

# Frequently Asked Questions<sup>1</sup> - Family Homes on Reserves and Matrimonial Interests or Rights Act

## Q.1 What is the on-reserve matrimonial real property issue?

A.1 Generally speaking, provincial and territorial laws protect the matrimonial real property interests and rights of both spouses during a relationship, or in the event of separation, divorce or death. On-reserve matrimonial interests or rights include a couple's family home, where both spouses or common-law partners live during a marriage or common-law relationship, and other matrimonial interests or rights.

In 1986 the Supreme Court of Canada ruled that courts cannot apply provincial or territorial family laws on reserves governed by the *Indian Act* if doing so would alter individual interests in matrimonial real property on reserves. As a result, many of the legal protections relating to matrimonial interests or rights that are applicable off reserves are not available to individuals on reserves. Further, the *Indian Act* is silent on this issue.

There is a broad recognition that resolution of this urgent issue is long overdue. Several parliamentary committees and other domestic and international bodies have studied the issue and consistently recommended legislative action. Litigation has also been filed on this matter by the Native Women's Association of Canada.

## Q.2 Do provincial/territorial matrimonial property laws apply on reserve?

A.2 Some rights and protections under provincial/territorial matrimonial property laws apply on reserves and some do not. Provincial/territorial laws can be used to assist couples living on reserve to determine how to divide the overall value of all matrimonial property (house, cash, cars, etc.). Either spouse can ask a court to determine his or her share of the couple's matrimonial property. However, a court cannot force the sale of a home on a reserve or re-allocate rights of possession or occupation of a home. Provincial/territorial laws cannot change the rights of individual First Nation members to their land.

This means that if a Certificate of Possession has been issued to only one spouse for land where the family home is located, the other spouse will not be able to obtain even temporary possession of the home, even if that spouse has custody of the children. If both spouses have their names on the Certificate of Possession, neither spouse can prevent, even temporarily, the other spouse from staying in the family home. Off reserve, courts can decide which spouse gets to stay in the family home, regardless of whose name is on the legal documents.

On reserve, there are no existing laws to prevent a spouse who has his or her name on the Certificate of Possession from selling the family home without the consent of the other spouse, whose name does not appear on the Certificate of Possession. This applies during a marriage or after a separation. As a result, on-reserve residents have unequal protections, rights and remedies in relation to matrimonial real property compared to other Canadians.

## Q.3 Why is legislation needed to address this issue?

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<sup>1</sup> Excerpt from [Aboriginal Affairs and Northern Development Canada website](#)

**A.3** The current legislative gap has been an outstanding issue for 25 years since the 1986 Supreme Court of Canada's ruling in *Paul v. Paul* and *Derrickson v. Derrickson* that provincial matrimonial real property laws do not apply on reserve. This creates a gap which means that:

- A spouse can sell an on-reserve family home without the consent of the other spouse and keep all of the money.
- A spouse who holds the interest in the family home can bar the other spouse from their on-reserve family home.
- In cases of domestic violence and physical abuse, a court cannot order the spouse who holds the interest in the family home situated on reserve to leave a family home situated on reserve, even on a temporary basis.

As a result, relationship breakdown in a First Nation on-reserve community can sometimes lead to homelessness, poverty and separation from cultural and family support.

**Q.6 With the provisional federal rules in the legislation, what rights and protections will individuals have access to?**

**A.6** Under the proposed Act, the provisional federal rules will provide basic rights and protections to individuals on reserves during a relationship, in the event of a relationship breakdown, and on the death of a spouse or common-law partner. The provisional federal rules include the following rights and protections:

- Equal right to occupancy of the family home: provides spouses or common-law partners with an equal entitlement to occupancy of the family home until such time as they cease to be spouses or common-law partners.
- Requirement of spousal consent for the sale or disposal of the family home: provides spouses or common-law partners with protection that the family home cannot be sold or otherwise disposed of or encumbered during the conjugal relationship without the free and informed written consent of the spouse or common-law partner, regardless of whether that spouse or common-law partner is a First Nation member.
- Emergency protection order: allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (in situations of family violence).
- Exclusive occupation order: enables courts to provide short- to long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners. The duration of this order could range from a determined number of days to a longer period, such as until dependent children reach the age of majority.
- Entitlement of each member spouse or common-law partner to an equal division of the value of the family home and any other matrimonial interests or rights: ensures that the proven value of a couple's matrimonial interests or rights in or rights to the family home and other structures and lands on the reserve are shared equally on the breakdown of a relationship.
- Order for the transfer of matrimonial real property between member spouses or common-law partners: allows a court to order the transfer, in some circumstances, of matrimonial interests or rights between member spouses or common-law partners together with, or instead of, financial compensation.
- Entitlement of surviving spouses or common-law partners: ensures that when a spouse or common-law partner dies, the surviving spouse or common-law partner may remain in the home for a specified period of time, and can apply under the federal rules for half of the value of the matrimonial real property interests or rights as an alternative to inheriting from the estate of the deceased.
- Enforcement of agreements on the division of the value of the matrimonial property: allows a court to make an order that can be used to enforce a free and informed written agreement made by spouses or common law partners that is not unconscionable and that sets out the amount to which each is entitled and how to settle the amount.

**Q.7 Will the provisional federal rules apply to all First Nations in Canada?**

**A.7** Twelve months after the proposed legislation comes into force, the federal provisional rules will apply to all First Nations automatically, with the following exceptions:

- First Nations that have enacted their own matrimonial real property laws under this legislation; and, First Nations with land codes or matrimonial real property laws in place under the [First Nations Land Management Act](#) ; First Nations with a negotiated self-government agreement unless they have reserve lands and choose to opt into the federal provisional rules; and, First Nations who are on the schedule to the *First Nations Land Management Act* but have not adopted a land code before the date of Royal Assent of Bill S-2 will have three years from that date to do so before the federal rules will apply to them.

**Q.8 Will the legislation recognize on-reserve matrimonial real property laws that First Nations already have in place under the jurisdiction of the *First Nations Land Management Act* or self-government agreements?**

**A.8** The proposed legislation will not affect those First Nations that are signatories to the Framework Agreement on First Nations Land Management if they have their land codes or matrimonial real property laws in force, under the *First Nations Land Management Act*, when the proposed legislation comes into force. If they are signatories to the Framework Agreement but have yet to develop and ratify their land codes, they will have three years, from the date of Royal Assent, to do so. After this, the provisional federal rules in the proposed legislation will apply to them. Once a signatory First Nation enacts their land codes or matrimonial real property laws under the *First Nations Land Management Act*, or matrimonial real property laws under the proposed legislation, the provisional federal rules will no longer apply.

First Nations with comprehensive self-government agreements that have reserve lands, but no matrimonial real property laws, may choose to opt into the proposed legislation.

**Q.10 With the legislation, will it be necessary to go to court for resolution?**

**A.10** The provisional federal rules may be accessed by those who need them, in circumstances that require the protection offered by the court system, but this does not mean that individuals must access the court system in order to resolve matrimonial real property issues. Many individuals may be able to come to agreement on division of property or temporary exclusive occupation of the matrimonial home or rely on existing traditional systems for resolution. As a result of the legislation, however, accessing the court system would be an option available to them.

First Nations, when developing their law, can choose to resolve issues that may arise through traditional dispute mechanisms or through the courts.

**Q.11 In which court can the rights and protections provided under the provisional federal rules of the proposed legislation be accessed?**

**A.11** The rights and protections provided in the provisional federal rules are accessible through the provincial and territorial court systems.

The proposed regulations to this bill will include provisions to increase access to justice for emergency protection orders applications made under the federal rules. For example, individuals would be able to apply for an emergency protection order by telephone, email or fax. Should a spouse or common-law partner be unable to apply for an emergency protection order, a peace officer or other appropriate person may apply on his or her behalf. On consent of the applicant, another person can appear for the applicant during the hearing, so the applicant does not have to attend in person.

In addition, and as is the case off reserve, individuals with low or fixed incomes who seek access to the courts may apply, where applicable, for financial assistance for legal services through existing provincial/territorial legal aid services.

**Q.12 Are rights and protections under the provisional federal rules similar to rights and protections in provincial/territorial legislation?**

**A.12** The proposed federal legislation is based on common elements of various provincial and territorial matrimonial real property regimes. However, not all of these elements are appropriate on reserve, due to the inalienability and collective nature of reserve lands. Few direct comparisons can be made between the uniquely collective nature of land and housing on reserves, and off-reserve land-holding systems and home ownership.

**Q.13 What measures will be put in place to ensure First Nation members agree with the First Nation matrimonial real property laws?**

**A.13** First Nations will be required to inform all on- and off-reserve First Nation members of the content of the proposed First Nation law and the voting procedures. All eligible voters, 18 years and older, may take part in the community ratification of a First Nation's law. As a First Nation enacts and implements its own laws, the rights of individuals on reserves will be protected, as they are off-reserve, by the *Canadian Charter of Rights and Freedoms (Charter)* and the *Canadian Human Rights Act* (to the extent that complaints fall within its scope). Should a First Nation not follow the requirements in the proposed Act for the community vote, or if an individual community member feels that the content of the law is not *Charter* compliant or otherwise legally valid, the community member would have recourse to the courts.

**Q.14 Why are there no additional minimum standards required of First Nations in the development of First Nation laws to address matrimonial interests or rights?**

**A.14** There are no stronger legal protections available to Canadians than those in the *Canadian Charter of Rights and Freedoms (Charter)*, the *Canadian Human Rights Act* and through the courts. Both the *Charter* and the *Canadian Human Rights Act* (where relevant) will apply. As well, this approach situates accountability with First Nation members and First Nation governments and promotes self-reliance and autonomy.

**Q.15 How can the government ensure the implementation of First Nation laws?**

**A.15** It is the choice of each First Nation whether or not to develop its own laws to address matrimonial interests or rights. After the 12-month transition period until a First Nation community ratifies its laws under the provisions of the proposed Act, the provisional federal rules will apply.

**Q.16 Will the provisional federal rules allow non-members to hold an interest or right to land on reserves?**

**A.16** No. The legislation respects the principle of non-alienation of reserve lands. The provisional federal rules will not lead to non-Indians or non-members acquiring permanent interests in reserve land through relationship breakdown that they were incapable of acquiring prior to this bill.

Moreover, the provisional federal rules will not lead to non-members benefiting from the value or appreciation of reserve land as such land is set aside for the use and benefit of members. The exception is to the extent that a non-member has directly contributed to the improvements to that land.

National consultations revealed that an appropriate balance is needed between individual rights of on-reserve residents and the collective interests of First Nations in their reserve lands. The provisional federal

rules in the proposed legislation, once in force, achieve the objective of filling the legislative gap on reserve for First Nation members and non-members, while respecting the principle of non-alienation of reserve lands.

**Q.17 Why does the legislation not refer to "matrimonial real property"?**

**A.17** Not all off-reserve matrimonial real property rights and protections can be applied on reserve. Given the collective nature of the reserve land regime, land on reserve cannot be owned outright and only members have rights to possession. For greater accuracy, the proposed legislation therefore refers to "interests or rights in or to the family homes" and "interests or rights in or to structures and lands on reserves" rather than "matrimonial real property", which is used off reserve to describe both the land and the property affixed to the land.

**Q.18 What is the definition of "spouse" in the proposed Act?**

**A.18** This Act applies to married couples and common-law partners, where at least one of them is a First Nation member or an Indian. The definition of spouse in this Act is "either of two persons who have entered in good faith into a marriage that is voidable or void."

The *Indian Act* definition of "common-law partner" applies in this Act, and means "a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year."

**Q.19 Will the provisions of the proposed Act apply retroactively?**

**A.19** No. There is no provision in the proposed legislation for it to apply retroactively. The provisions of the bill will only apply from the day or days on which they are brought into force.

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