

**Chippewas of Nawash
Matrimonial Real Property Law Creation
Supplementary information for Community Surveys**

Questions 4 and 5

The *Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada)* (“FHRMIRA”) states “Matrimonial interests or rights means real property rights or interests held by a spouse or common-law partner, other than the family home. To be considered matrimonial real property, these interests and rights must have been (i) acquired during the conjugal relationship; (ii) acquired before the conjugal relationship but in specific contemplation of the relationship; or (iii) are not covered by (i) or (ii) but appreciated in value during the relationship.” This Law does NOT apply to bank accounts, household goods, or other personal property. It only applies to real property on the reserve.

Questions 6 and 7

The *FHRMIRA* states the following:

- “(1) Subject to the *Indian Act*, a spouse or common-law partner must not dispose of or encumber (e.g. a mortgage) the family home during the conjugal relationship without the free and informed consent in writing of the other spouse or partner.
- (2) A court may set aside a disposition or encumbrance contrary to section 15(1) and impose conditions on any future transaction. The spouse or partner must apply to the court.
- (3) The disposition or encumbrance cannot be set aside of some other person paid for it in good faith.
- (4) A spouse or common-law partner who did not consent to the transaction may claim damages from the other spouse or partner.
- (5) The spouse or common-law partner who made the transaction is the one who may prove they got consent.
- (6) A court may allow a spouse or common-law partner to dispose of or encumber the family home without getting consent if the other spouse or common-law partner:
 - Cannot be found
 - Is not capable of consenting, or
 - Is unreasonably withholding consent”

Questions 8, 9, 10

The *FHRMIRA* provides detailed information on calculating compensation to spouses or common-law partners in Sections 28 to 33 of the *FHRMIRA*. (Copies of the relevant sections are attached as Appendix A.)

Question 11

The *FHRMIRA* provides that:

- (1) If a spouse or common-law partner applies with three 3 years after no longer living together, a court may decide any matter about what they owe each other (per section 28 and 29), including the following:
 - a. The amount payable by a spouse or common-law partner to the other; and

<ul style="list-style-type: none">b. The following methods for settling the amount payable:<ul style="list-style-type: none">i. Payment of a lump sumii. Payment by installmentsiii. Transferring a right or interest (section 31)iv. Setting-off any amounts owed by a spouse or common-law partner to the other, orv. Any combination of the above methods. <p>(2) If a spouse or common-law partner applies after the 3-year period, a court may extend the 3-year period however long it considers appropriate, if the court is satisfied that the applicant did not apply on time because:</p> <ul style="list-style-type: none">a. The delay was beyond the applicant’s control; orb. The applicant only became aware of the rights or interests after the 3-year period had expired.
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Questions 12, 13, 14

The *FHRMIRA* states “When a spouse or common-law partner dies, the surviving spouse or partner may occupy the family home for a period of 180 days. This includes non-members and non-Indians.”

Questions 15, 16, 17

Sections 16 to 19 of the *FHRMIRA* outline a number of provisions under Emergency Protection Orders. Essentially a spouse or partner may apply personally, or someone may apply on their behalf. Judges are required to follow federal regulations and have a number of points to consider. There are several orders that a judge may make to protect persons and/or children that may be involved. A person may also apply to the courts to have an emergency protection order changed or revoked. There may be a publication ban or public banned from attending court in order to protect identities of the involved spouses/partners, witnesses, or child(ren). A copy of the relevant sections is attached as Appendix B.

Questions 18, 19

The *FHRMIRA* provides that the court must consider a number of issues in granting exclusive occupation of the family home and outlines some of the items that an order may include. There may be conditions and a time limit imposed by the court. A grant of exclusive occupation does not change who holds a right or interest in or to the family home. Any person who disobeys an emergency protection order or an order to leave the family home and not come back is guilty of a punishable offence and may fined up to \$5000 and/or imprisoned up to one year.

Questions 20, 21, 22, 23, 24

Sections 20 of the *FHRMIRA* provides details on issues which the court must consider in granting exclusive occupation of the family home and outlines some of the items that an order may include. There may be conditions and a time limit imposed by the court. Section 21 outlines particulars to be considered when a spouse or partner dies, and what may be ordered by the courts. A grant of exclusive occupation does not change who holds a right or interest in or to the family home. Sections 20 to 27 are attached as Appendix C.

APPENDIX A

SECTIONS 28-33: BREAKDOWN OF A CONJUGAL RELATIONSHIP

28. (1) When a conjugal relationship breaks down, each spouse or common-law partner is entitled to receive 50% of the value of the other spouse or partner's right or interest in the family home as well as other compensation under ss. 28(2) and (3). The values are calculated as of the valuation date. The spouse or partner must make an application under s. 30.

(2) A spouse or common-law partner who is a member of a First Nation gets additional compensation totalling the amounts in s. (a) plus (b) plus (c):

- (a) 50% of the value of matrimonial rights or interests in or to lands and structures acquired both
 - during the relationship, and
 - before the relationship (but in specific contemplation of the relationship);
- (b) the larger of the amounts in s. (i) and (ii):
 - (i) 50% of the amount by which the value of the matrimonial rights or interests in or to lands and structures acquired before the relationship (but not in specific contemplation of the relationship) increased between the day when the conjugal relationship started and the valuation date, and
 - (ii) an amount equal to the difference between
 - any payments made by the spouse or common-law partner towards improvements made to these lands and structures, and
 - the amount of debt outstanding for making those payments as of the valuation date; and
- (c) if the lands and structures referred to in s. (b)(i) did not increase in value during the relationship, an amount equal to the difference between
 - any payments made by the survivor towards improvements made to these lands and structures, and
 - the amount of debts outstanding for making those payments as of the valuation date.

(3) A spouse or common-law partner who is NOT a member of the First Nation, gets additional compensation totalling the amounts in s. (a) plus (b) plus (c) below:

- (a) 50% of the value of matrimonial rights or interests in or to structures only [*not lands*] acquired both
 - during the conjugal relationship, and
 - before the conjugal relationship (but in specific contemplation of the relationship);
- (b) the larger of the amounts in s. (b)(i) and (b)(ii):
 - (i) 50% of the amount by which the value of the matrimonial rights or interests in or to structures only [*not lands*] acquired before the relationship (but not

in specific contemplation of the relationship) increased between the day when the relationship started and the valuation date, and

- (ii) an amount equal to the difference between
 - any payments made by the survivor towards improvements made to these structures, and
 - the amount of debts outstanding for making those improvements as of the valuation date; and

(c) the amounts of s. (c)(i) plus s. (c)(ii):

- (i) for lands (other than the family home) acquired
 - during the relationship,
 - before the relationship (but in specific contemplation of the relationship) or that increased in value during the relationship,

an amount equal to the difference between

- payments made by the spouse or common-law partner towards improvements made to these lands, and
- the amount of debts outstanding for making those improvements as of the valuation date, and

- (ii) for structures acquired before the conjugal relationship (but not in specific contemplation of the relationship) that did not increase in value during the relationship, an amount equal to the difference between
 - any payments made by the survivor towards improvements made to these structures, and
 - the amount of debts outstanding for making those improvements as of the valuation date.

(4) The value of the above rights or interests is the difference between

- (a) the amount a buyer would reasonably be expected to pay for comparable rights or interests to the ones at issue; and
- (b) the amount of any debts outstanding for acquiring those rights or interests or to improve or maintain the lands and structures.

(5) Spouses or common-law partners may agree on another way to value their rights or interests.

(6) In this section, "valuation date" means

- (a) in the case of spouses, the earliest of the following days:
 - (i) the day they separated, with no reasonable prospect of reconciliation,
 - (ii) the day they divorced,
 - (iii) the day when the marriage was declared a nullity,
 - (iv) the day when a spouse made an application to court about the breakdown of the marriage, and
 - (v) the day when a spouse made a successful application to restrain improvident depletion of the family home and the matrimonial rights or interests; or
- (b) in the case of common-law partners, the earliest of the following days:

- (i) the day when a common-law partner showed they did not want to continue the relationship,
- (ii) the day when a common-law partner made an application to court about the breakdown of the relationship, and
- (iii) the day when a common-law partner made a successful application to restrain improvident depletion of the family home and the matrimonial rights or interests.

29. If a spouse or common-law partner applies, a court may change the amount owed [s. 28] if that amount is unjust given the following factors:

- (a) the applicant's financial responsibility for the children;
- (b) the amount of debts of each spouse or common-law partner;
- (c) any significant change in the value of the rights or interests between the valuation date and the day the order was made;
- (d) whether a spouse or common-law partner can get exclusive occupation of the family home by agreement or order;
- (e) the availability of comparable housing;
- (f) the length of their relationship;
- (g) any agreement between the spouses or common-law partners;
- (h) whether the value of the rights or interests is less because of something done by the other spouse or common-law partner, e.g. selling for too little, improvident depletion and improperly selling or encumbering; or
- (i) anything else decided by the court.

30. (1) If a spouse or common-law partner applies within 3 years after no longer living together, a court may decide any matter about what they owe each other [ss. 28 and 29] including the following:

- (a) the amount payable by a spouse or common-law partner to the other; and
- (b) the following methods for settling the amount payable:
 - (i) payment of a lump sum,
 - (ii) payment by installments,
 - (iii) transferring a right or interest [s. 31],
 - (iv) setting-off any amounts owed by a spouse or common-law partner to the other, or
 - (v) any combination of the above methods.

(2) If a spouse or common-law partner applies after the 3-year period, a court may extend the 3-year period however long it considers appropriate, if the court is satisfied that the applicant did not apply on time because

- (a) the delay was beyond the applicant's control; or
- (b) the applicant only became aware of the rights or interests after the 3-year period had expired.

31. (1) If a spouse or common-law partner who is a First Nation member applies, a court may transfer to him or her the following rights or interests:

- a right to possession of land or structures allotted under s. 20 of the *Indian Act* (with or without a Certificate of Possession or a Certificate of Occupation),
- a right or interest (on reserve) subject to a land code or First Nation law under the *First Nations Land Management Act*,
- a right or interest (on reserve) subject to any First Nation law enacted under a self-government agreement with Canada,
- a right or interest (on reserve) subject to any land governance code or Kanesatake Mohawk law enacted under the *Kanesatake Interim Land Base Governance Act*,
- another right or interest (on reserve) in or to a structure recognized by the First Nation, or
- a right or interest (on reserve) recognized by a court order under s. 48.

Before making the transfer, the court must be satisfied that

- (a) the spouses or common-law partners already freely agreed in writing to the transfer and the agreement is not unjust considering the factors in s. 29;
- (b) the applicant already held the right or interest while living together; or
- (c) the transfer is appropriate because the spouses or common-law partners hold more than one such right or interest.

(2) The court's power to order a transfer under s. 31(1)

- (a) can be made despite ss. 24 and 49 of the *Indian Act*;
- (b) is subject to any land code or First Nation's law under the *First Nations Land Management Act*;
- (c) is subject to any First Nation law enacted under a self-government agreement with Canada; and
- (d) is subject to any land governance code or Kanesatake Mohawk law under the *Kanesatake Interim Land Base Governance Act*.

32. If a spouse or common-law partner applies, a court may make any order it considers necessary to restrain the improvident depletion of the family home and the matrimonial rights or interests in order to protect the following:

- (a) the potential right or interest the applicant might get from a court under ss. 20 or 31; or
- (b) the value of the rights or interests used to calculate what might be payable to the applicant under s. 30.

33. If the spouses or common-law partners make a written agreement that sets out the amount payable to each other and the methods for settling the amount by at least one of the methods referred to in s. 30(1)(b)(i), (ii) or (iv), a court may enforce that agreement if

- the party's consent to the agreement was free and informed, and
- the agreement was not unjust.

APPENDIX B

SECTIONS 16-19: EMERGENCY PROTECTION ORDER

16. (1) A spouse or common-law partner may apply to the court for an emergency protection order. The application may be made without notice to the other spouse or common-law partner. The order may last for up to 90 days and may contain one or more provisions in s. 16(5). The judge may make the order if satisfied that

- (a) family violence has occurred; and
- (b) the order should be made because of the seriousness or urgency of the situation to protect persons or property.

(2) A spouse or common-law partner may apply to the court, even if he or she was forced to leave the family home as a result of family violence.

(3) A peace officer or other person may apply for the emergency protection order on behalf of the spouse or common-law partner with that person's consent. If consent is not given, they may apply with permission of the judge. The judge must follow federal regulations on this point.

(4) The judge must consider the following:

- (a) the history and nature of the family violence;
- (b) the existence of immediate danger to persons at risk of harm or property at risk of damage;
- (c) the best interests of any child in their care, including a child's interest in keeping a connection with their First Nation;
- (d) the interests of any elderly person or disabled person who normally lives in the family home and who is cared for by either spouse or common-law partner;
- (e) whether someone else holds a right or interest in or to the family home;
- (f) how long the applicant has lived on the reserve; and
- (g) any exceptional circumstances that justify removing someone else from the family home (e.g. family violence, psychological abuse).

(5) The order may:

- (a) give the applicant exclusive occupation of the family home and reasonable access to the home;
- (b) require any person to leave the family home and not come back;
- (c) direct a peace officer to evict the other spouse or common-law partner and any other person from the family home;
- (d) prohibit any person who was required to leave the family home from going near the family home;
- (e) direct a peace officer to accompany the other spouse or common-law partner or other person in order and supervise the removal of their personal belongings; and

(f) order anything else the judge considers necessary to protect persons or property at risk.

(6) Everyone named in the order must obey it when they learn of it.

(7) A peace officer must give a copy of the order to the persons named in the order, either directly or in another way allowed by the court. The peace officer must inform the applicant as soon as each person gets a copy.

(8) The peace officer is not personally liable for anything done (or not done) in good faith.

(9) In this section, "family violence" means any of the following things done by one spouse or common-law partner against the other, a child cared for by either them, or any other person who normally lives in the family home:

- (a) wilful and unlawful force, (not including self-defence);
- (b) intentionally or recklessly causing bodily harm or damage to property;
- (c) intentionally or recklessly doing (or threatening) something that causes a reasonable fear of bodily harm or damage to property;
- (d) sexual assault, sexual abuse or threatening to do either of those things;
- (e) unlawful forcible confinement; or
- (f) criminal harassment.

17. (1) The justice of the peace or judge must forward a copy of the order under s. 16 and all the supporting materials to the court.

(2) The court must review the order within three working days or as soon as a judge becomes available.

(3) The court, after reviewing the order and the materials, must:

- (a) confirm the order, if satisfied that it was supported by sufficient evidence; or
- (b) order a new hearing of the matter by the court, if not satisfied that it was supported by sufficient evidence.

(4) The court must notify the parties and any person named in the order of its decision and of any resulting procedures.

(5) A confirmed order is deemed to be an order of the court.

(6) Even if the court orders a new hearing, the order remains effective unless the court orders otherwise.

(7) The new hearing must consider

- the materials present at the original hearing,
- any new evidence presented at the new hearing, and
- any evidence about the collective interests of First Nation members.

(8) At the new hearing, the court may confirm, change or revoke the order under s. 16 and make it last longer than the 90-day period [s. 16(1)].

(9) An application made under s. 18 must be considered at the new hearing, unless the new hearing has already begun.

18. (1) Any person involved in an exclusive occupation order [ss. 16 or 17] can apply to the court to have it changed or revoked. The application must be made

- (a) within 21 days after receiving notice of the order, or within any longer time that the court allows; and
- (b) at any time, if the situation has changed significantly.

(2) The court may confirm, change or revoke the order and may make it last longer than the 90-day period [s. 16(1)].

(3) The court hearing must consider

- the materials present at the original hearing,
- any new evidence presented at the new hearing, and
- any evidence about the collective interests of First Nation members.

19. (1) Subject to s. 19(2), the court may order:

- (a) a ban on the public attending all or part of a s. 17 new hearing or a s. 18 hearing;
- (b) a publication ban on the identity of a party, witness or child; and
- (c) a disclosure ban on any related information in a court document or record.

(2) The court may only make the order under s. 19(1) if satisfied that

- (a) it is necessary for the safety of a party or witness or the safety or physical or emotional well-being of a child; or
- (b) protecting a party, witness or child from undue hardship or adverse effect outweighs the public's right to the information.

APPENDIX C

SECTIONS 20–21: EXCLUSIVE OCCUPATION ORDER

20. (1) A court may order that exclusive occupation of and reasonable access to the family home be given to a spouse or common-law partner – whether or not the person is a First Nation member or an Indian. The court may attach conditions to and limit the time of the order.

(2) The court may make a temporary exclusive occupation order, before deciding whether to make the main order under s. 20(1).

(3) The court must consider the following when making an exclusive occupation

- (a) the best interests of any children who normally live in the family home, including a child's interest in maintaining a connection with their First Nation;
- (b) the terms of any agreement between the spouses or common-law partners;
- (c) the collective interests of First Nation members in their reserve(s) and the views of the council regarding the cultural, social and legal context;
- (d) how long the applicant has lived on the reserve;
- (e) the financial situation and the medical condition of the spouses or common-law partners;
- (f) the availability of other suitable housing on the reserve;
- (g) any existing order related to the breakdown of the conjugal relationship;
- (h) any family violence;
- (i) any psychological abuse by one of the spouses or common-law partners against the other, any child in their care, or any other family member who normally lives in the family home;
- (j) any exceptional circumstances that justify removing someone else from the family home (e.g. family violence, psychological abuse);
- (k) the interests of any elderly person or disabled person who normally lives in the family home and who is cared for by either spouse or common-law partner;
- (l) whether someone else holds a right or interest in or to the family home; and
- (m) the views given by any other person the court allows.

(4) The order may:

- (a) require any person to leave the family home and not come back;
- (b) require the other spouse or common-law partner to preserve the family home until they leave;
- (c) direct the applicant to pay the other spouse or common-law partner for the cost of other housing; and

- (d) requiring either spouse or common-law partner to pay costs for repair and maintenance of the family home and other related costs.

(5) When the court makes the exclusive occupation order under this section, any previous order made under ss. 16-18 is revoked, unless the court says otherwise.

(6) If the situation changes significantly, any party or person named in the order, or who holds a right or interest in or to the family home, may apply to the court to have the order changed or revoked. The court will then confirm, change or revoke the order.

(7) Anyone who applies for an order under this section must quickly send a copy of it to

- any adult who is being asked to leave the family home,
- any person who holds a right or interest in or to the family home, and
- any other person specified in the court's rules.

21. (1) If a spouse or common-law partner dies, the survivor can apply to the court for exclusive occupation. This includes survivors who are not members or Indians. The court may order that the survivor get exclusive occupation of and reasonable access to the family home, subject to the conditions and time specified by the court.

(2) The court may make a temporary exclusive occupation order, before deciding whether to make the main order under s.21(1).

(3) The court must consider the following when making an exclusive occupation order:

- (a) the best interests of any children who normally live in the family home, including a child's interest in maintaining a connection with their First Nation;
- (b) the terms of the will;
- (c) the terms of any agreement between the spouses or common-law partners;
- (d) the collective interests of First Nation members in their reserve(s) and the views of the council regarding the cultural, social and legal context;
- (e) the medical condition of the survivor;
- (d) how long the survivor has lived on the reserve;
- (g) whether the family home is the only property of significant value in the estate;
- (h) the interests or rights of any other person in or to the family home;
- (i) the interests of any elderly person or disabled person who normally lives in the family home and who is cared for by either spouse or common-law partner;
- (j) any exceptional circumstances that justify removing someone else from the family home (e.g. family violence, psychological abuse); and
- (k) the views given by any other person the court allows.

(4) The order may require:

- (a) the survivor to preserve the condition of the family home;
- (b) any person to leave the family home and not come back; and
- (c) the executor or administrator handling the estate or a person with an interest or right in or to the family home to pay for the costs of the repair and maintenance of the family home and other related liabilities.

(5) The survivor must quickly notify the other parties about the order. However, a peace officer must give a copy of the order to those persons if the court directs.

(6) If the situation changes significantly, any party or person named in the order, or who holds of a right or interest in or to the family home, may apply to the court to have it changed or revoked. The court will then confirm, vary or revoke the order.

- (7) Anyone who applies for the order must quickly send a copy of the court application to
- the executor or administrator handling the estate, if known to the applicant,
 - the Minister,
 - any adult who is being asked to leave the family home,
 - any person who holds a right or interest in or to the family home, and
 - any other person specified in the court's rules.

SECTIONS 22–27: OTHER PROVISIONS

22. A court has authority to decide that family violence has occurred regardless of any criminal proceeding.

- 23.** An exclusive occupation order [ss. 16-18, 20 or 21] does not
- change who holds a right or interest in or to the family home,
 - prevent an executor or administrator handling the estate from transferring the right or interest to a beneficiary, or
 - prevent a court from ordering the transfer of the right or interest [ss. 31 or 36].

24. The person who got an order under ss. 17, 18 or 20 must quickly give notice of the order to anyone named in the order. However, a peace officer must give a copy of the order to those persons if the court directs.

25. The family home includes all the adjacent land necessary to use and enjoy it, if the family home was allotted under s. 20 of the *Indian Act*. [See: ss. 16, 20 and 21]

26. A spouse, common-law partner or survivor who gets an exclusive occupation (ss.16-18, 20 or 21) is bound by any lease given to another, during the order.

27. Any person who disobeys an order under ss. 16-19, s. 20(4)(a) or s. 21(4)(b) is guilty of an offence punishable on summary conviction and is liable

- (a) for a first offence, to a maximum fine of \$2,000 or to imprisonment for a maximum term of three months, or to both; or
- (b) for a subsequent offence, to a maximum fine of \$5,000 or to imprisonment for a maximum term of one year, or to both.