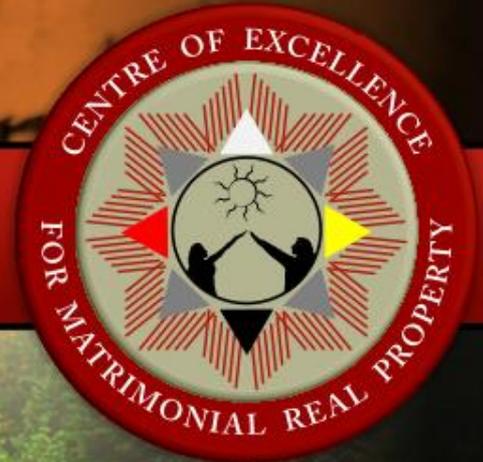


**CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY**



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



TOPICS

1. What is MRP?
2. Why was legislation necessary?
3. What is the Family Homes on Reserves and Matrimonial Interests or Rights Act?
4. Rights and Powers conferred by the Act.
 - Powers of the First Nation to enact laws;
 - Provisional Federal Rules.
5. Balancing Collective and Individual Rights.
6. Coming into Force.
7. Questions??

WHAT IS MATRIMONIAL REAL PROPERTY

- **Matrimonial real property is land held by one or both spouses or common-law partners and used by the family. It may include houses, sheds and any other property that is securely attached to the land.**
- **Personal property is the movable assets. eg. furniture, cars, cash etc.**

DIVISION OF POWERS

INTERPLAY BETWEEN FEDERAL AND PROVINCIAL LEGISLATION

Under the Constitution Act of 1867:

■ Powers of Parliament

- Section 91(24) “Indians and Lands reserved for the Indians”
- Section 91(26) Marriage and Divorce

■ Powers of Provincial Legislatures

- Section 92(13) Property and Civil Rights in the Province (including matters related to Family Law)

DERRICKSON V. DERRICKSON, [1986] 1 S.C.R. 285

- **Rose Derrickson and William Derrickson were members of Westbank Indian Band in British Columbia.**
- **When petitioning for divorce, one spouse made application under part 3 of the Family Relations Act (BC family law regime) for one-half of the interests in the Certificates of Possession (or compensation in lieu) that had been allotted to the other spouse under Section 20 of the Indian Act.**

WHY DID WE DID WE NEED LEGISLATION?

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

ADDRESSING THE GAP

- Over the almost 30 years since the Supreme Court decision in *Derrickson v. Derrickson*, Indigenous and Northern Affairs Canada (INAC) has considered various approaches to addressing the gap.

ADDRESSING THE GAP

- ***Federal Aboriginal Self-Government Policy***
 - Guidelines to ensure that on-reserve MRP interests or rights are incorporated in self government agreements involving reserve land management.

ADDRESSING THE GAP

- ***First Nation Land Management Act (1999)***
 - Signatory First Nations develop Land Codes to manage their reserve lands.
 - Provides **12** months from the date that a Nation's land code takes effect to enact the rules and procedures dealing with matrimonial rights or interests in reserve land into their land code or a First Nation law

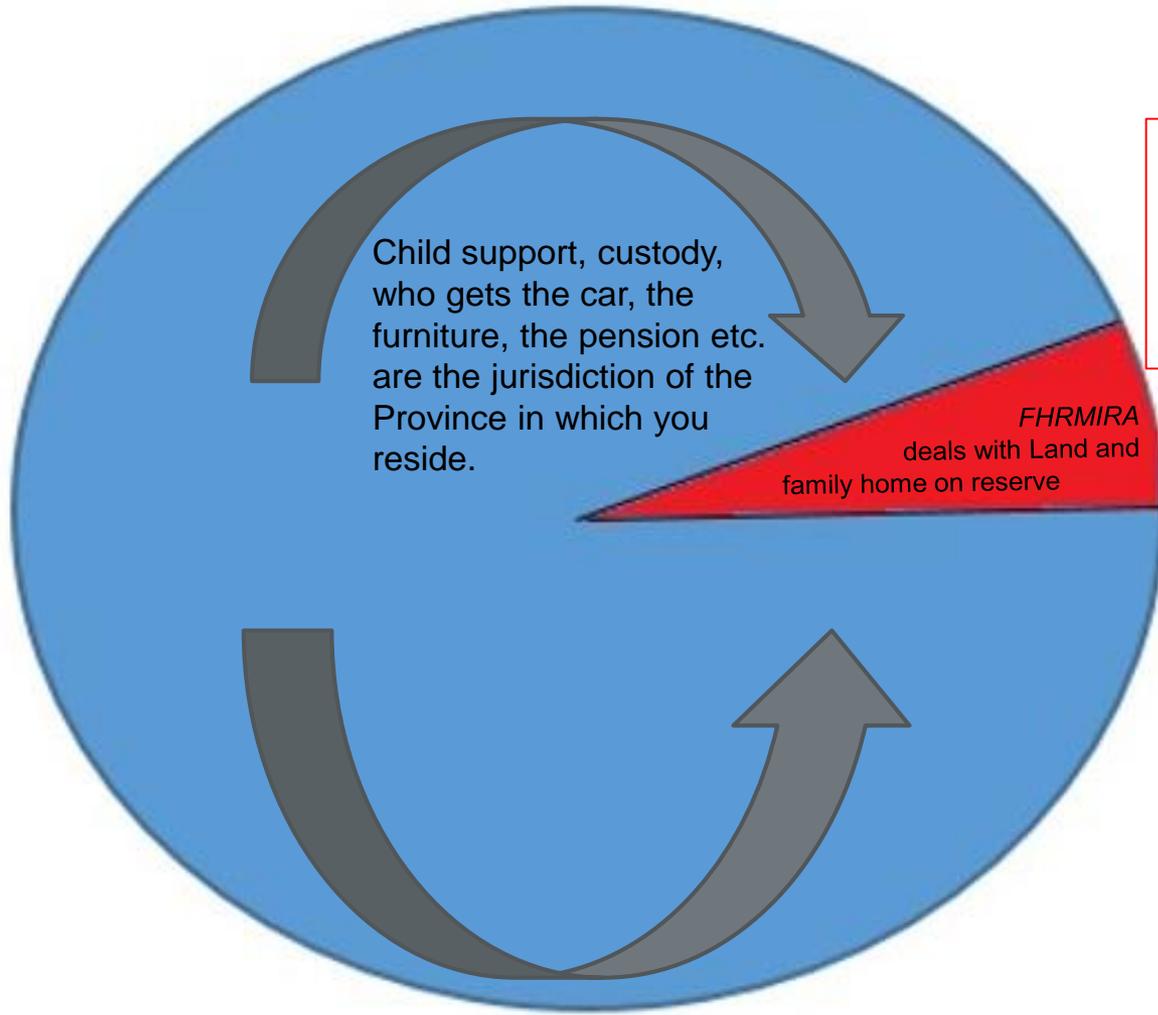
ADDRESSING THE GAP

- Even with those initiatives, the number of First Nations who developed measures to deal with matrimonial real property was small.
- There remained very few protections for spouses and common-law partners on reserve experiencing relationship breakdown or the death of a spouse.

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

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) was enacted to ensure that people living on reserves have similar protections and rights as other Canadians when it comes to the family home and the division of interests or rights.
- FHRMIRA applies on your reserve now and until you enact your own MRP Law.

FHRMIRA AND PROVINCIAL FAMILY LAW



Your law will replace FHRMIRA once enacted.

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

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the Act) is federal legislation.
- Sections 7-11, the First Nation lawmaking provisions, came into force on December 16th, 2013.
- The Provisional Federal Rules contained in sections 12-52 came in to force on December 16th, 2014

THE ACT

Provides rights to spouses during a relationship and **after it ends (divorce, separation or death)** with respect to 2 major issues:

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

The Act has two main parts

FN Law-Making Mechanism

(Took effect Dec 16, 2013)

- FN submits proposed law to members for approval
- Proper notice to members re: voting
- At least 25% of members must vote
- Law approved if majority achieved

Provisional Federal Rules

(Took effect Dec 16, 2014)

Provides laws for dealing with matrimonial real property until FN passes its own MRP law.

IMPORTANT DEFINITIONS

- **“*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.

IMPORTANT DEFINITIONS

- “*spouse*” includes either of two persons who have entered in good faith into a marriage that is voidable or void.
- “*common-law partner*” means a person who is cohabiting with another individual in a conjugal relationship, having so cohabited for a period of at least one year;

Your MRP Law (or land code if FNLMA) might define common-law differently

IMPORTANT DEFINITIONS

- *“other matrimonial interests or rights”*
 - means interests or rights, other than interests or rights in or to the family home, (see the *Act* for complete definition)
 - **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.**

WHO IS AFFECTED BY THE PROVISIONAL FEDERAL RULES?

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

NOT RETROACTIVE

- **The Provisional Federal Rules cannot be applied retroactively.**
- **They only apply in situations where the relationship breakdown or the death of the spouse occurred on or after December 16th, 2014.** (coming into force date of the Provisional Federal Rules)

NOT RETROACTIVE - EXCEPTION

- First Nations who were on the schedule to the Framework Agreement on FNLMA on the date of Royal Assent (June 19th, 2013) received an extension before the provisional federal rules began to apply.
- For those Nations, the PRF's began to apply June 19th 2016.
- **It is important for you to know when the PFR's began to apply in your Nation.**

COLLECTIVE AND INDIVIDUAL RIGHTS

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

COLLECTIVE AND INDIVIDUAL RIGHTS

- **This Act is intended to balance:**
 - **The collective interest of the First Nation in its reserve lands and the individual rights of spouses and common-law partners resident on reserve**

NOTICE TO COUNCIL

- In order to facilitate that balance, the provisional federal rules provide for **First Nations to be notified** in regard to any proceedings under the legislation so they may make representations to the courts about the cultural, social and legal context relevant to the proceedings.
- **This does not apply in the case of emergency protection and confidentiality orders.**

PROVISIONAL FEDERAL RULES

- **The provisional federal rules provide a set of interim rules that allow married spouses and common-law partners to determine what they are entitled to when their relationship breaks down or upon the death of a spouse.**
- **The Act applies to married couples and common law partners living on reserve where at least one of them is a First Nation member or an Indian.**

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Section 13**
 - Confirms the right of each spouse or common-law partner to occupy the family home during the conjugal relationship

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

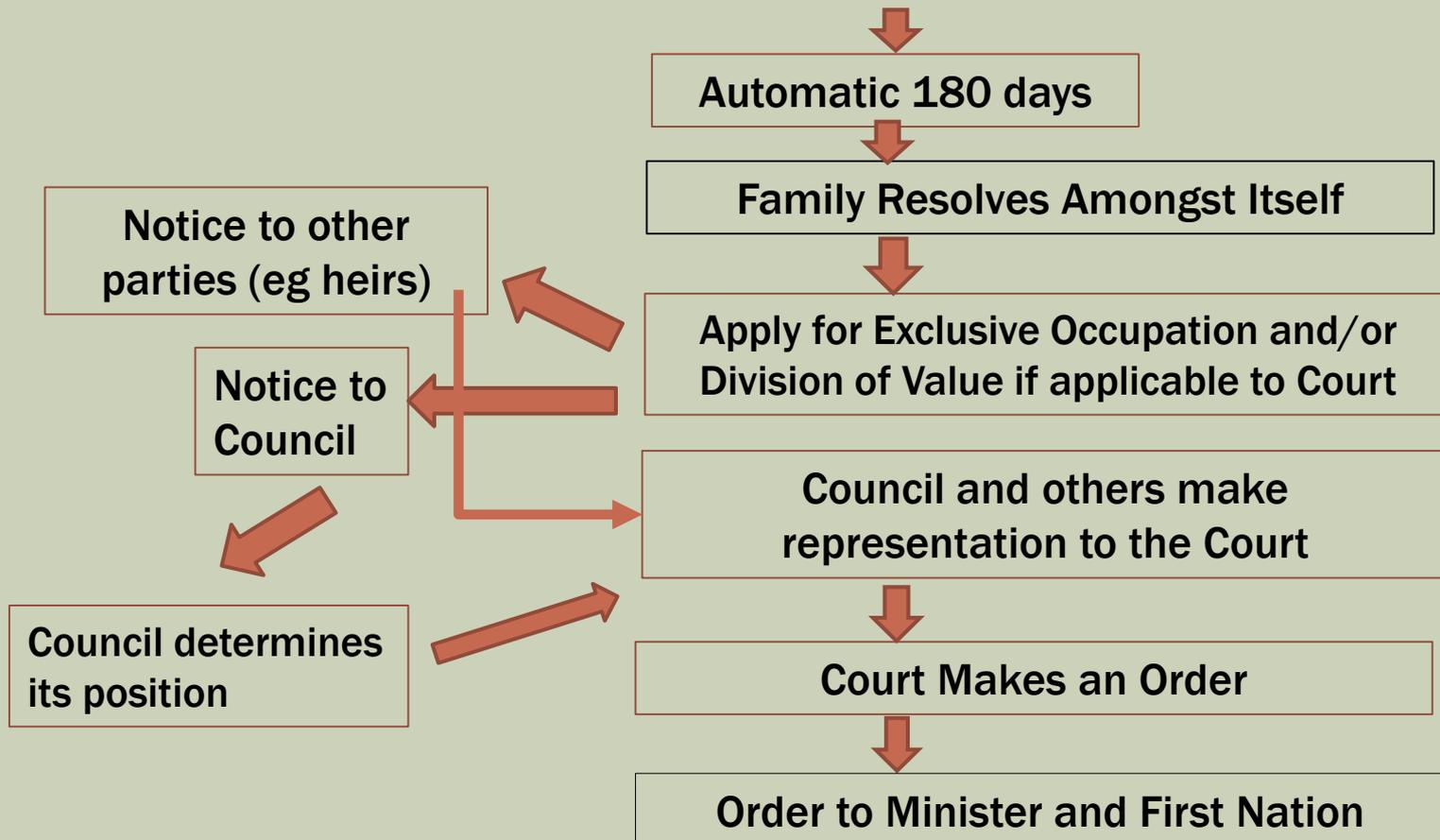
- **Section 14**
 - **Provides that when a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for a specified period of time (minimum 180 days);**



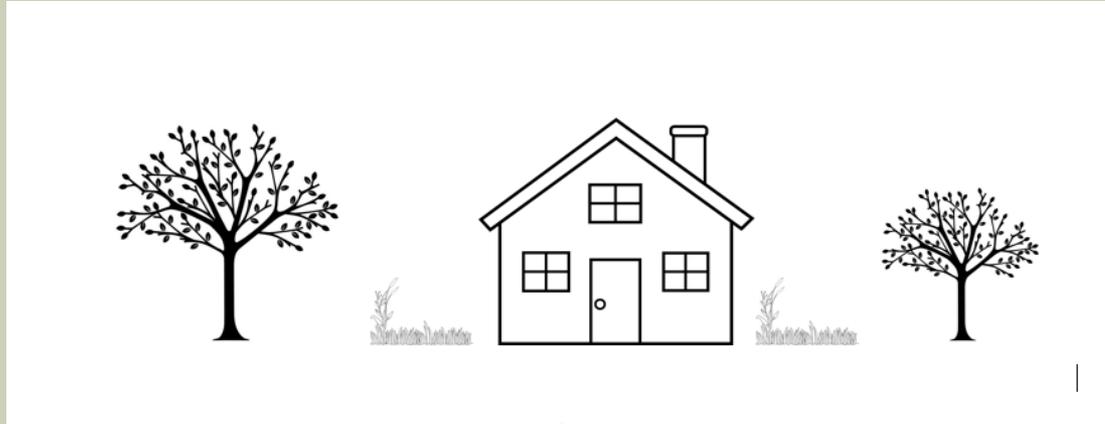
RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Section 34**
 - **Allows for a survivor to make application under the provisional federal rules for half of the value of the Matrimonial Real Property interests or rights as an alternative to inheriting from the estate of the deceased.**

Rights and Remedies on Death of Spouse or Common-Law Partner



Division of Value on Death of Spouse where CP is held



If property is held in joint tenancy, it passes automatically to the survivor and does not form part of the estate. If land is not held jointly, estate rules must be considered

Will

- Estate managed in accordance with Indian Act
- Land would be transferred to heir
- Survivor has options (FHRMIRA)

- EOO application

- Division application

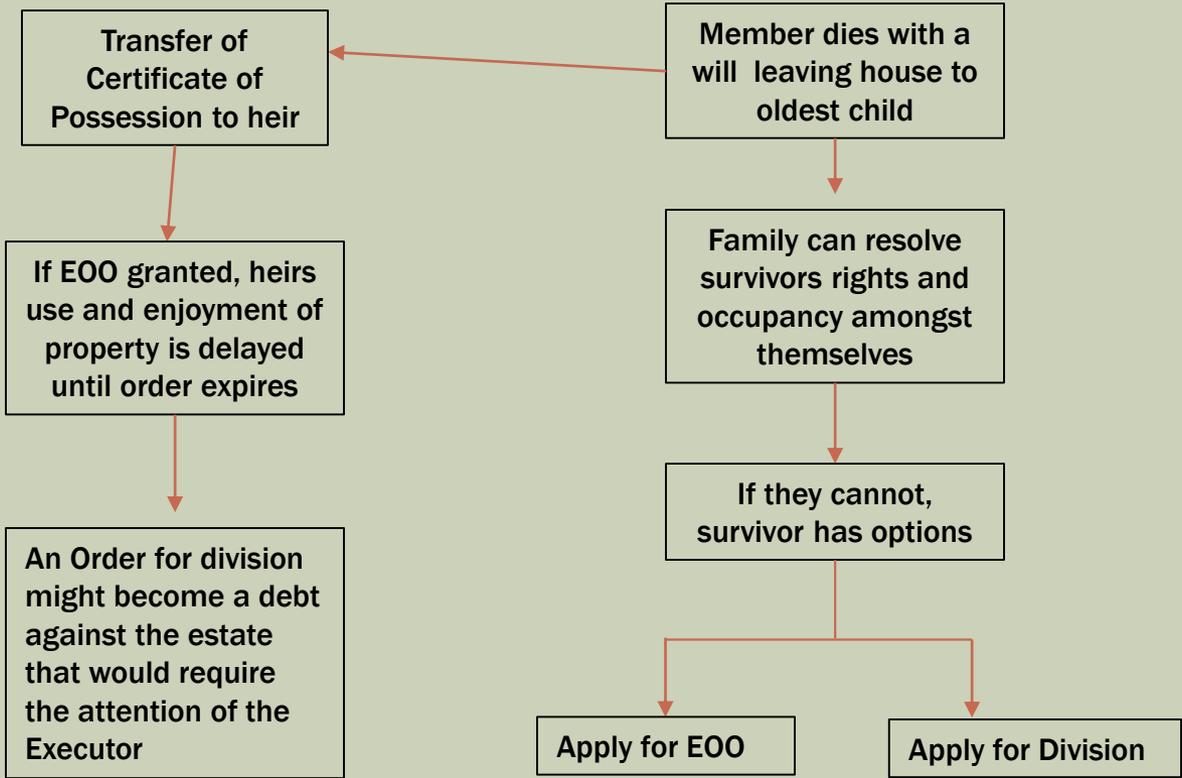
No Will

- Estate managed in accordance with section 48 of Indian Act
- Survivor has options (FHRMIRA)

- EOO application

- Division application

**** Note: survivor could apply for both EOO and Division**



RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Section 15**
 - Provides requirement for consent of spouse or common-law partner to dispose of or encumber the family home

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Sections 16-19**
 - Provides for emergency protection orders in the case of family violence to ensure the immediate protection of a person who is at risk of harm or a property that is at risk of damage (s.s 16-19);

EMERGENCY PROTECTION ORDERS NOT YET AVAILABLE

- **Emergency protection order (EPO):**
 - FHRMIRA provides for the lieutenant governor in council of the province to designate judges for the purposes of sections 16-19 of the Act.
 - Most provinces have chosen not to designate judges for the time being.
 - Without designated judges, emergency protection orders under s.s 16-19 **are not currently available.**
 - **Note:** New Brunswick is the only province to do so.

EMERGENCY PROTECTION ORDERS NOT YET AVAILABLE

- **A victim of family violence still has the option of applying for an Exclusive Occupation Order. However, access to the family court may not happen quite as quickly as it would have had judges been designated by the Province.**

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Sections 20 and 21**
 - **Provides for application for temporary exclusive occupation of the family home**
 - **s.20 applies to separation**
 - **s.21 applies on death of spouse or common-law partner**

EXCLUSIVE OCCUPATION ORDERS UNDER THE PROVISIONAL FEDERAL RULES

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

EXCLUSIVE OCCUPATION ORDERS UNDER THE PROVISIONAL FEDERAL RULES

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

Application for Exclusive Occupation on Separation



Come to agreement together or through mediation

One spouse may apply for Exclusive Occupation

Council and others make representation to the Court

Court Makes an Order

Order to Minister and First Nation

Notice to other parties

Notice to Council

Council determines its position

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- **Sections 28-31**
- **division of the value of matrimonial interests or rights**

RIGHTS AND PROTECTIONS UNDER THE PROVISIONAL FEDERAL RULES

- Entitlement of each spouse or common-law partner to an equal division of the value of the family home and other matrimonial interests or rights:
 - ensures that the proven value of a couple's matrimonial interests or rights in, or to, the family home and other structures 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)

Division of Value where CP is held



Come to agreement together or through mediation

Notice to spouse (others?)

Apply for Division of Value - Court

Notice to Council

Council and others make representation to the Court

Council determines its position

Court Makes an Order

Order to Minister and First Nation

Division of Value Calculation



Member and Member

$\frac{1}{2}$ value of family home = \$50 K
 $\frac{1}{2}$ value of land = \$10 K
Possible Division \$60,000.00

Member and Non-Member

$\frac{1}{2}$ value of the Family Home = \$50K
Possible Division - \$50,000.00

**Note: Non-members cannot share
in the value of the land**

Other Matrimonial Interests or Rights



Value of Family Home is always divisible unless a legally binding domestic agreement was made between the parties

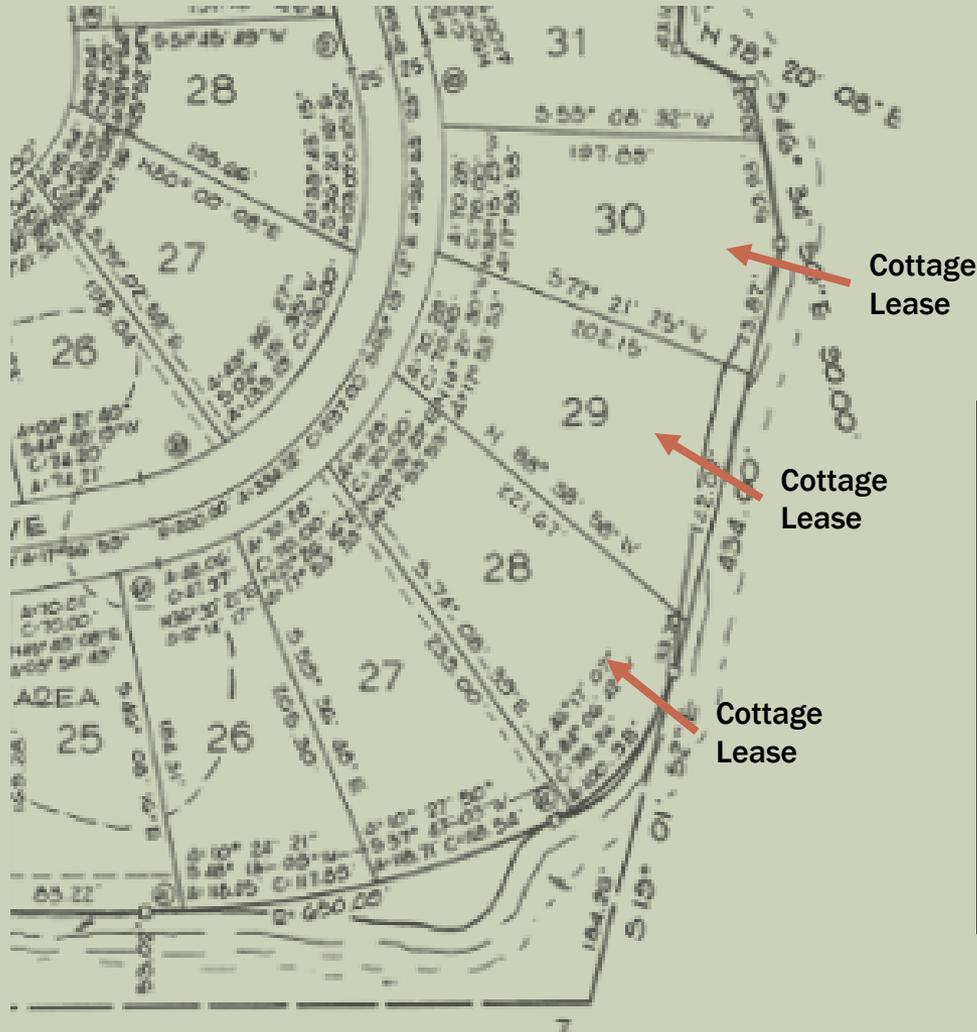
Division of Other Matrimonial Interests or Rights is complicated

Depends on (amongst other things):

- When it was acquired
- If it has appreciated in value
- If it was received as a gift or inheritance

The amount available to share is the value of the property less any debts against the property eg. Band mortgage, ministerial loan guarantee etc.

Locatee Leases



Value of Family Home on leased land may be divisible if it is the family home of a member or an Indian. That spouse might also apply for an EOO.

INAC requires Assessments to be completed by lessees when assigning a lease. This is to determine if a matrimonial right or interest exists. It is possible that the lessee has entered into a relationship with a member or an Indian. Consent of a member or Indian spouse would be required if the family home was located on the leased property,

WHAT RIGHTS AND PROTECTIONS DO THE PROVISIONAL FEDERAL RULES PROVIDE?

- **Section 28 (5)**
- **Enforcement of agreements on the division of the value of the matrimonial property allows a court to make an order that can be used to enforce a free and informed written agreement made by spouses or common law partners that is not unconscionable and that sets out the amount to which each is entitled and how to settle the amount.**

ENACTMENT OF FIRST NATION LAW UNDER FHRMIRA

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

ENACTMENT OF FIRST NATION LAW UNDER FHRMIRA

- The content and acceptability of any law is determined between a First Nation government and its members.
- The First Nation Law cannot be disallowed, altered, or cancelled by the Minister or any government official.

ENACTMENT OF FIRST NATION LAW UNDER FHRMIRA

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

ENACTMENT OF FIRST NATION LAW UNDER FHRMIRA

- The proposed First Nation law is approved if:
 - at least **25 percent of eligible voters participated in the vote; AND**
 - a majority of those members who participated in the vote, voted to approve it.
- First Nations may enact their community-specific laws at any time, however, the **Provisional Federal Rules are now in effect** and will apply until the First Nation enacts its own law.

ENACTMENT OF FIRST NATION LAW UNDER LAND CODE

- If you are enacting MRP Law under your Land Code, law making procedures, and authorities, may differ.
- It is important that you understand the difference between enacting under FHRMIRA and enacting under Land Code.

CONTACT US

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

Kathy McCue
Administration and Communications Coordinator
kmccue@coemrp.ca

Christopher E. Angeconeb LL.B
Legislative Analysis Coordinator
cangeconeb@coemrp.ca

www.coemrp.ca