

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



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c/o National Aboriginal Lands Managers
Association

1024 Mississauga St, Curve Lake, Ontario K0L 1R0

Email: info@coemrp.ca

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

www.coemrp.ca



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

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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

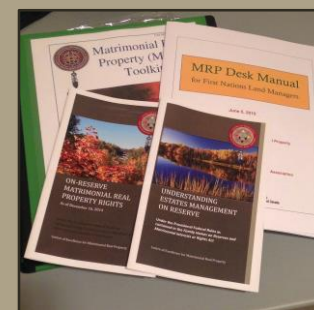
This pamphlet provides information to residents to gain an understanding of survivorship rights.

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.



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**

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



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.

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



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.



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

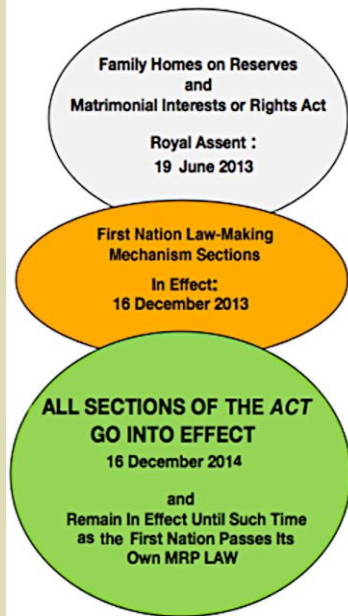
The Provisional Federal Rules came into force:

- 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



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

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.



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...]

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:

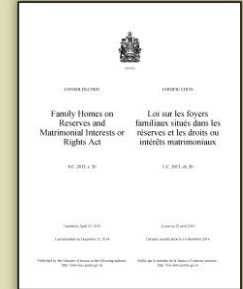


No will, Inherit under Intestacy provisions (s.48):



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: 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)

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

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

(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)]



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*.