



# A BRIEF REVIEW OF THE FEDERAL MATRIMONIAL REAL PROPERTY LAW

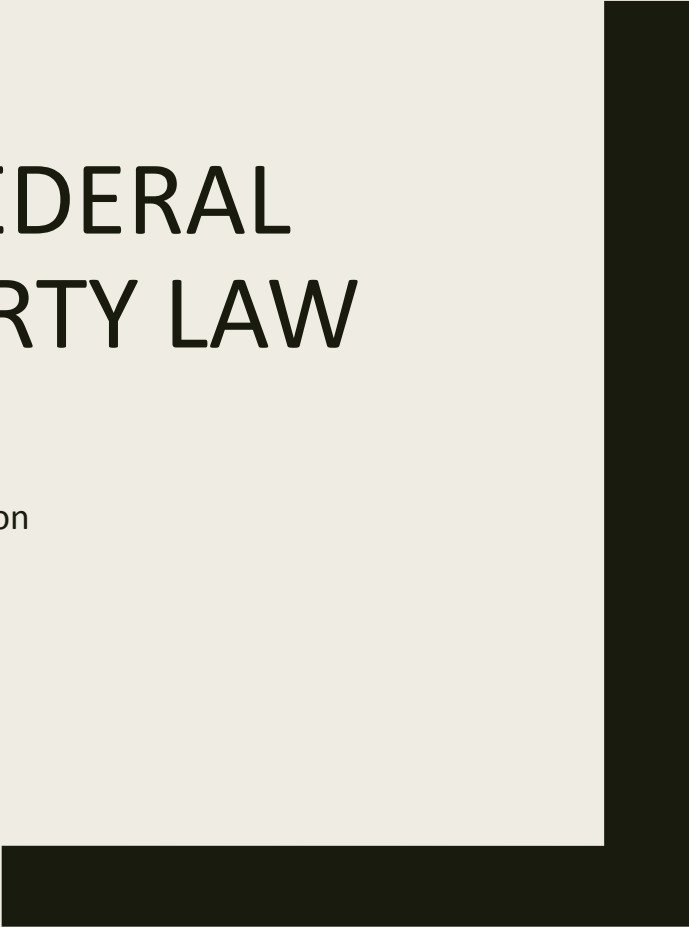
## **Immediate Issues and Options**

Prepared for the Chippewas of Nawash Unceded First Nation

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January 2016



# The New Federal Law Matrimonial Real Property Law

- The Federal Government passed a new law, called *The Family Homes on Reserve and Matrimonial Interests and Rights Act* on December 16, 2013.
- The law took effect on December 16, 2014.
- Will be referred to as “MRP” in this presentation

# Why did the federal government enact the MRP?

- In 1986 the Supreme Court of Canada held that provincial family laws related to the possession and ownership of matrimonial homes could not apply on reserve land, because that portion of the law infringed upon Parliament's exclusive jurisdiction over "lands reserved for Indians".
- Provincial laws regarding division of moveable assets and division of the value of assets continues to apply on reserve (as well as support and child custody/access), but a provincial law could not grant a non-member spouse any right in reserve land.
- After 1986, the status quo was that non-member spouses would be entitled to be paid out ½ the value of a matrimonial home (and other real property) on reserve, but could not have any right in the property itself. This is consistent with the Royal Proclamation of 1763 and the *Indian Act* that reserve lands are reserved for Indians.
- This was seen to create unfairness, particularly where children were involved.

## Government involvement in private relationships

Family or domestic relationships are a private matter.

Except in cases of child protection, the government has no interest (rights or responsibilities) when a relationship breaks down.

Provinces have enacted laws (the *Family Law Act*) that detail the legal rights and responsibilities of spouses upon breakdown of a relationship.

- However, the former Conservative government enacted the *Family Homes on Reserve and Matrimonial Interests and Rights Act (MRP)*.
- The MRP grants extraordinary and broad rights to common law and married spouses living on reserve.
- It grants rights in reserve land to partners and former partners, whether they are members or not.
- The MRP impacts the use and occupation of reserve land, the jurisdiction of Chief and Council to govern residency, land use and housing allocation.
- The MRP exposes the First Nation to significant financial liability

# First Nations' choice:

## Option "A" – Do nothing

- The MRP "Provisional Rules" continue to apply, with all of the disadvantages and liabilities that we will review.

## Option "B" – Enact a FN law

- The First Nation enacts its own law, displacing the provisional rules. This FN law can:
  - *return the FN to the status quo (before the MRP came into effect), or*
  - *mirror Ontario provincial laws,*
  - *modify the "provisional rules" to meet the First Nation's values,*
  - *come up with its own law, customized specifically for the FN*

## 2 Parts to the MRP Law:

### 1. Procedures and requirements for a FN to enact their own law regarding:

- *Family homes on marital breakdown or death, and*
- *Division of real property on reserve*
  - Division of value, or
  - Division of the actual rights in use and occupation of property.

### 2. “Provisional” Federal Rules (for FN that have not enacted their own law) cover:

- Occupation of Family Home
- Emergency Protection Orders (ineffective because no provinces have appointed judges)
- Exclusive Occupation Orders
- Division of the Value of Matrimonial Interests or Rights
- Role of Chief and Council in proceedings
- Enforcement

# MRP Provisional (default) Rules

## The “Highlights”

### MRP

- Gives property rights on-reserve to non-members (during marriage and upon breakdown of a relationship).
- Also grants property rights to common-law spouses (upon breakdown of a relationship).

### Ontario FLA

- Can not grant property rights on-reserve to non-members.
- Does not grant property rights to common-law spouses.

**Common law Spouse Opt In Option:** Nova Scotia family laws automatically grant property rights (off-reserve) to married couples, and if common-law couples wish to have the same rights as married spouses, they just have to register their co-habitation, triggering the same rights. This respects the wishes of common law couples that may wish to avoid triggering the legal responsibilities of a married couples.

# Granting rights of occupation (on-reserve) to common law spouses

- Under MRP a common-law relationship is “recognized” 1-yr after co-habitation begins. This does not mean co-habiting on-reserve for 1 year. It could mean co-habiting anywhere.
  - *The FN has no way to determine when the common-law rights accrue and when the non-member acquires rights to reserve land, and thus when the FN’s housing, residency, mortgage and leasing policies and agreements may have no effect.*
- The MRP grants many more rights to common-law spouses than are granted off-reserve, which may influence a couples decision to live on or off reserve.
- The MRP does not recognize the right of common law couples to make a choice to reside together without the legal obligations and rights of marriage. Where the couple involves one FN member, they are not allowed to choose.
- The MRP does not indicate when a common-law relationship is considered to be over.
- In some situations, a home on reserve could be subject to simultaneous claims by a non-member spouse and a non-member common-law partner.



# Impacts on Governance from Granting property rights to non-members:

- Prevents FN from governing occupation and residency on reserve.
- Will interfere with housing policy, residency policy, mortgage policies, etc. The MRP will override any inconsistent policies.
- Undermines Royal Proclamation of 1763 and the *Indian Act* which reserve Indian lands for Indians.
- Applies whether or not there are children from the relationship, so could result in a non-member having indefinite rights to live on-reserve, with their new non-member partner and non-member children– undermining the FN's land base.
- Requires the FN to become involved (as a party) in all family court applications to try to protect the FN's interests in FN land and to minimize financial impacts on the FN.

# Financial Cost and Liability: Mortgages, leases and housing

- Mortgage loans are between a FN member that owns the CP and the FN. Not enforceable against a non-member. That could leave the FN with someone on the property who does not have to comply with the mortgage.
- **Example:** A common law and/or married partner suddenly has rights under the MRP and is granted the indefinite right to reside in a home on reserve that is subject to a mortgage loan. The FN member (that owns the CP) is forced to move out (by court order) and therefore refuses to make any payments on the mortgage. The new resident is not bound by the mortgage and does not make any payments, the mortgage goes into default and the FN must satisfy the mortgage guarantee. THEN only if all of the mortgage paperwork is in order, can the First Nation take legal steps to recover possession of the property.

# Financial Cost and Liability: Mortgages, leases and housing

- Section 14 of the MRP gives 6 months' free "occupation" of housing by a surviving spouse/partner.
- Unlike the Ontario *Family Law Act*, which specifies that the deceased person's estate must pay for a 60 day occupation. The MRP is silent, implying that it is at the First Nation's cost. Moreover, the 6 months' is a much greater benefit than the provincial equivalent.
- This imposes legal obligations arising from a private relationship, onto Chief and Council.

# Financial Cost and Liability: Mortgages, leases and housing

- **Another example:** a non-member receives an Exclusive Occupation Order in a rent-geared-to-income rental unit owned and subsidized by the First Nation. The non-member with exclusive occupation then starts a new relationship with another non-member, who moves into the unit – and perhaps they have children – none of whom are members. Yet, they all enjoy the continued use of the unit, subsidized by the First Nation, through a program intended to relieve housing hardships of band members.

# Financial Cost and Liability: Mortgages, leases and housing

- Federal law will take precedence over any FN policy, such as housing and residency policies.
- Therefore, Exclusive Occupation Orders and other remedies that grant rights to non-members (and to members) will interfere with the First Nation's ability to allocate housing, to support home improvements, to provide loan guarantees, etc.
- Under MRP, as soon as there is a conjugal relationship begins, the First Nation's policies and agreements (with the CP holder or tenant) may have limited application. You would have to review and revise all policies to accommodate the MRP, if you want the policies and agreements to remain binding in relation to individuals in a conjugal relationship living on reserve – particularly with non-members.
- The FN will have to investigate the relationship status of every tenant or mortgagor, on an ongoing basis, to try to minimize the negative impacts of MRP on the FN.

# Unfair Impact of Division of Value of Property in MRP

- MRP guarantees the partner/spouse that does not own an interest in the property (that doesn't hold the CP) a guaranteed return on investment for any improvements made to the property during the conjugal relationship. This is unprecedented in provincial family laws and could cause significant financial hardship on the CP holder.

# Not Equivalent to Ontario Law

- The Provisional Rules go far beyond addressing a “gap” identified by the SCC in *Derrickson* whereby the provincial family law legislation could not be used to grant exclusive possession of a matrimonial home (typically pending sale or transfer of that home).
- The Provisional Rules may impose legal and financial responsibility on First Nation governments as a consequence to the breakdown of a domestic relationship of one of its members.
- The Provisional Rules grant the most generous rights to non-member spouses and to common law partners, rights that they would never receive in a relationship off-reserve.

# Enforcement of the Default MRP

- In an application or motion within the family law proceeding between the spouses. One spouse will seek a right to reside, exclusive possession, right to return of investment, division of value of the matrimonial home...
- The Court order will apply to the land, but will be between the spouses
- Council and CP holders will not be effected, unless or until there is a court order
- Exclusive possession orders require specially appointed judges, and none have been appointed yet
- Some enforcement of the MRP requires Council to enforce the order against members, failing which the court may order the spouse to pay money into court



# MRP give Chief and Council standing in all court proceedings:

The MRP imposes hardship on the First Nation both financially and in terms of governance.

**MRP's 'Solution'**: The provisional rules give the FN standing to provide evidence in all MRP court proceedings, other than emergency application or where there is a publication ban. Therefore, on a case-by-case basis, the FN will be required to argue how the situation will negatively impact the FN.

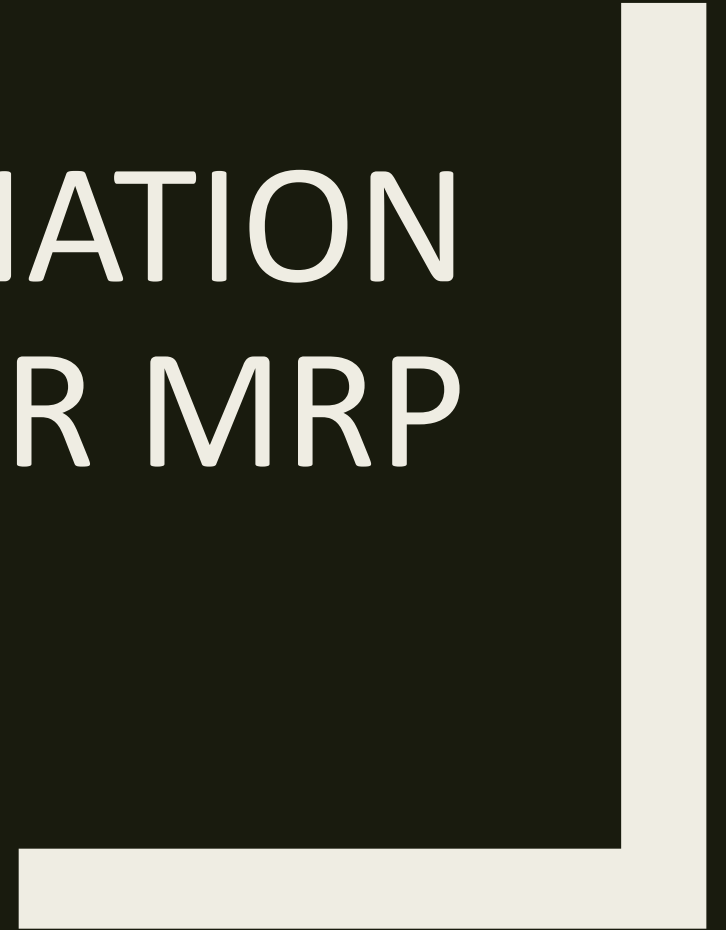
This would be costly, and time-consuming, and there is no guarantee that the judge will comprehend the FN's issues, or care. Moreover, if there is a settlement before it reaches the court, the FN will never have a say.

Why should the FN have to go to court, on a case-by-case basis, to argue that the MRP is not fair to the FN?

# The Alternative – Your Own Law

- As an alternative to reviewing and revising all housing and residency policies, leases, and mortgage agreements and to investigating the conjugal relationships of all members on reserve – or facing the financial and governance burdens and risks imposed by MRP, the FN can enact its own law.

# ENACTING A FIRST NATION LAW UNDER MRP



# MRP Section 7

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.

(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.

(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.

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

The only MANDATORY elements of a FN law under MRP are:

- The law must include procedures for amending and repealing it.

The First Nation law MAY include any (or none) of the following elements:

- Laws that apply during the conjugal relationship
- Laws that apply upon breakdown of the relationship
- Laws that apply upon death of a spouse/partner
- Laws respecting occupation and possession of family homes (on reserve)
- Laws respecting division of VALUE of any interests or rights held by spouses/partners in property/buildings on reserve (which is already covered under the Ontario FLA).

# FN Law-making

- There is no requirement that the FN law resemble the provisional rules.
- There is no requirement that the FN law contain all of the elements contained in the provisional rules.
- There is no requirement that the FN law grant rights to common-law partners.
- There is no requirement that the FN law grant residency rights to non-members.
- For example, if a FN believes that non-member spouses/partners should only have rights to reside on reserve after the breakdown of a relationship if they are the primary caregiver of member children – that can be done in a FN law.
- A FN law may ensure that whoever resides in a home that is subject to a lease or mortgage, must either pay out the mortgage or re-negotiate a new lease, if they obtain any rights of occupancy under the law.

# FN Law-making

- FN law may be very simple, continuing to rely upon provincial FLA for division of value of property (which is more fair than MRP) and addressing only short-term possession of a family home following breakdown of a relationship (like the FLA).
- Or the FN law can be complex, granting indefinite or long term rights of residency, dealing with emergency protection orders, including enforcement procedures and dispute resolution mechanisms.

# FN Law-making Responsibilities

- Application and compliance with *Charter of Rights and Freedoms* and the *Canadian Human Rights Act* are the responsibility of the First Nation.
- **Protected grounds:** age, criminal record of pardon or suspended sentence, disability, family or marital status, colour, national or ethnic origin, race, religion, sex, sexual orientation
- Aboriginal rights to self government can be a defence, but the burden of proving and defending those rights would be on First Nation.

# Community Approval Process

The MRP requires FN's submit their proposed law to the FN membership for approval. The requirements are:

- Every member of the First Nation, who is 18 years of age or older, regardless of residence, is eligible to vote.
- The notice to eligible voters must include a copy of the proposed law, notification of their right to vote, and how that right to vote can be exercised.
- Council must also publish a notice of the date, time and place of vote.
- At least 25% of eligible voters must participate in the vote.
- The FN law must be approved by a simple majority of voters (provided that at least 25% of eligible voters participate).
- Does not allow a second vote to set aside this requirement



# Community Approval

At first glance, it appears that the approval process is more difficult than surrenders and designations, which do not require a 25% participation rate if a second vote is held. However, the MRP contains no requirements as to HOW the right to vote can be exercised. This community approval process does NOT need to follow the Indian Band Election Regulations or the Indian Referendum Regulations.

- No requirement for secret ballot.
- No requirement to appoint a Returning Officer or Electoral Officer.
- No requirement that individuals vote in person.
- No requirement that all votes be conducted on one day.

There IS AN EQUITABLE requirement that the vote be fair and that it follow standard principles of “due process”.

# Some strategies to achieve 25%

- Allow voting by email, mail or even internet poll or telephone poll. Precautions would have to be taken to prevent anyone from voting twice, and to confirm identity of the person, but there is no requirement for voting secrecy, so a record of who has voted should be easy to maintain.
- There are no restrictions on the days and times of voting. Thus, it would be possible to have a longer voting period, such as one week, where members could exercise their vote in any number of ways, by typical (election-style) voting or as described above.
- During the period of voting (which could be days), if you're not yet at 25%, First Nation administration could contact people who haven't voted yet and ask them to send in their vote, or go in person to vote.
- A First Nation may even consider allowing proxy voting, since there is no restriction on it and it is an acceptable practice in organizational governance.

# Conclusion

- The Provisional Rules under MRP have significant negative impact upon the First Nation's ability to govern and regulate housing and residency in the community. It can undermine mortgages and leases and may lead to significant financial costs for the First Nation. Moreover, granting rights to common-law partners adds an even greater level of uncertainty and risk. However, the FN does have standing if any proceeding makes it to court where it can argue that it would be unfairly impacted. This would have to be done on a case-by-case basis for every family dispute over property in the community.
- Alternatively, the FN can enact its own law to meet its immediate or long-term needs. Although it appears an onerous task and the documentation provided by the "Centre for Excellence" suggests a lengthy and expensive procedure, it can be significantly simplified while still meeting all of the MRP requirements.
- There are "rumours" that the new Trudeau government is considering amending the MRP.