

Matrimonial Real Property Law

Frequently Asked Questions

Topics:

Introduction

Estates

Consultations

First Nations Matrimonial Real Property Laws

Provisional Federal Rules

Transition Period and Coming into Force

Implementation

Introduction

Q.1) What is the on-reserve matrimonial real property issue?

A1. Matrimonial real property refers mainly to the family home where both spouses or common-law partners live during a marriage or common-law relationship. Generally speaking, provincial and territorial laws protect the matrimonial real property interests and rights of both spouses or common-law partners during a relationship, or in the event of separation, divorce or death. For most Canadians undergoing a breakdown of their marriage or common-law relationship or on the death of a spouse or common-law partner, there is legal protection to ensure that their matrimonial real property is dealt with equitably. Many provincial laws also permit a judge to order a spouse or common-law partner to temporarily leave the family home, particularly in cases of domestic or physical abuse. These provincial and territorial laws do not apply on reserve lands.

Provincial or territorial family laws related to matrimonial personal property, such as money in bank accounts and cars, apply on reserves. However, in 1986 the Supreme Court of Canada ruled that courts cannot apply provincial or territorial family laws on reserves governed by the Indian Act if doing so would alter individual interests in matrimonial real property on reserves. As a result, many of the legal protections relating to matrimonial interests or rights that are applicable off reserves are not available to individuals on reserves. Further, the Indian Act is silent on this issue.

When the Family Homes on Reserves and Matrimonial Interests or Rights Act comes into force many of the legal protections relating to matrimonial real property applicable off reserves will be available to individuals on reserves, for example:

- A spouse or common law partner will not be able to sell an on-reserve family home without the consent of the other spouse or common law partner and keep all the proceeds of sale;
- One spouse or common law partner will not be able to bar the other spouse or common law partner from their on-reserve family home;
- In cases of domestic violence, a court will be able to order one spouse or common law partner to leave a family home situated on reserve, even on a temporary basis.

Q.2) Do provincial/territorial matrimonial property laws apply on reserve?

A2. Some rights and protections under provincial/territorial matrimonial property laws apply on reserves and some do not. Provincial/territorial laws can be used to assist couples living on reserve to determine how to divide the overall value of all matrimonial property (house, cash, cars, etc.). Either spouse can ask a court to determine his or her share of the couple's matrimonial property. The court can order one spouse or common-law partner to pay the other a sum of money to make an equal division of the couple's total matrimonial property. However, a court cannot apply provincial laws to force the sale of a home on a reserve or re-allocate rights of possession or occupation of a home. Provincial/ territorial laws cannot change the rights of individual First Nation members to their land.

With the provisional federal rules in force, if a Certificate of Possession has been issued to only one spouse for land where the family home is located, the other spouse may be able to obtain temporary possession of the home, especially if that spouse has custody of the children. This will align with the situation off reserves where courts can decide which spouse or common-law partner gets to stay in the family home, regardless of whose name is on the legal documents.

If the federal rules in the Act apply, they will prevent a spouse or common-law partner living on reserve and whose name is on the Certificate of Possession from selling the family home without the consent of the other spouse or common-law partner, whose name does not appear on the Certificate of Possession. This will apply during a marriage or after a separation.

Q.3) Why is this Act needed?

A3. This Act addresses an issue that has been outstanding since 1986 when the Supreme Court of Canada ruled in Paul v. Paul and Derrickson v. Derrickson that provincial matrimonial real property laws cannot alter rights of possession of reserve land. These rulings identified a legislative gap which meant that on reserve residents would continue to lack basic rights and protections in relation to matrimonial real property since the Indian Act was silent on the issue. As a result, relationship breakdown in a First Nation on-reserve community can sometimes lead to homelessness, poverty and separation from cultural and family support if spouses are forced out of their home.

Q.4) Who does this Act apply to?

A4. The Act will 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.

There is a 12-month transition period from the coming into force of the Act for First Nations to enact their own laws before the federal rules apply. After the 12-month period, the provisional federal rules will automatically apply to all First Nations with reserve land, with the following exceptions:

- First Nations that have enacted matrimonial real property laws under this Act during the 12-month period;

- First Nations with a self-government agreement unless they have reserve land and opt into the provisional federal rules;
- First Nations with land codes in place under the First Nations Land Management Act;
- First Nations without land codes in place that are on the schedule to the First Nations Land Management Act will be exempted for a period of three years from the date of Royal Assent.

Once First Nations enact their own matrimonial real property law under the Act, the provisional federal rules will no longer apply to their community.

Q.5) What is the definition of "spouse" in the Act?

A5. The Act applies to married couples and common-law partners, where at least one of them is a First Nation member or an Indian. The definition of spouse includes "either of two persons who have entered in good faith into a marriage that is voidable or void."

The Indian Act definition of "common-law partner" will apply in this Act, and means "a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year."

Q.6) Why is it important that the Act balance individual and collective rights?

A6. Equality rights are guaranteed under sections 15 and 28 of the Canadian Charter of Rights and Freedoms (Charter), and existing collective Aboriginal rights are recognized under section 35 of the Constitution Act, 1982, and referred to in section 25 of the Charter. The Act is intended to balance individual rights, specifically the need for spouses and common-law partners on reserves to have access to matrimonial real property protections and rights, and the collective interest of First Nations in their reserve lands.

Traditional practices and values vary among First Nations. For this reason, the provisional federal rules in the Act provide for First Nation councils to be notified of court proceedings brought forward under the Act, with the exception of emergency protection or confidentiality orders. First Nation councils will be able to make representations to the courts about the collective interests of the First Nation members in their reserve lands, the cultural, social and legal context relevant to the application.

Estates

Q.7) How do the provisional federal rules in this Act affect survivors of estates?

A7. The provisional federal rules in the Act provide that:

- A surviving spouse or common-law partner who does not hold an interest or right in or to the family home will have an automatic right to occupy the family home for a minimum of 180 days after the death of their spouse or common-law partner.

- The survivor will be entitled to apply for exclusive occupation of the matrimonial home for longer than 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.
- The surviving spouse or common-law partner will be able to make an application to receive 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. If the court determines that the surviving spouse or common-law partner is entitled to an amount in respect of that interest or right, the surviving spouse or common-law partner will not be able to benefit from the deceased's will or from the provisions of the Indian Act in respect of the same interest or right. In other words, **the surviving spouse or common-law partner will have to choose between receiving an amount under this Act or an amount or right under the will or the Indian Act. Administrators and executors of estates will have access to information regarding the options for survivors that may affect the estate administration.**

Consultations

Q.8) Were First Nations consulted on the best approach to address this issue?

Yes. This government launched an **extensive two-year national consultation process in 2006** in collaboration with the Native Women's Association of Canada and the Assembly of First Nations and facilitated by a Ministerial Representative, Wendy Grant-John. Consultations included over 100 meetings in 76 sites across Canada.

In **March 2007, the Ministerial Representative presented her report**, based primarily on what was heard during the consultations and consensus-building discussions with Aboriginal Affairs and Northern Development Canada, the Native Women's Association of Canada and the Assembly of First Nations.

During summer and fall 2007, the federal government shared a draft legislative proposal with the Assembly of First Nations, Native Women's Association of Canada, the provinces and territories and the First Nations Lands Advisory Board. All participants were given opportunities to share their views during this process. Their input resulted in significant improvements that were incorporated in this Act.

More information can be found under: Engagement Sessions on Bill S-2, Family Homes on Reserves or Matrimonial Interests or Rights Act.

First Nations Matrimonial Real Property Laws

Q.9) What if a First Nation never develops its own matrimonial real property law?

A9. It is the **choice of each First Nation whether or not to develop and enact its own laws** to address matrimonial real property interests or rights on their reserve land. Until a First Nation community develops and enacts its own matrimonial real property law under the Act the provisional federal rules, once in force, apply.

Q.10) What will be the voting requirements for enacting First Nation matrimonial real property laws?

A10. If a First Nation intends to enact matrimonial real property laws under section 7 of the Act, the council of the First Nation will have to submit the proposed First Nation laws to the First Nation members for their approval. Every person who is 18 years of age or over and a member of the First Nation, whether or not they are a resident on a reserve of the First Nation, will be eligible to vote in the community approval process.

The council will have to, before proceeding to obtain community approval, take reasonable measures 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. The council will have to publish a notice of the date, time and place of a vote.

The proposed First Nation laws will be considered approved if at least 25 per cent of the eligible voters participated in the vote and a majority of those who participated in the vote voted to approve them.

A First Nation council may, by resolution, increase the percentage of eligible voters required.

Q.11) What measures exist if a First Nation member is unsatisfied with a First Nation matrimonial real property law?

A11. As a First Nation develops its own laws, the rights of individuals on reserves are protected, as they are off-reserve, by the Canadian Charter of Rights and Freedoms (Charter) and the Canadian Human Rights Act, to the extent that complaints fall within its scope. Should a First Nation not follow the requirements in the Act for the community vote, or if an individual community member feels that the content of the law is not Charter compliant or otherwise legally valid, the community member will have recourse to the courts.

Q.12) Why are there no additional minimum standards required of First Nations in the development of First Nation laws to address matrimonial interests or rights?

A12. There are no stronger legal protections available to Canadians than those in the Canadian Charter of Rights and Freedoms (Charter) and the Canadian Human Rights Act, both of which may be enforced through the courts. Both the Charter and the Canadian Human Rights Act, where applicable, will apply to First Nation laws. This approach makes First Nation governments accountable to First Nation members and will respect First Nations' ability to make laws to suit their community needs.

Provisional Federal Rules

Q.13) What rights and protections do the provisional federal rules in the Act provide?

A13. Under the Act, the provisional federal rules provide basic rights and protections to individuals on reserves during a marriage or common-law relationship, in the event of a relationship breakdown, and on the death of a spouse or common-law partner. The provisional federal rules include the following rights and protections:

- **Equal right to occupancy of the family home**: provides spouses or common-law partners with an equal entitlement to occupancy of the family home until such time as they cease to be spouses or common-law partners.
- **Requirement of spousal consent for the sale or disposal of the family home**: provides spouses or common-law partners 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, regardless of whether that spouse or common-law partner is a First Nation member.
- **Emergency protection order**: allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (in situations of family violence).
- **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.
- **Entitlement of each member spouse or common-law partner to an equal division of the value of the family home and any other matrimonial interests or rights**: ensures that the proven value of a couple's matrimonial interests or rights in, or to, the family home and other structures and lands on the reserve are shared equally on the breakdown of a relationship.
- **Order for the transfer of matrimonial real property between member spouses or common-law partners**: allows a court to order the transfer, in some circumstances of the matrimonial interests or rights between member spouses or common-law partners together with, or instead of, financial compensation.
- **Entitlement of surviving spouses or common-law partners**: ensures that when a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for a specified period of time, and can apply under the 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.
- **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.

Q.14) Will rights and protections under the provisional federal rules be similar to rights and protections in provincial/territorial legislation?

A14. This Act ensures that individuals living on reserve have similar protections and rights as other Canadians. The provisional federal rules are based on common elements of various provincial and territorial matrimonial real property regimes. However, not **all of these elements are appropriate for**

application on reserve, due to the inalienability of reserve lands and the uniquely collective nature of land and housing on reserves.

Q.15) How will the Family Homes on Reserves and Matrimonial Interests or Rights Act help women, families and violence prevention?

A15. The Family Homes on Reserves and Matrimonial Interests or Rights Act (the Act) provides basic protections and rights to individuals on reserves regarding the family home and other matrimonial interests or rights during a relationship, in the event of a relationship breakdown, and on the death of a spouse or common-law partner. These protections will either be through First Nations' laws or provisional federal rules.

Under the provisional federal rules, a spouse or common-law partner can apply for an emergency protection order to stay in the family home at the exclusion of the other spouse in situations of family violence. Additionally, the provisional federal rules allow for courts to provide short to long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners.

Aboriginal Affairs and Northern Development Canada is supporting the implementation of the Act by funding the Centre of Excellence for Matrimonial Real Property, an arm's length organization that will support First Nations in the application of the Act, including the development of their own on-reserve matrimonial real property laws. Furthermore, the Government of Canada will continue to promote the Act by disseminating relevant communications products, ensure police officers working on reserves will be trained to enforce the law, as well as distribute education materials for legal experts to promote informed decisions under the legislation.

Q.16) With the Act, will it be necessary to go to court for resolution?

A16. Once a First Nation's matrimonial real property law or the provisional federal rules are in place, individuals living on reserves will have matrimonial real property rights that they did not have before. The provisional federal rules may be accessed by those who need them, in circumstances that require the protection offered by the court system, but this does not mean that individuals must access the court system in order to resolve matrimonial real property issues. Many individuals may be able to come to agreement on division of property or temporary exclusive occupation of the family home through mediation, alternative dispute resolution or existing traditional systems for resolution. However, as a result of the Act, seeking resolution through the court system is an option.

First Nations, when developing their matrimonial real property laws, can choose the best way to resolve issues in their community, for example through traditional dispute mechanisms or through the courts.

Q.17) In which court can the rights and protections provided under the provisional federal rules of the Act be accessed?

A17. Generally speaking, the protections and rights provided in the provisional federal rules will be accessible through the provincial and territorial superior courts that normally deal with family law matters.

Q.18) How will people on reserves gain access to the courts or legal intervention, if required?

A18. The intent of the Act is to provide a degree of legal certainty that will make it easier for couples to come to an agreement so they will not have to go to court. However, if on-reserve individuals feel they need to access the courts, they have to do so in the same way as those living off reserve.

When it comes to emergency protection orders, the intent of the Emergency Protection Order Regulations of the Act is to include options to make access to justice more accessible given the rural nature of many communities. It is intended that the application can be made to the judge in person or by telecommunication systems, which includes telephone, e-mail or fax. The application can be made by the applicant or someone acting on the applicant's behalf.

Q.19) Who will be responsible for enforcing the orders made under the provisional federal rules in the Act?

A19. Responsibility for enforcing orders made under the provisional federal rules will vary depending on the circumstances. Pursuant to section 89 of the Indian Act, orders in favour of a non-Indian cannot be executed against property of an Indian situated on reserve. A court order for compensation between spouses or common-law partners who are Indians, whether a member of that First Nation or not, can be enforced as any other order.

On application from a non-member or non-Indian spouse or common-law partner, the provisional federal rules provide that a First Nation council will be able to enforce a court order against a member for compensation made under the Act. If the council does not enforce the order within a reasonable period of time, a court will be able to vary the order to require the member spouse or common-law partner to pay the specified amount into the court directly.

With respect to First Nations' own matrimonial real property laws, the power to enact First Nation laws contained in the Act enables First Nations to make laws respecting enforcement of court orders on reserve despite section 89 of the Indian Act.

Q.20) Will the provisional federal rules allow non-members to hold an interest or right to land on reserves?

A20. No. The Act respects the principle of non-alienation of reserve lands. The provisional federal rules will not lead to non-Indians or non-members acquiring permanent interests in reserve land.

In a situation where the non-member spouse has made direct contributions to improvements made to the family home or other structures, a court will be able to order that they be compensated.

Q.21) Could court orders force the sale of the family home or other matrimonial interests under this Act?

A21. No, a court cannot force the sale of a home on a reserve.

Q.22) Does the Act affect custom allotments?

A22. When in force the provisional federal rules in the Act will not apply to the value of the lands that have been allotted according to custom as these allotments are not recognized as legal holdings by the federal government. However, they will apply to structures on custom allotments which are recognized by First Nations or by the courts.

Q.23) Does the Act affect leasehold interests?

A23. The protections provided by the federal provisional rules in the Act will apply to family homes and other matrimonial interests or rights that are leased. If a spouse or common-law partner is granted exclusive occupation of the home, that individual will be bound by the lease and required, for example, to pay the rent.

Q.24) How does the Act address the valuation of homes?

A24. The provisional federal rules provide that each spouse or common-law partner, whether a member of the First Nation or not, and whether a status Indian or not, is entitled to half of the value of the interests in or rights to the family home and other matrimonial interests or rights on reserve which were acquired during the relationship. Value is based on what a buyer would reasonably be expected to pay a seller for comparable interests and/or rights.

Q.25) How will individuals from remote areas be able to get emergency protection orders?

A25. It is intended that the Emergency Protection Order Regulations to this Act will include provisions concerning applications made pursuant to the provisional federal rules that will increase access to justice in remote areas. For example, it is expected that individuals will be able to apply for an emergency protection order by telephone, email or fax.

Should a spouse or common-law partner not be able to apply for an emergency protection order in person, a peace officer or other person may apply on behalf of that spouse or partner to ensure the immediate protection of the person or property at risk of harm. In situations where the applicant spouse or common-law partner has not provided consent to apply for an emergency protection order, the designated judge may grant leave in accordance with the regulations to the Act for an application to be made on behalf of that spouse or common-law partner.

During the time period of an emergency protection order, the spouse or common-law partner will be able to apply for exclusive occupation of the family home.

Transition Period and Coming into Force

Q.26) When will the Family Homes on Reserves and Matrimonial Interests or Rights Act come into force?

A26. The Act received Royal Assent on June 19, 2013. Sections 1 to 11 and 53, the first part of the Act, came into force on December 16, 2013, by Order of the Governor in Council. First Nations will be able to enact their own community-specific matrimonial real property laws under the Act as of that date. Twelve months after that date the provisional federal rules will come into force. The provisional federal rules will apply to those First Nations who have not enacted laws under this Act but will cease to apply once they have done so. As noted above, the provisional federal rules will not apply to First Nations currently operating under the First Nations Land Management Act or First Nations with a comprehensive self-government agreement with reserve lands.

Q.27) Why is there a transition period?

A27. The 12-month transition period provides time for First Nations to enact their matrimonial real property laws before the provisional federal rules apply. The government recognizes that some First Nations are well advanced in developing their own laws and the transition period provides time for them to enact their own laws under this Act before the provisional federal rules take effect. The 12-month transition period is meant to further encourage and support First Nations in developing their own laws and to respond to feedback from stakeholders.

Q.28) Does the Act apply retroactively?

A28. There is no provision in the Act for it to apply retroactively. The provisions of the Act will only apply from the day or days on which they are brought into force. December 16, 2013 is the date the First Nation law-making mechanism came into force. The provisional federal rules will come into force a year later on December 16, 2014.

Implementation

Q.29) What are the elements of the implementation plan?

A29. The plan will include three elements:

- The dissemination of information products, tools and services to First Nation individuals, organizations, governments and law enforcement.
- The operation of a Centre of Excellence to support First Nations in the implementation of the Act and in the development of their own on-reserve matrimonial real property laws.
- Providing the mechanisms for the training and education of key officials, including:

1. police officers on reserves who will be trained to properly enforce the legislation; and,

2. provincial superior court judges and judicial professionals who will be provided with education material to promote informed judgements under the Act.

Q.30) Will funding be provided to First Nations to develop their own matrimonial real property laws?

A30. The implementation plan **does not include direct funding** to First Nations for the development of their laws. The Centre of Excellence will provide expertise and support, such as best practices and templates, to assist First Nations in developing their own laws.

Q.31) What will be the role of the Centre of Excellence?

A31. The Centre of Excellence for Matrimonial Real Property, hosted by the National Aboriginal Lands Managers Association, is an arm's length First Nation organization that will assist First Nation communities in developing their own matrimonial real property laws and will provide research on alternative dispute resolution mechanisms. The Centre will focus on disseminating knowledge to First Nation individuals, communities and organizations to assist them in understanding and implementing the Act.