



Matrimonial Real Property (MRP) *and* the *Framework Agreement*

Presentation by:

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Matrimonial Real Property (MRP)

- **Matrimonial real property** on-reserve generally refers to the family home where both spouses or common-law partners live during a marriage or common-law relationship
- Both provincial and federal laws protect matrimonial real property interests and the rights of both spouses or common-law partners in the event of separation, divorce or death...so for most Canadians undergoing a break-down of their marriage, common-law relationship, death of a spouse or partner there is legal protection available to ensure their matrimonial real property is dealt with equitably
- Ex. Provincial laws allow a judge to order a spouse or partner to leave the home if there is domestic violence or physical abuse
- Issue is that many of these important protections related to matrimonial interests are not available on-reserve
- *Indian Act* is silent on the issue

Introduction

- One of the many weaknesses of the *Indian Act* is that it fails to address division of property on marriage breakdown or the death of a spouse
- Clause 5.4 of the *Framework Agreement* (FA) requires a First Nation operating under a land code to establish a community process in its land code to develop rules and procedures applicable upon the breakdown of a marriage, to the use, occupancy and possession of First Nations land and the division of interests in that land
- Section 17 of the *First Nations Lands Management Act* (FNLMA) indicates the same
- Under both the FA and FNLMA, the general rules and procedures shall be contained within a First Nations law or incorporated into the First Nations land code within 12 months after the First Nations land code comes into force

Provincial laws and MPR

- Provincial and territorial law remedies cannot be applied to MRP interests in **unsurrendered** reserve lands as a result of the *Derrickson* and *Paul* decisions. (*Derrickson* – when a conjugal relationship breaks down, courts cannot apply provincial/territorial family law that would alter individual interests in matrimonial real property located on reserves, because reserve lands fall under federal jurisdiction)
- Courts can however in the case of spouses who are both band members include a valuation of an interest in a reserve land allotment in calculating an equalization payment.
- “unsurrendered reserve lands” BCSC *Dunstan v. Dunstan* case drew an important distinction between MRP located on designated lands (lands surrendered less than absolutely) and that located on unsurrendered reserve lands

Provincial laws and MRP

- Provincial laws of “general application” respecting real property off-reserve apply to First Nation people
- Provincial laws respecting the division of matrimonial personal property (property other than land) applies to First Nation people on reserve, and regardless of Indian status or band membership, as a law of general application.

Authorities

- Inherent right to self-government
- Comprehensive self-government arrangements
- *Family Homes on Reserve Matrimonial Interests & Rights Act (FHRMIRA)*
- ***Framework Agreement***

MRP and the FA

- First Nations family laws have been recognized for some time under the FA
- FA First Nations follow the ratification process as described in their land code
- **New** FA Amendments related to MRP (overall increase in self-governing, discretionary provision rather than mandatory, notice requirement of MRP laws to government, expansion beyond breakdown of marriage)

“Rights” in family law

- Occupation of the family home during a conjugal relationship
- A survivor’s right to occupy the family home
- Granting of Emergency Protection Orders
- Exclusive occupation orders for the family home after a relationship breakdown
- Formula for division of matrimonial property on relationship breakdown
- Formula for division of property for survivors

Common Elements for MRP

Common elements found in most, if not all, provincial and territorial legislation addressing MRP include:

- Definition of matrimonial property
- Equal rights of possession to matrimonial home during marriage
- Provision for some form of equalization payments based on value of matrimonial property Remedies
- Rules respecting Agreements.

Definitions

"common-law partner" means an individual who, in respect of another person, is not married to the other person but

- (a) has been living together with the other person in a marriage-like relationship continuously for a period of at least [one] year;
- (b) has been living together with the other person in a marriage-like relationship and together they are the natural or adoptive parents of a child; or
- (c) has entered into a domestic agreement that treats their relationship as marriage-like

Definitions continued...

"family home" means a structure

(a) where the spouses habitually reside or, if they separated or one of them died, they habitually resided on the day on which they separated or the death occurred; and

(b) in which at least one spouse has any right or interest or that was allocated to at least one of the spouses by the [name of the First Nation].

"Family violence" includes actual or threatened acts of bodily harm, sexual assault, unlawful confinement, criminal harassment, or damage to property, regardless of whether it involves an intentional or reckless act.

Where does your First Nation fall with respect to MRP laws?

- Is your First Nation operating under your own Land Code pursuant to the *First Nation Land Management Act*?
- If yes, do you already have your own MRP laws in force (You had until June 18, 2016)
- If No to both questions the default provisions of FHRMIRA apply on your reserve lands until you either
 - 1) enact your own MRP laws pursuant to your Land Code; or
 - 2) enact your own laws under the FHRMIRA
- Upon reviewing the provisional rules under FHRMIRA you can adopt them under the Act even if you are governing under your own Land Code

Main principles of MRP law with a Land Code

- The right of spouses to make their own **agreement** (contract) as to the disposition of interests in First Nation lands
- The value and necessity for **mediation** where the parties have not or are unable to reach their own agreement
- The right of spouses to have access to a **court** of competent jurisdiction

Compulsory Mediation – intended to create a process to divide interest in reserve lands where there is no agreement. A court can create rules and procedures for mediation process

Access to Courts of Competent Jurisdiction – courts can be used to apply provincial laws and also provide members with various orders. For example: an order that First Nation land be transferred to a spouse absolutely

Land Code MRP Continued...

Courts of competent jurisdiction continued...

If a court orders an auction, the council may set the prices. Courts can also declare the “matrimonial home.”

General Provisions – a First Nation can set penalties and punishments if a person contravenes an order set by courts of competent jurisdiction

First Nations have jurisdiction from their land code and MRP to address the division of interest in First Nation lands upon the breakdown of a marriage or spousal separation

Notable aspects of MRP under FNLMA

- FNLMA provides for FN authority to pass “rules and procedures” in cases of marriage breakdown – unclear whether this includes domestic violence matters
- FNLMA refers to MRP as it applies to a breakdown of a marriage – not clear whether it applies to customary marriages or common law
- Words and expressions in the FNLMA have the same meaning as in the *Indian Act*
- FNLMA and FA does not address the issue of FN’s jurisdiction to determine MRP rights in situations of violence
- requirement for non-discrimination on the basis of sex
- provides for the power of FNs to adopt land codes dealing with interests in FN land held pursuant to allotment under the *Indian Act* or "pursuant to the custom of the first nation", as well as licences and leases

Benefits of having an MRP law

- Allows First Nations to exercise jurisdiction over land and family law matters.
- Protects/ensures the interests of children as a priority.
- Aids in resolving property disputes through community-based solutions (e.g., as a result of marital breakdown).
- Promotes fairness, rights and remedies, without discrimination on the basis of sex.
- Preserves and protects the well-being of all parties involved and helps to prevent further conflict from arising.
- Protects the human rights of members while balancing individual and collective rights.

Benefits of MRP Law continued...

- Complements First Nations traditional laws, customs, practices, and policies.
- Complements dispute resolution mechanisms to assist couples in resolving disputes relating to family law matters.
- Clarifies the mechanism for the disposition of matrimonial real property on reserves following a marital breakdown.
- Ensures the safety of all First Nation members and residents

MRP Examples

- Beecher Bay
- Georgina Island
- Kitselas
- Lheidli T'enneh
- Matsqui
- McLeod Lake Indian Band
- Mississauga
- Muskoday
- Nipissing
- Opaskwaya Cree Nation
- Scugog Island
- Skawahlook
- Tsawout
- Tzeachten
- Westbank
- Whitecap Dakota

Available on FNLMRC's website

Elements of FHRMIRA

The stated purposes of FHRMIRA are two-fold:

1. To enable First Nations to pass laws regarding:

- (a) the occupation and possession of family homes located on reserves; and
- (b) the division of the value associated with structures or real property located on reserve upon the breakdown of the conjugal relationship or the death of a spouse.

2. To establish provisional rules and procedures that apply until such time as individual First Nations enact their own laws regarding the occupation, use, possession and division of value of property located on reserve

Provisional federal rules (as of December 16, 2014)

- Equal right to occupancy of the family home
- Requirement of spousal consent for the sale or disposal of the family home
- Emergency protection orders (in situations of family violence)
- Exclusive occupation order (short or long-term occupancy of family home)
- Enforcement of agreements/contracts on the division of the value of the matrimonial property
- Entitlement of each spouse or common-law to an equal division of the family home and any other matrimonial interests or rights
- Order for the transfer of matrimonial real property between member spouses or common-law
- Entitlement of surviving spouse or common-law partner to stay in the home for a specified time after death (180 days) and can apply for half the value of the matrimonial property interests or rights as an alternative to inheriting from the estate

Division of the Value of Matrimonial Interests or Rights

- Your MRP law must provide for the division of the value of MRP interests or rights on the breakdown of a conjugal relationship, or on the death of a spouse. Including a timeline for entitlement (E.g. 12 months from date of separation).
- Also important to include a written consent provision. E.g. a spouse that holds the interest or right to the family home is required to obtain the written consent of the other spouse prior to disposing or encumbering their rights or interest in the family home.
- The calculation of entitlement (under FHRMIRA for example) depends on whether the applicant is a member of the First Nation on whose reserve the MRP is situated, any spouse is entitled to one half of the value of the interests/rights held in or to the family home as well as, one half of the appreciated value of any rights or interests of assets either...

Division of the Value continued...

.....acquired during the relationship, or in contemplation of the relationship (excluding gifts or legacies).

- for those rights or interests acquired before the relationship, and not in contemplation of the relationship, the spouse who is a member of the FN (on whose reserve the MRP is situated) is entitled to the greater of one half of the appreciated value or alternatively, the amount of their contributions towards any improvements for all rights and interests.
- spouses or survivors who are not members of the FN on whose reserve the MRP is situated, are only entitled to the net value of payments made toward improvements for land and structures that were acquired by the other spouse prior to the relationship

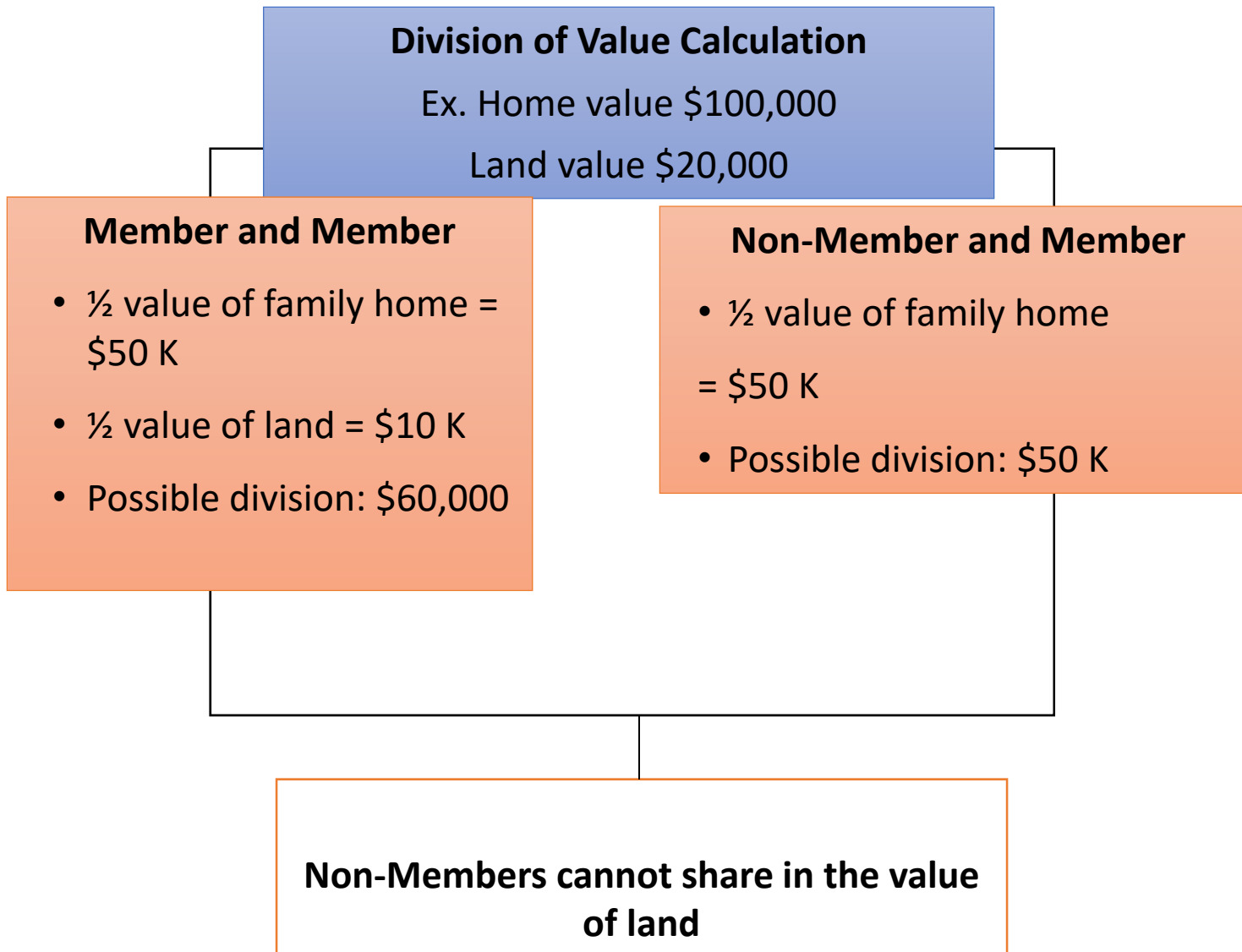
Resolution of MRP issues

- When developing your MRP laws, FA FN's can choose the best way to resolve issues in their community. E.g. by way of agreement through traditional dispute mechanisms, or through the courts.
- Individuals may 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.
- Most MRP laws include seeking resolution through the court system as an option
- Determine who is going to be involved. E.g. appointed committee, chief and council, independent/third party services?

Non-members and interests or rights on reserve

- Both the FNLMA and FHRMIRA respect the principle of non-alienation of reserve lands. Ex. The provisional federal rules do not lead to non-Indians or non-members acquiring permanent interests in reserve land. (Ss. 5 of the Act: “the protections and rights in the legislation do not affect title to reserve lands.”)
- Non-member spouses are entitled to a division of the appreciation in value of relevant matrimonial structures located on reserve but may not share in the appreciation in value of the related interests or rights to the lands; however, in a situation where the non-member spouse has made direct payments to improvements made to such matrimonial interests or rights, a court is able to order that they be compensated.

Valuation of Homes and Land Example



MRP and custom allotments?

- Does your FN have custom allotments? If so note that the provisional federal rules will apply to custom allotments if the "family home" is located on such lands.
- provisional federal rules dealing with the division of value of matrimonial interests or rights do not automatically apply to the value of the lands that have been allotted according to custom; however, they can be applied on custom allotments which are recognized by First Nations or by the courts in accordance with the Act.
- Your own MRP laws can deal with custom allotments in equitable ways

Concluding Remarks



FHRMIRA

- confers rights and obligations on spouses regarding the occupation of the family home and division of matrimonial property, none of these rights or obligations affect the title to the land
- Land continues to be reserve land and as such, cannot be held otherwise than in accordance with the *Indian Act* or *FNLMA*
- **No transfer of ownership can result from any proceeding under FHRMIRA so the reserve land base is not affected**
- **Access FHRMIRA at <http://laws-lois.justice.gc.ca/eng/acts/F-1.2/page-1.html>**

Concluding Remarks

- Despite some opposition to the imposition of provincial family laws on reserve, many MRP laws enacted by First Nations mirror key provisions of provincial family law legislation. Ex. Emergency Protection Orders, Order for Exclusive Occupation, Equitable distribution of family property policy considerations
- MRP laws should also provide for the enforcement of any consent agreements between the parties.
- Essentially, FHRMIRA masks the imposition of provincial family law legislation on reserve, under the guise of providing First Nations with the ability to enact their own laws in this regard.

Concluding Remarks

- Arguably, an applicant can continue to rely on the provisions and procedures provided under FHRMIRA in circumstances where a First Nation either fails to enact its own MRP laws, or where First Nation MRP laws fail to provide the same or similar provisions found under the FHRMIRA.
- Therefore, any First Nation laws will necessarily be modeled pursuant to the provisions of FHRMIRA. These laws will then be applied by the court rather than an on-reserve First Nation tribunal or similar First Nations body.
- Ultimately, FHRMIRA inevitably results in the imposition of provincial family law legislation on reserve.



If you require further information please contact:

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www.LABRC.com

THANK YOU !!!

