

A National Online Conversation on Indigenous Laws:

Enforcement Under First Nation Family Law - Matrimonial Real Property

October 30, 2020



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Background – MRP on reserves

- Matrimonial Real Property refers to the family or matrimonial home and other structures or land that a couple owns or occupies while they are married or in a common-law relationship.
 - MRP in a nutshell: occupation / possession of the matrimonial or family home and division of value of lands and structures that run with the lands
- *Derrickson v. Derrickson* (1986) and *Paul v. Paul* (1986) - provincial laws relating to matrimonial real property cannot apply to alter individual interests in reserve lands, as these are within the jurisdiction of Parliament.



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Federal Objective and Legislative Initiatives

- To fill the legislative gap:
 - with basic rights and protections similar to those found in provincial/territorial legislation;
 - respecting the unique situation of reserve communities and the collective interest in their reserve lands; and
 - in a way which compliments the existing jurisdiction of the provincial/territorial superior courts
 - e.g. applications under the Provisional Federal Rules of the *Family Homes on Reserves and Matrimonial Interests or Rights Act* can be heard and determined as part of other family law applications



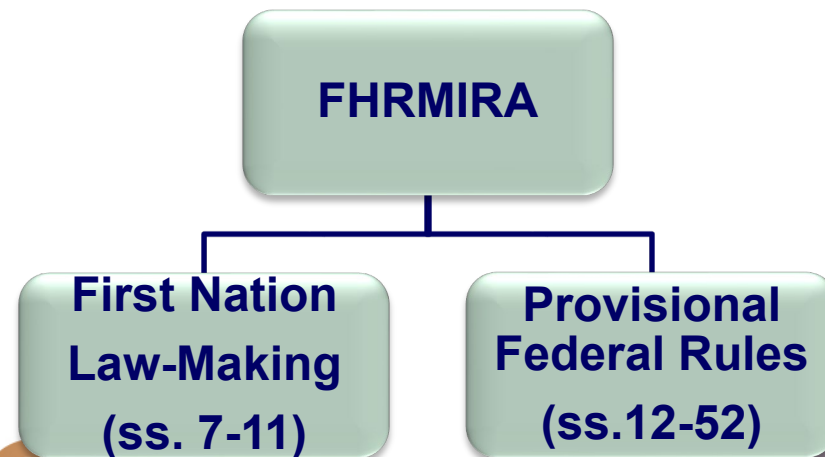
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Federal Legislative Response

- **Framework Agreement on First Nations Land Management and the *First Nation Land Management Act (FNLMA)***
 - Clauses 5.3(f) and 18.3-18.5 of the Framework Agreement
 - Subsections 20(1)(c) and 20(2.1)-20(2.3) of the FNLMA
- ***Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)***



Broader Context



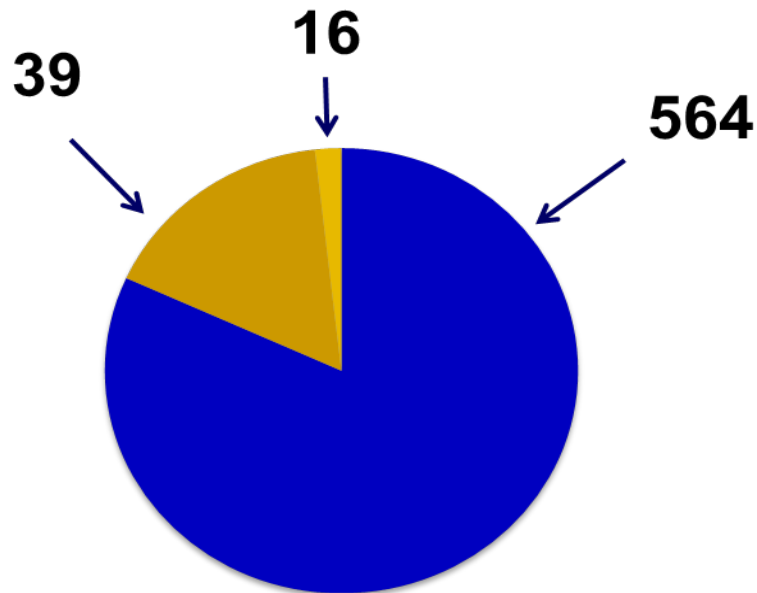
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Addressing the Gap

ISC's sense of the breakdown of MRP laws in First Nation communities



- First Nation matrimonial real property laws enacted pursuant to the FHRMIRA (16)
- Matrimonial real property addressed under First Nations Land Management (39)
- Subject to the Provisional Federal Rules (approx. 564)



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Application of Legislation

Reserves and First Nation land

- Both the FNLM and the FHRMIRA apply on First Nation reserves, and do not affect title or change status of the lands as reserve lands.

Spouses or common-law partners

- Section 6 of the FHRMIRA states that the Act applies only where at least one of the spouses or common-law partners is a First Nation member or an “Indian”, as defined by the Indian Act.

First Nations with reserves lands but without own MRP law

- Except in very limited circumstances, the Provisional Federal Rules of the FHRMIRA apply to First Nations whose lands are managed pursuant to the *Indian Act* or the *First Nations Land Management Act*, until such time as they enact their own laws or where they take on land management powers through a negotiated comprehensive self-government agreement.

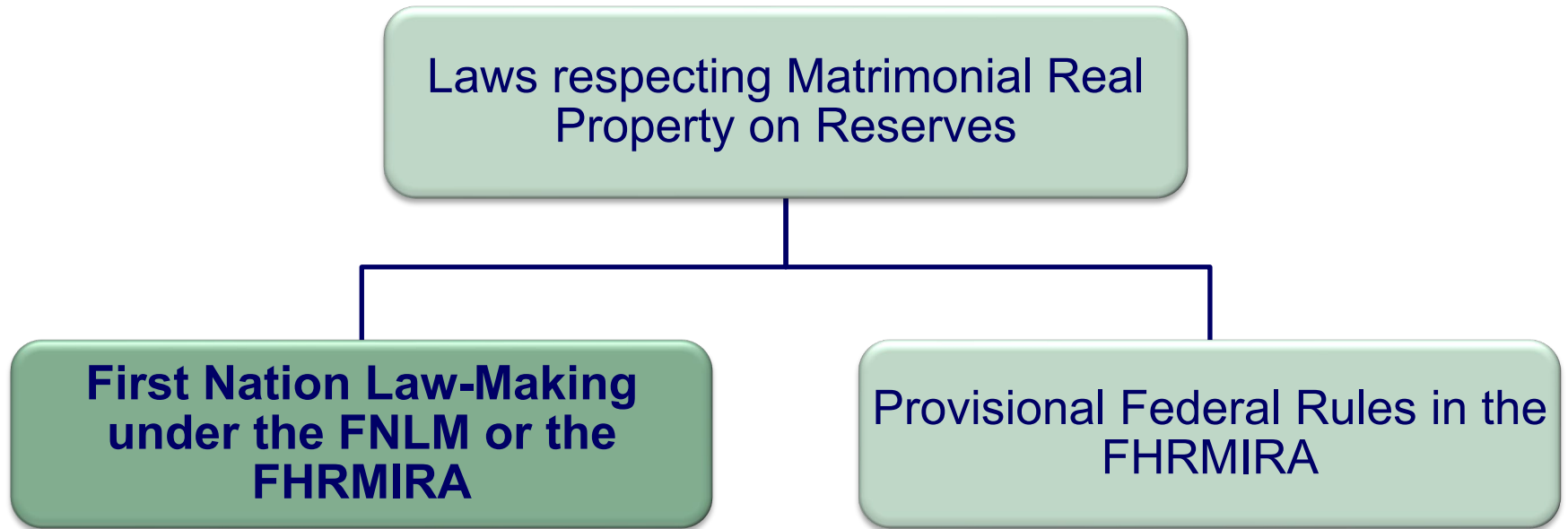


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Key Distinction



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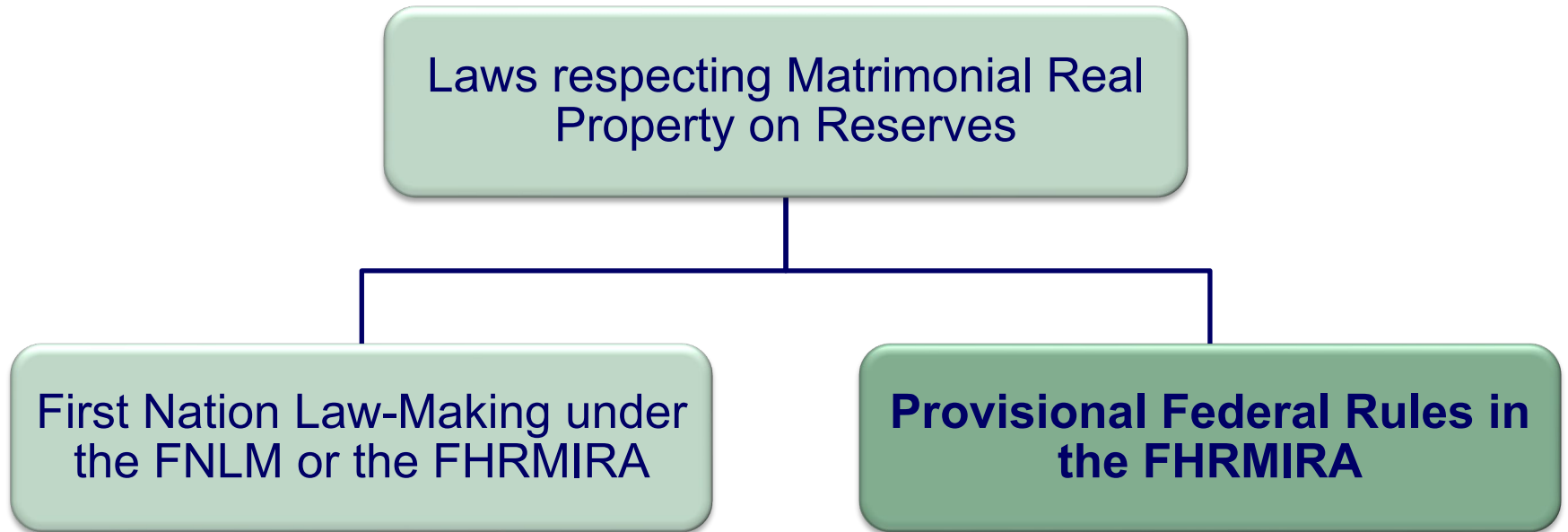
First Nation Law-Making

Particular Provisions Related to Enforcement

- Contents of First Nation law
 - May include enforcement provisions despite subsection 89(1) of the *Indian Act*
- Process Requirement: Notice to provincial Attorney General of intention to enact
- Judicial Notice
- Access to, and copies of, First Nation laws
- List of First Nations with MRP laws in force (FHRMIRA)



Key Distinction



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Two key Definitions related to Enforcement

Definitions from s. 2(1) of the FHRMIRA

- **court**, unless otherwise indicated, means, in respect of a province, the court referred to in any of paragraphs (a) to (e) of the definition **court** in subsection 2(1) of the *Divorce Act*.
(*tribunal*)
- **designated judge**, in respect of a province, means any of the following persons who are authorized by the lieutenant governor in council of the province to act as a designated judge for the purposes of this Act:
 - (a) a justice of the peace appointed by the lieutenant governor in council of the province;
 - (b) a judge of the court in the province; or
 - (c) a judge of a court established under the laws of the province.(*juge désigné*)



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FHRMIRA Provisional Federal Rules



Occupation of the Family Home

- During relationship; after a death; consent to disposition

Emergency Protection Orders (EPOs)

- Time-limited ex parte order issued by a “designated judge” to exclude a spouse or common-law partner from the family home on an urgent basis where family violence has occurred; may be ordered confidential where necessary

Exclusive Occupation Order (EOOs)

- Temporary and exclusive occupation of the family home (including interim orders) following relationship breakdown or death

Division of the Value of the Family Home and Matrimonial Interests or Rights on

- Relationship Breakdown
- Death of a Spouse or a Common-Law Partner



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FHRMIRA Emergency Protection Orders - Enforcement Considerations

- Urgent *ex parte* applications
 - See federal EPO Regulations in place and available for use by interested jurisdictions that authorize a “designated judge” but do not have provincial/territorial civil family violence protection legislation.
 - Ex. Applications by phone; substituted service
- Peace officers and others may make application on behalf of a spouse or common-law partner in certain circumstances.
- Proceedings likely to be sensitive and confidentiality orders may be made where necessary.



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Notice of Applications/Orders & First Nation Representations

Notice of application

- Applicants must send notices of applications made under the FHRMIRA Provisional Federal Rules to the council of the relevant First Nation, except for initial EPOs or confidentiality applications.

Representations by council

- On request, the court must allow the council of the First Nation to make representations.
 - For such a proceeding, see *Toney v. Toney Estate*, 2018 NSSC 179

Notice of order and copies to Minister or council

- Copies of orders (except confidentiality orders) must be sent, to:
 - the First Nation; and
 - to the Minister when land management is occurring under *Indian Act*.



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Civil Procedure - FHRMIRA

Superior Court Jurisdiction

- The superior court (judges appointed under s. 96 of the *Constitution Act, 1867*) of the province of habitual residence for the couple has jurisdiction. (Initial EPO proceedings a potential exception.)

Possibility of Joinder

- An application made under the FHRMIRA (except for EPOs) may be heard in the same proceeding as a divorce or other application related to the breakdown of the relationship or the death of a spouse or common-law partner.



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Rules of Practice and Procedure

- The authority ordinarily competent to make rules of practice and procedure for courts in that province may make rules applicable to any proceedings under the FHRMIRA.
 - Intended to provide opportunity to harmonize procedures in proceedings dealing with similar matters.
- Manitoba: s. 41 of the *Court of Queen's Bench Act* amended to give that court's family division jurisdiction over FHRMIRA proceedings; and the *Court of Queen's Bench Rules* amended to provide for EOO applications under the FHRMIRA: Rule 70.03(7.2).
- Ontario: *Courts of Justice Act* and *Family Law Rules* amended to bring proceedings under the FHRMIRA, as well as those under First Nations laws, under Family Court has jurisdiction: s. 21.8(3) of the *Courts of Justice Act* and s. 1(2) of the *Family Law Rules*.
- New Brunswick: *Judicature Act* amended to provide jurisdiction to the Family Division of the Court of Queen's Bench for matters relating to the FHRMIRA: Schedules A and B.
- British Columbia: *Supreme Court Family Rules* amended to include proceedings in which a party is seeking an order under the FHRMIRA, or under First Nation laws: Rules 1-1(1), 4-4(1), 5-1(1) and 7-1(3)(b.1).
- Newfoundland and Labrador: *Supreme Court Family Rules*, Rules F1.02(1)(p) and Rule F39.



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Enforcement of Orders and s. 89 (*Indian Act*)

FHRMIRA provisions related to the restrictions on enforcing some orders on reserves due to s. 89 of the *Indian Act*

- A person who is not a member or an “Indian”, as defined by the *Indian Act*, can apply to the First Nation to have them enforce the order on his or her behalf.
- Also, the court can vary the order to require the person against whom it was made to pay the amount into court.
- The First Nations law-making authority specifies that a First Nation may include in their law provisions for enforcing an order of a court on reserve, despite s. 89(1) of the *Indian Act*.



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Enforcement of Agreements & Traditional Dispute Resolution

- The FHRMIRA Provisional Federal Rules contain various provisions permitting a court to make an order to enforce written agreements between the parties if the court is satisfied that the consent of the parties was free and informed and that the agreement is not unconscionable.
 - E.g. Division of Value, and Valuation
- Also, the FHRMIRA expressly provides that, for the purposes of the Act, an agreement between spouses or common-law partners includes agreements reached through the use of traditional dispute resolution.



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