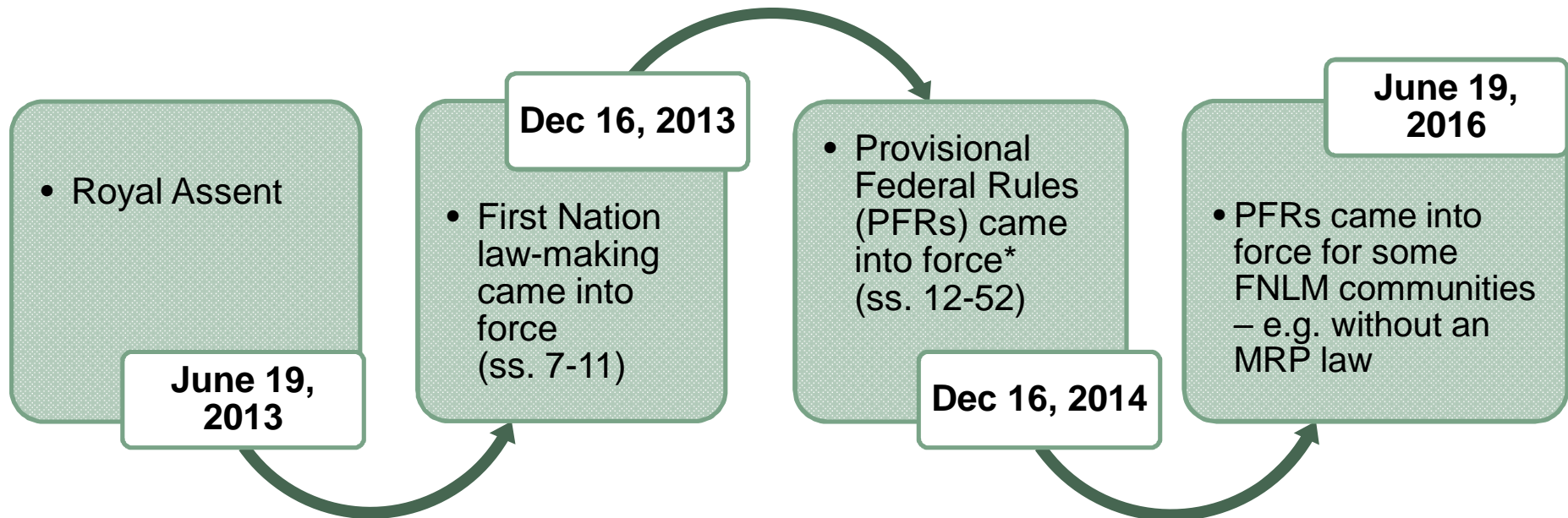
First Nations with reserves lands

- The Provisional Federal Rules apply to First Nations whose lands are managed pursuant to the *Indian Act* or the *First Nations Land Management Act*, until such time as they enact their own laws or where they take on land management powers through a negotiated comprehensive self-government agreement. [s. 12]





Application of the Act (cont.)



* Provisional federal rules only apply if no MRP law or FNLM land code was brought into force by a First Nation before this date.



Key Definitions

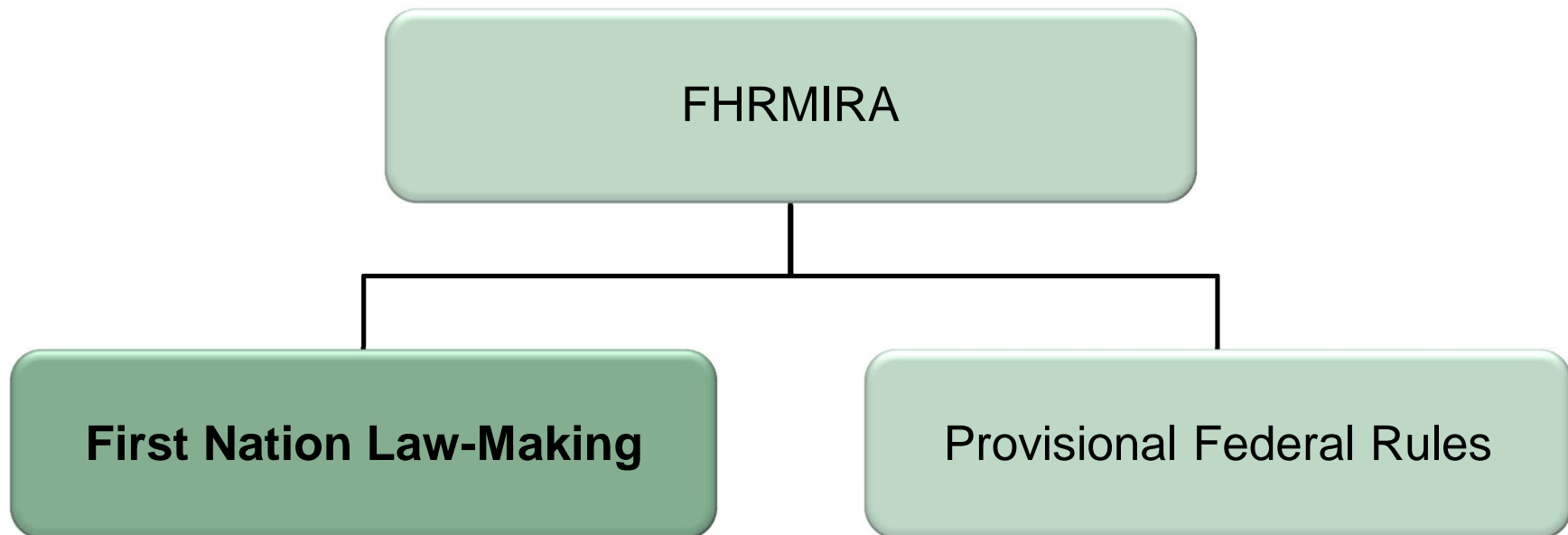
Definitions are found in s. 2(1)

- Court
- Designated Judge
- Family Home
- Interest or Right
- Matrimonial Interests or Rights
- Words and expressions not defined in FHRMIRA have the same meaning as in the *Indian Act*, e.g. “band” and “common-law partner” [s. 2(2)]





Key Components





First Nation Law-Making [ss. 7-11]

Power to enact First Nation Laws

- Contents
- Notice to provincial Attorney General
- Non-application of *Statutory Instruments Act*

Community Approval

- Voting requirements, e.g. informing membership
- Approval process
- Informing Minister, Attorney General and Centre of Excellence



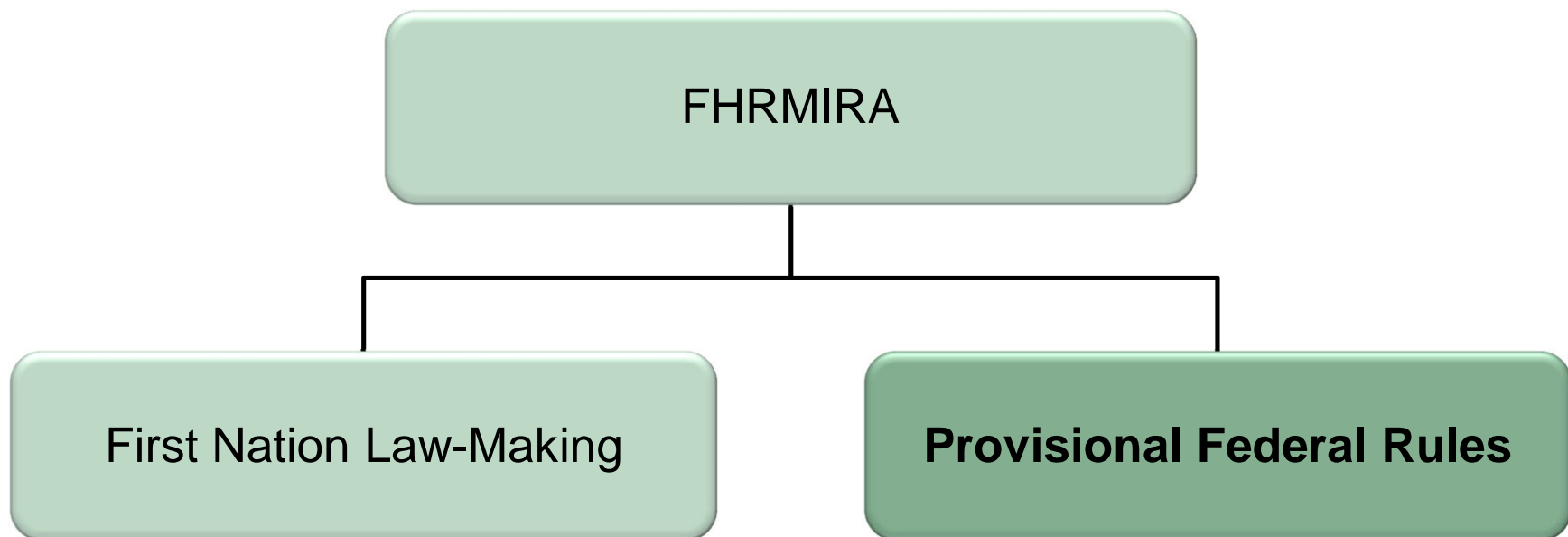
Coming into Force

- Access to First Nation Law
- List of First Nations with laws in place





Key Components





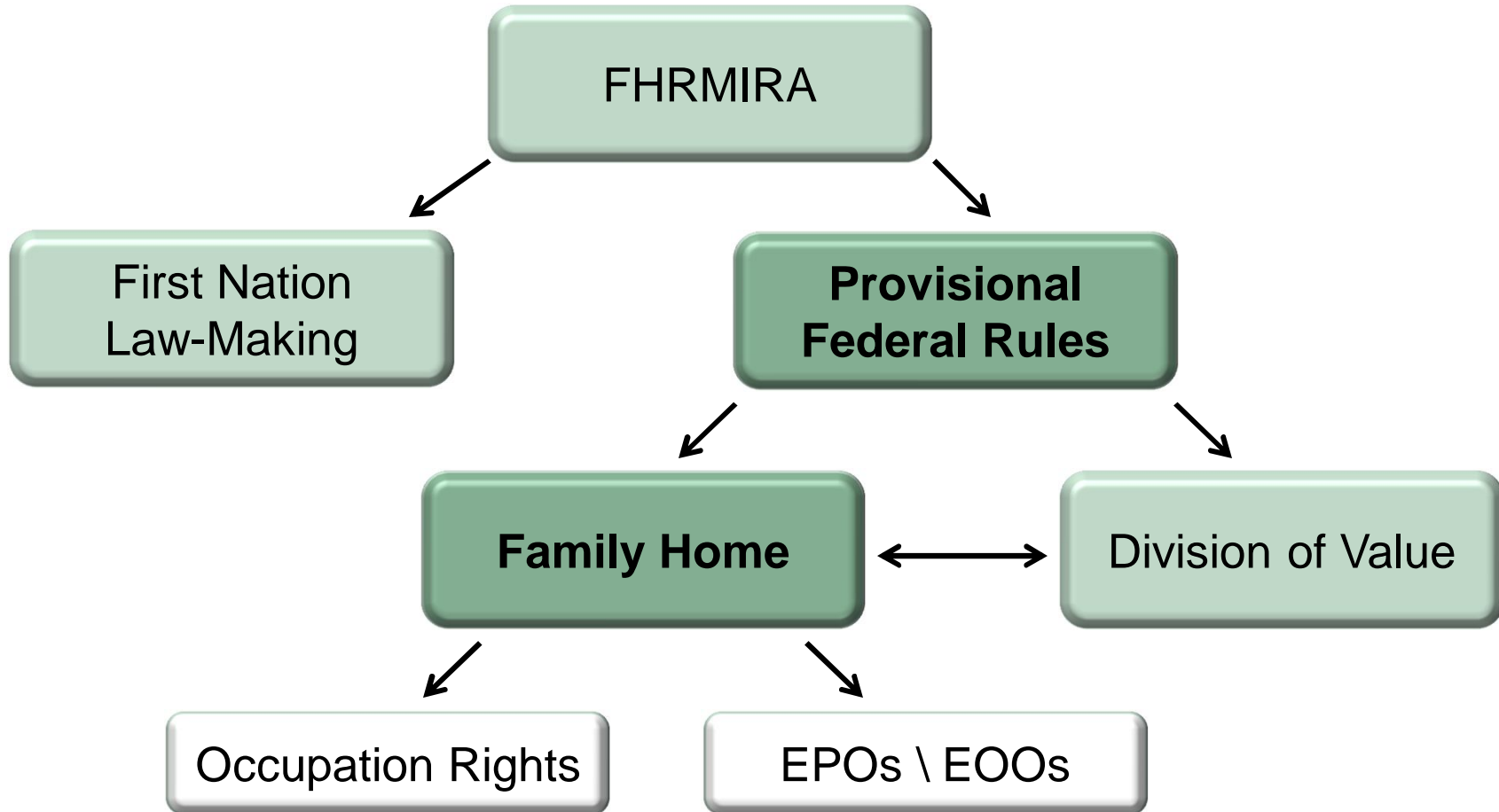
Provisional Federal Rules

- Occupation of the Family Home
- Emergency Protection Order (EPO)
- Exclusive Occupation Order (EOO)
- Division of the Value of the Family Home and other Matrimonial Interest or Rights on:
 - Relationship Breakdown
 - Death of a Spouse or a Common-Law Partner





Key Components





Rights of Occupation [ss. 13-15]

During conjugal relationship

- Equal right to occupy the family home. [s.13]

After death

- Right of a surviving spouse or common-law partner to occupy the family home for 180 days after a death occurs. [s.14]

Consent of spouse or common-law partner

- Written consent of a spouse or common-law partner prior to the disposition or encumbrance of an interest or right in or to the family home. [s.15]





Exclusive Occupation Orders [ss. 20 and 21]

Court order

- Temporary and exclusive occupation of the family home (including interim orders) following relationship breakdown [s. 20] or death [s. 21].

Considerations

- Open ended list of factors that must be considered (e.g. including best interests of any children, any family violence and collective interests of First Nations members in their reserve lands). [s. 20(3) and 21(3)]

Content of order

- Ss. 20(4) and 21(4) set out some possible content for an EOO.

Application to vary or revoke order

- EOOs may be varied or revoked where an applicant can demonstrate a “material change in circumstances”. [s. 20(6) and 21(6)]
-





Emergency Protection Orders [ss. 16 to 19]

Order of designated judge

- Time-limited *ex parte* order issued by a provincially “designated judge” to exclude a spouse or common-law partner from the family home on an urgent basis where family violence [defined in s. 16(9)] has occurred.
- Up to 90 days [s. 16(1)], and may be extended. [s. 17(8)]

Considerations

- Factors [s. 16(4)], including the existence of immediate danger and best interest of dependants.

Content of order

- S. 16(5) set out some possible content for an EPO.

Confidentiality

- Orders may also include confidentiality where necessary. [s. 19]



Emergency Protection Orders (cont.)

Order sent to court for review

- If initial order not made by superior court judge, superior court is required to expedite review and confirm the order or direct a rehearing. [s. 17]

Application to vary or revoke order

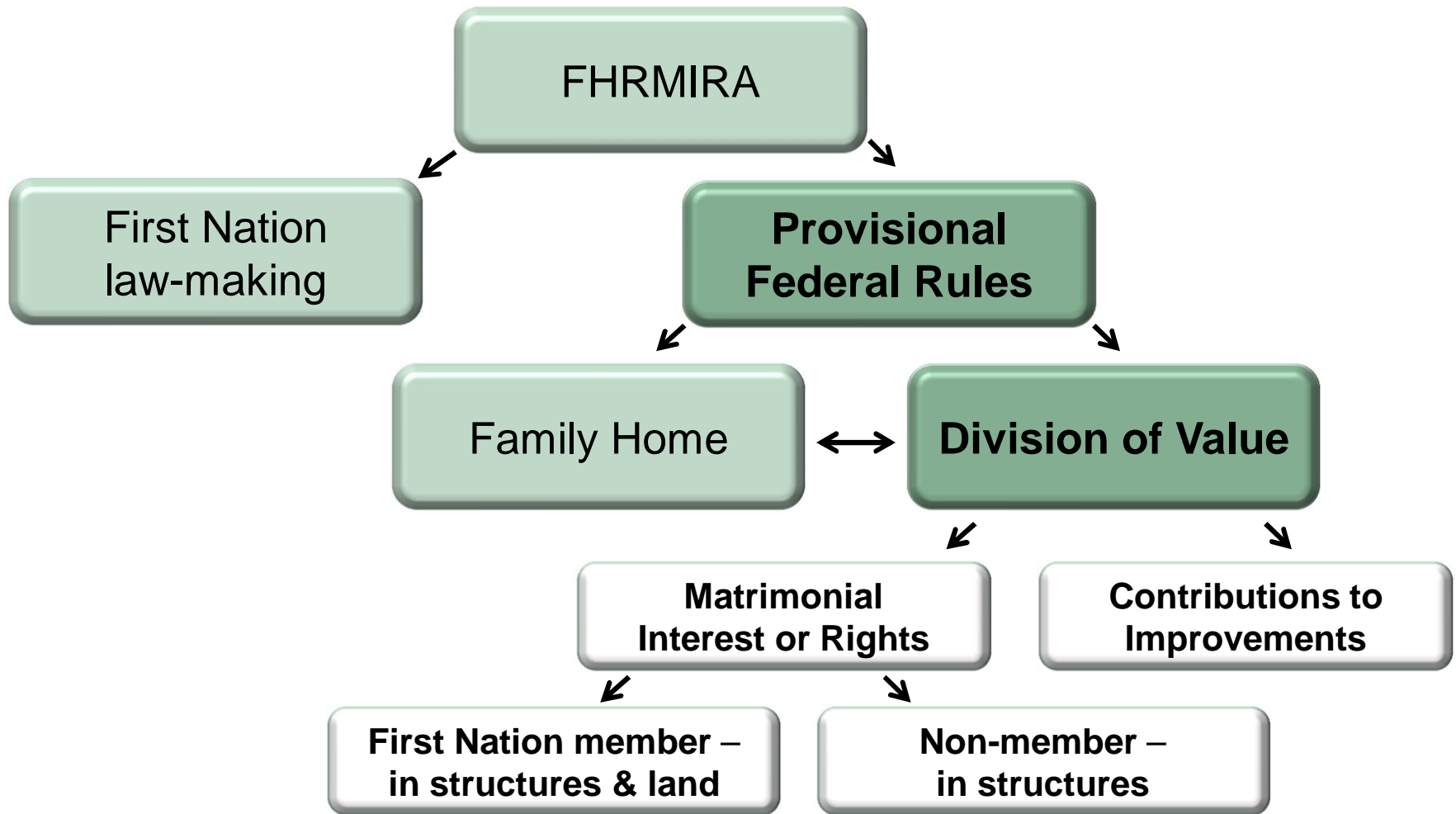
- Application to vary or revoke the order may be made. [s. 18]

Governor in Council EPO Regulations

- Federal regulations have been made under s.53 for jurisdictions with no civil family violence protection legislation choosing to use the EPO provisions. [s.53]



Key Components





Division of Value [ss. 28 to 40]

Division of value

- Each spouse or common-law partner (or survivor) is entitled to a presumptive equal share of the value of the “family home” and “matrimonial interests or rights” held by the other spouse or common-law partner in or to:



**structures and lands
for members**



**structures only
for non-members**

[s. 28 (relationship breakdown) and s. 34 (death)]



Division of Value (cont.)

Variation of amount

- Variation of amount payable is possible where the court is satisfied that the amount would be unconscionable, on the basis of an open-ended list of criteria. [ss. 29, 35]

Improvident depletion

- The court may make orders for preservation of the family home and matrimonial interests or rights. [s. 32]

Order to transfer interest or rights

- The court may, in certain circumstances, order the transfer of interests or rights in or to lands and structures between member spouses or common-law partners (or to a member survivor). [ss. 31, 36]





Division of Value (cont.)

Valuation

- The difference between the amount a buyer would reasonably pay and the amount of outstanding debts or other liabilities. [ss. 28(4) and 34(4)]

Agreement by parties

- Couples may determine the value on another basis. [ss. 28(5) or 34(5)]

Recognition by First Nation or determination by court – interest or right

- A First Nation may recognize an “interest or right” in or to a structure on its reserve. [s. 2(1) – para. (c) of “interest or right”]
- The court may determine whether an “interest or right” is held in or to any structures or lands situated on a reserve. [s. 48]

Two survivors

- In the context of an estate, where there are two survivors, the executor or administrator must pay the common-law partner first. [s. 38(3)]
-





Notice of Applications/Orders & First Nations Representations

Notice of application

- Applicants must send notices of applications made under the Act to the council of the relevant First Nation, except for initial EPOs or confidentiality applications. [s. 41(1)]

Representations by council

- On request, the court must allow the council of the First Nation to make representations. [s. 41(2)]

Notice of order and copies to Minister or council

- Copies of orders (except confidentiality orders) must be sent, to:
 - the First Nation; and
 - to the Minister when land management is occurring under *Indian Act*. [ss. 42, 50]



Enforcement of Orders

- There are additional difficulties in enforcing some orders on reserves due to s. 89 of the *Indian Act*.
- A person who is not a member or an “Indian”, as defined by the Indian Act, can apply to the First Nation to have them enforce the order on his or her behalf. [s. 52(1)]
- Also, the court can vary the order to require the person against whom it was made to pay the amount into court. [s. 52(2)]
- The First Nations law-making authority specifies that a First Nation may include in their law provisions for enforcing an order of a court on reserve, despite s. 89(1) of the *Indian Act*. [s. 7(2)]





Civil Procedure

Superior Court Jurisdiction

- The superior court (judges appointed under s. 96 of the Constitution Act, 1867) of the province of habitual residence for the couple has jurisdiction (s. 16 a potential exception). [s. 2(1) - definition of “court”]

Possibility of Joinder

- An application made under the Act may be heard in the same proceeding as a divorce or other application related to the breakdown of the relationship or the death of a spouse or common-law partner. [ss. 43(2), 43(3), 45]



Civil Procedure (cont.)

No pending proceedings

- If structures and lands are located in more than one province, the couple may agree, or jurisdiction is provided to the superior court in the province of habitual residence at the time the couple ceased to cohabit. [ss. 43(4), 44(2)]

Rules of practice and procedure

- The “competent authority” may make rules applicable to any proceedings under this Act in a court in accordance with the powers conferred to it. [s. 47]

Provincial laws of evidence

- As with the *Divorce Act*, provincial rules of evidence apply. [s. 51]



Transitional Provisions

Commencement of application

- When the Provisional Federal Rules begin to apply to a First Nation, they apply to spouses and common-law partners who ceased to cohabit on or after that date, or to survivors if the death occurred on or after that date. [s. 54(1)]

Cessation of application

- When the Provisional Federal Rules cease to apply to a First Nation, they remain applicable when the breakdown of the relationship or the death occurred on a date when the provisional federal rules still applied. [s. 54(2)]





Application of the Provisional Federal Rules

Provisional Federal Rules not applicable

Provisional Federal Rules **do not apply** if spouses and common-law partners ceased to cohabit **before they came into force**, or to survivors if the death occurred before that date.

Provisional Federal Rules

Provisional Federal Rules **apply** if spouses and common-law partners ceased to cohabit **on or after they came into force**, or to survivors if the death occurred on or after that date.

First Nation Law

Provisional Federal Rules **do not apply** if spouses and common-law partners ceased to cohabit **on or after the First Nation law came into force**, or to survivors if the death occurred on or after that date.

* Four (4) First Nations enacted their laws before the Provisional Federal Rules came into force.





Some FHRMIRA Caselaw

***McMurter v. McMurter*, 2018 ONSC 2626 (Ont. S.C.J.); and also *McMurter v. McMurter*, [2016] O.J. No. 3798, 2016 ONSC 1225 (Ont. S.C.J.)**

***Droit de la famille – 162829*, 2016 QCCS 5685 (CanLII)**

***Bradfield v. Brydges*, [2016] B.C.J. No. 215, 2016 BCSC 189 (B.C.S.C.).**

***Poitras v. Khan*, 2016 SKQB 346 (CanLII)**

***Toney v. Toney Estate*, 2018 NSSC 179**



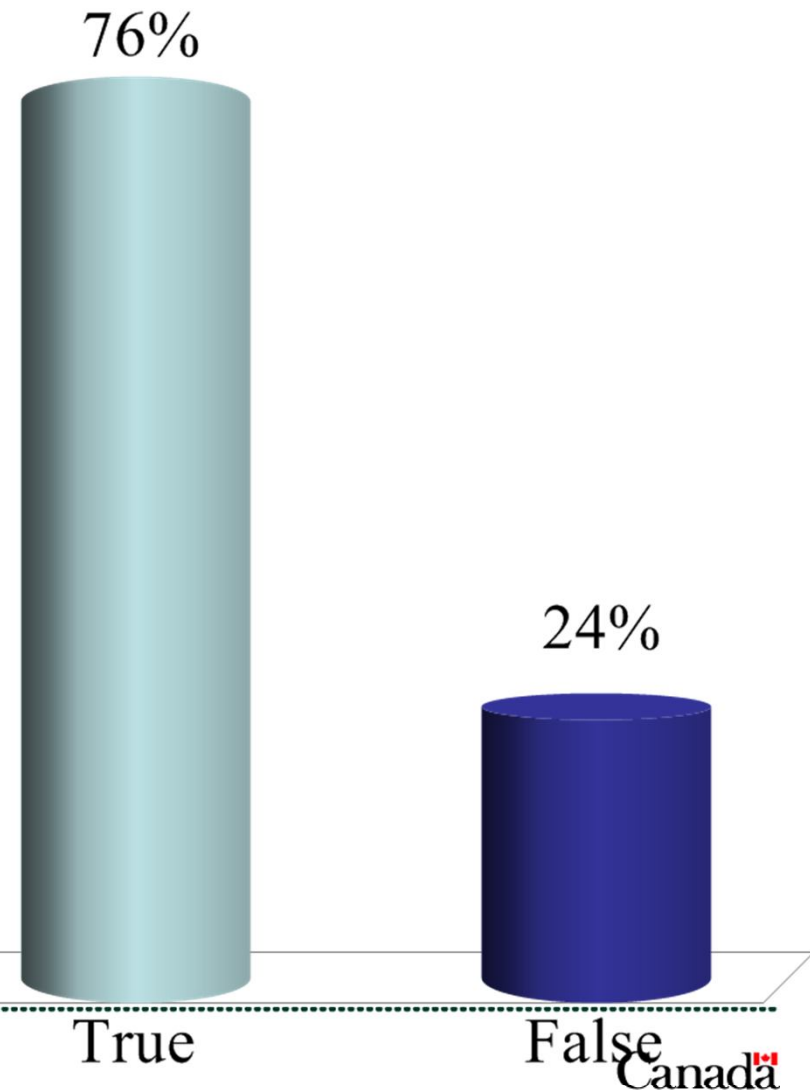
APPLYING THE FHRMIRA





In the absence of a First Nation's own MRP law, the FHRMIRA's Provisional Federal Rules began to apply as of December 16th, 2014 with some exceptions.

- A. True
- B. False





For most First Nations, this is **TRUE**. December 16th 2014 is the coming into force date of the Provisional Federal Rules (PFRs). However, the PFRs do not apply to First Nations with MRP laws enacted under the FHRMIRA or the FNLMA. See s. 12 of the FHRMIRA.

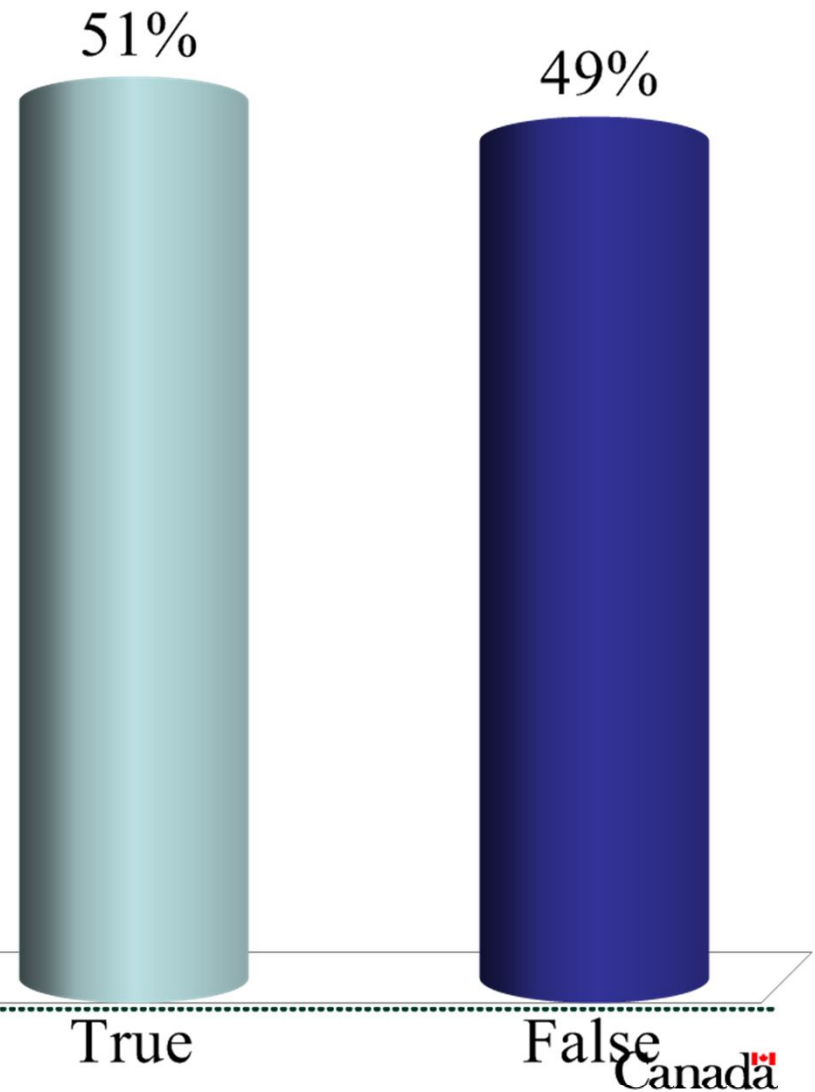
In addition, the PFRs do not apply to FNLM First Nations with a land code in force before December 16, 2014; and First Nations on the FNLMA schedule (even without a land code) on June 19, 2013 were exempt from the application of the PFRs until **June 19th 2016**.

See s. 55 of the FHRMIRA.



A First Nation must notify the Attorney General of the province only once it's MRP Law has been enacted.

- A. True
- B. False





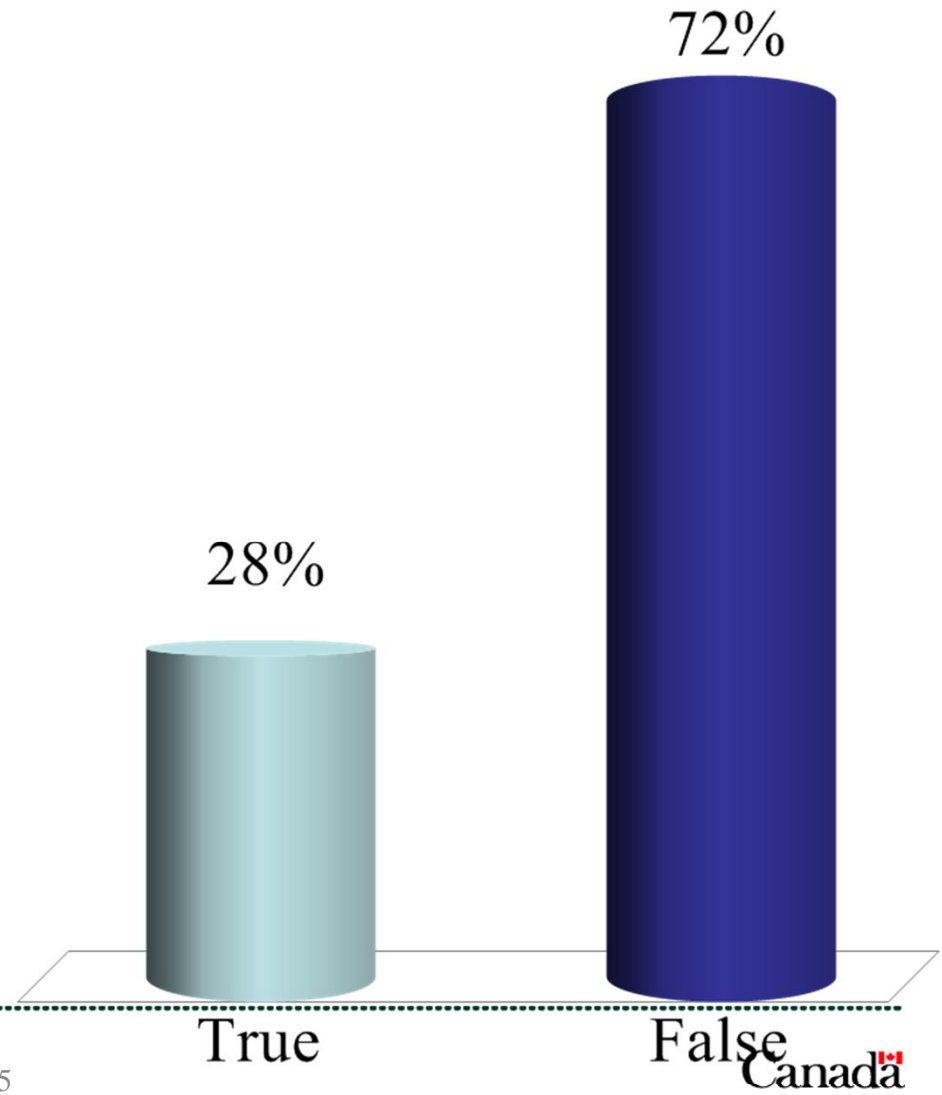
FALSE. A First Nation must first notify the AG when it **intends** to enact its own law. See s. 7(3). Once the First Nation has enacted its own law, it must provide a **copy** to the AG of the province (or provinces) in which it has reserve lands and to the Minister (currently of CIRNA) and the COEMRP.

See s. 10 of the FHRMIRA.



The Minister of CIRNA/ISC must approve a First Nation's MRP Law.

- A. True
- B. False





FALSE. The contents of a First Nation MRP Law is determined during the First Nation's internal law-making process and needs to be approved by the members of the community.

Neither the Ministers or any departmental officials have a role in reviewing or approving First Nation laws being proposed for enactment under the Act. Approval of a First Nation law is determined by the community ratification or approval process. See sections 8-10 of the FHRMIRA.

Note: The FHRMIRA (s. 10) requires First Nations that approve MRP laws to inform the Minister of the results of the community approval vote. CIRNAC/ISC does read these packages to confirm that the First Nation indicates that the law was enacted in accordance with the requirements of the FHRMIRA before the name of the First Nation is added to the Minister's published list of First Nations whose matrimonial real property laws are in force.



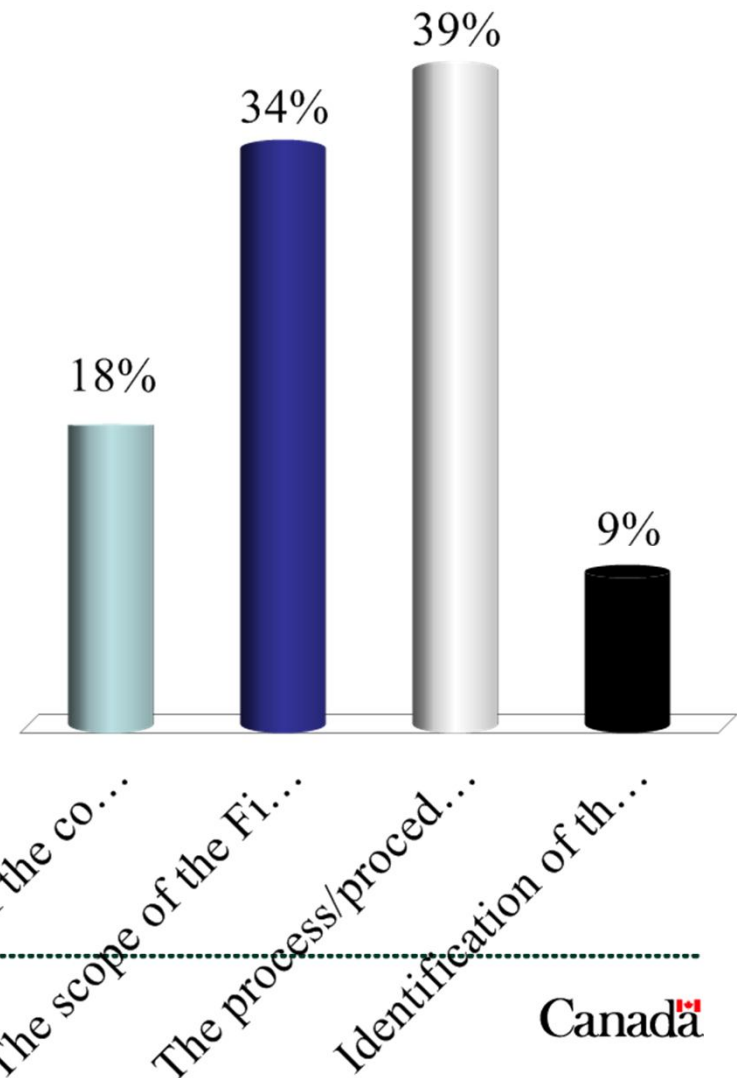
Scenario 1

- Windyway First Nation has consulted with its community and determined that the provisional rules contained in FHRMIRA do not adequately reflect their practices and beliefs. The community consultation determined that its members and residents do not wish to be bound by the provisional federal rules and have directed Council to begin the process of enacting its own MRP Law.
- The Windyway First Nation leadership has retained you to support them during the development and enactment of their MRP law.



What is the first piece of advice you would bring to the attention of the Windyway First Nation?

- A. The role of the community consultations and community input in the development of the law.
- B. The scope of the First Nation law-making authority under the FHRMIRA.
- C. The process/procedure towards enactment identified in the FHRMIRA (e.g. communication with the Attorney General of the province; informing eligible voters of the content of the proposed law; publishing the details of the vote, etc.)
- D. Identification of the 25% participation threshold for the community approval vote.





APPLYING THE FHRMIRA IN THE ABSENCE OF A FIRST NATION LAW

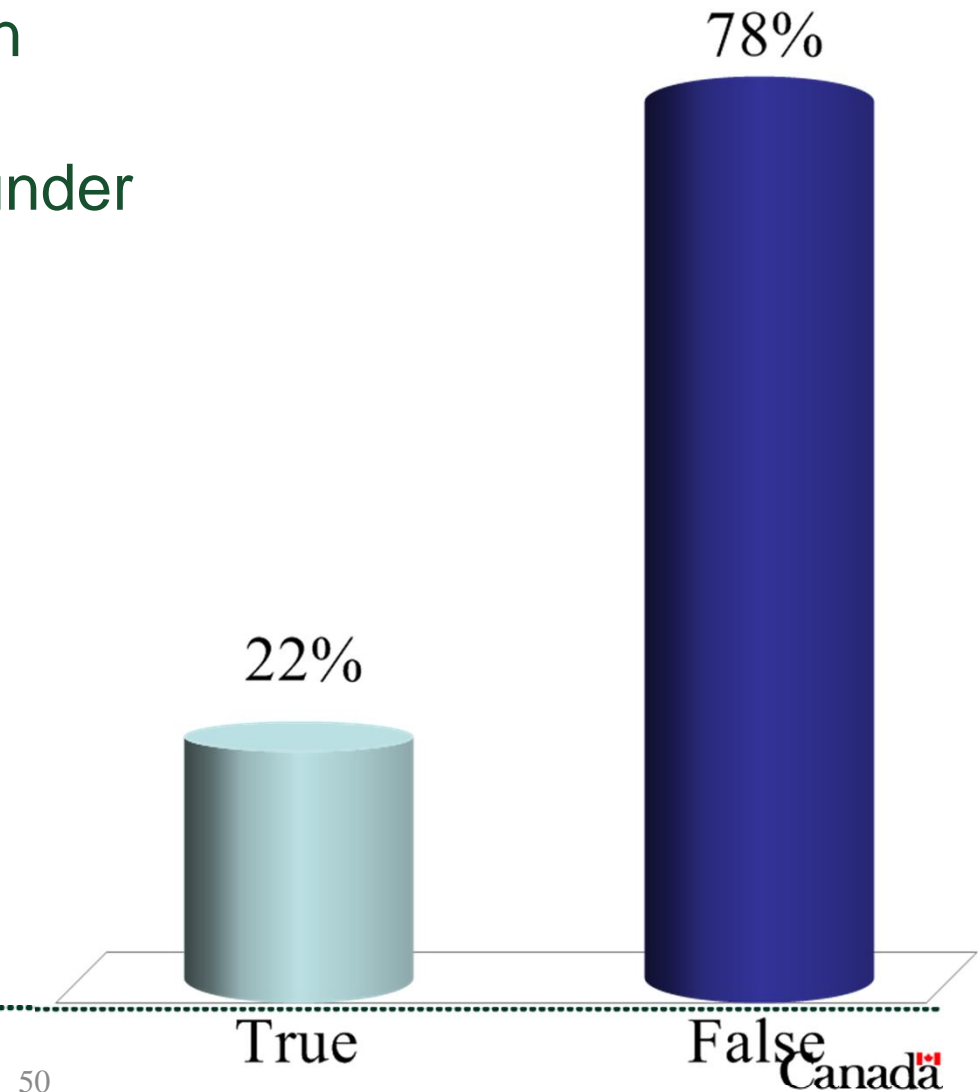
(THE PROVISIONAL FEDERAL RULES)





George and Sally separated in 2012. George can apply for division of value of the MRP under section 28 of the FHRMIRA.

- A. True
- B. False





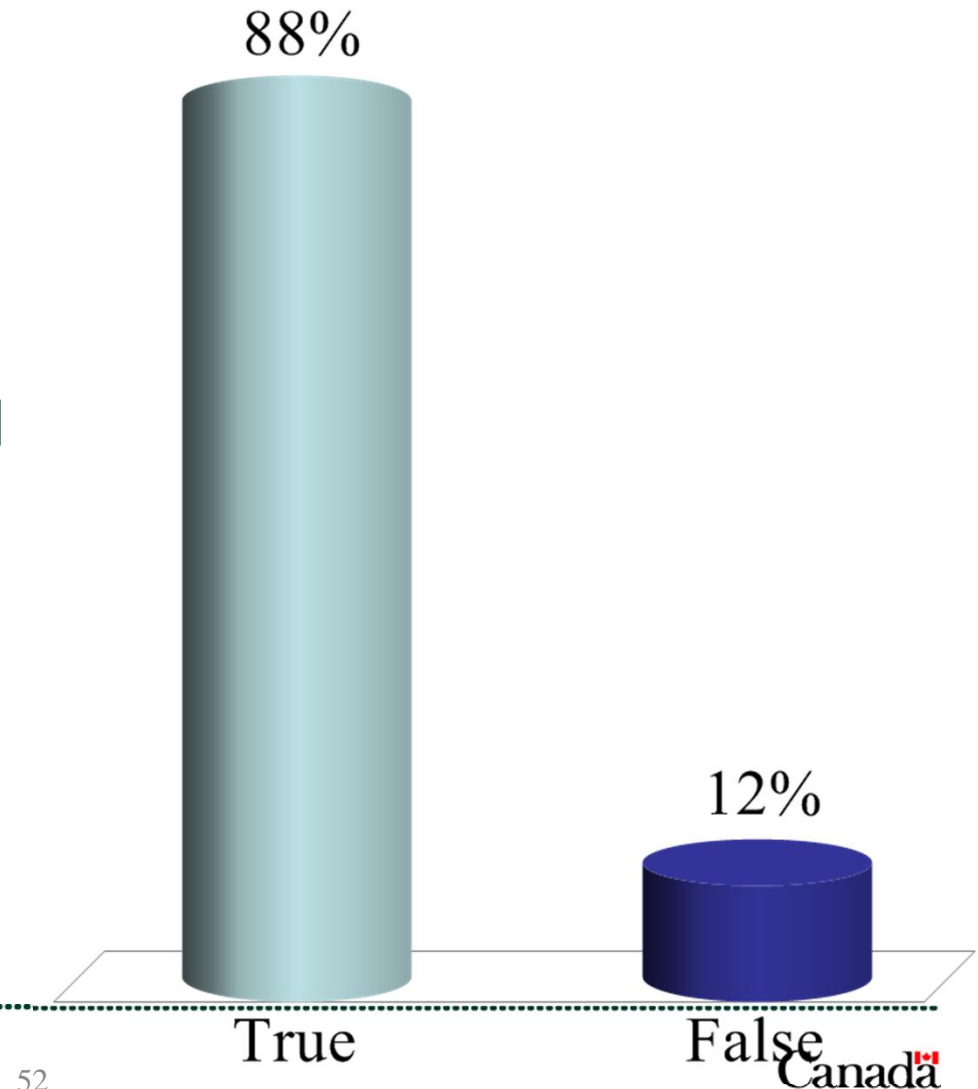
FALSE. Sections 28-33 of the Provisional Federal Rules apply to spouses or common-law partners ... if they ceased to cohabit on or after the day on which those sections began to apply to that First Nation.

See s. 54 of the FHRMIRA.



For the purposes of the FHRMIRA, “common-law partner” means a person who is cohabiting with an individual in a conjugal relationship, having cohabited for a period of **at least one year**.

- A. True
- B. False





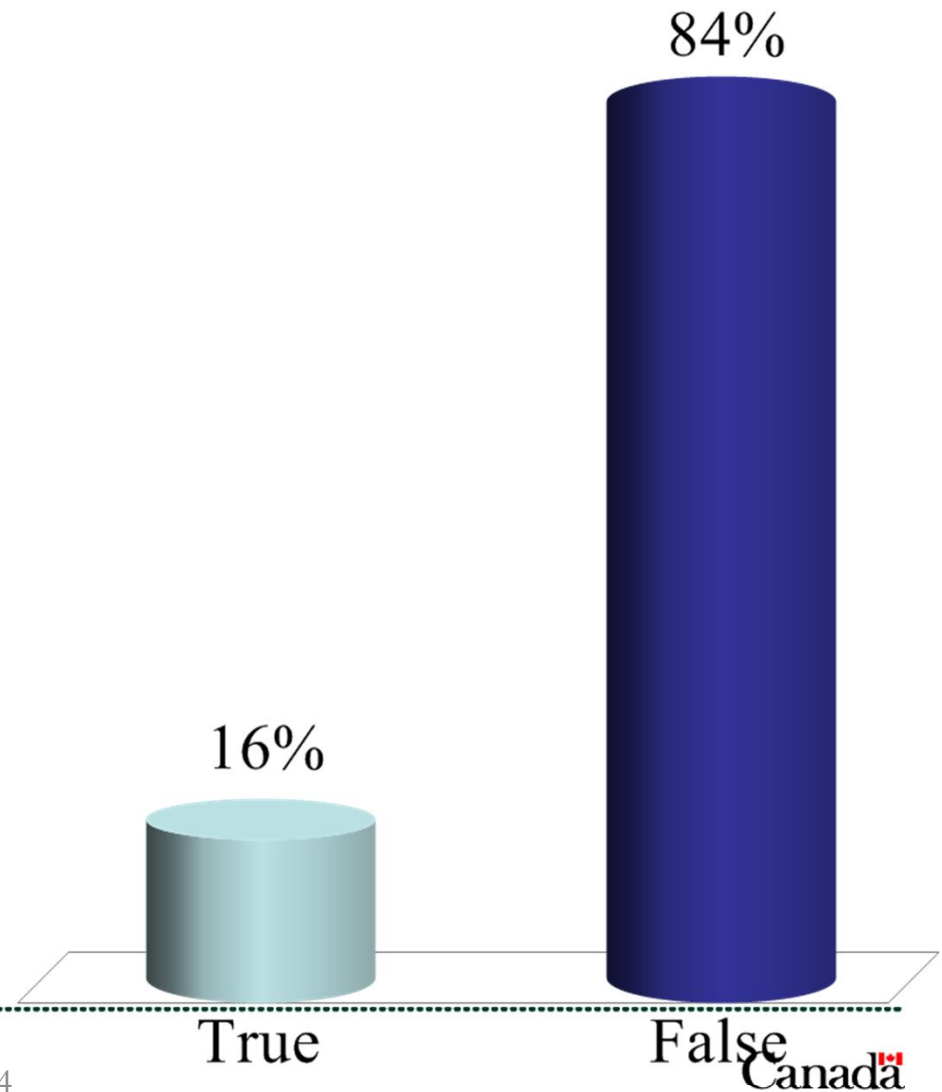
TRUE. For the purposes of the FHRMIRA, the term “common-law partner” is defined in s. 2(1) of the *Indian Act*.

Note: Some First Nations have specified a different period of cohabitation (e.g. 6 months, 2 years, 5 years etc) in their community-specific law.



A Superior level court in the Province may grant an **Exclusive Occupation Order (EOO)** only to non-members.

- A. True
- B. False





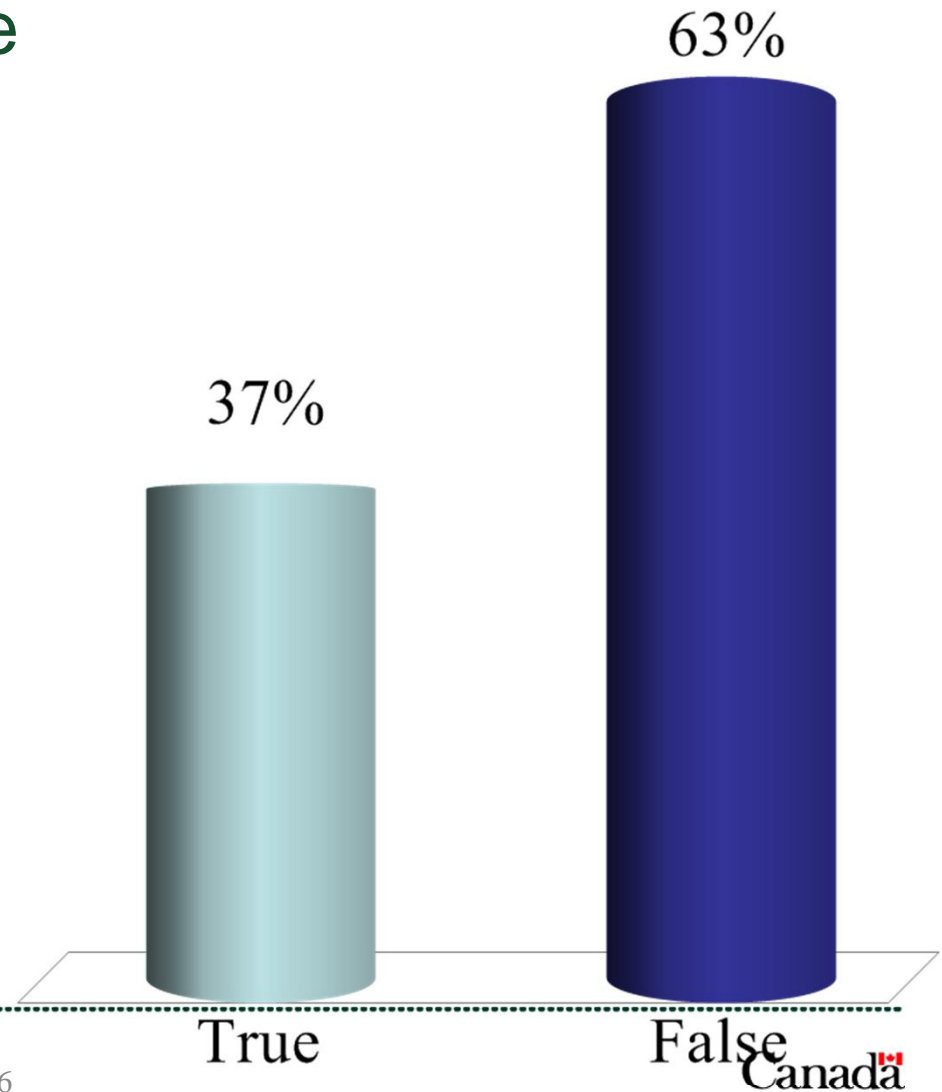
FALSE. A Superior level court in the Province may grant an EOO to a spouse or common-law partner, or survivor, whether or not that person is a First Nation member or an “Indian” (as defined by the *Indian Act*).

See sections 20 and 21 of the Provisional Federal Rules.



Chief and Council have the right to veto an Exclusive Occupation Order.

- A. True
- B. False





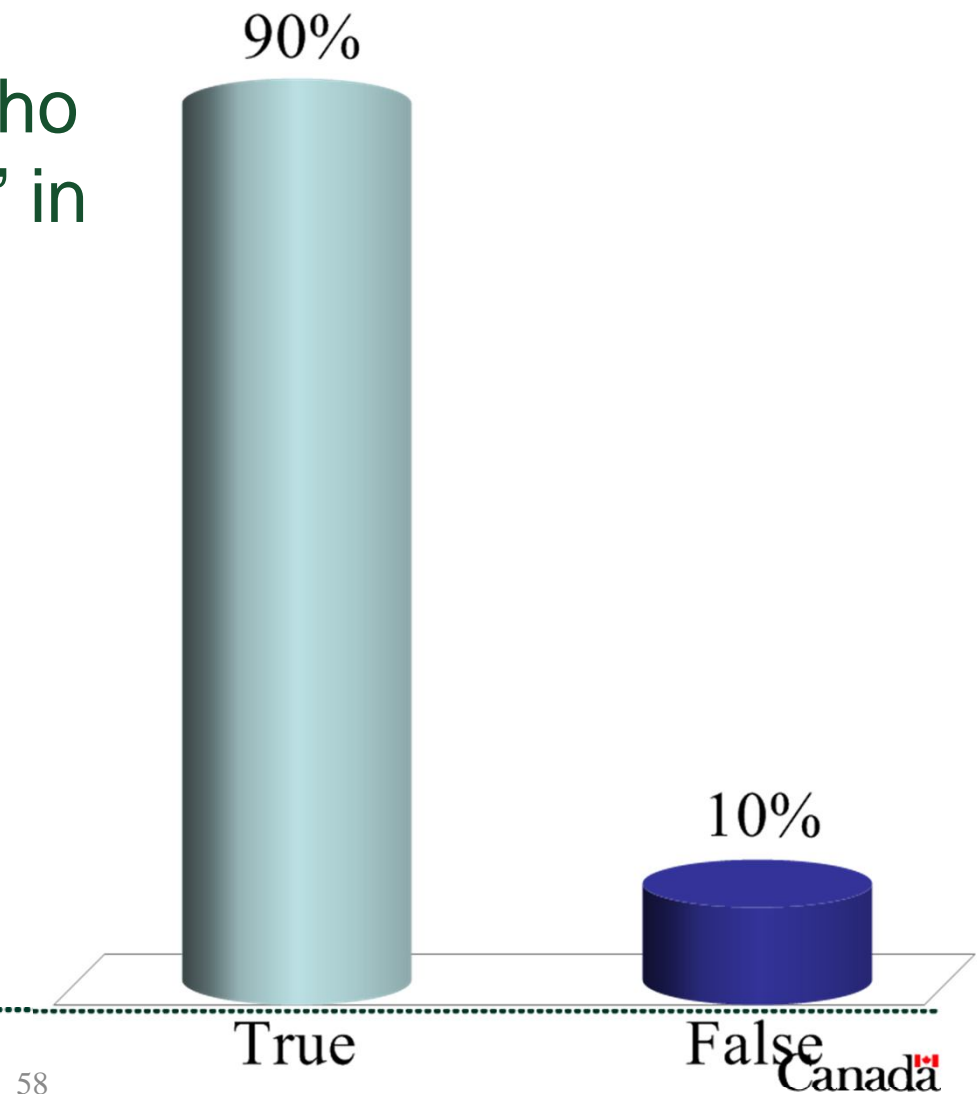
FALSE. Council cannot veto an EOO but can make representations to the court with respect to the cultural, social and legal context that pertains to the application and present its views about whether or not the order should be made.

See s. 41 of the Provisional Federal Rules.



An Exclusive Occupation Order does not change who holds an “interest or right” in or to the family home.

- A. True
- B. False





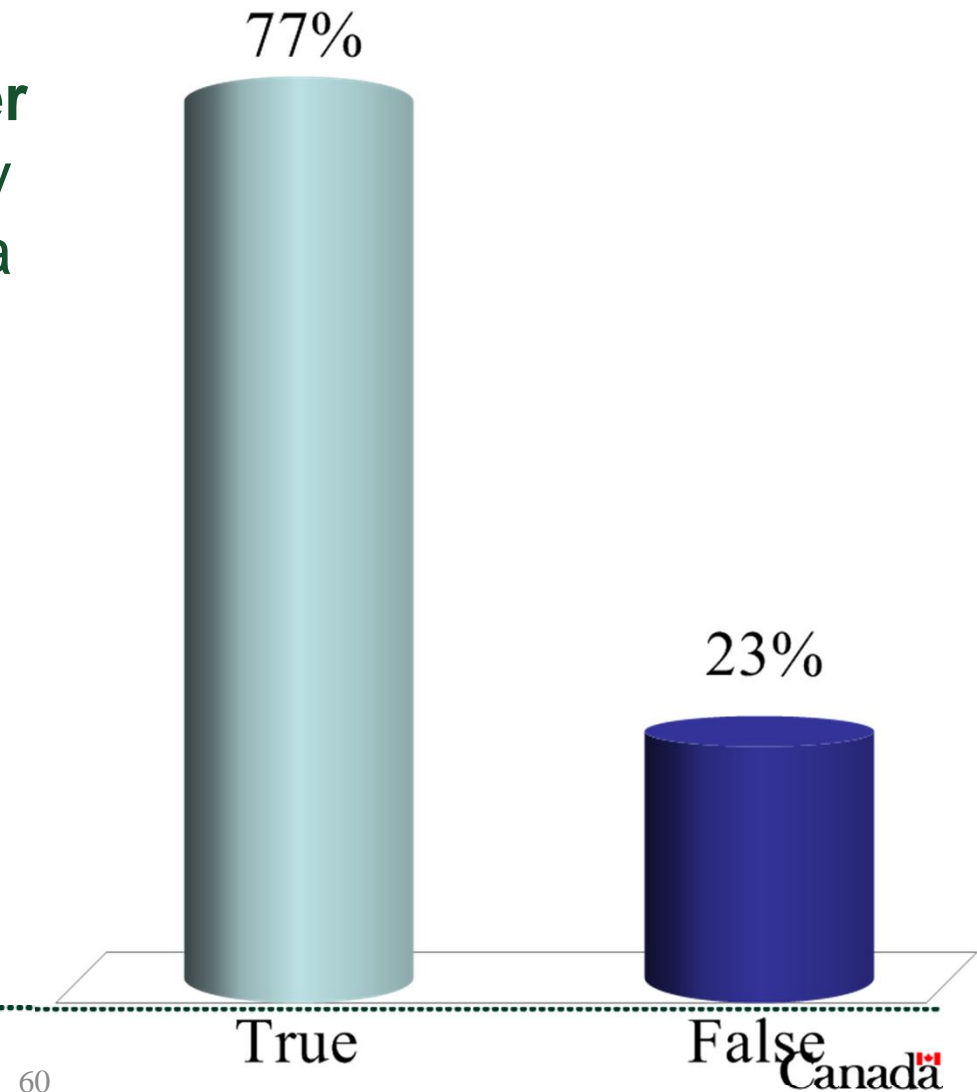
TRUE. An EOO does not change who holds an interest or right in or to the family home. It may change only who **OCCUPIES** the family home.

See s. 23 of the Provisional Federal Rules.



An application for an **Emergency Protection Order** under the FHRMIRA may only be made in provinces where a “designated judge” has been authorized to hear it.

- A. True
- B. False





TRUE. Emergency Protection Orders (EPOs) made under this federal legislation are only available in a province where a judge or justice of the peace has been authorized by the province to act as a “designated judge” to hear *ex parte* EPO applications.

However, even in Saskatchewan where designated judges have not been authorized, a victim of family violence could still apply for an Exclusive Occupation Order (not *ex parte*).

See ss. 16-19 of the Provisional Federal Rules.



Scenario 2

- Pat and Jamie are both members living on-reserve in a common-law relationship. They have 2 small children. Jamie holds the Certificate of Possession for the land on which their family home is located.
- Pat and Jamie got into a violent argument. The neighbours overheard and called the police.
- Pat does not want to lay charges but wants Jamie to leave the house. The responding police told Pat, because it was Jamie's house, that Pat needed to leave the home.
- Pat fled the home with the children.
- How could the FHRMIRA apply in this situation?



Scenario 2 – Rights of Occupation

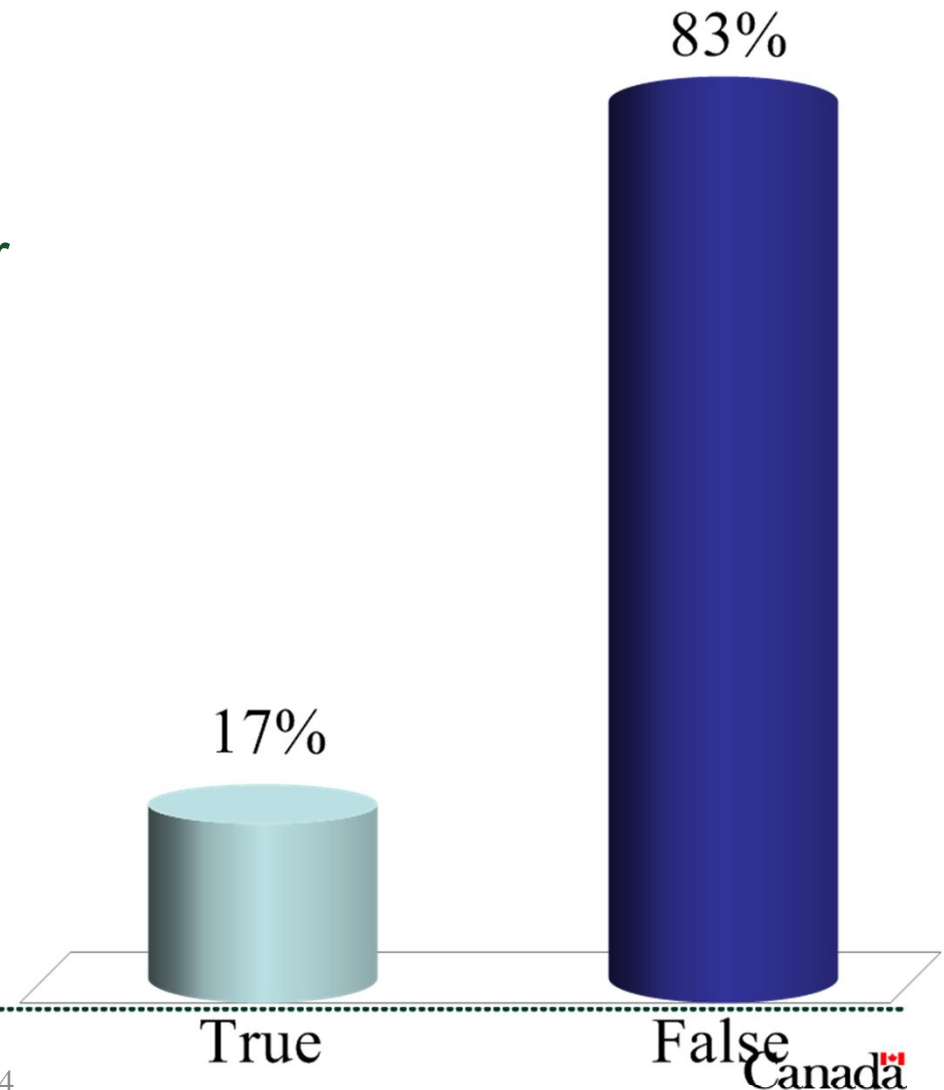
- **How could the FHRMIRA apply:**
 - The Act establishes that each spouse or common-law partner may occupy the family home during the conjugal relationship, whether or not that person is a First Nation member or an Indian. (Section 13)
 - Even if Pat already fled the house, she has the opportunity to apply for an EPO in provinces where a designated judge has been authorized. (s. 16)
 - In Saskatchewan, in the absence of a designated judge, Pat could still apply for an EOO. The process for obtaining an EOO is **not *ex parte*** and may not be as immediate as an application for an EPO. A judge must take into consideration several factors, including the best interest of the children, any family violence, etc. (Section 20)
 - It is important to note that Pat, in making the application for an EOO, must notify the band so that the First Nation may make representation to the courts regarding any legal, cultural, or social issues that the judge must also consider in determining whether or not the order should be made. Example: housing shortage (Sections 20(3)(c) and 41)
-





In the case of relationship breakdown, a spouse or common-law partner who is a MEMBER is entitled to a bigger share of the value of the family home than a spouse or common-law partner who is a NON-MEMBER.

- A. True
- B. False





FALSE. Each spouse or common-law partner, whether a member or a non-member, is entitled on application to an amount equal to one half of the value of the interest or right that is held by at least one of them in or to the family home (the structure only).

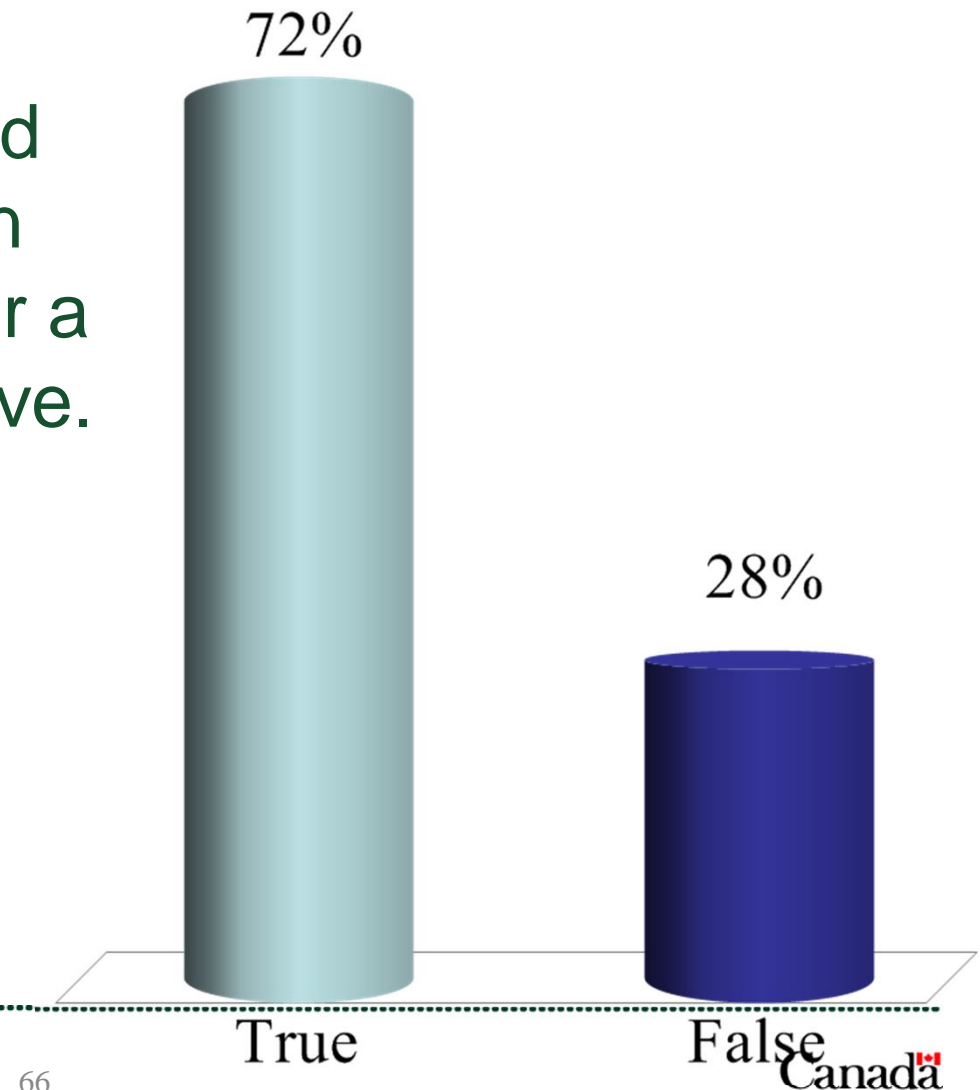
The division could be different where a spouse or common-law partner **who is a member** of the First Nation may also be entitled to share in the value of the land.

See s. 28(1) of the Provisional Federal Rules.



A court in the province in which a reserve is situated can determine whether an “interest or right” exists for a structure or land on reserve.

- A. True
- B. False





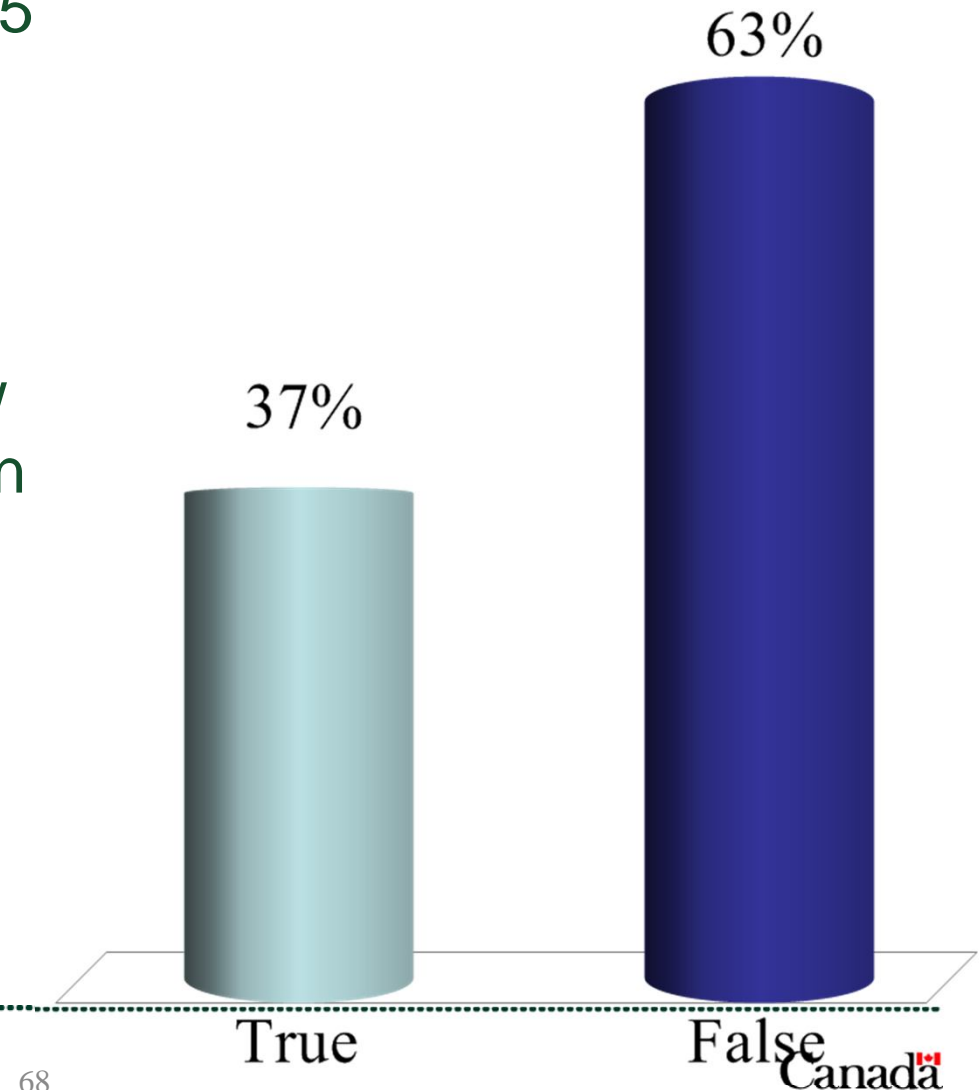
TRUE. A court may, by order, determine whether a spouse or common-law partner, a survivor, or the estate of a deceased spouse or common-law partner holds an interest or right in or to a structure or land situated on reserve.

See s. 48 of the Provisional Federal Rules.



George married Sandy in 2015 after a whirlwind courtship. They moved into a house that George inherited from his father. The house alone is valued at 200K. They are now divorcing. Sandy is entitled, on application, to 100K with respect to the house.

- A. True
- B. False





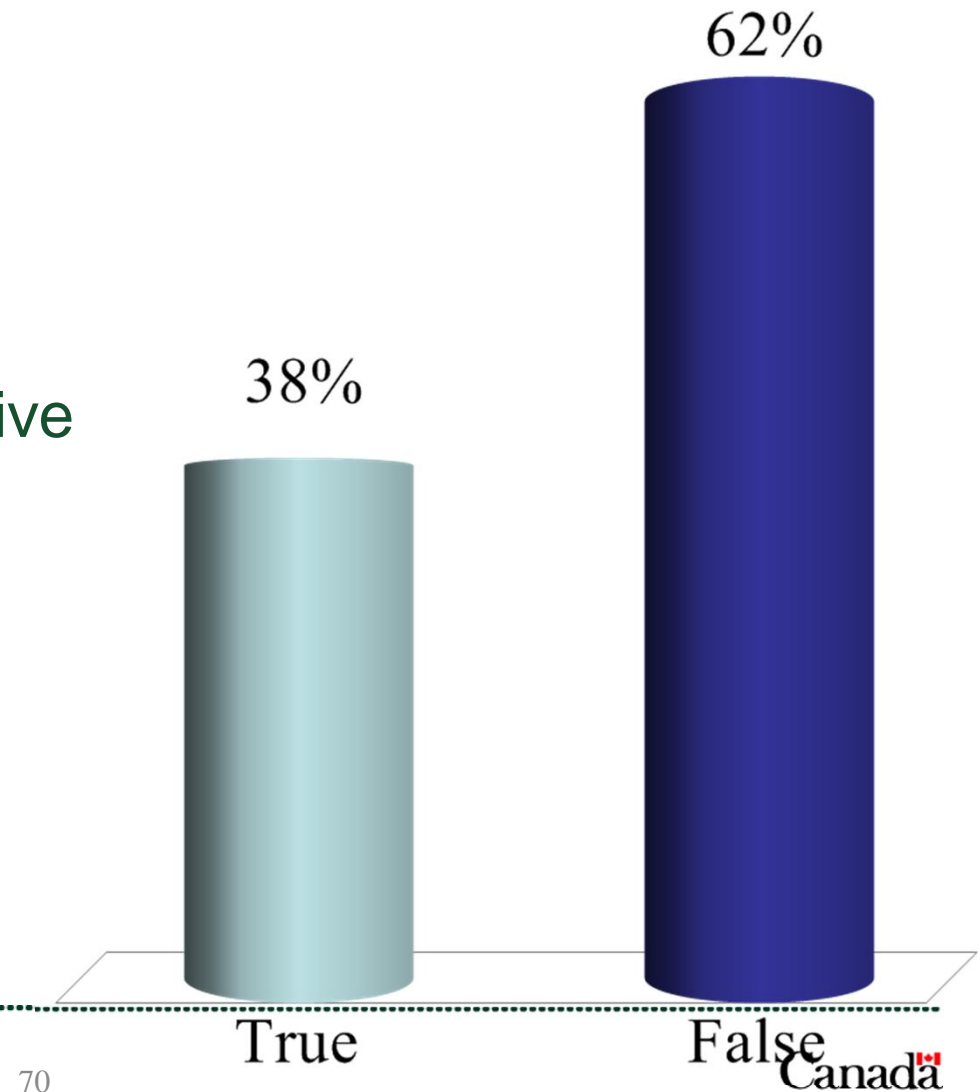
TRUE. Each spouse or common-law partner is entitled, on application, to one half of the value of the family home. Even though George inherited it, he and Sandy occupied the house as their family home. While inherited **land** is excluded from the division of value of matrimonial interests or rights, the **structure** is not excluded once it becomes their family home.

See s. 28(1) of the Provisional Federal Rules (and the definition of “matrimonial interests or rights”).



Earl inherited a property from his mother. He rents it to his cousin. He and his husband Bob are now separating. Bob can apply for a division of the value of both the house they live in and the rental property.

- A. True
- B. False





FALSE. Bob is not entitled to a division of the value of the rental property as the definition of matrimonial interests or rights excludes inherited property like the rental property in this situation.

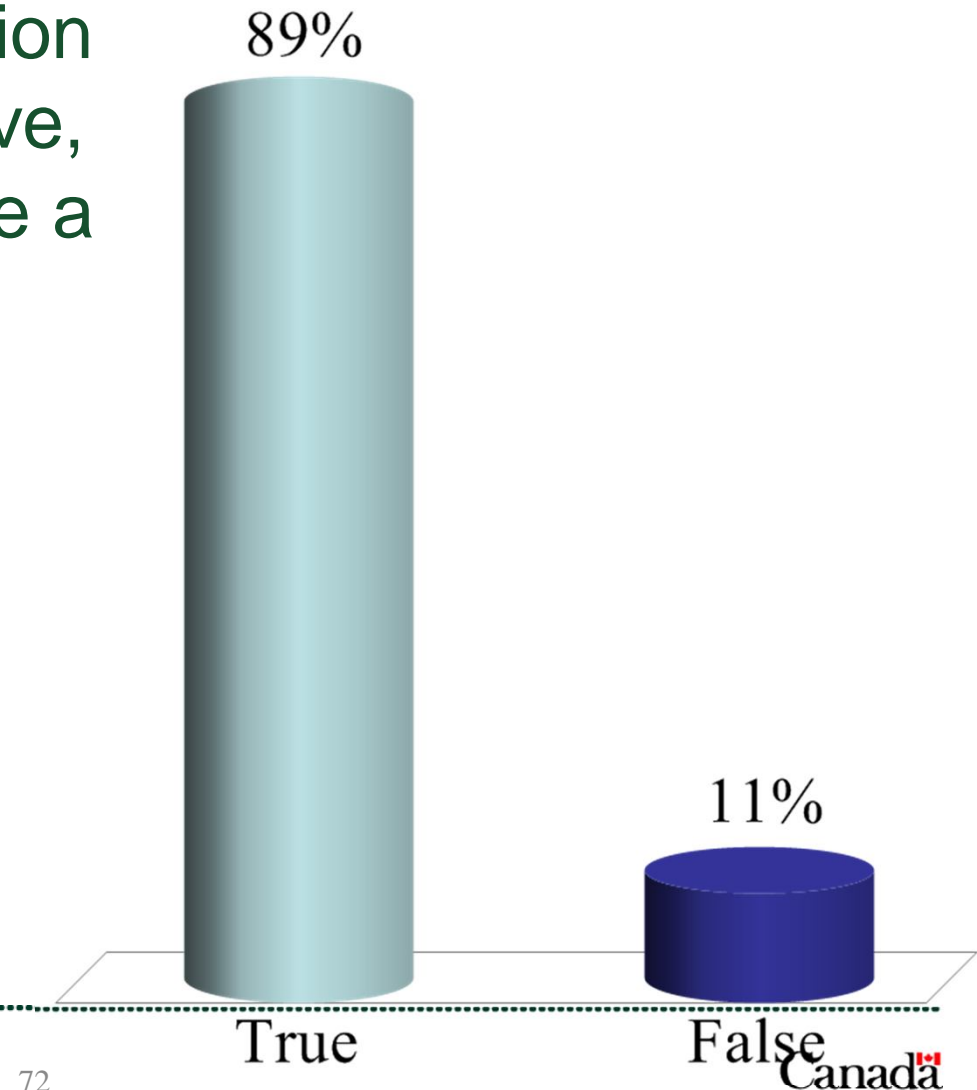
See the FHRMIRA definition of “matrimonial interests or rights”.

Note, however: the rental home would have lost its exemption had Bob and Earl occupied it as a family home.



When applying for a division of value of MRP on reserve, the applicant must provide a copy of the application to the council of any First Nation on whose reserve the property is located.

- A. True
- B. False





TRUE. See s. 41 of the Provisional Federal Rules - Notice to Council



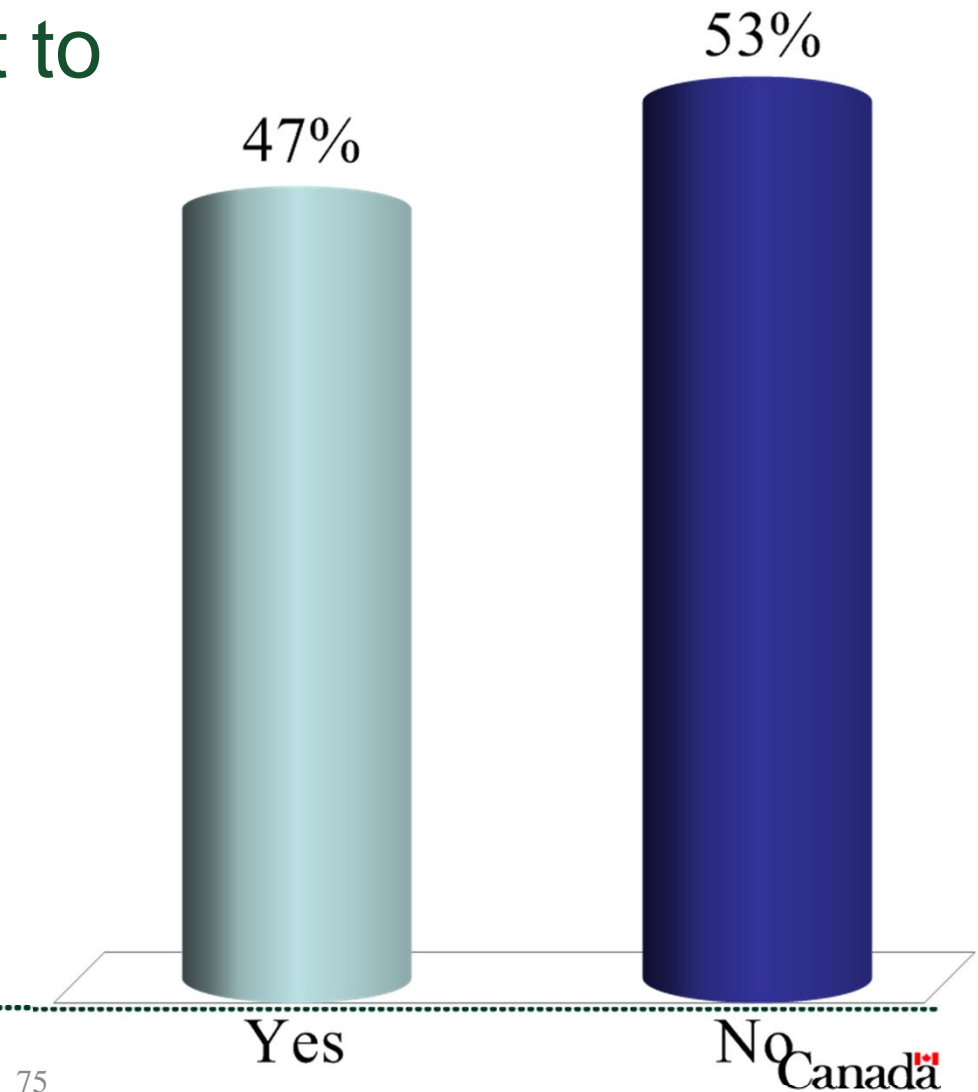
Scenario 3

- Kay and Phillip are both members resident on-reserve. They have been in a common-law relationship for 10 years and have 2 children together. Their family home is on one piece of property appraised at \$100,000 (including the land). There is \$20,000 outstanding on their mortgage.
 - There is a second piece of property that Kay received as an inheritance from her uncle. Before they could rent out the property, they made \$20,000 worth of improvements. Kay now rents out the property for \$500 a month.
 - Kay and Phillip are separating and Phillip has approached you for assistance with a separation agreement. The community has not made its own MRP law.
 - Phillip wants Kay to transfer the family home to him and suggests she could move into the inherited property. He would then continue to pay the mortgage.
 - Kay agrees but wants \$40,000 as compensation for her entitlement to the value of the family home.
-



Is this a fair settlement to the facts presented in Scenario 3?

- A. Yes
- B. No





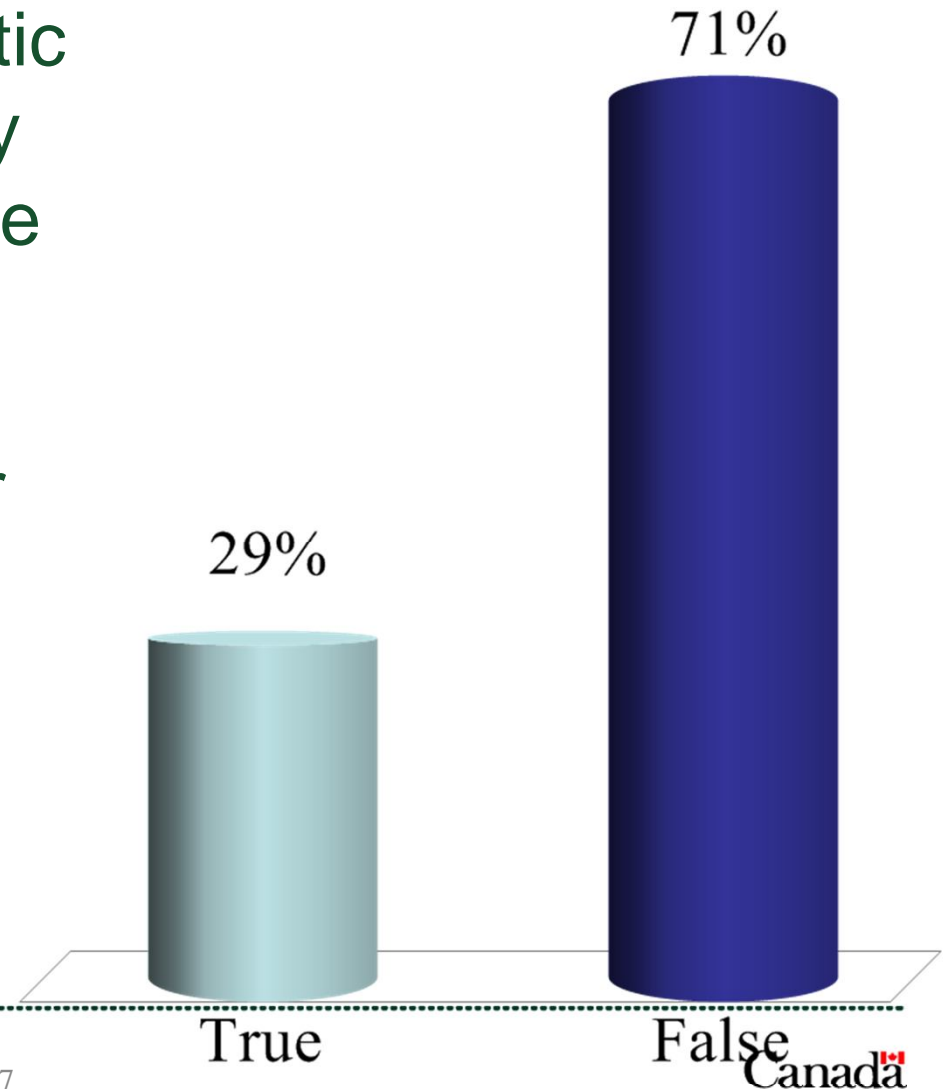
Scenario 3 - Division of Value: How might the FHRMIRA Provisional Federal Rules apply?.....

- Subsection 28(5) of the FHRMIRA allows for the couple to come to an agreement on how to divide the value of the matrimonial real property.
- If they cannot reach an agreement on their own, they could rely on the Provisional Federal Rules which contain division of value provisions.
- The division of value provisions take into account whether or not both spouses or partners are members.
- Valuation is based on the difference between the amount a buyer would reasonably be expected to pay for comparable interests or rights, and any outstanding debts or liabilities associated with the interests or rights. (subsection 28(4))
- Kay and Phillip:
 - Value of the Family home and land = $100 - 20 = \$80 \text{ K}$
 - Rental property excluded from the division of value as it was inherited.
 - Phillip to make mortgage payments and Kay to give up rental income.



A survivor has the automatic right to remain in the family home for **one year** after the death of his/her spouse or common-law partner whether or not the survivor is a member or an Indian.

- A. True
- B. False





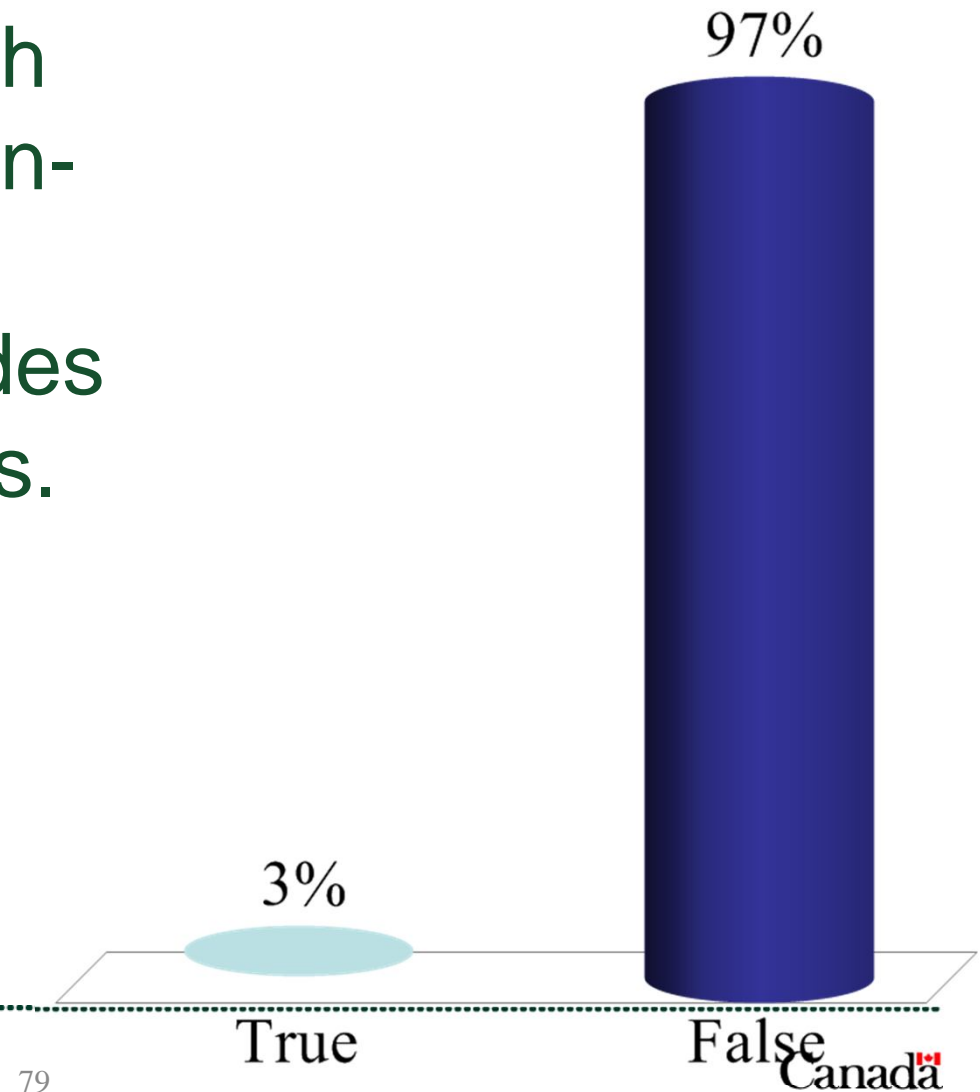
FALSE. The survivor has the automatic right to remain in the family home for **six months** (180 days) whether or not they are a member or an Indian.

See s. 14 of the Provisional Federal Rules.



In the case of the death of a spouse or common-law partner, the deceased's will overrides all other considerations.

- A. True
- B. False





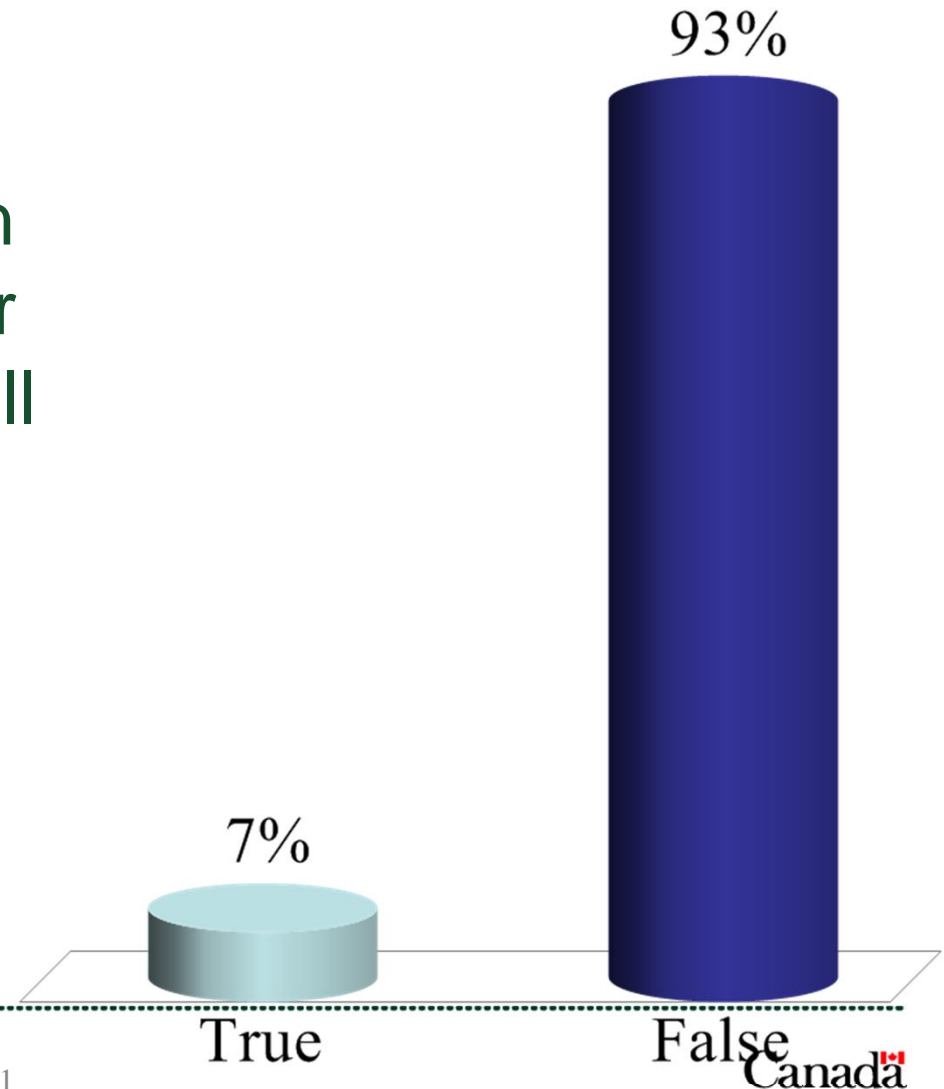
FALSE. The surviving spouse or common-law partner may **choose** to, within 10 months of the date of the death of their spouse or common-law partner, make an application to the court under s. 36 of the Provisional Federal Rules for a division of the value of the on-reserve matrimonial real property; however, if the court awards an amount, the survivor may not benefit from the deceased's will or from the intestacy provisions of the *Indian Act* with respect to the same on-reserve matrimonial real property.

See s. 37 of the Provisional Federal Rules.



Tina, a non-member survivor, has received an EOO under s. 21 to remain in the family home until her death. She can make a will leaving the property to her children.

- A. True
- B. False





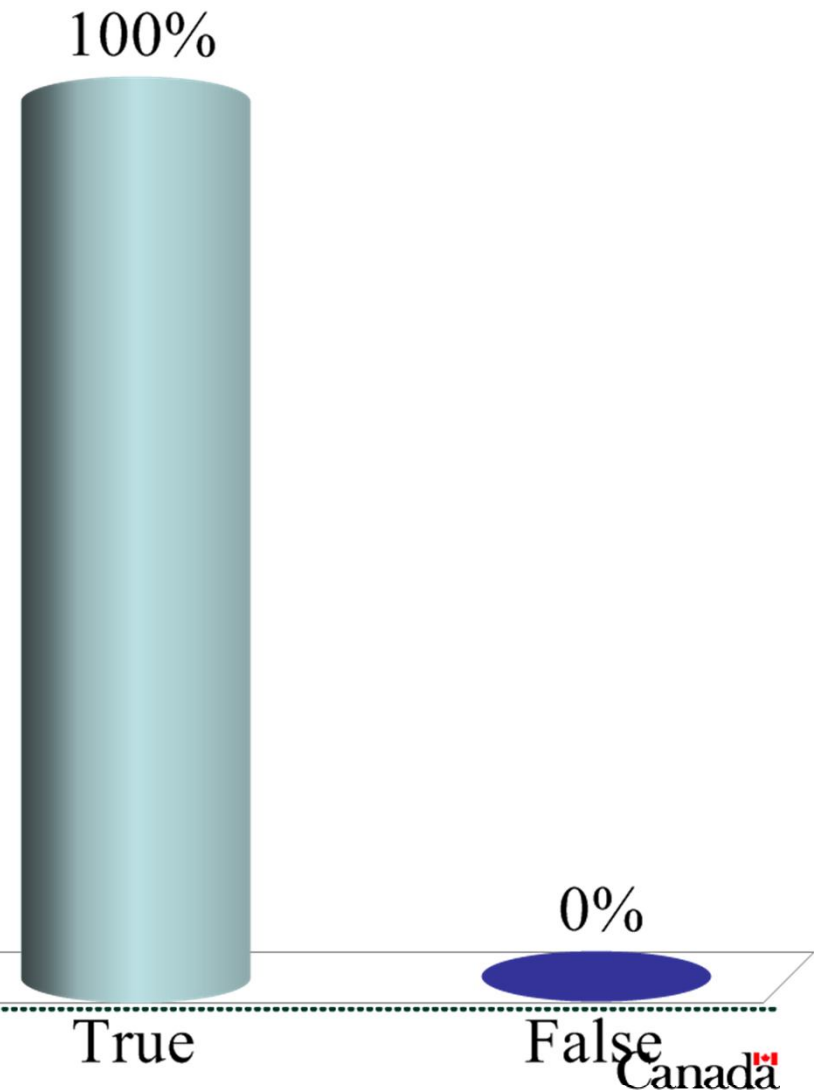
FALSE. Tina has a right under the s. 21 order only to **occupy** the family home. As a non-member, Tina could not hold a permanent interest or right to leave to her children (inalienability of reserve land). The transfer of any permanent interest or right would have been determined during the administration of Tina's deceased spouse's estate (e.g. in accordance with his will or s. 48 of the *Indian Act* if he died without one).

See s. 23 of the Provisional Federal Rules.



Jeff and Amy were tragically killed returning from a hunting trip (Amy survived Jeff by a few days in the hospital). They had been married for 20 years and had a home valued at 200 K on custom allotted land. They never had children of their own but Amy, a non-member, had grown children from a previous relationship. Despite the fact that the First Nation is not supportive, Amy's estate administrator could apply for a division of the value of the family home.

- A. True
- B. False





TRUE. Amy's estate administrator could probably make an application under sections 36 and 48 of the Provisional Federal Rules for a court order determining that Jeff's estate holds an interest or right in or to the MRP on reserve and that Amy's estate is entitled to a division of value (however, notice of the application must be provided to the council of the First Nation which may make representations to the court and present its views about whether or not the order should be made).

See ss. 41 and 48 of the Provisional Federal Rules.



Romeo died still married to Stella but at the time of his death he had been living with Liz in a common-law relationship. Both Stella **AND** Liz applied for, and were granted, an order for a division of the value of the family home. The executor of Romeo's estate must pay Liz's order first.

- A. True
- B. False





TRUE. The executor of the will or the administrator of the estate must pay the survivor who was the common-law partner before paying the survivor who was the spouse.

See s. 38(3) of the Provisional Federal Rules.



Henry was allotted a band house under the community's social housing program. He has lived in the house for 10 years with his common-law partner. It has been the band's practice to allow its members to will their home on death. Henry passed away and in his will he leaves his house to his son Jesse. Henry's partner can make an application for division of the 15K improvements that they made to the kitchen.

- A. True
- B. False





TRUE. Henry’s partner may apply for a division of the value of the on-reserve MRP; however, in this case the application will depend on whether or not the court determines that (as a survivor) Henry’s partner holds an “interest or right” in or to the home or land situated on reserve, or whether or not the First Nation recognizes an “interest or right” in or to the house for which Henry’s partner could seek some kind of division of value.

See the FHRMIRA definition of “interest or right” (para. c) and s. 48 of the Provisional Federal Rules.



Scenario 4

- Jiggs Stonethistle married Darlene (a non-member). They lived with their children in a band owned home that was originally occupied by Jigg's parents. Over the past ten years, they had made many improvements to the home.
- Unfortunately, Jiggs passed away unexpectedly. Darlene was left in the family home with the 3 children.
- The day after the funeral, Jiggs' sister, Fiona, started removing Darlene's belongings from the home. Fiona demanded that Darlene must leave the home, because in her opinion, she was the next in line for it within the Stonethistle family.
- Darlene wants to stay in the family home (even though she is a non-member) to raise their 3 children.
- Fiona continues to threaten Darlene to get out of "her" home.
- You have been retained by Darlene. What options and advice will you present to her?





Scenario 4 – Estates: How would the Provisional Federal Rules apply?

- Under the Provisional Federal Rules, Darlene has the right to occupy the house for 180 days after Jiggs’s death, even if she is a non-member of that First Nation. (Section 14)
 - Darlene could apply for an Exclusive Occupation Order (EOO) to remain in the house with her children for a fixed period of time determined by a judge. In making an EOO, the judge must consider a numbers of factors, including for example the best interest of the children, the collective interests of First Nation members, the medical condition of the survivor, etc. (Section 21)
 - It is worth noting that Darlene has to notify the band if she files an application for an EOO so that the First Nation can make representations to the courts with respect to the cultural, social and legal context and raise any concerns or views they may have about the order (e.g. housing policies). (Section 41)
 - If Jiggs and Darlene had been renting the family home under a lease, Darlene would still be bound by that lease during the period of any EOO awarded by the court. (Section 26)
 - Depending on whether or not there is a court-ordered, or First Nation-recognized, “interest or right” in or to the band owned home, Darlene, as a survivor, may have the option of applying for division of value of the family home. (Section 2 – para. (c) of “interest or right”, and sections 36 and 48)
-



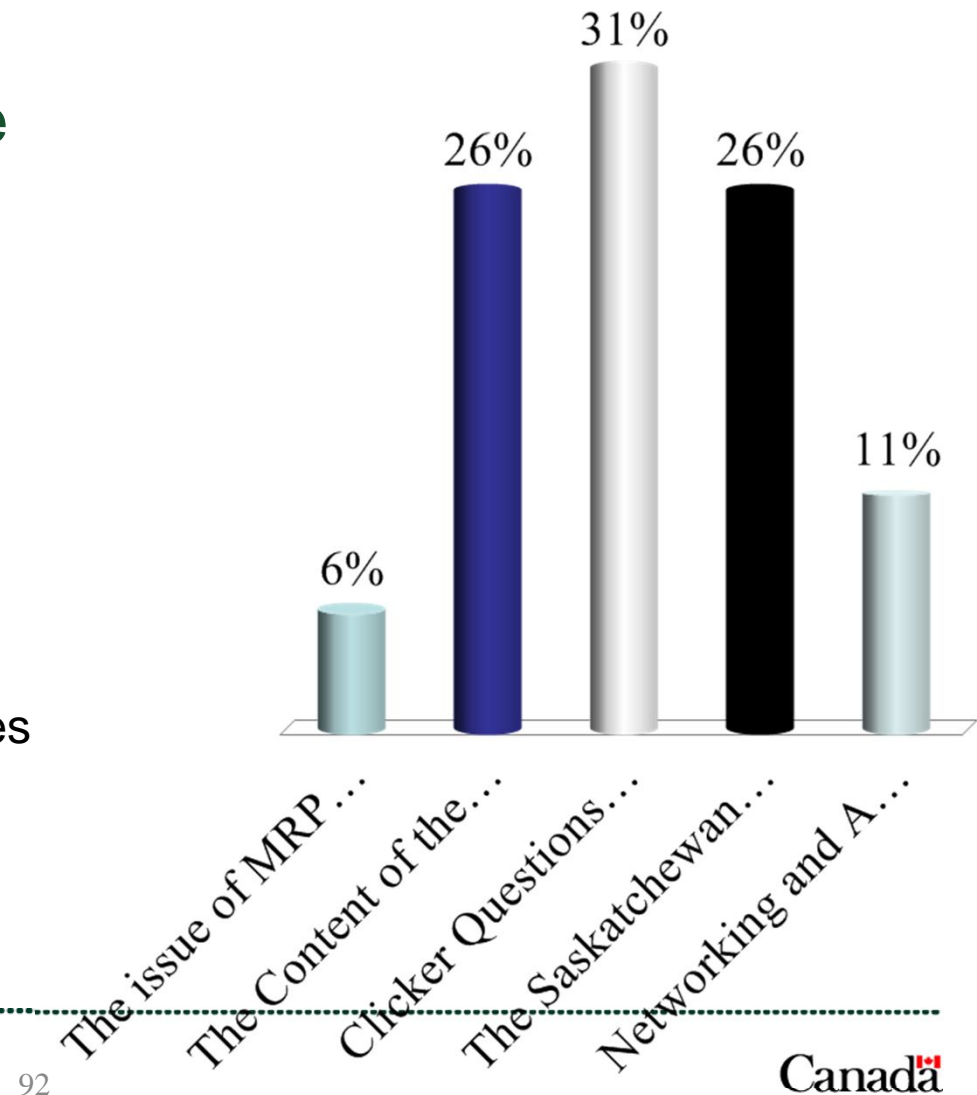
POST-COURSE SURVEY





What part of the session did you find most useful? (choose all that apply)

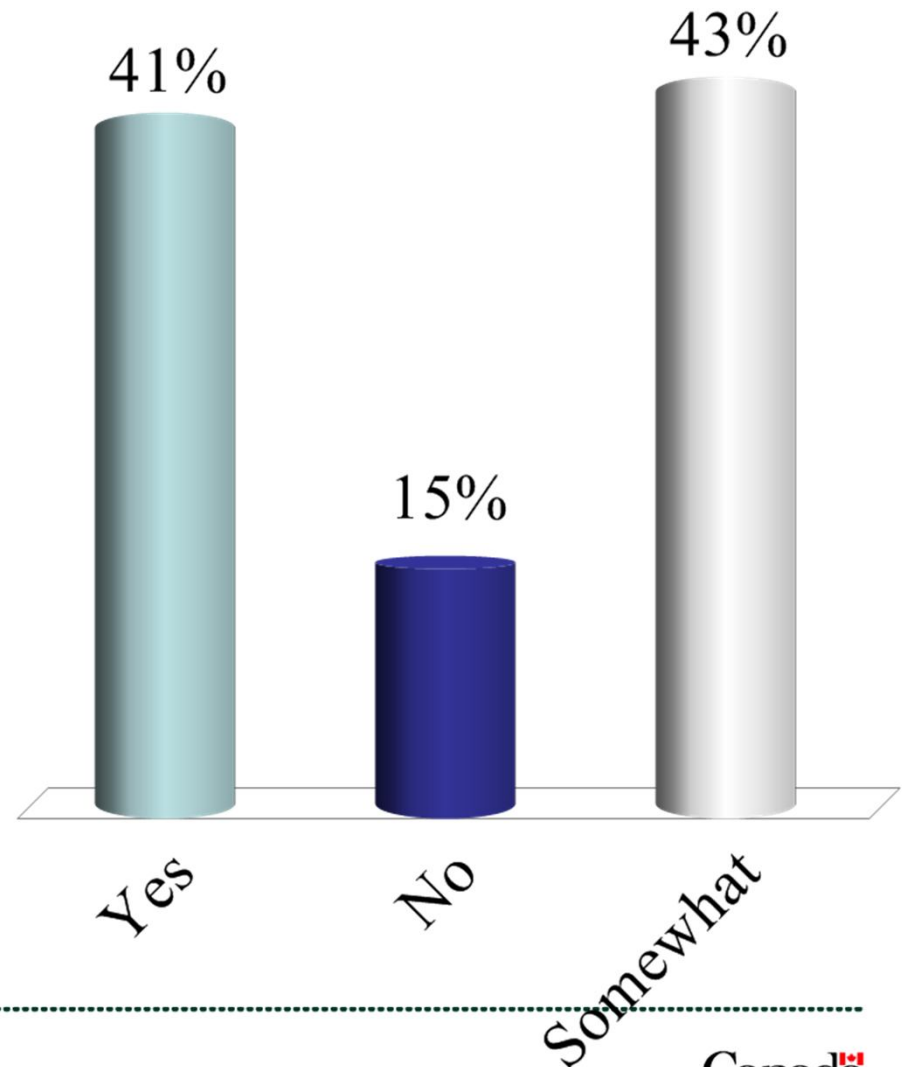
- A. The issue of MRP and Background Info
- B. The Content of the Legislation
- C. Clicker Questions and Scenarios applying the FHRMIRA
- D. The Saskatchewan Perspective
- E. Networking and Additional Resources





Do you feel the information you received today will benefit you in your role?

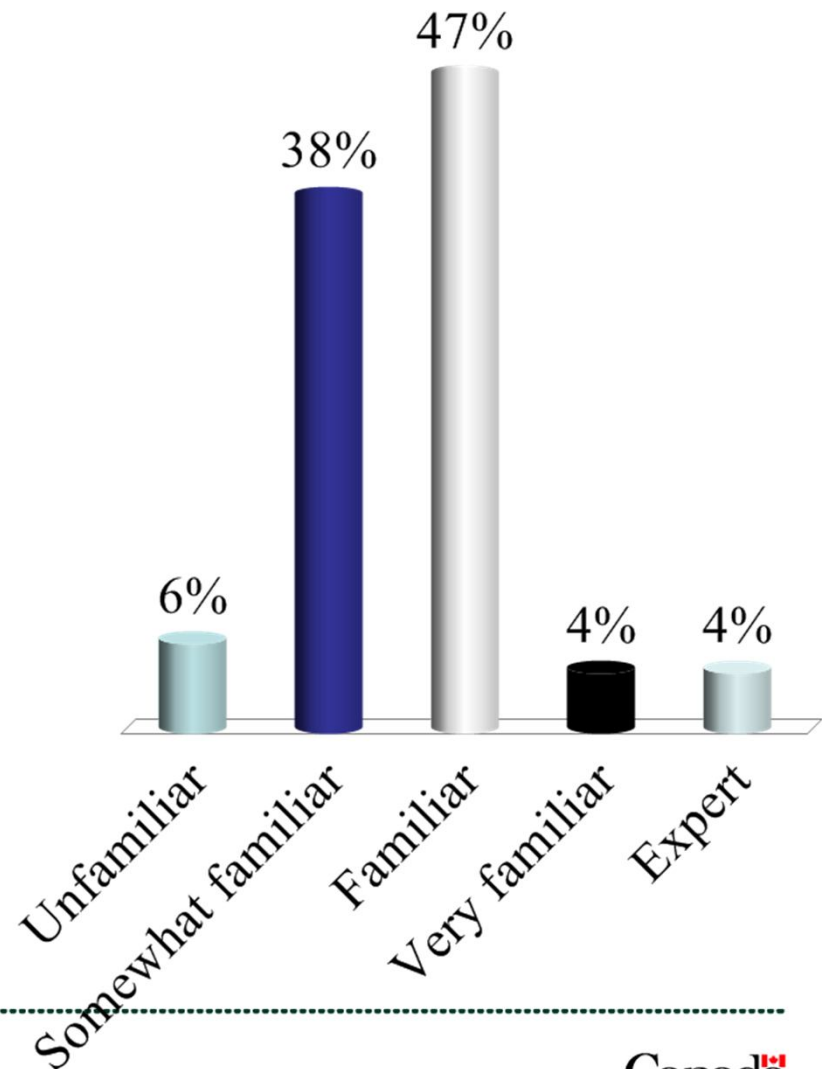
- A. Yes
- B. No
- C. Somewhat





Having now completed this course, how would you rate your familiarity with this issue of matrimonial real property on-reserve?

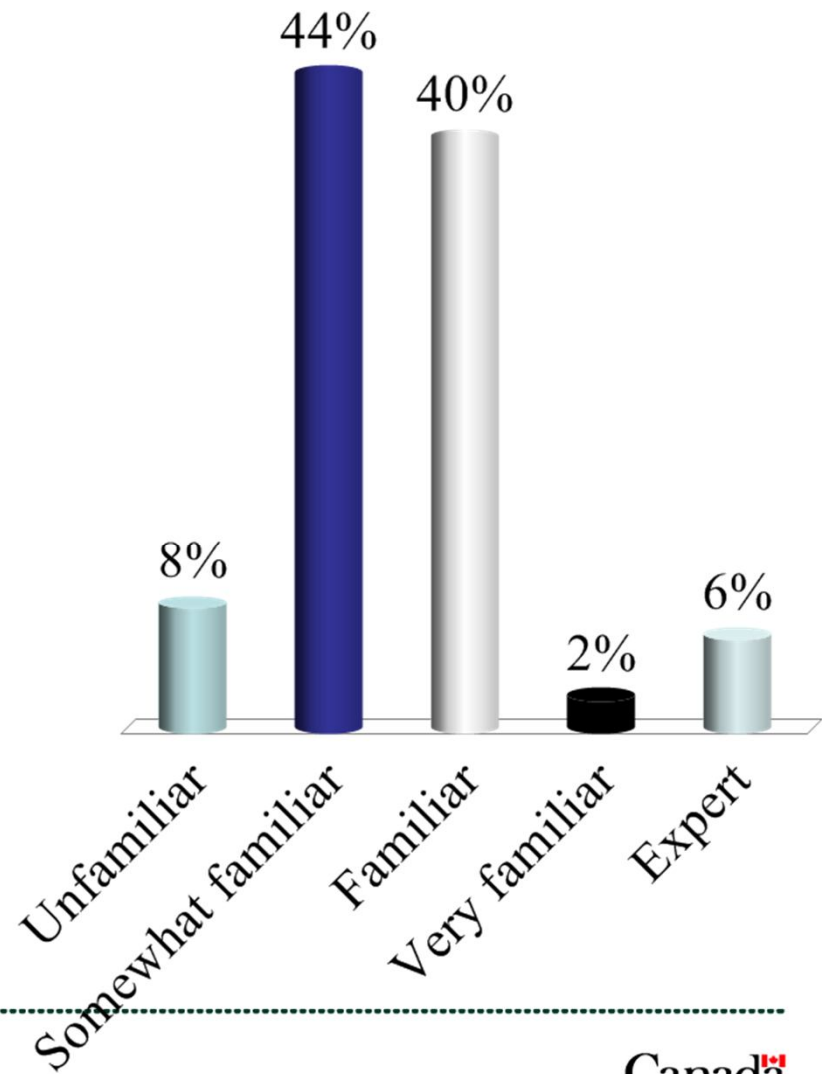
- A. Unfamiliar
- B. Somewhat familiar
- C. Familiar
- D. Very familiar
- E. Expert





Having now completed this course, how would you rate your familiarity with the *Family Homes on Reserves and Matrimonial Interests or Rights Act*?

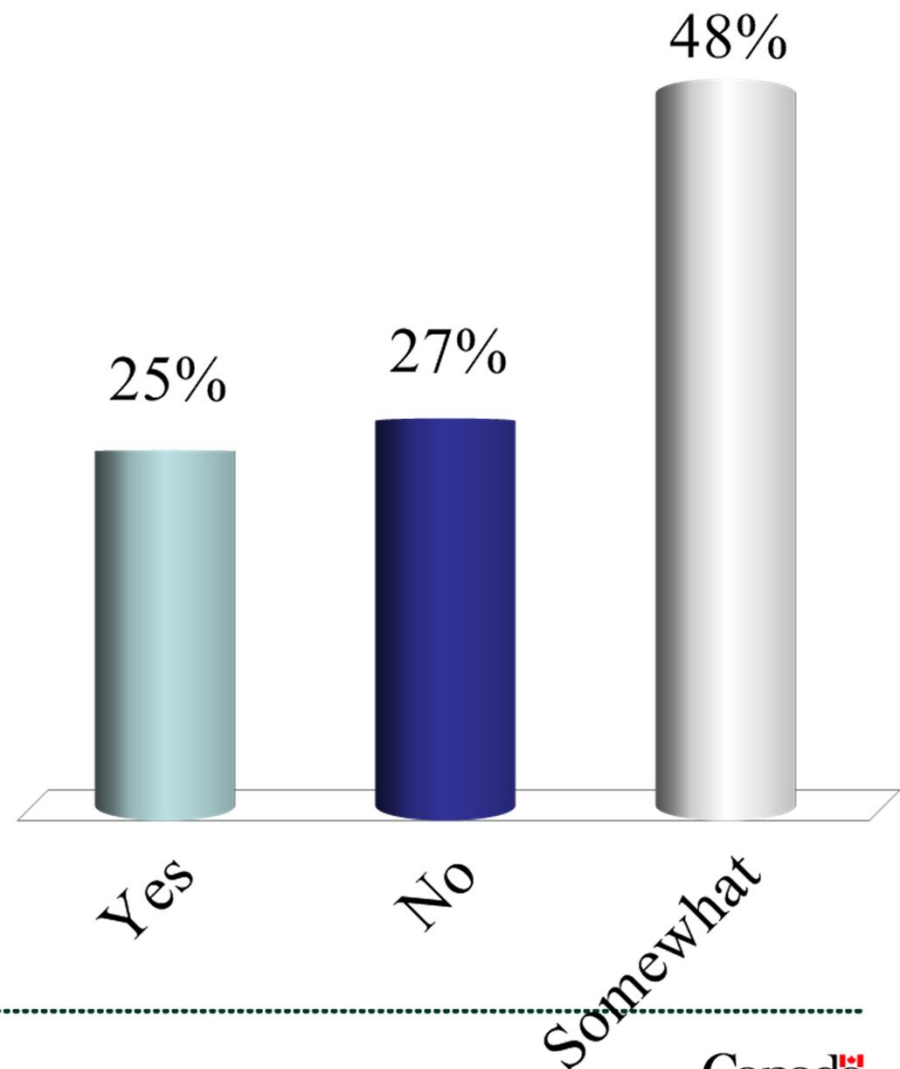
- A. Unfamiliar
- B. Somewhat familiar
- C. Familiar
- D. Very familiar
- E. Expert





Would you feel comfortable providing advice to an individual respecting their rights and protections under the Act?

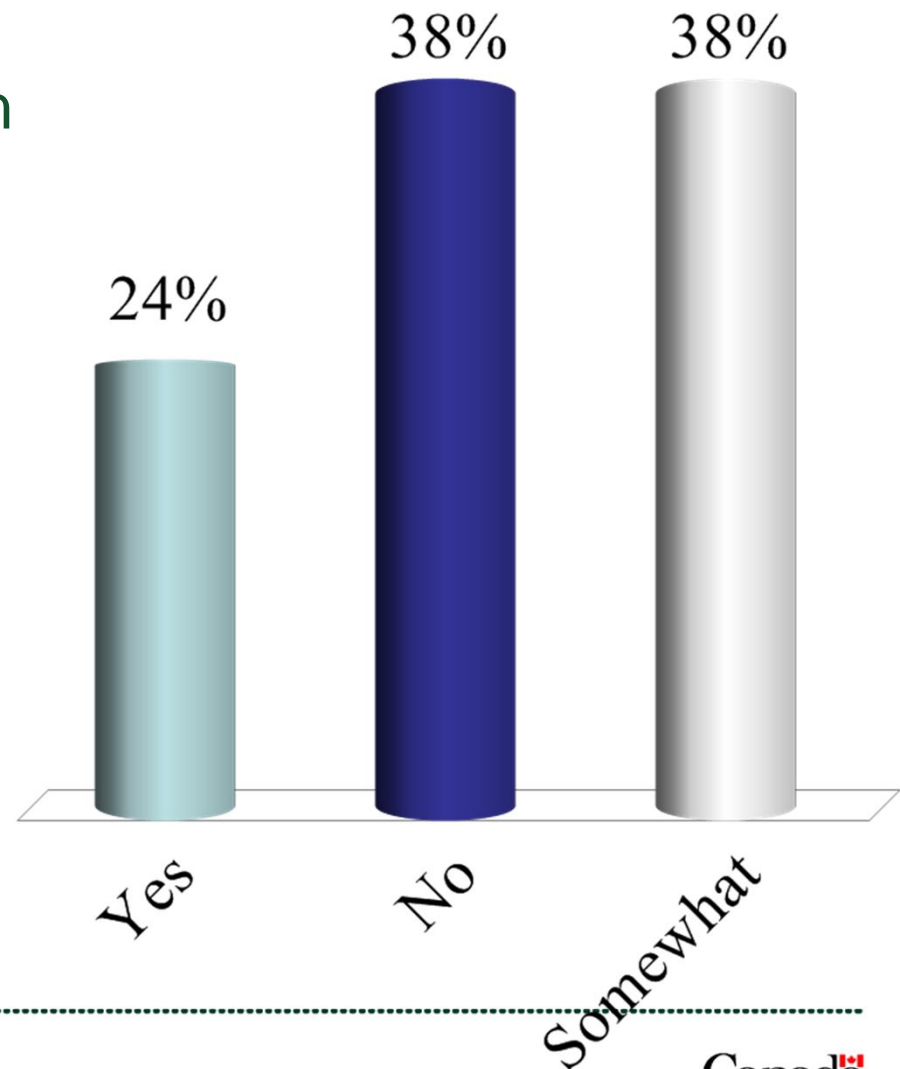
- A. Yes
- B. No
- C. Somewhat





Would you feel comfortable providing advice to a First Nation community respecting its powers, rights and responsibilities under the Act?

- A. Yes
- B. No
- C. Somewhat





Contact Us

If you have further questions or comments, you can contact the Implementation Policy Team, Community Lands Development, Crown-Indigenous Relations and Northern Affairs Canada:

aadnc.mrp-bim.aandc@canada.ca