

Landlords, Tenants, and Domestic Violence: The *Family Homes on Reserves and Matrimonial Interests or Rights Act*

By: Elysa Darling

Legislation Commented On: *Family Homes on Reserves and Matrimonial Interests or Rights Act*, [SC 2013, c 20](#)

This blog post accompanies a series of posts written by Jonnette Watson Hamilton and Jennifer Koshan on [Landlords, Tenants and Domestic Violence](#). The series examines the legal uncertainties facing landlords and property managers seeking to respond to domestic violence involving their tenants, as identified in the Centre for Public Legal Education Alberta (CPLA) report on [Domestic Violence: Roles of Landlords and Property Managers](#).

As section 91(24) of the *Constitution Act, 1867*, [30 & 31 Vict, c 3](#), places “Indians and Lands reserved for Indians” within federal jurisdiction, provincial laws regarding leases and matrimonial property are inapplicable on designated reserve land (for more details on the inapplicability of provincial regulations on reserve in a lease context, see [here](#)). The *Indian Act*, [RSC 1985, c I-5](#), does not, however, provide for any laws dealing with matrimonial real property on reserve lands. As a result, indigenous persons and communities were left without any recourse regarding property (owned or leased) upon the death of a spouse or the breakdown of a marriage or common-law relationship. The federal government sought to fill this gap in 2013 with the passage of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, [SC 2013, c 20](#) (*FHRMIRA*). This Act governs the actions of tenants and landlords dealing with domestic violence in reserve communities.

This post will briefly address the unique circumstances in which the *FHRMIRA* came to be, and then provide an overview and critique of several provisions: section 7 (exemption for First Nations wishing to enact their own matrimonial real property (MRP) laws), sections 16-19 (emergency protection orders), section 20 (exclusive possession orders), and section 26 (leases). Findings from the March 2017 [Centre of Excellence for Matrimonial Real Property Report](#) (COEMRP Report) will also be commented on. This post will not examine the numerous indigenous communities that may have adopted MRP Laws under their Land Codes or self-government agreements.

Case Law – Inapplicability of Provincial Legislation On-Reserve

The legislative gap in the *Indian Act* resulted in inequitable consequences for indigenous women residing on-reserve, already a severely marginalized population. The combination of the lack of federal domestic violence remedies on reserves and the potential inapplicability of provincial legislation providing for [no-contact orders](#) put indigenous women in a uniquely precarious and dangerous situation. Indigenous women are twice as likely as non-indigenous women to

experience family violence ([Family Violence in Canada: A statistical profile 2014](#), 4). This problem is exacerbated by the remote location of many reserves, and the access to justice issues faced by these communities ([Male Partner Violence Against Aboriginal Women in Canada](#), 68). These problems contribute to a sobering statistic: indigenous women are eight times more likely than non-indigenous women to be killed by their partners ([Male Partner Violence Against Aboriginal Women](#), 66).

The Supreme Court of Canada examined the consequences of this legislative gap in *Derrickson v Derrickson*, [1986] 1 SCR 285, [1986 CanLII 56 \(SCC\)](#) and *Paul v Paul*, [1986] 1 SCR 306, [1986 CanLII 57 \(SCC\)](#). In *Derrickson*, the Supreme Court considered whether the provisions in British Columbia's *Family Relations Act*, [RSBC 1996, c 128](#), concerning the right to ownership and possession of immovable property applied to reserve lands (para 43). Applying the interjurisdictional immunity doctrine, the Court held that the provincial Act could not apply because the right to possession of lands touches on the "very essence" of federal authority under the *Indian Act* (para 41). As a result of the finding that the *Family Relations Act* could not apply, Mrs. Derrickson was not entitled to half of the net family assets, as she would have been had the home been off-reserve (para 41). More broadly, the Court held that provincial laws could not substitute for the lack of matrimonial real property provisions in the federal *Indian Act* (para 96).

In *Paul*, the plaintiff applied under s 77 of British Columbia's *Family Relations Act* for an exclusive possession order for herself and the three children of the marriage (para 13). The Supreme Court examined section 88 of the *Indian Act*, which states that provincial laws of general application can apply on-reserve to the extent that they are consistent with the provisions in the *Indian Act* (para 12). The Court found that section 77 of the *Family Relations Act* was inconsistent with section 20 of the *Indian Act*, which gives band councils (subject to the Minister's approval) control over allotments of reserve land (para 7). As a result, provisions in the *Family Relations Act* that would allow Mrs. Paul interim exclusive occupation of the home were blocked by section 20, which prevented any alteration to Mr. Paul's entitlement to the allotment (para 13).

It is unclear whether provincial domestic violence legislation such as Alberta's *Protection Against Family Violence Act*, [RSA 2000, c P-27 \(PAFVA\)](#) can apply on First Nations reserves, as there is currently no case law in this area. *Derrickson* and *Paul* suggest that orders made under the *PAFVA* that provide for exclusive possession in relation to property on-reserve would likely be inapplicable. Although the continued application of the interjurisdictional immunity doctrine to section 91(24) powers was called into question in *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#), there have been recent decisions restricting *Tsilhqot'in* to the Aboriginal title context and applying interjurisdictional immunity to reserve lands (see [here](#)).

Nearly three decades after the rulings in *Derrickson* and *Paul*, the *FHRMIRA* was put in place to address the lack of federal legislation and legal vacuum in this critical area.

Filling the Gap: The *Family Homes on Reserves and Matrimonial Rights or Interests Act*

The *FHRMIRA* applies to married couples and common-law partners living on-reserve when at least one person is a First Nation member or an Indian (as defined by section 6 of the *Indian*

Act). The provisional federal rules provide for basic rights and protections to individuals on-reserve during a marriage or common-law relationship (*FHRMIRA*, section 6) in the event of a relationship breakdown, and on the death of a spouse or common-law partner ([Indigenous and Northern Affairs Canada](#)).

Section 7 – Power to Enact First Nation Laws

Section 7 allows First Nations to opt out of the *FHRMIRA* by providing a process to establish their own matrimonial real property laws (MRP Laws). Until a First Nation passes such laws, the provisional rules set out in the *FHRMIRA* apply (*FHRMIRA*, section 12(1)). In conjunction with *FHRMIRA*, Parliament provided \$5 million of funding for the Centre of Excellence for Matrimonial Real Property (COEMRP) over a five-year period to assist in drafting and implementing laws ([Canadian Human Rights Commission Annual Report 2013, 31](#)).

There are currently [eleven First Nations in Canada](#) who have enacted MRP Laws under the *FHRMIRA* (1 each in British Columbia, Quebec, and the Northwest Territories, 3 in Ontario, and 6 in Nova Scotia). In its Report, the COEMRP noted a number of difficulties these communities experienced in drafting the MRP Laws. In general, the community members reported a persistent lack of knowledge (COEMRP Report, 25). For example, few knew of the MRP Laws, what their rights were, or how to access them (COEMRP Report, 19). Lack of financial resources was the most commonly cited reason for failing to implement MRP Laws, even in communities that had drafted them (COEMRP Report, 19). Unfortunately, communities were unable to connect with other local stakeholders in order to further their implementation efforts. Many people quoted in the Report expressed disappointment that their efforts to educate stakeholders and obtain support had not met with any success (COEMRP Report, 24). Many communities provided their MRP Laws to local police (either the First Nation’s police force, the RCMP or the local police force) and reached out to local courts and the provincial attorney general, but received no response (COEMRP Report, 24). If the communities with the institutional capacity and assistance of the COEMRP to enact their own MRP Laws are facing these hurdles, it is likely that the rights of individuals in communities governed by the *FHRMIRA* are being overlooked.

Section 16 – Order of Designated Judge for Emergency Protection Order

Section 16(1) provides that an *ex parte* application for an emergency protection order can be made before a designated judge. The judge may make an emergency order if they are satisfied that family violence has occurred and that “the order should be made without delay, because of the seriousness or urgency of the situation, to ensure the immediate protection of the person who is at risk of harm or property that is at risk of damage” (*FHRMIRA*, section 16(1)(b)).

Similar to the *PAFVA*, a peace officer or other person may make the application on behalf of the applicant (*FHRMIRA*, section 16(3)). Section 16(4) sets out the factors a designated judge may consider, including (but not limited to):

1. The history and nature of the family violence;
2. The existence of immediate danger to the person who is at risk of harm or property that is at risk of damage;

3. The best interests of any child in the charge of either spouse or common-law partner; and
4. Whether a person, other than the spouses or common-law partners, holds an interest in, or right to reside in, the family home.

An emergency protection order can last for up to 90 days (*FHRMIRA*, section 16(1)) and may provide for a number of conditions dealing with the matrimonial home, such as:

1. A provision granting the applicant exclusive occupation of the family home (16(5)(a));
2. A provision requiring the applicant's spouse or common-law partner to vacate the home and prohibit them from re-entering (16(5)(b)); and
3. A provision directing a peace officer to remove the applicant's spouse or common-law partner and any specified person who habitually resides in the family home from the family home (16(5)(d)).

Section 2(1) of *FHRMIRA* defines “designated judge” as a person authorized by the lieutenant governor in council of the province to act as a designated judge. This can include a justice of the peace appointed by the lieutenant governor, a judge of the superior court in the province, or a judge of a court established under the laws of the province (*FHRMIRA*, section 2(1)). The COEMRP speculates that: “the possibility of designating judges from various levels of court ensures that applicants in each province and territory have access to existing provincial or territorial frameworks” (*FHRMIRA Clause-by-Clause Analysis*, 4).

Unfortunately only three provinces have designated judges to date: New Brunswick, Prince Edward Island and Nova Scotia (see [here](#) and [here](#)). This means that for the rest of the country, the sections pertaining to emergency protection orders are essentially useless, as there is no authority empowered to grant them. The COEMRP Report indicates that this is a huge source of frustration for communities:

...most First Nations noted disappointment that no judge had been appointed in their province, so as to prevent the possibility of an issuance of emergency protection orders. This omission has the effect of rendering a very important part of the MRP Laws – the power to protect families in cases of violence – useless. There was also confusion as to why *FHRMIRA* was drafted such as to require a designation of a specific judge for this purpose. (COEMRP Report, 24)

Without a designated judge, victims of domestic violence have substantially less recourse against perpetrators if they live on-reserve than if they do not. The inaction on the part of the provinces in not providing designated judges significantly diminishes a victim's ability to utilize the justice system, even before one factors in the additional access to justice barriers faced by indigenous peoples.

Section 20 – Court Order for Exclusive Occupation Order

Section 20(1) of the *FHRMIRA* provides for the possibility of exclusive occupation orders on-reserve. It states:

A court may, on application by a spouse or common-law partner whether or not that person is a First Nation member or an Indian, order that the applicant be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.

Applications under section 20 do not require a designated judge, but the *FHRMIRA*'s definition of "Court" requires that this application be heard in a superior court, for example the Court of Queen's Bench of Alberta (*FHRMIRA* section 2, *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), section 2(1)). As discussed earlier, applicants residing on-reserve experience significant access to justice challenges, such as lack of resources and legal knowledge. In addition, more remote reserves are often located great distances from judicial centers. Requiring exclusive occupation order applications to be heard solely by superior courts, with their more complex procedures and fewer locations, exacerbates these issues.

Section 26 – Leases

Section 26 deals with a victim's rights to a leased family home. It states that anyone who is granted exclusive occupation of the family home under sections 16-18, 20 or 21 is bound by the lease on the family home during the period of the order. This is true even if that person is not a named lessee (*FHRMIRA*, section 26).

This provision is helpful in that it secures the rights of the landlord, the original lessee, and the person deemed to be the lessee. In practice however, this provision may operate to hold victims of domestic violence responsible for overdue rent and damages caused by the perpetrator (as discussed by Jonnette Watson Hamilton with respect to similar provincial legislation [here](#)).

Elevated poverty rates and unemployment levels on reserves means that victims are often less able to withstand these financial blows than those living off-reserve. In addition, chronic housing shortages on reserves across Canada mean that victims are less able to seek housing alternatives, even when this might be a preferable outcome to remaining in a family home subject to overdue rent or damage charges.

Conclusion

Applications of the provisions of *FHRMIRA* discussed in this post are extremely problematic for several reasons. The first and most damning issue is the lack of designated judges for emergency orders. Second, the communities surveyed in the COEMRP Report note that they have received "no funding to help with any implementation, training or education initiatives following approval of the MRP Law" (COEMRP Report, 19). If this is a problem for First Nations who have the financial assistance of the COEMRP, it can only be assumed that communities left to navigate the *FHRMIRA* on their own are experiencing the same issues around education and implementation. This is reflected in the lack of case law surrounding the *FHRMIRA*. To date, there have been few [judicial interpretations](#) of *FHRMIRA*, and no exclusive occupation or emergency protection orders have been granted (COEMRP Report, 19).

Successful implementation of the *FHRMIRA* is also thwarted by persistent access to justice issues experienced on-reserve. Implementation is stifled by a lack of accessibility to the court system and perceived jurisdictional issues for peace officers, RCMP, and police services. Their

absence on reserve makes enforcing orders difficult, as the likelihood of deterrence is reduced when enforcement is perceived as unlikely.

Finally, a persistent distrust of the police and justice system continues to prevent indigenous peoples from seeking redress from the justice system. As one community reported, a mother fearing for the protection of her children in a violent home would “not trust that she could disclose information about violence to the courts, because the very fact that there was violence could be enough to justify removal of her children” (COEMRP Report, 10). This historical lack of trust, entrenched in indigenous communities’ experiences with the criminal and child welfare systems, requires significant attention and resources in order to make this legislation accessible.

While this is not a simple issue to address, provinces could make a decent start by appointing designated judges under *FHRMIRA*, educating reserve residents, police, and social services about its provisions, and allocating enough money to ensure that those who need orders have help applying for them, and those who have obtained orders can have them enforced.

The research in this post was supported by a grant from the Social Sciences and Humanities Research Council (SSHRC) for the project Domestic Violence and Access to Justice Within and Across Multiple Legal Systems (Koshan, Chan, Keet, Mosher and Wiegers).

This post may be cited as: Elysa Darling “Landlords, Tenants, and Domestic Violence: The *Family Homes on Reserves and Matrimonial Interests or Rights Act*” (30 October, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/10/Blog_ED_FMRMIRA.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

