CASELAW REVIEW OF THE *FAMILY HOMES ON RESERVE AND MATRIMONIAL RIGHTS AND INTERESTS ACT*

Arbutus Law Group LLP
Catherine Fagan & Kathryn Deo
November 5, 2019
under research contract with the
Centre of Excellence for
Matrimonial Real Property

CASELAW REVIEW OF THE *FAMILY HOMES ON RESERVE AND MATRIMONIAL RIGHTS AND INTERESTS ACT*

Table of Contents

CASELAW REVIEW OF THE *FAMILY HOMES ON RESERVE AND MATRIMONIAL RIGHTS AND INTERESTS ACT*[*]

INTRODUCTION

For a long time, the Canadian courts have been trying to find fair and appropriate solutions for couples resident on reserve regarding the occupancy or division of value of their family home and on-reserve property. Outside of reserve land, there have been longstanding provincial laws in place to ensure that matrimonial real property assets are equitably distributed following a separation or death. Before December 2014, this was not the case for couples living on reserves governed by the *Indian Act*.[1] The tools at the courts' disposal were limited. The *Indian Act* doesn't address the rights and interests held by couples in structures and lands on reserve lands during and at the end of a relationship. The Supreme Court of Canada told us that provincial/territorial laws relating to matrimonial real property cannot be applied on reserves.[2] Therefore, the courts struggled and often failed to find just solutions. The result was that vulnerable spouses (frequently the women) and children often had limited or no options and were forced to leave their family home and community, and received no compensation for the value in their family's on-reserve property that they were forced to abandon.

With the *Family Homes on Reserves and Matrimonial Interests or Rights Act* ["**FHRMIRA**"][3], the federal government filled this legislative gap. They did so by creating a legal regime to address:

- the use, occupation and possession of family homes on reserves,
- the division of the value of any interests or rights held by spouses or common-law partners in structures and lands on reserve when the relationship breaks down or on the death of a spouse or partner.

Very simply, FHRMIRA was enacted to ensure that people living on reserve (including non-member partners) have similar protections and rights as other Canadians.

It has now been close to 5 years since the coming into force of the Provisional Federal Rules of FHRMIRA and close to 6 years since the coming into force of the law-making powers in the Act. This report dives into the treatment of FHRMIRA by the courts since it's adoption in order to:

- review the courts' interpretation of FHRMIRA;

* The authors thank Emily Boyle and Elizabeth Zarpa for their instrumental help researching the various cases and topics canvassed throughout this report.

[1] *Indian Act*, RSC 1985, c I-5, < http://canlii.ca/t/5333k> retrieved on 2019-10-05 [Indian Act] s 30.

[2] *Derrickson v. Derrickson*, [1986] 1 SCR 285.

[3] *Family Homes on Reserves and Matrimonial Interests or Rights Act,* SC 2013, c 20. [FHRMIRA]

- analyze how it has been used to create fair and just results for individuals following a separation or death;

- consider how and whether FHRMIRA has successfully balanced individual rights with the collective interests of First Nations;

- compare judgments since FHRIMRA came into force with certain pre-FHRMIRA cases to see the differences or similarities in the results; and finally, to

- discuss some of the issues that the courts and communities will have to address as we move forward to ensure that FHRMIRA can have the positive impact that its drafters and Parliament intended.

PRE-FHRMIRA CASE LAW

This report begins with a review of a sampling of pre-FHRMIRA cases, to review how the courts attempted to find equitable remedies for spouses and common-law partners following separation or death. Given the lack of a source of law giving courts the legislative authority to determine occupancy rights outside the *Indian Act* provisions, most of these cases turned on compensation in lieu of ordering the division or transfer of matrimonial property. Note that this section does not review the seminal Supreme Court of Canada cases *Derrickson v Derrickson* and *Paul v Paul,* but looks at how the courts tried to find solutions for applicants following the finding in those cases that provincial and territorial matrimonial property laws don't apply on reserve.

Pre-FHRMIRA Case Summaries

Poitras v Khan, 2016 SKQB 346

Facts:

This was an application for probate, for an estate with a value of at least $535,000. The applicant, Jason Poitras (Ms. Poitras' son) was appointed executor under the will. He applied for letters probate appointing him executor of the estate. The respondent, Aman Khan, was married to Ms. Poitras. He and Ms. Poitras lived together in her home, located on a reserve of the Peepeekisis First Nation. Mr. Khan argued that the will was not valid given that it was made two years before Ms. Poitras met and married Mr. Khan.

Issue:

The central issue was the validity of the will, which left the estate to the children of Ms. Poitras, but which was executed two years before she met her non-member spouse, Mr. Khan.

Ruling:

The Court confirmed the validity of the will, granted letters probate, and sent Mr. Khan back to court to make a claim under *The Dependents' Relief Act, 1996.* It also noted that, pursuant to the Saskatchewan *Family Property Act*, Mr. Khan would still have a *prima facie* claim to "one half of the value of family property accrued from the date of marriage until Ms. Poitras' passing."[4]

Analysis:

Regarding the validity of the will, this case involved the intersection of provisions under the Saskatchewan *Wills Act* and sections dealing with testamentary dispositions under the *Indian Act*. Under subsection 17(1) of the *Wills Act*, the will would have automatically been revoked by Mr. Poitras' marriage. A similar provision does not exist in the *Indian Act.* Therefore, Mr. Khan argued that paragraph 46(1)(c) of the *Indian Act* should apply, by which a will can be invalidated if its terms would "impose hardship on persons for whom the testator had a responsibility to provide". The Court acknowledged that Mr. Khan's interests should not be "lightly disregarded", but also held that the will reflected a "logical and loving mother's testamentary wishes to her children". The Court thus confirmed the validity of the will and granted letters probate.[5]

Not wanting to totally disregard Mr. Khan's claim, the court concluded that "Mr. Khan is still possessed of the rights provided to him under the *Family Property Act* of Saskatchewan where he has a *prima facie* claim for one half of the value of family property accrued from the date of marriage until Ms. Poitras' passing." The Court further noted that Mr. Khan may be entitled to make a claim under *The Dependents' Relief Act, 1996.*[6]

The Court also considered subsections 34(1) and (3) of the FHRMIRA but concluded that they "are of no assistance" to Mr. Khan, as the Act came into effect several months after the death of Ms. Poitras.[7]

Commentary:

Had FHRMIRA been in effect at the time of Ms. Poitras' passing, Mr. Khan would have been able to make an application pursuant to section 36 of that Act for his entitlements under subsections 34(1) and 34(3).

In accordance with subsection 34(1) regarding the family home, Mr. Khan would have been entitled to half of the value of the interest held by the deceased in the family home. He would also have been able to make a request for a division of the value of the other matrimonial real property under subsection 34(3) (the provision that applies to non-member spouses).

The court in the case above did not give a breakdown of Ms. Poitras' assets and their value, so we don't know what this amount would be. In accordance with paragraph 34(3)(a), Mr. Khan would

---

[4] *Poitras v Khan*, 2016 SKQB 346 at para. 33.
[5] *Ibid* at para 35.
[6] *Ibid* at para 33.
[7] *Ibid* at para 32.

also be entitled to half of the value, as of the day before Ms. Poitras' death, of any interests or rights that were either acquired during, or in contemplation of, their conjugal relationship. Pursuant to paragraph 34(3)(b), he would also be entitled to either half of the appreciation value, or the difference between payments he made towards improvements and the amount of outstanding debts, respecting any interests or rights that Ms. Poitras acquired before the conjugal relationship, but which appreciated in value during the relationship. Finally, if Ms. Poitras had held any other lands or structures on Peepeekisis reserve lands, Mr. Khan would be entitled to the difference between any payments he had made towards improvements to those lands and structures and any debts or liabilities in relation to those improvements.

Unfortunately, we don't know whether Ms. Poitras held any other properties on reserve other than the family home, nor do we know the value of the family home or whether it had increased in value, so we cannot speculate as to the amount of his entitlement.

Had FHRMIRA been in force, he could had made an application for an exclusive occupation order, to allow him to stay in the home for a short or long period of time.

McMurter v McMurter, 2016 ONSC 1225

Facts:

This was just one of a long list of court actions dating back to 2008, in relation to the divorce between the parties. The case concerned a motion by Mr. McMurter to terminate his obligation to pay spousal support in the amount of $2,500 per month to Mrs. McMurter (the order made in 2010, after a 15-day trial). It is a lengthy decision, most of which is not relevant. We will focus on the parts of the case that are relevant to the issue of family property on reserve.

Both parties were status Indians, and members of the Mohawks of the Bay of Quinte First Nation, residing on reserve. Before their separation in 2007, they had been in relationship for 33 years (since he was 21 and she was 19) and married for more than 30 years.[8] They had two children together. They were a successful couple and, over the course of their relationship, "accumulated significant marital property through their mutual effort and hard work."[9] However, the parties entered into a marriage contract in 2005 (apparently for the primary purpose of preventing CRA from placing liens on their properties).[10] The result of the marriage contract was that it made the parties "separate as to property under the *Family Law Act*" and, accordingly, left Mr. McMurter with "significantly more monetary value" than Mrs. McMurter.[11] Mr. McMurter had not complied with previous court orders requiring him to pay spousal support and sign some of his properties and interests over to Mrs. McMurter, among other things. At the time of this case Mr. McMurter owed to Mrs. McMurter almost $150,000 in spousal support. Indeed, the arrears were so significant

[8] *McMurter v McMurter*, [2016] OJ No 3798, 2016 ONSC 1225 [McMurter] at para 20.
[9] *Ibid* at para 14.
[10] *Ibid* at para 17-19.
[11] *Ibid* at para 20.

that he lost his drivers' licence on several occasions,[12] and was previously ordered to be incarcerated (although he never did go to jail).[13]

Issues:

The Court considered three issues:

- whether there had been a material change in circumstances justifying a variation or termination of the spousal support order, pursuant to the *Divorce Act*;

- whether orders should be made, pursuant to the Ontario *Family Law Act*, with respect to "outstanding property matters" under the 2010 order; and

- of most relevance to this report, whether and how it could use Mr. McMurter's on-reserve properties as security for the spousal arrears owing to Mrs. McMurter, pursuant to the *Indian Act*.

Ruling:

The Court declined to vary the spousal support order, as Mr. McMurter did not establish that there had been a material change in circumstances since the original order was issued. The Court ordered that Mr. McMurter's Certificates of Possession ("**CP**") be used as security against the arrears owing to Mrs. McMurter. The Court declined to make an order with respect to the other matrimonial properties still held jointly by the parties.

Analysis:

Variation of Spousal Support Order

The court declined to vary or terminate the spousal support order based on a material change in circumstances,[14] and stated:

From the evidence before me in this trial on this Motion to Change, I draw adverse inferences against Mr. McMurter for the following reasons: he has not provided full and frank financial disclosure, his disclosure is inadequate, his disclosure is intended to mislead Mrs. McMurter and the court, he has significantly more income than he has disclosed, his assets are significantly more valuable than he has disclosed, his net worth is significantly more than what he has disclosed, he is in defiance of court orders, he has undisclosed cash dealings, and his financial statements are untruthful and blatantly false. I find one of the main reasons that Mr. McMurter has accumulated assets since 2010, is by not paying spousal support to Mrs. McMurter as ordered.[15]

---

[12] *Ibid* at para 195.
[13] *Ibid* at paras 44-49.
[14] *Ibid* at para. 170.
[15] *Ibid* at para 92.

Outstanding Property Matters

Mrs. McMurter sought further relief with respect to the only other matrimonial property still held jointly by the parties. The Court held that it did not have sufficient evidence to rule on this issue but granted leave to both parties to bring a motion in the future under FHRMIRA to join an application under that Act with a case under the Ontario *Family Law Rules*.[16]

In a later, related, decision,[17] the Ontario Superior Court granted Ms. McMurter's request for an order "to register a further Notice of right or interest in Land for registration"[18] against the four properties at issue in *McMurter v McMurter*, 2016 ONSC 1225. With respect to FHRMIRA, however, the Court stated that it would not assist the parties "as they are no longer spouses of one another and have been separated since 2007."[19]

Security for Spousal Support – Arrears and Future Payments

With respect to spousal support arrears, the Court ruled that it did not have jurisdiction over enforcement, as the arrears are filed with the Director of the Family Responsibility Office.[20]

The Court then considered Mrs. McMurter's request for security against future support payments, which is to be paid "indefinitely".[21] The Court considered the implications of ss. 29 and 89 of the *Indian Act* and determined that, because Mrs. McMurter is a status Indian, Mr. McMurter's properties can be used as security against future spousal support payments owing to her under the *Divorce Act*.[22] In making this determination, the Court relied on the decision of the Ontario Court of Appeal in *Mohawks of the Bay of Quinte v. Brant*, [23] in which the plaintiff obtained an order allowing them to seize the property of the defendant, to settle debts he owed to them. "The real property interest of an Indian or a band is a possessory one, by way of a Certificate of Possession, and that is what is referred to in s. 89(1) as the real property of an Indian or a band situated on a reserve"; [24] the underlying title remains with the Crown pursuant to section 29, because "[a] Certificate of Possession is not reserve lands or lands situated in a reserve, but it is either real or personal property of an Indian."[25]

This appears to be the first case in which CPs have been used to secure payments owing under the *Divorce Act*.[26]

---

[16] *Ibid* at paras 247-249.
[17] *McMurter v McMurter*, 2018 ONSC 2626.
[18] *Ibid* at para 35.
[19] *Iibid at* para 9.
[20] *McMurter, supra* note 8 at paras 194, 197.
[21] *Ibid* at para 198.
[22] *Ibid* at paras 208-224.
[23] *Mohawks of the Bay of Quinte v. Brant*, 2014 ONCA 565. (Leave to appeal to Supreme Court of Canada was denied.)
[24] *McMurter, supra* note 8, at para 213.
[25] *Ibid* at para 214.
[26] *Ibid* at para 219.

The Court ordered that charges be registered against each of Mr. McMurter's 4 CPs as a lien in the amount of $400 000 in favour of Mrs. McMurter[27] and prohibits Mr. McMurter from "disposing of, transferring, encumbering or in any way dealing with" the CPs without leave of the court.[28] The terms of the order are binding on the estates of Mr, and Mrs. McMurter.[29]

Commentary:

Even though this is a pre-FHRMIRA case and touches very little on issues raised under that Act, it is an important case nonetheless, as it the first example of a case in which the court used CPs to secure payments owing pursuant to the *Divorce* Act. The ability to use property on reserve as security for support payments may be of great value in future cases, but it is important to note that, in this case, using the CPs as security was only possible as both spouses were status Indians. Had Mrs. McMurter not had status, this option would not have been available to her. In this case the court granted security to ensure that support payments would continue to be made. FHRMIRA is silent on the issue of using CPs as security on orders respecting division of value. Still, it is nonetheless interesting as a potential tool to enforce all types of payments, such as compensation payments under FHRMIRA. Perhaps in the future, case law will provide clarification or legislators will consider whether the securitization of support payments through on-reserve property could be addressed within FHRMIRA.

***Bradfield Estate v Brydges,* 2016 BCSC 189**

Facts:

The plaintiff, Mr. Bradfield, on his own behalf and as executor of the estate of his mother, Ms. Bradfield, sought a declaration of trespass and an order that the defendant, Mr. Brydges, vacate the property. Ms. Bradfield had been an Indian and member of the Tsartlip First Nation. Mr. Brydges was her common-law spouse for approximately 16 years. He was a non-member of the Tsartlip First Nation and was not a status Indian. Ms. Bradfield had two sons.

The essence of the plaintiff's position was that the *Indian Act* does not allow a non-Indian to live on a reserve without permission. Mr. Brydges asserted that as the common-law spouse of Cecelia Bradfield, he was entitled to half of Cecelia Bradfield's estate. He further asserted that as a vulnerable person he was entitled to remain on the property for the remainder of his life.

Issues:

In this case, an action for trespass, the court addressed the issues of:

- whether a non-member common-law spouse has the right to reside on reserve in the matrimonial home after the death of their member spouse, and;

[27] *Ibid* at paras 226 and 231.
[28] *Ibid* at para 237.
[29] *Ibid* at para 238.

- whether the non-member spouse is entitled to half of the estate of their deceased spouse.

The defendant also challenged the validity of the will, but the court held that it did not have jurisdiction over the matter, as the Minister had not consented.[30]

Ruling:

Mr. Brydges was found to be trespassing and was ordered to remove himself and his belongings from the property.

Analysis:

Pursuant to the *Indian Act*, a person who resides on reserve without authorization commits trespass[31] and cannot, through a will or intestacy, acquire a right to possession or occupation of an interest in land on reserve.[32] Case law establishes that a member may bring an action for trespass even if that member is not in possession of the interest in reserve land at issue.[33]

Although sections 14, 21 and 34 of FHRMIRA would have been relevant to the second issue, the court did not consider them, as they came into force after the death of Ms. Bradfield.

Even though a CP was never issued for the property at issue, and although the plaintiff was not in possession of the property, the court held that Mr. Brydges was in trespass, and ordered him to remove his effects from the property.[34]

Commentary:

The court clarified in this case that a member of a First Nation does not have to be in possession of the reserve land which is the subject of the unlawful occupation in order to bring a civil action in trespass.

It is also clear that the ruling in this case would have been different if Ms. Bradfield had passed away after the coming into force of the Provisional Federal Rules under FHRMIRA, just two months later. Mr. Brydges would have had an automatic right to stay in the family home for 6-months following Ms. Bradfield's passing, and the court would have had the authority to grant exclusive occupation to Mr. Bradfield for a period determined by the court. As the death occurred before FHIRMIRA's Provisional Federal Rules came into effect, Mr. Brydges, a non-member, had no legal recourse that would allow him to remain in his family home.

---

[30] *Bradfield Estate v Brydges,* [2016] BCJ No 215, 2016 BCSC 189 [Bradfield] at paras 30-36.
[31] *Indian Act*, *supra* note 1 at s 30.
[32] *Bradfield, supra* note 30 at para 50.
[33] *Ibid* at paras 18-22.
[34] *Ibid* at para 40.

Hepworth v Hepworth, 2012 NSCA 117

Facts:

The parties married in 2000 and separated in 2008. The appellant was a member of the Milbrooke First Nation, and the respondent, his ex-wife, was a non-member. They lived in a home on the reserve for approximately ten years. The Millbrooke First Nation had provided the land, infrastructure, labour, and a $27,500 grant for the home. A CP was not issued to Mr. Hepworth for the property at issue.

Throughout the years the parties put $19,500 of their own money into the home and did some repairs and renovations to the home. In 2008, the home was appraised as having a market value of $127,000, or replacement cost of $98,818 (after depreciation). There was further evidence (albeit limited) that a home of comparable size was listed for sale at $40,000 on reserve. The husband already paid the wife $10,000 as compensation for the money she put into the home.

The trial judge considered issues regarding the family home, custody, support, matrimonial property, and debts. In his oral reasons,[35] the trial judge issued an award of $17,170 for the wife, after valuing the home at $40,000, taking into account a retroactive support order of $10,000, and an equalization award of $12,830. The trial judge then deducted the previous $10,000 payment and ordered Mr. Hepworth to pay the award to Ms. Hepworth in three yearly installments.

When the trial judge realized that he had made a mathematical error, and as a result the award did not result in the bottom line he intended, he added an addendum to his judgement stating that the home was worth $80,000 not $40,000, leaving the compensation order at $17,170. The parties appealed and cross-appealed the compensation order and the evaluation methodology.[36]

Issue:

This was an appeal and cross-appeal of a compensation order made by the lower court. The issue was whether the trial judge made an error in the evaluation of the matrimonial home which would also affect the amount of the compensation order.

Ruling:

The appeal was allowed and the cross-appeal was dismissed. The court held that the trial judge did not err in deciding that the matrimonial home was a matrimonial asset to be considered in the division of property for the purpose of issuing a compensation order; however, the court also held that the trial judge erred in the method of evaluating the matrimonial property.

---

[35] *Hepworth v Hepworth*, 2012 NSCA 117 [Hepworth]at paras 10-13.
[36] *Ibid* at paras 14-15.

Analysis:

In evaluating the value of the home, the Court of Appeal recognized that when reserve land is transferred or sold there is little record of that process and the value. An appraisal done in July 2008 appraised the home at a market value of $127,000.00. It also gave a total replacement cost of $123,648.00 which, less accrued depreciation, was $98,918.00. The trial judge determined that the value of the home was $40,000 after recognizing the limitations of a home on reserve such as the inability to obtain a mortgage on reserve, and also that only band members could obtain a home on reserve. The trial judge instead accepted limited evidence that a similar home on reserve sells for $40,000.[37]

Mr. Hepworth argued that because he did not have a CP, the home in question could not be considered a matrimonial home, and a compensation order therefore could not be issued. The court determined that Mr. Hepworth did not need to hold a CP for the matrimonial home in order for him to be deemed to be in possession of the home.[38] Even though Mr. Hepworth did not have a CP, the entirety of the other evidence such as his having lived there unfettered for over a decade, was enough evidence to show he had lawful possession of the matrimonial home. Further, the court held that his interest was not a leasehold interest.[39] Accordingly, the court determined that the home fell within the meaning of "matrimonial assets" under the Nova Scotia *Matrimonial Real Property Act* and was therefore considered to be real or personal property acquired before or during marriage and was to be divided equally between the parties.[40]

The court overturned the trial judge's amended valuation of $80,000 and restored it to the original value of $40,000. Accordingly, the court ruled that Mrs. Hepworth was entitled to $20,000 in compensation for half her interest in the home.[41] Finally, the court adjusted the amount of the equalization payment set by the trial judge and ultimately determined that Ms. Hepworth owed Mr. Hepworth $8,706, after deducting the value of the compensation award.

Commentary:

This case is a good example of the difficulties in valuing homes on reserve. The value on the home set by trial judge (and upheld by the Court of Appeal) was considerably lower than both its assessed market value and its assessed replacement value. Instead, the trial judge accepted the limited evidence that the house would be worth $40,000, and that there was no real market value for a home on the reserve:

> […] These compensation orders require some market value being attributed to the property. Mr. Lederman suggests the replacement cost approach as was done in *Darbyshire-Joseph v. Darbyshire-Joseph*, 1998 Can LII 3522. There may be times or cases where this approach would be appropriate. In this case I have an appraisal for $127,000.00 and a total replacement cost of

[37] *Ibid* at paras 10-13.
[38] *Ibid* at para 33.
[39] *Ibid* at paras 34-37.
[40] *Ibid* at para 38.
[41] *Ibid* at para 50.

> $123,648.00, both figures found in the 2008 appraisal by Mr. Weatherby. The value of the land and any tax factors obviously have not been factored in. I am satisfied there is relatively no market value for this home. Millbrook is a small Reserve. It is a modest community economically speaking. Few, if any, houses move on any kind of a sale basis. Most transactions are without formality or costs. Only Band members can live there. It is not mortgageable which has a downward pressure on the value. All these things produce, as I say, a downward effect on the value regardless of what was spent on building the home.
>
> […]
>
> What evidence of value do I have before me? Really, just Mr. Johnson's evidence. He testified the highest price he ever heard of was $40,000.00. His evidence was very limited in that no details were provided as to who they were, their status, where this happened, the kind of a house or any other factors. He had heard of one house going for $40,000.00. That is the evidence before me. Nothing has been advanced to refute that figure. On the evidence and the authorities before me I attribute a $40,000.00 value to this home.[42]

The Court of Appeal recognized that other methods of valuation may be appropriate in different circumstances.[43] All this leaves little clarity for future cases. There are many methods available for valuation, and it will be up to each spouse to make their case for their preferred method before the court. This leaves considerable discretion to the trial judge. Hopefully, as the case law expands, a proper test or steps of analysis will be developed, to better guide trial courts and ensure that a similar approach is taken by courts in determining the value of the property.

The fact that the trial judge valued the house at $40,000, and then immediately amended him judgment when he realized it did not amount to the compensation order he had intended demonstrates that judges may be tempted to pick a value that will allow them to make their intended compensation order, and will find a valuation methods that matches their intentions, rather than starting with an appropriate valuation methodology.

***Dunstan v Dunstan*, 2002 BCSC 335**

Facts:

Mrs. and Mr. Dunstan were both status Indians. They married in 1988 and separated approximately 10 years later. The family assets at issue in the case included the cattle and horses, the matrimonial home (located on lands subject to a leasehold interest on designated lands of the First Nation) and Mr. Dunstan's interest in a ranch (located on undesignated reserve lands). The ranch was

[42] *Ibid* at para 13 (citing paragraphs 19 and 21 of the trial judgment).
[43] *Ibid* at para 48.

bequeathed to Mr. Dunstan and his nine siblings in a will, and he held a 1/10 undivided interest in the ranch.[44]

Issue:

At issue in this case was whether a provincial court judge could issue a restraining order to prevent Mr. Dunstan from selling the cattle and horses, the matrimonial home on reserve and the ranch on reserve.

Ruling:

The judge ordered a restraining order prohibiting the sale of the matrimonial home, the horses and the cattle. The order would remain in force until a final determination of the division of family assets was made.

No restraining order was made for the ranch because Mr. Dunstan was in legal possession of the ranch and it was located on reserve, over which provincial law could not apply.

Analysis:

In determining the division of family assets, the court, at paragraph 10 cited a passage in *Derrickson*[45]:

> All family assets having been taken into account, where an equal division is not possible because some assets, in this case lands on a reserve, cannot be divided, I fail to see why a compensation order could not be had. Compensation in lieu of a division of property is not a matter for which provision is made under the *Indian Act* and in my view, there is no inconsistency or "actual conflict" between such a provision for compensation between spouses and the Indian Act.

The court determined that it was appropriate to issue a restraining order to stop Mr. Dunstan from selling the cattle and horse, as it was an order against an individual and "not an attempt to 'charge, pledge, mortgage,' or to attach, levy, seize, distress or execute against 'real and personal property of an Indian'."[46] Further, the court held that the restraining order was in favour of another Indian and therefore was not prohibited by subsection 89(1) of the *Indian Act*.[47]The court then issued a restraining order to prevent Mr. Dunstan from selling the cattle and horses.[48]

The court also issued a restraining order to stop Mr. Dunstan from selling the matrimonial home. The home was located on designated lands of the First Nation, over which the plaintiff had a

---

[44] *Dunstan v Dunstan,* [2002] BCJ No 443 [Dunstan] at para 4.
[45] *Supra* note 2 at para 10.
[46] *Dunstan, supra* note 44 at para 12.
[47] *Ibid* at para 14.
[48] *Ibid* at para 15.

leasehold interest. The Court stated that leasehold interests in designated lands are subject to Provincial laws of general application:

> [16] Section 89(1.1) of the Indian Act contemplates that leasehold interests in designated lands are subject to financial charges and execution like proceedings, all of which are governed by Provincial Legislation. Whether or not she was an Indian as defined under the Indian Act, s.89(1.1) contemplates that Ms. Dunstan could have received a charge, pledge or mortgage against the leasehold interest in designated lands of the Plaintiff or could have levied, seized, restrained or executed against the leasehold interest in designated lands of the Plaintiff.
>
> [17] By allowing a person whether or not defined as an Indian under the Indian Act to deal freely with a leasehold interest in designated lands including the seizure and potential sale of the leasehold interest, I am satisfied that the Parliament contemplated that all Provincial legislation of general application would apply to such leasehold interests. As well, there is nothing to suggest that the ability to restrain the transfer of a leasehold interest in designated lands is a matter for which provision is made under the Indian Act so as to be inconsistent or in "actual conflict" with the provisions in the F.R.A.[49]

Therefore, the court concluded that a restraining order regarding the leasehold interest in designated lands would not come into conflict with federal jurisdiction.[50] Although it wouldn't have changed the outcome in this case, it is interesting that the judge concluded that *all* provincial laws of general application apply on leasehold interests in designated lands. It is arguable that this is overly expansive and that section 88 of the *Indian Act* still applies.

However, no order could be issued regarding Mr. Dunstan's interest in the family ranch. It was determined that the ranch was not subject to provincial laws of general application because it was located on reserve lands and, therefore, issuing a restraining order would be in direct conflict with federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*.[51] Notwithstanding its refusal to issue a restraining order against the ranch, the court noted that "in due course, the Defendant may well be entitled to a declaration that the interest of the Plaintiff in the Alkalai Ranch was a family asset so that the Court can then make a compensation order."[52]

Commentary:

This case includes a clear discussion on the limitation of provincial law to project the rights of spouses upon a separation or divorce. Mrs. Dunstan was clearly afraid that Mr. Dunstan would sell off their assets and interests before the value of the division was finalized by the court. However, the court could provide no protection for assets held on regular reserve land. Luckily for Mrs.

[49] *Ibid* at para 16-17.
[50] *Ibid* at para 22.
[51] *George v George,* [1992] BCJ No 1837 (BC SC) [George v George] at para 25.
[52] *Ibid* at para 26.

Dunstan, their matrimonial home was on designated lands, and leasehold interests on those lands were subject to regular provincial laws. Otherwise, Mrs. Dunstan would have had no protection.

If this case had been decided under FHRMIRA, the court would have had more options to deal with matrimonial property on reserve. Presumably, a similar type of restraining order could have been made to deal with all the matrimonial property under section 32 of FHRMIRA:

> 3.2 On application by a spouse or common-law partner, a court may make any order that it considers necessary to restrain the improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights for the purpose of protecting
>
> (a) the right that might be granted to the applicant in an order made under section 20 or any interest or right that might be transferred to the applicant in an order made under section 31; or
>
> (b) the value of the interests or rights that will be used to determine the amount that might be payable to the applicant in an order made under section 30.

Further, under FHRMIRA, Mrs. Dunstan could have also included a request for an occupation order.

***George v George,* [1992] BCJ No 1837 (BC SC)**

Facts:

In July 1991, a divorce order was issued for Mr. and Mrs. George who were married for 29 years. Mrs. George was a member of the Squamish First Nation and Mr. George was a member of the Burrard Inlet First Nation. When the two married, Mrs. George relinquished her membership to the Squamish First Nation and became a member of her husband's band, the Burrard First Nation.

The matrimonial home where Mr. and Mrs. George resided throughout the duration of their marriage was located on the Burrard Reserve. It was gifted to Mr. George by his father and uncle, but neither Mr. or Mrs. George had a certificate of possession for land on which the home stood, although Mr. George received money from Indian Affairs to help build the home in 1971. An application for a certificate of possession was in progress during the trial.

At the time of the trial, she was considered "state-less" while she was in the midst of finalizing the processes of her divorce and filing to reclaim her membership with the Squamish First Nation.

Issue:

The main issue in this case was whether Mrs. George could receive a compensation order and a spousal maintenance order under the BC *Family Law Act*.

Ruling:

A compensation order was issued requiring Mr. George to pay $88,015 to Mrs. George in $800 monthly installments.

Analysis:

Based on a balance of the evidence, the judge determined that Mr. George was in legal possession of the home, despite that absence of a certificate of possession:

> "On balance, I find that Mr. George is lawfully in possession of the subject property, pursuant to s. 20(1) of the *Indian Act*.
>
> Section 20(2) of the *Indian Act* provides that a Certificate of Possession is only evidence of an Indian's right to possession of land in a reserve.

The judge decided that Mrs. George, who lived and raised three sons in the home, would receive a compensation order for the matrimonial home. The Court appraised the value of the home at an annual rental value of $10,000. The Court accepted 80 years old as an average life span. Mrs. George was 52 at the time of the appraisal and the appraiser subtracted 3.5% and a little more in case Mrs. George did not live to 80. The total Mrs. George was entitled to get under the compensation order was $88,015. Given Mr. George's inability to pay such a large sum, the Court ordered it to be paid in $800 monthly increments by Mr. George.

In determining whether to issue a spousal order the judge looked at the income of both Mr. and Mrs. George while they were married and used the Rutherford formula. The Rutherford formula calculated the pension amount from the date of separation, but because Mr. George ignored an interim maintenance order the judge issued the calculation for a spousal order to begin the date of the divorce which was July 1991.

The order was later appealed to the British Columbia Court of Appeal and the appeal was dismissed.[53]

Commentary:

Mrs. George would have had more options if this case had been heard after the coming into force of FHRMIRA's Provisional Federal Rules, such as requests for occupancy of the family home. It is nonetheless a useful case to demonstrate how compensation can be calculated, using rental value, average life-span etc. It is also useful to demonstrate the tools at a Court's disposal to ensure that payment of compensation orders is feasible, and that the payments can be made in small instalments over many years. This is a significant area of concern for First Nations members and Councils, who fear that orders of division would be impossible for many members to follow, because of lack of financial resources, particularly ready access to cash.

---

[53] *George v George*, 1996 CanLII 2766 (BC CA).

MRP Laws under the jurisdiction of the Framework Agreement under the FNLMA

For many reasons, including the absence of provisions to address matrimonial property rights, First Nations were looking for a way out of the paternalistic constraints of the land management regime under the *Indian Act.* Therefore, in 1996, Canada and several First Nations signed a Framework Agreement prescribing a regime for reserve land management that was an alternative to the default arrangement in the *Indian Act.* In 1999, the *First Nation Land Management Act* ["**FNLMA**"] ratified the Framework Agreement and gave it legal effect. Participation in this alternative land management regime is open to any First Nation that chooses to sign the Framework Agreement.

The FNLMA land regime comes into effect for a signatory First Nation and its reserve land upon preparation of a land code, negotiation of an agreement with Canada, verification that the proposed land code and community approval process complies with FNLMA, and community approval. Once in effect, 40 sections of the *Indian Act* dealing with land management cease to apply to that First Nation and its reserve land.

To be eligible for verification, the land code must include procedures that govern transfer of First Nation land by succession or testamentary disposition, rules to govern the First Nation when granting or expropriating rights or interests in reserve lands, and specification of a forum to resolve disputes respecting rights or interests in reserve lands. Once a land code is in force, the participating First Nation may enact rules and procedures for the use, occupation and possession of lands subject to the land code and for the division of interests or rights in lands on marriage breakdown. If they choose not to enact such rules, then FHRMIRA's Provisional Federal Rules apply. It should be noted that until 2018, communities were required to enact MRP rules. There are currently approximately 153 First Nations who have entered into First Nations Land Management and are either developing or operating under their own land codes.

This was a first attempt to address the legislative gap whereby there were little or no protections for vulnerable spouses in cases of violence, divorce or death with regard to their family home and other on-reserve real property.

We could only find one reported case under a community-specific matrimonial real property law.

Kumagai v. Campbell Estate, 2018 BCCA 24

Facts:

This was an appeal and cross-appeal of an order under the BC *Family Law Act*[54] regarding: 1) the division of family property on the reserve lands of the Tzeachten First Nation, and 2) spousal support.

[54] *Family Law Act*, S.B.C. 2011, c. 25.

The Tzeachten First Nation is scheduled to the *First Nations Land Management Act*. It enacted a Land Code in 2008, [55] and in 2009 it enacted its *Matrimonial Real Property Law*[56], which "provides that the former *Family Relations Act* (now the *Family Law Act*) and the *Divorce Act*, apply 'as modified by this Law and to the extent possible subject to this Law, the Land Code, and the common law'."[57]

The late Mr. Campbell was a wealthy man, owning 6 CPs and several businesses. He executed his last will a few days after Ms. Kumagai filed a Notice of Family Claim (which she filed after learning that Mr. Campbell was having an affair), and a few weeks before he died. In his will he left his properties and businesses to his minor grand-nephew. The will also granted a large monthly payment to the executrix (his mistress), and a small monthly spousal support payment to Ms. Kumagai.[58] The Minister of Indian Affairs made an order under subsection 44(1) of the *Indian Act*[59] transferring jurisdiction "in relation to testamentary matters and causes with respect to the estate of the deceased, to the Supreme Court of British Columbia."[60]

Issue:

The central issues in this care were the value of the family property, and the appropriate amount of spousal support owed to Ms. Kumagai.

Ruling:

The Court increased the net family property from $3,370,000 to $6,328,601, and increased Ms. Kumagai's entitlement to $3,164,301 from the $1,959,301 awarded by the trial judge. The Court sent the issue of spousal support back to the trial court.

Analysis:

The trial judge awarded to Ms. Kumagai half of the value of the family property. Ms. Kumagai challenged the basis on which the value was determined. Specifically, she argued that:

1) the trial judge erred in discounting the "highest and best use" appraisal of the residential lands;

2) in the alternative, the trial judge erred in ignoring the appraiser's opinion that the appraised valued of the residential lands should be greater than that of a single residential site; and

3) the trial judge erred in setting the valuation date as the date of Mr. Campbell's death rather than the date of the trial.

---

[55] *Tzeachten First Nation Land Code*, approved on April 24, 2008.
[56] *Tzeachten First Nation Matrimonial Real Property Law*, Law No. 09-03.
[57] *Kumagai v Campbell Estate,* 2018 BCCA 24, [2018] BCJ No 66 [Kumagai].
[58] *Ibid* at paras 15 and 16.
[59] *Indian Act, supra* note 1 at s. 44(1).
[60] *Kumagai, supra* note 57 at para 19.

The Court found that the fact that the executrix could not herself develop the residential lands did not constitute a "legal impediment" and should not prevent the lands from being valued at their highest and best use. Indeed, the Court set out a number of options for orders which would allow the executrix to facilitate the development of the lands.[61] In fact, evidence would need to be adduced establishing a *legal* impediment to the use of land that justifies rejecting the highest and best use valuation. This is a high bar, indeed. At paragraph 65, the Court talks about the difference between a legal impediment, which can validly affect the value of land, in contrast to personal impediments which cannot validly affect the value of the land:

> [65] In short, legal impediments are legal restrictions on the use of the land. They do not include an owner's intentions or desires, which are irrelevant, or in this case an executrix's inability to facilitate the highest and best use of the land, which may be rectified. As a bare trustee, the executrix could apply to the Supreme Court for an order under the *Trustee Act*, R.S.B.C. 1996, c. 464, for the appointment of a new executrix, or for an order under s. 43 of the *Indian Act* and *Indian Estates Regulations*, C.R.C., c. 954, for the appointment of an administrator that could facilitate the highest and best use of the land and be in compliance with any Band requirements. Under s. 44 of the *Indian Act,* orders can be made pursuant to provincial laws, like the *Trustee Act*, as long as they are "in accordance with" (i.e., not inconsistent with) the *Indian Act*.

The appraiser's "highest and best use" calculation was further supported by Tzeachten's Land Code and Land Use Plan, which supported the type of development contemplated by the appraiser.[62]

The Court held that the trial judge erred in accepting the appraisal which treated the residential lands as a single, non-developable parcel. The appraisal should have treated the highest and best use as "high-density residential and commercial development" or, at a minimum, as "three individual residential sites."[63]

With respect to the valuation date, the Court held that the trial judge erred in choosing the date of death, as he did not find that "it would be significantly unfair to divide the net family property equally."[64] Absent an agreement between the spouses respecting the division of net family property, the default valuation date is "the date of a hearing with respect to the division of family property and family debt", in accordance with paragraph 87(a) of the *Family Law Act*.[65]

---

[61] *Ibid* at para 65.
[62] *Ibid* at para 66.
[63] *Ibid* at para 68.
[64] *Ibid* at para 69.
[65] *Ibid* at para 74.

Taking all these factors into consideration, the Court increased the net family property to $6,328,601, and increased Ms. Kumagai's entitlement to $3,164,301[66] from the $1,959,301 awarded by the trial judge.

The Court sent the issue of spousal support back to the trial court, given the "proposed change in the compensation award, proposed change in the findings for each party's income, and the need to weigh the factors under s. 171 of the *Family Law Act.*"[67] In the interim, the existing order was to be maintained.[68]

Commentary:

This case provides a very helpful discussion of appraised values. The Court made it clear that for appraisal purposes, properties should be assessed at their highest and best use, regardless of their present use. Evidence would have to be adduced establishing a *legal* impediment to the use of land (i.e. a zoning or other regulatory impediment to development) that justifies rejecting the highest and best use valuation. Further, appraisals should not factor in the *intentions* of the interest-holders or any personal impediments of the individual that could affect their ability to develop the property. The change in appraisal methodology resulted in the net value of the family properties almost doubling.

The plaintiff further benefited from the change in valuation date, as all the properties had appreciated in value from the time between the date of death and the date of the hearing, as permitted under the BC *Family Law Act*. This is one area where the result would have been different under FHRMIRA, which would have set the date of valuation as the date of death in accordance with section 34:

> 34 (1) On the death of a spouse or common-law partner, the survivor is entitled, on application made under section 36, to an amount equal to one half of the value, on the valuation date, of the interest or right that was held by the deceased individual in or to the family home and to the amounts referred to in subsections (2) and (3).
>
> […]
>
> 34 (6) For the purposes of this section, valuation date means
>
> (a) in the case of spouses, the earliest of the following days:
>
> (i) the day before the day on which the death occurred,
>
> (ii) the day on which the spouses ceased to cohabit as a result of the breakdown of the marriage, and

[66] *Ibid* at para. 86.
[67] *Ibid* at para 94.
[68] *Ibid* at para 109.

(iii) the day on which the spouse who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted; or

(b) in the case of common-law partners, the earlier of the following days:

(i) the day before the day on which the death occurred, and

(ii) the day on which the common-law partner who is now the survivor made an application to restrain improvident depletion of the interest or right in or to the family home and of the matrimonial interests or rights that is subsequently granted.

Given the size of the estate, and the significant increase in value of the estate, Ms. Kumagai would have been entitled to significantly less under FHRMIRA.

Use of Pre-FHRMIRA Cases Today

FHRMIRA put in place a detailed legal regime for matrimonial real property on reserve, and so pre-FHRMIRA cases will of course be of limited use for many areas of legal analysis (particularly in areas of possession and occupation orders). Even in areas where the courts had tools at their disposal, such as awarding compensation orders, FHRMIRA in some cases made modifications, such as the appropriate date of valuation, and whether the value of land is to be included when determining the divisible value of a couple's property.

Nonetheless, there are some areas where pre-FHRMIRA cases still provide useful precedent. Most significantly are the various approaches and methods that the Court used to value a home and land on reserve. This issue is discussed in greater detail latter in this Report. It is also useful to see how they dealt with the sometimes difficult issue of enforcing payment of sometimes large sums of money, particularly considering the issues of low-income and poverty on reserve.

FHRMIRA CASE LAW

Before we review the cases that interpreted FHRMIRA, it is beneficial to briefly review the legislative regime put in place by FHRMIRA.

The purpose of FHRMIRA is two-fold. First, it recognizes the jurisdiction of First Nations to adopt their own laws regarding the use, occupation and possession of the family home and the division of the value of matrimonial real property following a separation or death. The Act creates requirements for the community approval of such laws. The provisions authorizing these laws came into effect on December 16, 2013.

Second, for those First Nations that have not adopted their own matrimonial real property law, FHRMIRA establishes provisional rules that apply during or after a conjugal relationship breaks

down or on the death of a spouse or partner. The rules cover, in simple terms, the occupation of the family home and the division of the value of any interests or rights held in buildings and lands on reserve ["**Provisional Federal Rules**"].[69] These Rules came into effect on December 16, 2014. They apply only to First Nations that have not yet enacted matrimonial property rules. A validly enacted First Nation law ousts the entirety of the Provisional Federal Rules for that First Nation.

FHRMIRA applies only to structures and lands on reserve and applies to spouses or common-law partners only if at least one of them is a First Nation member or an Indian.[70]

It is important to note that if a First Nation has signed a self-government agreement with Canada, which recognizes its power to manage its reserve lands, the Provisional Federal Rules do not apply, even if the First Nation has not enacted their own matrimonial real property law (unless the federal minister declares that the Rules apply to that First Nation). FHRMIRA also clarifies how the Provisional Federal Rules apply to First Nations who have adopted land codes under the *First Nation Land Management Act.*

The Federal Provisional Rules can be broken down into three parts:

1) sections 13 to 27 address the entitlement of each spouse to occupy the family home during the relationship, the procedure to grant exclusive occupation through an emergency protection order in the event of domestic violence, and procedures to grant exclusive occupation on the separation of spouses and common-law partners, or to the surviving partner upon the death of one of them.

2) sections 28 to 40 deals with how to value each spouse's interests to the family home, and other matrimonial interests, upon separation or on the death of one of the spouses.

3) sections 41 to 52 cover how to determine rights and interests, the entitlement to notice to the affected First Nation and other affected persons and participation in the process, and the enforcement of orders resulting from process.

Cases applying FHRMIRA

NC c EP, 2019 QCCS 754[71]

Facts:

This case concerned an unmarried couple who lived together for 17 years until their separation. The couple had one child, over whom they held shared custody. NC, the plaintiff, contributed significantly to the enrichment of EP, allowing him to purchase the family home while she took

[69] *FHRMIRA, supra* note 3 at section 4.
[70] *Ibid* at section 6.
[71] Alternative citation : Droit de la famille -- 19338, [2019] JQ no 1568

care of all regularly occurring household expenses. The family residence was located on reserve and the land was provided by the Band Council to EP as a member of the First Nation.

Issue:

The issue in this case was whether the Plaintiff, NC, was entitled to half of the value of the family home that she occupied with the Defendant, EP, until the date of their separation in 2015.

Ruling:

The Court held that NC was entitled to compensation for her contribution to the sole asset of the couple, namely the residence built on the reserve. Her contributions were equivalent to half the value of the home, minus the value of the down-payment, which was made by EP.

Analysis:

The Court relied almost exclusively on the principle of unjust enrichment to determine the amount of compensation owned the plaintiff. Articles 1493-1495 of the *Civil Code of Quebec*[72] prohibit unjust enrichment. Case law establishes six elements of unjust enrichment:

1) the contributions made by the spouse making the claim,

2) the enrichment of the other spouse,

3) a causal link between the contributions and the enrichment,

4) the proportion of the enrichment,

5) the impoverishment of the party making the claim, and

6) the lack of justification for the enrichment.

However, there is a rebuttable presumption that the enrichment of one party is to the detriment of the other (that is, that there has been unjust enrichment), and another presumption that the enrichment cannot be justified.[73]

As NC was a non-member and cannot hold property on the reserve, the home and the land on which the home was built were registered in the name of EP, a member. EP paid the mortgage, but NC contributed to many of the other household expenses including furniture, as well as all the expenses for their son, and she made the mortgage payments for an 18-month period during which EP went bankrupt. The Court held that NC was therefore entitled to receive half the net value of the matrimonial home – $8250 – plus her costs.[74]

---

[72] *Civil Code of Québec*, CQLR c CCQ-1991, <http://canlii.ca/t/542k8> retrieved on 2019-10-05 [Civil Code of Quebec].
[73] *NC c. EP*, 2019 QCCS 754 [NC c. CP], at para 72.
[74] *Ibid* at para 32.

The value of the house was determined by an expert to be $251,000 in 2015. From this amount, the Court deducted the $118,000 down payment paid by the defendant, which came from an inheritance received in 2000. The Court also deducted the hypothec, valued in 2015 at $117,000. Therefore, the equity in the house was found to amount to $16,500, which was divided between the two parties, leaving $8,250 for NC.

Although NC also made her claim based on the FHRMIRA[75], the Court declined to decide on the applicability of that Act, as it determined that the Act would not have been of any additional benefit to NC.[76]

Commentary:

As noted, the Court deducted from the award the down payment which was paid for by the member defendant (and received from an inheritance in 2000). It is strange that neither the lawyers nor the judge seemed to realize that if they had used FHRMIRA, the couple would have been considered 'common-law partners' and the home would have been deemed to be the couples' matrimonial home, meaning that the down payment wouldn't have been deducted from her award. Therefore, it seems that there *would* have been a benefit to use FHRMIRA, despite the judge's indication to the contrary. This seems to illustrate a lack of comfort and familiarity with FHRMIRA, by both the lawyers and the judge in this case, which results in an overreliance on the *Civil Code of Québec*, which offers less beneficial protections for vulnerable spouses, particularly unmarried partners.

This judgment also raises concerns that in the future the Quebec courts may not recognize rights to unmarried couples under FHRMIRA, given that this is foreign to Civil law. Under Quebec law, there is no concept of 'common law partners', whereby unmarried partners are considered spouses for many purposes, particularly following a separation.[77] As such, under Quebec civil law, there is no family patrimony (i.e. family property, in which both individuals share equal interest) for couples living together but not married or in a civil union, even if they have children. Therefore, the remedy in this case seems problematic. Since the parties had a child in 2000 and were together for 17 years, the plaintiff presumably should have been entitled to half of the value of the home, without deducting the down payment (note: inheritances are deducted from all matrimonial property, except when it is used towards the family home). However, there is no indication that this case was appealed, which means that the decision stands and puts into question how FHRMIRA will be applied to unmarried partners in the future in Québec.

***Toney v Toney Estate*, 2018 NCCS 179, [2018] NSJ No 292**

Facts:

The applicant and her late husband lived in the family home for 30 years. Mr. Toney held a Certificate of Possession ("**CP**") for the home, and for another parcel. Over the course of their relationship, the applicant and her late husband spent approximately $140,000 on permanent

[75] FHRMIRA, *supra* note 3.
[76] *NC c. EP*, *supra* note 73 at para 27.
[77] The exception is if the couple choses to sign a contract of civil union, which would extend many of the protections of matrimony to the couple.

improvements to the home. Mr. Toney had 5 children, including 2 with the applicant. In his will, Mr. Toney left the family home to the applicant, and alternatively to their two children. The family home was the only significant asset in his estate. Although Indigenous & Northern Affairs Canada (as it then was) approved the will, it also indicated that it would distribute the estate as though there were no will, as the property could not be transferred to the applicant, a non-member. INAC's preference was to transfer the property into the names of all 5 of Mr. Toney's children.

Issue:

This case concerned an application by the non-member widow of a member for an order for exclusive occupation of the family home and half of the value of the estate. The central issue was the application of the FHRMIRA to the facts at issue.

Ruling:

The Court granted an exclusive occupation order for an indeterminate period, with certain conditions attached. The Court also granted the applicant $70 000, equal to one-half the value of the deceased's interest in the family residence at the time of his death.

Analysis:

The Court considered FHRMIRA generally, including the background and history leading to its enactment, and considers, in particular, sections 2, 4-6, 21, 34 and 36.

The Annapolis Valley First Nation appeared as an interested party, due to the significant lack of housing on reserve, and argued that, if granted, an order of exclusive occupation should be for a limited period.

Section 21of FHRMIRA allows a court to grant to a surviving spouse an order for exclusive possession, on application, whether or not the surviving spouse is a member or a status Indian. Subsection 21(3) sets out several factors that the court must consider when deciding whether to grant such an order.

The Court reviewed each of the factors under FHRMIRA subsection 21(3) in determining whether to grant an order for exclusive occupation, and if so for what length of time and under what conditions.

The Court found that the factors under paragraphs 21(3)(a) (best interests of the children) and (d) (collective interests of AVFN members) weighed against the granting of the order. Indeed, the Court noted that, due to the significant housing shortage, paragraph 21(3)(d) "strongly favours not issuing an order for exclusive possession."[78]

However, the Court also determined that the factors under paragraphs 21(3)(b) (terms of the will), 21(3)(c) (terms of agreement between the spouses), 21(3) (e) (medical condition of the survivor),

[78] *Toney v Toney Estate,* 2018 NSSC 179, [2018] NSJ No 292 [Toney] at paras 109 and 118.

21(3) (f) (period during which survivor has habitually resided on the reserve), 21(3) (g) (family home is the only significant asset in the estate) weighed in favour of granting the order. The terms of the will (21(3)(b)) and the fact that the home was the only significant asset (21(3)(f)) were particularly significant.[79]

The factors at paragraphs 21(3)(i) (interests of a person needing care from the survivor and who lives in the family home) and 21(3)(j) (need to remove another person from the home) were not applicable.[80]

Pursuant to paragraphs 21(3)(h) and (k), the Court considered the interests of any persons who held or may in the future hold an interest in the family home. In this case, only one person - one of the children of the late Mr. Toney - made submissions. The Court held that the daughter's objection to the application for an order for exclusive occupation "[did] not detract from the factors favouring issuance of an order for exclusive possession."[81]

The Court took into consideration a number of other factors, as "[s]ection 21(3) mandates the court consider the above 11 considerations 'among other things'."[82] The Court found that "[t]he totality of the circumstances dictates that the only fair outcome is to grant an order for exclusive occupation."[83]

This order was granted for an indeterminate period, but the Court noted that order could be revoked or varied if circumstances change, under FHRMIRA section 21(6).[84] The Court granted an order for exclusive occupation, subject to conditions that the applicant "not cohabitate with anyone during her occupation, other than with one of her children or grandchildren, and that she maintain the home and not commit waste."[85]

The Court then went on to consider compensation for the interest in the family home pursuant to sections 34 and 36 of FHRMIRA.[86] Subsection 34(1) provides that a surviving spouse is entitled to half of the value "of the interest or right that was held by the deceased individual in or to the family home", and subsections 34(3)-(5) address how this is to be determined where the surviving spouse is a non-member. Subsection 36(1) allows a court to make orders respecting the surviving spouse's entitlements, provided that the application is made within 10 months of the death of the spouse.

The Court determined that the appropriate value of the family home was $140,000 – the value of the improvements made to the home – and awarded the applicant $70,000, "an amount equal to

---

[79] *Ibid* at paras 112, 114, 120, 121 and 126.
[80] *Ibid* at para 131-132.
[81] *Ibid* at para 130.
[82] *Ibid* at paras 134-142 referencing the considerations to be taken into account in FHRMIRA.
[83] *Ibid* at para 138.
[84] *Ibid* at para 139.
[85] *Ibid* at paras 141-142.
[86] FHRMIRA, *supra* note 3 at ss. 34 and 36.

one-half the value of the deceased's interest in the family residence at the time of his death."[87] In choosing to use the value of the improvements as a valuation tool, the Court rejected other methods of valuing the home, such as the replacement value ($400,000), the amount of the insurance on the home (also $400,000), or the municipal tax assessment ($73,900).[88] These were rejected as being either too high given the difficulties of selling a home on reserve (the replacement and insurance value), or unreliable and not based in evidence (the municipal tax assessment, for which the home was in any case exempt).

The Court declined to make an order for the value of the other CP (Lot 15), as the Applicant was a non-member and thus not entitled to any value in the land itself. There was no evidence presented that any money had been spent to build structures or improve it, and there was no evidence that the value of the lot had appreciated since it was purchased in 2000 for $3,000.[89]

Commentary:

To our knowledge, this is one of the first decisions to interpret the FHRMIRA. Indeed, the Court noted:

> Counsel are unaware of any case law interpreting the FHR. This court found a few trial decisions that refer to the FHR, but none that contain a comprehensive analysis of the statute and, in particular, ss. 21 and 34, the sections that authorize courts to grant exclusive occupation of the family home and compensation to a surviving spouse for their interest in matrimonial assets.[90]

The Court determined that it could not include Lot 15 in the award to the plaintiff, as there was "no evidence that any other monies were expended to build structures or to make improvements".[91] This is consistent with FHRMIRA subsection 34(3), which states that only the value of structures (and not land) is divisible for non-members. This provision was an attempt by the legislators to balance the rights of non-member spouses living on reserve with the collective interest of the First Nation in its reserve land. Although this balancing is important, 34(3) is about the *value* in the property, and not *title* to the property. The rationale for this is interesting, because the simple fact of a non-member sharing in the monetary value of the family's land would not impact the status of, or the rights of the First Nation in, the land. Given that some land can be extremely valuable on certain reserves, the exclusion of the value of land could result in some non-member spouses being awarded a disproportionately small share of the matrimonial real property, despite the length of the relationship or the significance of their contributions (financial and intangible) to the relationship and to the property itself.

---

[87] *Toney, supra* note 78 at para 160.
[88] *Ibid* at para 77.
[89] *Ibid* at para 162.
[90] *Ibid* at para 10.
[91] *Ibid* at para 162.

Apart from the inability for a non-member spouse to share in the value of land, the judge rejected the argument that non-members or non-Indian spouses should be treated differently: "Counsel for AVFN frankly acknowledged that if the applicant had been an Indian or AVFN band member, that its position may be different."[92] The Court finds that status or membership should not influence a judge when making orders under FHRMIRA: "I have concluded that this fact [of being a member or Indian], in the context of parliament's legislative purpose in enacting the FHR, should not influence this decision."[93] This finding flowed from the Court's interpretation of FHRMIRA's legislative objectives, which were, in part, to project individual rights of spouses to matrimonial property on reserve, while also protecting the collective interest and rights of First Nations in their reserve lands.[94]

In FHRMIRA, the protection of First Nation interests is seemingly affected by maintaining the inability for non-members or non-Indians to hold permanent interest in reserve lands or by sharing in the value of land. The protection of individual spouses and partners is affected by giving members and non-members alike the ability to share in the value of buildings and structures and to allow them the right to request (temporary) exclusive occupation orders for matrimonial homes on reserve.

Another interesting part of this decision was the Court's rejection of the argument by the First Nation that individuals shouldn't benefit from voluntary improvements made to homes or structures on reserve and that such improvements shouldn't influence whether an exclusive occupation order should be granted. The Court instead found that the care and resources that spouses put into their homes is in fact meaningful and should weigh in favour of an order for exclusive occupation.

> [136] A factor that I have considered is that while the original cost of the bungalow of $23,000.00 was paid for by a grant by the federal government in the 1970s, the present condition of the residence is very substantially the result of the personal investment, through the joint efforts, resources and monies of the deceased and the applicant over many years. They have spent at least $140,000.00 in permanent improvements. Some of these expenditures were for the purpose of making the home more accessible to the applicant. AVFN submits that the fact that the applicant and deceased voluntarily made improvements over 30 years is not adequate reason to grant the applicant exclusive occupation. I disagree. This fact favors issuance of an order for exclusive occupation.

Presumably, this could also mean that if individuals neglect to improve or maintain the condition of their home, this could be proof of lack of care or investment into the home and could weigh *against* the issuance of an order. This may be played out in future case law.

---

[92] *Ibid* at para 134.
[93] *Ibid* at para 135.
[94] *Ibid* at para 98.

Finally, the Court went into some detail on the legislative objectives of FHRMIRA to promote gender equality and to properly balance individual and collective rights and interests. At the start of its analysis, the Court found that the Provisional Federal Rules under FHRMIRA are a proper attempt to ensure the application of the guarantee in section 35(4) of the *Constitution Act, 1982* that existing aboriginal and treaty rights apply equally to men and women:

> [100] Section 35(1) of the Constitution Act (1982) recognizes existing aboriginal and treaty rights, and s. 35(4) guarantees these rights equally to male and female persons. Section 35(4) is a rebuke of the European colonial patriarchal value system imposed on aboriginal peoples by colonial settlers in the 1800's through legislation such as the *Indian Act*. The provisional rules of FHR that give rights and protection to spouses and partners on separation and death create no conflict with gender equality rights when the affected persons are all First Nations people.

The Court then acknowledged that FHRMIRA's protection of the rights and interests of those who are neither First Nation members nor Indians is more complicated. Next, the Court waded into complex constitutional debate, which was probably unnecessary for the purposes of the case itself. It stated that there is a constitutional dichotomy between protection of gender equality in sections 15 and 28 of the *Charter of Rights and Freedoms* and section 25 of the *Charter*. Section 25 is an interpretive provision affirming that *Charter* rights shall not be construed so as to abrogate or derogate from any constitutionally protected aboriginal and treaty rights.[95]

Although this dichotomy was not addressed by the parties in this case, the Court nevertheless delved into the debate by conducting a cursory analysis of whether section 25 is respected and addressed briefly whether FHRMIRA could be considered a justifiable infringement of a section 35 aboriginal or treaty right. In doing so, the Court alluded to the test laid out by the Supreme Court of Canada in *R. v. Sparrow*[96] used to determine whether an infringement of section 35 right is justified (albeit without mentioning the case of *Sparrow*).

> [103] In order to be an aboriginal right protected by s. 35(1), the right must be integral to the distinctive culture of the community. Not all First Nation communities shared identical cultural values. The provisional rules appear to reflect the cultural norms of most First Nations (as I abstract them from the Royal Commission Report).
>
> [104] "Even in the case of an established right, … statutes … that impinge or affect the exercise of aboriginal rights may, however, be valid if they meet the test for justifying an interference with a right recognized and affirmed under section 35(1)… If a prima facie interference is found, the analysis moves to the issue of justification … The first issue is whether there is a valid legislative objective. …[if so] the second part of the analysis determines whether the limit or infringement is justified". (Regimbald, ¶¶ 30.169-30.173)

[95] *Ibid* at para 101.
[96] [1990] 1 SCR 1075.

> [105] An aboriginal right to title is not absolute, but any infringement must be in furtherance of a compelling and substantial legislative objective and it must be consistent with the Crown's fiduciary duty.

The Court pronounced that this dichotomy is properly balanced within the Provisional Federal Rules of FHRMIRA, and suggested that *if* FHRMIRA infringes section 35 constitutional rights, it would be a justifiable infringement:

> a) the FHR respects the principle of non-alienation of reserve lands. The Rules do not lead to non-Indians or non-band members acquiring permanent or tangible interests in reserve lands pursuant to s. 21, or receiving compensation for the value of reserve lands – unlike Indians or band members, pursuant to s. 34.
>
> b) The FHR balances the equality rights of spouses under ss. 15 and 28 of the Charter with recognition of aboriginal and treaty rights under s. 35 of the Constitution Act (1982).
>
> (c) The property provisions of the Indian Act and related property legislation are not helpful in` this analysis as they 'completely disregard traditional First Nations' core values'.
>
> (d) In pre-colonial times, women appeared to have played, in most First Nations, an important and equal role in all aspects of tribal life and governance. Some were matrilineal societies.
>
> (e) Interpretation of the FHR in a way that recognizes the role and status of spouses of both genders, whether or not they are members of the band, is not inconsistent with what appears to have been aboriginal values in pre-colonial times.
>
> (f) Gender equality is a universal value that transcends nationality or race. In this context, the FHR promotes and protects a compelling and substantial legislative objective.[97]

It is surprising that the Supreme Court of Nova Scotia delved into such a complex constitutional debate when it was not argued by the parties. Nonetheless, it is an important finding that FHRMIRA properly balances sections 15 and 25 of the Charter and *if* FHRMIRA infringes any section 35 rights, it is a justifiable infringement because it promotes and projects a compelling and substantial legislative objective.

---

[97] *Toney, supra* note 78 at para 106.

ML v NG, 2016 QCCS 5685[98]

Facts:

This was a divorce case, in which the parties had reached agreement on the division of all their assets, other than the family home. The construction of the home was financed through a loan from the Council of the Huron-Wendat Nation. The couple married in 2005 and separated in 2012. They had no children.

Issue:

At issue was whether the home should be exempted from the division, as it would be held in the name of the Huron-Wendat Nation until it was repaid in full.

Ruling:

The Court held that the value of the home was to be divided equally ($10,572.48 for each spouse).

Analysis:

In making its decision, the Court relied largely on sections 415 and 416 of the *Civil Code of Quebec*[99], which states that family homes are part of the family patrimony meaning that their value should be divided equally on separation.

The Court also referred to similar provisions in FHRMIRA - namely, section 28, which provides that spouses (including those who are not members) are entitled to one-half of the value of the family home, and section 29, which allows the court to vary the amount to be paid, if it would be "unconscionable."[100]

The respondent claimed that, as she was subject to the *Indian Act,* and as she had taken out a loan from the Council of the Huron-Wendat Nation for the construction of the family home, the Council remained the owner of the home until the loan was completely paid. The respondent thus argued that the value of the family home can't be included in the family patrimony and divided. The Court rejected this argument. The fact that NG had an outstanding loan from the Council of the Huron-Wendat Nation was analogous to a mortgage from a bank and did not prevent the couple from having an interest in the home and from the home forming part of the family patrimony. As such, the family home could be divided.[101]

In accordance with FHRMIRA s. 28, the court held that the value of the home was to be divided equally. In terms of the valuation, the parties agreed that 50% of the value would be $10,572.48, without any explanation on how they came up with this amount. In addition, the parties also agreed

---

[98] Alternative citation : Droit de la famille -- 162829, 2016 QCCS 5685.
[99] *Civil Code of Québec*, *supra* note 71.
[100] FHRMIRA, *supra* note 3 at ss. 28 and 29.
[101] *ML c NG*, 2016 QCCS 5685 [*ML v NG*] at para 16.

that, should division be necessary, it would be paid in 6 installments in the amount of $1,762.08 every 6 months, without interest.[102]

The court held that it was not necessary to apply FHRMIRA s. 29 (giving the power to the Court to vary the amount of the division in certain circumstances).

Commentary:

The Court relied mostly on legal principles from the *Civil Code of Québec* to support the division of the value of the family home. The mention of FHRMIRA, seemed a secondary support and not a primary source of law.

Also, as mentioned in the judgement, the parties were legally married and separated in 2012 and there has been no resumption of cohabitation. They separated before the coming into force of FHRMIRA's Provisional Federal Rules (December 16, 2014). Given this, the Provisional Federal Rules shouldn't have applied to this case. Given the reliance by the Court on the *Civil Code of Québec*, the lack of application of FHRMIRA wouldn't have likely impacted the outcome of this case. Nonetheless, the mistake on the application of the Act shows, yet again, the unfamiliarity of the lawyers and judges in Québec to FHRMIRA.

Community-Specific MRP Laws enacted under FHRMIRA

There are at least 15 First Nations who have adopted matrimonial real property laws under FHRMIRA.[103] We are aware of only one court judgment rendered under one of these laws. This was a case issued on June 12, 2019 by the Akwesasne Court of the Mohawks of Akwesasne. The names of the parties have been redacted in the version provided to the authors, as so we refer to the case as *Ms. v Mr*.

Ms. v Mr., 2019-06-12 Akwesasne Court

Facts:

Ms. made an application to the Akwesasne Court for exclusive possession of the matrimonial home for her and her children and a stepchild pursuant to the Mohawk Couple's Property Law (Iatathróna Raotiientáhtsera). Ms. had full custody of the children and the children had been residing at the matrimonial home since birth.

On March 23, 2018 Ms. sought an emergency remedy and the court responded with a 90 *ex parte* exclusive occupation order under the Couple's Property Law. In July, the court granted a 90-day extension to the emergency order. In November the order was extended for yet another 90 days and mediation was ordered. The mediation failed and so the parties returned to the Court once again.

---

[102] *Ibid* at paras 18-19.
[103] See: https://www.aadnc-aandc.gc.ca/eng/1408981855429/1408981949311

Issue:

At issue in this case was whether the applicant should be granted exclusive possession of matrimonial home under the Akwesasne Couple's Property Law.

Ruling:

A 2-year occupancy order of the matrimonial home was granted to Ms. and her three children. Mr. was ordered to stay away from the matrimonial home for the two-year period.

As conditions of these orders, Ms. was ordered to keep the matrimonial home safe and to preserve the value of the home. Ms. would also be responsible to pay the mortgage and hydro payments beginning in July 2019, although the accounts would remain under Mr.'s name. Titles to the land and property remains in Mr.'s name while the order is in effect.

The court ordered that the parties would face a fine of at least $1000 to a maximum of $10,000 in the event that the order is breached. The Court clarified that the Mohawk Police Force have the authority to enforce these orders.

Analysis:

In making her judgment, the judge took into account the dysfunction of the relationship, the cooperation of Mr. and the uncooperative behaviour of Ms. The judge also considered the withholding of information by Ms., specifically that she was not forthright regarding where she could live and that she was not open to mediation again.

The judge recognized that Mr. and Ms. are at different places with their own healing and that they both must continue to heal because it is in the best interests of the children involved. The judge also stressed the importance to restore the 'good mind' (Kanikonri:io) of both parties for their own health and wellbeing but also the children's.

Both parties verbally agreed that the children need their mother as well as their father and that the children need a stable home. They also agreed that they need to work together for the best interests of the children.

Commentary:

This judgment did not analyze the provisions of the Couples Property Law, but instead went through the facts of the case and discussed what was a fair outcome in the circumstances. It seems that the fact that Ms. has full custody of the children was the determinative factor in deciding to give her exclusive occupation, despite her uncooperative and difficult behaviour through mediation and before the Court. After the expiry of the 2-year period, the Court stated it would review the circumstances and renew the order if necessary.

The most interesting part of this judgment is how it incorporated important aspects of the Mohawk and Haudenosaunee worldview and legal order into the judgment (Kanikonri:io). In this discussion, the judge was using the written judgment not just to render judgment and issue an order, but to guide the family members towards healing, health and living with a 'good mind'.

We were informed by the justice department of the Mohawk Council of Akwesasne that this case is being appealed to the Akwesasne Court of Appeal, which will be heard by judges sitting in another Mohawk community in Quebec.

MRP Laws Adopted under the Jurisdiction of a Self-Governance Agreement

We are unaware of any judgments respecting matrimonial real property issued by a court under a matrimonial real property law adopted pursuant to jurisdiction recognized in a self-governance agreement.

COMMENTARY

Above we included our commentary on each case directly following its case summary. Below, we present a brief overview of the frequent themes, concerns or issues that have arisen from the body of cases as a whole.

Issues Surrounding Valuation

The question of how to determine the fair value for a home, building or land on reserve has been the object of significant discussion by courts both before and since FHRMIRA came into force. It has proven difficult to rely on any one method to value land or structures on reserve because the legal regime and economic realities on reserve are often so different to off-reserve property. As well, First Nations have such high variability between them, such as differences in how land is held, whether there is a private market for homes, whether CPs are granted, proximity to cities, the economic and employment situation, average income on reserve, availability of houses, whether there is a property taxation regime in place and so on. The result has been a large assortment of valuation methods used by the courts, some being not very well-reasoned or of questionable logic.

For example, in *Hepworth v. Hepworth*[104] the Court set the value of the home as significantly less than its appraised value, relying on one short and vague statement from a witness that there was no housing market in the First Nation and the one house he had heard being sold was for less than a third of the assessed value of the house at issue. The shakiness of this finding was exacerbated when the trial judge immediately amended his judgment and doubled the valuation once he realized it did not amount to the compensation order he had intended.

This strange flip-flop demonstrates that, in the absence of a guiding valuation methodology, judges can pick a value that will allow them to make a compensation order that they intuitively find fair. In the absence of clear jurisprudence, it is tempting for a judge to pick a valuation method that matches his or her intentions, instead of being guided by a principled approach. Another example of this is in *Toney v. Toney,*[105] where the judge equated the value of the home with the monetary value of renovations carried out by the couple - $140,000. Perhaps this equated to an equitable

[104] *Hepworth, supra* note 35.
[105] *Toney*, *supra* note 78.

result in that case, but in most cases it likely would not and thus it is a worrisome precedent in some ways. In *Toney*, it seems the judge picked this number because it happened to be roughly halfway between the other numbers put forward for valuation and thus seemed fair – and not because it really reflected the value of the home.

Nonetheless, despite this general lack of uniform guidance from the courts with respect to valuation, there are some cases that are slowly providing bits of clarity as to what is and isn't acceptable considerations for the purposes of valuating land or structures. One such example is *Kumagai v Campbell Estate,*[106] where the British Columbia Court of Appeal clarified that for appraisal purposes, land should be assessed at its highest and best use, regardless of its present use (in that case, the highest and best use of the land was considered "high-density residential and commercial development"). Only a true legal impediment to the development of the land itself could be considered for valuation, such as a zoning limitation. Impediments to development by a current owner or interest holder is not to be considered. The *intentions* of an interest-holder regarding the development of the land should also not affect the land's value. This is an important finding and, in many cases such as in *Kumagai,* could significantly increase the value of a family's matrimonial property or an estate.

First Nation Taxation Regimes

First Nations property taxation regimes under the *First Nations Fiscal Management Act* require the assessed value of taxable properties to determined "as if the land or improvements are held in fee simple off the reserve."[107] The rationale is that properties should not be devalued simply because they are located on reserve, but should be valued based on comparison with similar properties. Although in some cases the market value of on-reserve properties may be lower than their off-reserve counterparts, it is also the case that properties on many reserves in Canada (e.g. new homes with 99-year leases) have the same or essentially the same market value as similar properties off reserve. We note this approach from the *First Nations Fiscal Management Act* because it is quite different than the approach taken in many court cases, yet may be something to consider in future cases, or in the development of a unified methodology towards valuation of land and homes on reserve.

Valuation Date

Another important issue to touch on relates to the date of valuation set by FHRMIRA. Pursuant to subsection 34(1), the valuation date is, in most cases, the day before the death occurred, or the day on which the spouses or partners separated (see subsections 28(6) and 34(6)). Prior to FHRMIRA, the court told us in *Kumagai* that the appropriate date for valuation, at least in the case of a contested distribution of an estate, is the trial date. For large estates, the date of valuation can make a significant difference, such as it was in *Kumagai.* If *Kumagai* was decided under FHRMIMRA, the surviving spouse may not have benefited from the increase in value of the estate between the death of her husband and the trial. This approach to valuation is also found in paragraph 87(a) of

[106] *Kumagai, supra* note 57.
[107] First Nations Tax Commission, "Standards for First Nation Property Assessment Laws, 2019", s. 4.1(a), available online at: http://sp.fng.ca/fngweb/assessment_law_stds_web.pdf.

the British Columbia *Family Law Act,* which states that the valuation date will either be the date chosen in an agreement between the spouses respecting the division of net family property, or "the date of a hearing with respect to the division of family property and family debt". Under FHRMIRA there is an option, however, if using the regular valuation date results in an "unconscionable" amount owing to the applicant. Subsection 29(c) allows a judge to vary the amount if there was "(c) any significant change in the value of the interests or rights in question between the valuation date as defined in subsection 28(6) and the day on which the order is made, inclusive." This is an exceptional type of remedy, so the court would have to be convinced that the difference in value between, say, the date of death and date the order is made is so large that using the regular valuation date would be patently unfair or "unconscionable".

Issues Specific to Quebec

As noted in the case commentaries above, the two judgments on FHRMIRA in Quebec (*NC v EP* and *ML v NG*) made some questionable findings. In *ML v NG,* for example, the Court applied FHRMIRA's Provisional Federal Rules even though the couple separated before the coming into force of the Rules.

In *NC v EP*, the judge deducted the amount of the down payment made for the matrimonial home, because it came from an inheritance, even though this is contrary to fact that inheritances are not deducted from the value of the matrimonial home under FHRMIRA. This points to a discomfort and unfamiliarity with FHRMIRA by the judges and lawyers in Quebec. In particular, the courts, knowingly or perhaps unknowingly, failed to apply the concept of 'common law partners' which exists in FHRMIRA, but which is absent in the civil law in Quebec. Under Quebec law, there is no concept of 'common law partners', whereby unmarried partners are considered spouses for many purposes, particularly following a separation (unless the couple signed a contract of civil union, as per the *Civil Code of Quebec*). *NC v EP* thus raises concerns that in the future the Quebec courts may not recognize rights to unmarried couples under FHRMIRA, given that this is foreign to Civil law.

Both judgments also heavily relied on the Civil Code of Québec to support the division of the value of the family home. It seemed that FHRMIRA was mentioned only as a secondary support and not a primary source of law, again pointing to a lack of familiarity with the Act.

Balancing of Collective v. Individual Rights

The FHRMIRA cases bring to light interesting issues regarding the individual rights of the spouses as compared to the collective rights of the Indigenous group on whose reserve the property is located.

One of the ways that Canada has attempted to balance the rights granted to individuals in FHRMIRA with the collective interests of a First Nation is by preventing non-members from sharing in the value of any land. Non-members can share only in the value of the on-reserve structures, pursuant to subsections 28(3)(a) and 34(3)(a). However, before FHRMIRA came into force the courts issued compensation orders for half the value of the couple's estate, and such

orders could presumably include the value of the land. In any event, we did not come across any cases where the value of the land was clearly deducted from the value of the compensation order

For example, in *Hepworth v Hepworth* and *George v George*, the courts did not separate the value of the land from the value of the structures on the land when determining valuation. In the normal course of things, the value of a building includes the value of the land on which it is situated. As a result, it is possible that a non-member would receive less under FHRMIRA than they would have before FHRMIRA came into effect. In particular, in *Toney v. Toney* Ms. Toney would have been able to share in the value of an empty lot of land held by her late husband.

We are not certain of the rationale for these provisions given that even before FHRMIRA, a non-member spouse would not have been entitled to half of the property itself, but just its monetary value. It is arguable that eliminating land from the divisible property for non-members does not logically protect the communal interests of the First Nation. Indeed, how does a lower compensation order for the non-member protect the communal interests of a First Nation?

Issues Regarding Enforcement

FHRMIRA section 52 provides enforcement options when a compensation order is contravened and enforcement options are limited because the spouse/partner seeking to enforce the order is not a member or status Indian.

> 52 (1) On application by a person who is neither a First Nation member nor an Indian and in whose favour an order is made under subsection 30(1), section 33, subsection 36(1) or section 40, a council may, on behalf of the person, enforce the order on a reserve of the council's First Nation as if the order had been made in favour of the First Nation.
>
> (2) If the council notifies the person that it will not enforce the order or does not enforce it within a reasonable period after the application is made, a court may, on application by the person, vary the order to require the person against whom the order was made to pay into court the amount payable that was specified in the order, if the court is satisfied that it is necessary for the enforcement of the order.

The first option is that the Council may enforce the order on the person's behalf. However, it seems unlikely that a Council would take on the time and expense of enforcing an order on behalf of a non-member. The other option is that the Court can vary the order to require the award to be paid to the Court. However, this second option is only available once the non-member already made a request to the Council, and they refused to act. Although section 52 offers options to ensure enforcement in favour of non-members, there is no case law on this yet and its utility will likely prove limited in the future because it is a cumbersome and lengthy process. There is also a chance that section 52(2) could not stand up to close legal scrutiny. There seems to be an assumption that section 89(1) of the *Indian Act* does not create a barrier for courts to enforce an order on reserve, however, this is disputable, and it will be interesting to see how courts deal with section 52(2) in the future.

In fact, there is very little case law generally touching on issues of enforcement under FHRMIRA. But by looking at some pre-FHRMIRA cases, there may be some options available to support the enforceability of orders under FHRMIRA, such as using on-reserve assets as security to ensure payment or issuing retraining orders to prevent the liquidation of assets prior to the determination of the division of the family assets.

IMPACT OF FHRMIRA

In this next part, we briefly discuss the overall impact of FHRMIRA, as demonstrated through the case law, in order to glean whether FHRMIRA represents a significant advance in providing parties an adequate legal mechanism to address issues regarding their matrimonial real property.

Protecting Vulnerable Spouses and Children

The principal reason for the adoption of FHRMIRA was to ensure a legal regime was in place regarding matrimonial property on reserve that would protect vulnerable spouses and children, who often suffered and were ousted from their homes and communities because of the legislative gap left under the *Indian Act.* The results on this front so far have been mixed.

Of course, there have been exclusive occupation orders issued under FHRMIRA that wouldn't have been possible before, particularly for non-members. Although there are very few such orders reported, the Centre of Excellence on Matrimonial Real Property has been informed by Canada that there have been other exclusive occupation orders that were issued but not made publicly available. Nonetheless, indications are that, overall, the use of FHRMIRA has been limited in the almost five years since the coming into force of the Provisional Federal Rules.

It should be noted that there may indeed be an increased number of mediated solutions and agreements in relation to occupation and the division of matrimonial property, but this is hard to gauge as they are not publicly available.

This lack of use of the courts can be linked to many factors, such as the fact that an order under FHRMIRA requires a spouse or partner to hire a lawyer, which is often too expensive or inaccessible because of other access to justice issues. As well, a lack of awareness of FHRMIRA and a person's rights thereunder is a significant problem. This lack of awareness exists at the individual level, with First Nation Councils, police, lawyers and the judiciary. In our view, the issues of affordability and awareness are the two largest impediments to FHRMIRA having a broader and deeper impact.

It also seems that the valuation date under FHRMIRA may result in vulnerable spouses being denied the benefit of an increase in the value of the family property or estate between the date or the death or separation and the date of the trial. As well, non-member spouses cannot share in the monetary value of land on reserve, even though this seemed to be included in compensation orders in pre-FHRMIRA cases.

Finally, to our knowledge, no emergency protection orders have been issued under FHRMIRA. This is extremely disheartening, as this was the remedy most desperately needed by the most vulnerable family members, particularly in cases of family violence. We presume that the lack of emergency orders is likely attributable to the same factors listed above - lack of money and other access to justice issues and lack of awareness of rights and options under FHRMIRA – and does not indicate that such orders are not needed. We note some additional factors that are specific to emergency protection orders: the lack of designated judges in most provinces, and the very real fear of many parents (primarily mothers) that if they takes steps to get an emergency protection order, family services would be alerted and the request would be used as proof that the children need to be removed from the home.

Easier Access to Remedies

Of course, FHRMIRA put in place the legal regime to allow for the issuance of occupation orders and emergency protection orders of reserve. So, although there are not many cases, remedies are now available where they didn't exist before, particularly for non-members but also for members whose names are not on a CP or lease. Presumably, there were also many agreements regarding occupation that didn't make it to court, that were fueled by FHRMIRA.

In regard to compensation orders to allow a spouse to share in the value of a family's on-reserve property, there is no real indication that, overall, there is easier access to remedies than before. With such a small amount of cases, it seems that individuals are not finding more relief through the courts than before FHRMIRA. However, it may very well be that there are many more agreements made directly between spouses or partners in regard to sharing the value of the family property fueled by the clear rights in this regard set out in FHRMIRA.

Protecting Communal Interests of the First Nation

It is hard to make any clear statements on whether communal property rights are better protected under FHRMIRA as compared to pre-FHRMIRA cases. Before FHRMIRA, there was no ability to transfer interests in on-reserve property to non-members or non-Indians. This has not changed. Since FHRMIRA, an interest in land or real property cannot be transferred to non-members, but rights to occupy on-reserve property can be granted (i.e. a person can be allowed to live in a home, without having actual ownership interest in it). In this, FHRMIRA was an attempt to make sure that, in protecting a First Nation's land and communal interests, individual rights weren't completely left out of the equation. Like many things in the law, when a balance is sought, sometimes certain interests weigh heavier, and other interests cannot be fully accounted for. For FHRMIRA, this has meant that sometimes non-members are allowed to stay in the family home after the death of a spouse, even if the First Nation is against it, and even if there is a long list of members waiting for homes (ex. *Toney v. Toney*).

CONCLUSION: FUTURE OF FHRIMRA BEFORE THE COURTS

Lack of Familiarity of Judges and Lawyers with FHRMIRA

Through the few cases this report has reviewed, it is clear that judges would benefit from some training on FHRMIRA. Often, like for both Québec cases, judges are clearly not comfortable with the Provisional Federal Rules, and instead rely on the regular provincial legal regime to determine the amount of a compensation order. Although some provincial and territorial law societies and organizations have held training sessions on FHRMIRA, it seems that much more of this is needed. Further, the legal regime under FHRIMRA should be included in the bar courses for every province and territory.

Areas Where More Guidance Needed with Future Case Law

Until there are more cases involving FHRMIRA, it will be difficult to predict how the courts will use and interpret its provisions. Further, it will be important for some of these decisions to be heard by appeal courts, as many of the FHRMIRA cases to date were heard by lower courts which are not binding on courts in other provinces or territories.

As the case law under FHRMIRA develops, we hope that the courts will develop jurisprudence on how to weigh the different factors listed in FHRMIRA for the determination of whether to issue occupation orders and emergency protection orders. Of course, enforcement is always difficult on reserve, and especially so for non-members, so it will be very useful to see how individuals and the courts deal with the enforcement options in FHRMIRA, particularly section 52.

Another area, mentioned above in the report, is the need for a more structured and consistent approach to valuation. In this regard, we submit that it would be beneficial for the COEMRP or another entity to work on a proposed method to value structures and land on reserve. Such an analysis may prove quite useful for the courts, as they are clearly struggling with how to deal with the tricky problem of valuing land and buildings on reserve. Of course, case law has shown us that the same method doesn't work in all cases because of the huge variances between each First Nation in regard to private homeownership, how rights are held and granted, the economic situation etc. However, there could be a model that would guide judges through the various valuation options that would result in a more consistent and fair result.