

***Family Homes on Reserves and Matrimonial  
Interests or Rights Act***

**STATUTES OF CANADA 2013  
CHAPTER 20**

An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves

**ASSENTED TO**  
19th JUNE, 2013

**Clause-by-Clause Analysis**

**An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves**

**PREAMBLE**

Preamble

Whereas it is necessary to address certain family law matters on First Nation reserves since provincial and territorial laws that address those matters are not applicable there and since the *Indian Act* does not address those matters;

Whereas measures are required to provide spouses or common-law partners with rights and remedies during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner in respect of

the use, occupation and possession of family homes on reserves, including exclusive occupation of those homes in cases of family violence, and

the division of the value of any interests or rights that they hold in or to structures and lands on those reserves;

Whereas it is important that, when spouses or common-law partners exercise those rights and seek those remedies, the decision-maker

take into account the best interests of the children, including the interest of any child who is a First Nation member to maintain a connection with that First Nation, and

be informed by the First Nation with respect to the cultural, social and legal context in the circumstances;

Whereas the Government of Canada has recognized the inherent right of self-government as an aboriginal right and is of the view that implementation of that right is best achieved through negotiations;

Whereas this Act is not intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation;

And whereas the Parliament of Canada wishes to advance the exercise, in a manner consistent with the *Constitution Act, 1982*, of First Nations law-making power over family homes on reserves and matrimonial interests or rights in or to structures and lands on reserves;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada enacts as follows:

**What the provision does**

Provides background information and explains the circumstances that gave rise to it.

**Explanation**

Self-explanatory

**SHORT TITLE**

Clause 1 - Short Title
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This Act may be cited as the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

**What the provision does**

Provides a short title for this *Act*.

**Explanation**

Self-explanatory

**INTERPRETATION**

**Definitions**

Clause 2(1) - Definitions
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The following definitions apply in this Act.

“council”

“**council**”, in relation to a First Nation, has the same meaning as the expression “**council of the band**” in subsection 2(1) of the *Indian Act*.

**What the provision does**

Defines the term “council” to be consistent with the *Indian Act*.

**Explanation**

Self-explanatory

“court”

“**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*.

**What the provision does**

Defines the term “court” for the purposes of this *Act*.

### **Explanation**

This definition identifies the courts responsible for making determinations under the majority of this *Act* as the superior courts of the provinces and territories, consistent with the *Divorce Act*.

#### **“designated judge”**

**“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.

### **What the provision does**

Defines the term “designated judge”, for the purpose of the emergency protection orders in sections 16 to 19 of the *Act*, to mean a) a provincial justice of the peace appointed by the lieutenant governor in council of the province or territory, (b) a judge of a superior court in a province or territory, or (c) a judge of the provincial or territorial court, as authorized by the lieutenant governor in council of the province or territory to act for these purposes.

### **Explanation**

The *Act* provides for the use of designated judges to allow an immediate response where applications are made for emergency orders. 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. The use of designated judges also ensures that the necessary conditions are in place to meet the requirements of judicial independence.

#### **“family home”**

**“family home”** means a structure — that need not be affixed but that must be situated on reserve land — where the spouses or common-law partners habitually reside or, if they have ceased to cohabit or one of them has died, where they habitually resided on the day on which they ceased to cohabit or the death occurred. If the structure is normally used for a purpose in addition to a residential purpose, this definition includes only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.

### **What the provision does**

Defines the term “family home” to be the home the couple habitually occupied on reserve.

### **Explanation**

The family home is the structure habitually occupied during the conjugal relationship until the breakdown of that relationship or the death of one of the partners. Only the portion of the structure that is used for residential purposes is covered by the definition.

### **“First Nation”**

**“First Nation”** means a band as defined in subsection 2(1) of the *Indian Act*.

### **What the provision does**

Defines the term “First Nation” to be consistent with the definition of “band” in the *Indian Act*.

### **Explanation**

Self-explanatory

### **“First Nation member”**

**“First Nation member”** means a person whose name appears on the band list of a First Nation or who is entitled to have their name appear on that list.

### **What the provision does**

Defines the term “First Nation member” to be consistent with the *Indian Act*.

### **Explanation**

The *Indian Act* term is “member of a band”; “First Nation” is synonymous with “band” for the purposes of this *Act*.

### **“interest or right”**

**“interest or right”** means

(a) the following interests or rights referred to in the *Indian Act*:

(i) a right to possession, with or without a Certificate of Possession or a Certificate of Occupation, allotted in accordance with section 20 of that Act,

(ii) a permit referred to in subsection 28(2) of that Act, and

(iii) a lease under section 53 or 58 of that Act;

(b) an interest or right in or to reserve land that is subject to any land code or First Nation law as defined in subsection 2(1) of the *First Nations Land Management Act*, to any First Nation law enacted under a self-government agreement to which Her Majesty in right of Canada is a party, or to any land governance code adopted, or any Kanesatake Mohawk law enacted, under the *Kanesatake Interim Land Base Governance Act*; and

(c) an interest or right in or to a structure — that need not be affixed but that must be situated on reserve land that is not the object of an interest or right referred to in paragraph (a) — which interest or right is recognized by the First Nation on whose reserve the structure is situated or by a court order made under section 48.

### **What the provision does**

Defines the term “interest or right” to indicate the interests or rights that are subject to this *Act*.

### **Explanation**

Included in the definition are interests or rights to possession, leases and permits allotted or issued under the *Indian Act*, interests or rights granted under the *First Nations Land Management Act*, the *Kanesatake Interim Land Base Governance Act* and self-government agreements, and interests or rights to structures or permanent improvements on reserve land that have not been allotted pursuant to the *Indian Act*.

### **“matrimonial interests or rights”**

**“matrimonial interests or rights”** means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners

(a) that were acquired during the conjugal relationship;

(b) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or

(c) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship.

It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights.

### **What the provision does**

Defines the term “matrimonial interests or rights” for the purposes of this *Act*.

### **Explanation**

The definition includes those interests or rights beyond the family home that are held by one or both of the two spouses or common-law partners, and were acquired either during the course of that relationship, or before it but specifically because of that relationship. Interests or rights that an individual received as part of a gift or through a will or intestacy, or bought with any of those, are not included. Where an interest or right was acquired before the relationship, but not specifically because of it, then only the appreciation of that interest or right during the relationship would be included.

**“Minister”**

**“Minister”** means the Minister of Indian Affairs and Northern Development.

**What the provision does**

Specifies the Minister is the Minister of Indian Affairs and Northern Development.

**Explanation**

Self-explanatory

**“peace officer”**

**“peace officer”** means a person referred to in paragraph (c) of the definition **“peace officer”** in section 2 of the *Criminal Code*.

**What the provision does**

Defines the term “peace officer” for the purposes of this *Act* as an individual referred to in paragraph (c) of section 2 of the *Criminal Code*.

**Explanation**

The reference to paragraph (c) of section 2 of the *Criminal Code* means that individuals who are already appointed and trained for similar purposes will also be used for the purposes of this *Act*. The term “peace officer” is defined as a police officer, police constable, bailiff, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process.

**“spouse”**

**“spouse”** includes either of two persons who have entered in good faith into a marriage that is voidable or void.

**What the provision does**

Expands the ordinary meaning of the term “spouse” as a married person, to also include persons who are not legally married, but who have entered in good faith into a marriage that is voidable or void.

**Explanation**

This expansion to the usual meaning of the term “spouse” ensures that persons, who, in good faith, believed that they were married but, because of a technicality or other error, are not legally married, are also included.

**Words and expressions**

Clause 2(2) – Words and expressions
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Unless the context otherwise requires, words and expressions used in this Act have the same meaning as in the *Indian Act*.

### **What the provision does**

Clarifies that the words and expressions used in this *Act* have the same meaning as in the *Indian Act*, unless the context explicitly states otherwise.

### **Explanation**

Several terms used in this *Act* are not defined here because they are already defined in the *Indian Act*. For example, a “survivor” is defined in the *Indian Act* as a “surviving spouse or common-law partner”. Similarly, “common-law partner” is defined in the *Indian Act* as “a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year”.

### **Agreement between spouses or common-law partners**

Clause 2(3) – Agreement between spouses or common-law partners
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For greater certainty, for the purposes of this Act, an agreement between spouses or common-law partners includes an agreement reached through the use of traditional dispute resolution.

### **What the provision does**

Explicitly provides, for greater certainty, that agreements reached between spouses or common-law partners include agreements reached through the use of traditional dispute resolution.

### **Explanation**

This provides greater certainty that agreements reached through traditional dispute resolution are agreements that a judge must take into consideration during determinations of exclusive occupation and division of the value of the family home. Nothing in the *Act* prevents the parties from using traditional dispute resolution, but this subsection makes the inclusion of the results of such dispute resolution more explicit.

### **Former spouse or common-law partner**

Clause 2(4) – Former spouse or common-law partner
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For the purposes of the definition “**matrimonial interests or rights**” in subsection (1), subsection (3), section 6, subsections 15(2), (4) and (5) and sections 16, 20, 26, 28 to 33, 43, 45, 48, 49 and 54, a spouse or common-law partner includes a former spouse or common-law partner.

### **What the provision does**

Identifies which sections and subsections of this legislation also apply to a former (divorced) spouse or a former common-law partner.

**Explanation**

Clarifies that several rights and protections under this *Act* are intended to capture situations following the breakdown of a conjugal relationship, where a spouse may now be divorced or a common-law partnership may have ended.

**Term not restrictive**

Clause 2(5) – Term not restrictive

The use of the term “**application**” to describe a proceeding in a court under this *Act* must not be construed as limiting the name under which and the form and manner in which that proceeding may be taken in that court, and the name, manner and form of the proceeding in that court are those that are provided for by the rules regulating the practice and procedure in that court.

**What the provision does**

Ensures that the use throughout this *Act* of the term “application” will not limit the name, form or manner in which proceedings under this *Act* can be brought in the provincial or territorial courts.

**Explanation**

The superior courts of each province and territory may have different name, forms or manners for the proceedings contemplated by this *Act*. This provision ensures that parties will refer to the rules that regulate practice and procedure to determine the appropriate way to proceed in each jurisdiction.

**Kanesatake**

Clause 2(6) – Kanesatake

For the purposes of this *Act*, a reference to a reserve is also a reference to the Kanesatake Mohawk interim land base as defined in subsection 2(1) of the *Kanesatake Interim Land Base Governance Act*.

**What the provision does**

Specifies that reference to a “reserve” includes lands under the *Kanesatake Interim Land Base Governance Act*.

**Explanation**

Pursuant to an agreement between Canada and the Mohawks of Kanesatake, signed on December 21, 2000 and implemented by the *Kanesatake Interim Land Base Governance Act*, the Kanesatake Mohawk interim land base is set aside as lands reserved for the Indians within the meaning of class 24 of section 91 of the *Constitution Act, 1867* but is not a reserve within the meaning of the *Indian Act*. The Agreement also provides for jurisdiction by Kanesatake over the use and development of those lands.

## HER MAJESTY

### Binding on Her Majesty

Clause 3 – Binding on Her Majesty

This Act is binding on Her Majesty in right of Canada or a province.

#### What the provision does

Provides that this *Act* will be binding on Her Majesty in right of Canada or a province.

#### Explanation

There is a presumption set out in section 17 of the *Interpretation Act* that the Crown is not bound by enactments unless otherwise set out in the enactment. The Minister and the provinces will have obligations under this *Act*, and as such this *Act* is binding on them.

## PURPOSE AND APPLICATION

### Purpose

Clause 4 – Purpose

The purpose of this Act is to provide for the enactment of First Nation laws and the establishment of provisional rules and procedures that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on First Nation reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on those reserves.

#### What the provision does

Sets out the purpose of the *Act*.

#### Explanation

This clause is intended to provide the rationale for the provisions which follow. It indicates that the purpose of the *Act* is to provide for the enactment of First Nation laws respecting family homes and the division of matrimonial interests or rights in or to structures and lands situated on reserves during a conjugal relationship, on relationship breakdown or on the death of a spouse or common-law partner, as well as the establishment of provisional federal rules and procedures pending the development of these laws by First Nations. The more usual focus on real property in similar legislation is deliberately adapted to meet the unique needs identified for the reserve context during the consultations.

## **Title to First Nation land**

Clause 5 – Title to First Nation land

For greater certainty,

(a) title to reserve lands is not affected by this Act;

(b) reserve lands continue to be set apart for the use and benefit of the First Nation for which they were set apart; and

(c) reserve lands continue to be lands reserved for the Indians within the meaning of Class 24 of section 91 of the *Constitution Act, 1867*.

### **What the provision does**

Sets out clearly that the *Act* is not intended to alter the current land regime on reserves.

### **Explanation**

Because the *Act* deals to some extent with interests or rights in lands, this provision states that it is not intended to alter the title of the lands affected or to change the status of reserve lands to which the *Act* applies.

## **Spouses or common-law partners**

Clause 6 – Spouses or common-law partners

This Act applies to spouses or common-law partners only if at least one of them is a First Nation member or an Indian.

### **What the provision does**

Specifies that the *Act* will apply to spouses or common-law partners where at least one of them is a First Nation member or an Indian.

### **Explanation**

This *Act* applies to spouses or common-law partners if one of them is a member of the First Nation on whose reserve the family home and other matrimonial interests or rights are located or a status Indian.

## ENACTMENT OF FIRST NATION LAWS

### POWER OF FIRST NATIONS

#### Power to enact First Nation laws

Clause 7(1) – Power to enact First Nation laws

A First Nation has the power to enact First Nation laws that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner, respecting the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structures and lands on its reserves.

#### What the provision does

Sets out the power of First Nations to establish their own laws on family homes on their reserves and the division of matrimonial interests or rights on relationship breakdown and death.

#### Explanation

First Nations can establish their own laws for the use, occupation and possession of family homes on their reserves and for the division of matrimonial interests or rights.

#### Contents

Clause 7(2) – Contents

The laws must include procedures for amending and repealing them and may include

(a) provisions for administering them; and

(b) despite subsection 89(1) of the *Indian Act*, provisions for enforcing, on a reserve of the First Nation, an order of a court that includes one or more provisions made under the laws or a decision made or an agreement reached under the laws.

#### What the provision does

Sets out that the laws must include procedures for amending and repealing First Nation laws on family homes on reserves and matrimonial interests or rights and can include provisions respecting administration as well as enforcement. This provision was added as a result of consultations with the Native Women's Association of Canada, the Assembly of First Nations and the Ministerial Representative who recommended that, although the provisional federal rules should not override section 89 of the *Indian Act*, each First Nation should have the power to deal with enforcement issues as they see fit.

**Explanation**

Ensures that First Nation laws on family homes on reserves and matrimonial interests or rights can be amended and repealed and that the procedure for amending and repealing First Nation laws be set out and approved by the community. This provision also ensures that First Nations who choose to do so can make rules regarding enforcement of orders and decisions made under their laws without being bound by section 89 of the *Indian Act*.

**Notice to provincial Attorney General**

Clause 7(3) – Notice to provincial Attorney General

When a First Nation intends to enact laws, the council must so notify the Attorney General of any province in which a reserve of the First Nation is situated.

**What the provision does**

Requires a First Nation that intends to enact laws under this *Act* to notify the Attorney General of the province in which the First Nation reserve is situated.

**Explanation**

First Nation laws may require related amendment to existing provincial laws, rules of practice or make administrative arrangements with the province to give them full effect, for example, where they wish to use the provincial court system. Providing notice to the provincial Attorney General allows the province to contact the First Nation to identify and provide any needed support to remove any unintended barriers to the effectiveness of First Nation laws.

**Non-application of *Statutory Instruments Act***

Clause 7(4) – Non-application of *Statutory Instruments Act*

The *Statutory Instruments Act* does not apply in respect of the laws.

**What the provision does**

Provides that First Nation laws on family homes on reserves and matrimonial interests or rights are excluded from the application of the *Statutory Instruments Act*.

**Explanation**

Without this exemption, First Nation laws on family homes on reserves and matrimonial interests or rights would be subject to the *Statutory Instruments Act*, which provides for the examination, registration, publication and parliamentary scrutiny of regulations.

## **COMMUNITY APPROVAL**

### **Submission to members**

Clause 8(1) – Submission to members

If a First Nation intends to enact First Nation laws under section 7, the council of the First Nation must submit the proposed First Nation laws to the First Nation members for their approval.

#### **What the provision does**

Requires a First Nation to submit their proposed laws to the membership for approval.

#### **Explanation**

Ensures that the First Nation must present their law on family homes on reserves and matrimonial interests or rights to the community for their approval by holding a vote.

### **Eligibility to vote**

Clause 8(2) – Eligibility to vote

Every person who is 18 years of age or over and a member of the First Nation, whether or not resident on a reserve of the First Nation, is eligible to vote in the community approval process.

#### **What the provision does**

Sets out who is eligible to vote in the community approval process.

#### **Explanation**

Self-explanatory

### **Information to be provided**

Clause 8(3) – Information to be provided

The council must, before proceeding to obtain community approval, take reasonable measures that are in accordance with the First Nation's practices to locate voters and inform them of their right to vote, the means of exercising that right and the content of the proposed laws.

#### **What the provision does**

Requires the council to locate and inform voters of their right to vote and provide them with any relevant information.

**Explanation**

Ensures that all members, living on or off the reserve, know what they are voting on and have the opportunity to approve the law on family homes on reserves and matrimonial interests or rights.

**Publication of notice**

Clause 8(4) – Publication of notice

The council must publish a notice of the date, time and place of a vote.

**What the provision does**

Requires that the council give public notice of the vote.

**Explanation**

Self-explanatory

**Approval by members**

Clause 9(1) – Approval by members

The proposed First Nation laws that have been submitted for community approval are approved if a majority of those who participated in the vote voted to approve them.

**What the provision does**

Sets out single majority threshold for obtaining community approval of a First Nation's law on family homes on reserves and matrimonial interests or rights.

**Explanation**

Provides direction on the required community approval threshold as a single majority.

**Minimum participation**

Clause 9(2) – Minimum participation

Despite subsection (1), the proposed laws are not approved unless at least 25 per cent of the eligible voters participated in the vote.

**What the provision does**

Specifies that at least 25 percent of all eligible voters must participate in the vote on the proposed laws.

**Explanation**

Ensures that at least 25 percent of all eligible voters participated in the community vote of the First Nation's law on family homes on reserves and matrimonial interests or rights.

### **Increased percentage**

Clause 9(3) – Increased percentage

A council may, by resolution, increase the percentage of eligible voters required under subsection (2).

#### **What the provision does**

Provides that the council may, by band council resolution, increase the level of minimum participation.

#### **Explanation**

This provision ensures that a mechanism is in place for a council which decides to increase the community vote threshold required to approve their law on family homes on reserves and matrimonial interests or rights.

### **Approved Laws**

Clause 10(1) – Approved Laws

When a First Nation approves the proposed First Nation laws, its council must, without delay after the vote, inform the Minister in writing of the result of the vote and send a copy of the approved laws to the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

#### **What the provision does**

Requires the First Nation council to inform the Minister, in writing, of the results of the vote approving the First Nation laws and to send a copy of the approved laws to the Minister, the organization, if any, and the Attorney General of the province where the First Nation reserve is located.

#### **Explanation**

For transparency, it requires the First Nation council to provide in writing the results of the vote when the First Nation proposed laws were approved. In addition, the First Nation council is to provide a copy of the approved laws to the Minister, the organization, if any, and the Attorney General of the province where the First Nation reserve is located.

## COMING INTO FORCE

### Force of law and judicial notice

Clause 11(1) – Force of law and judicial notice

The First Nation laws come into force and have the force of law on the day on which they are approved or on any later day that may be specified in or under them and judicial notice must from then on be taken of the laws in any proceedings.

#### What the provision does

Provides the point in time at which the First Nations' laws come into force and have the force of law.

#### Explanation

Sets out the date as of which First Nations' laws on family homes on reserves and matrimonial interests or rights are in force, and also ensures that judicial notice can be taken of the laws.

### Evidence of laws

Clause 11(2) – Evidence of laws

In the absence of evidence to the contrary, a copy of the First Nation laws appearing to be certified as a true copy by an officer of the First Nation is proof of the original without proof of the officer's signature or official character.

#### What the provision does

Proof of a First Nation law can be established by a copy certified by an officer of the First Nation without further evidence required.

#### Explanation

Self-explanatory

### Access to First Nation laws

Clause 11(3) – Access to First Nation laws

A copy of the First Nation laws, as amended from time to time, must be maintained by the council for public inspection at locations designated by the council.

#### What the provision does

Provides for public access to the First Nation laws.

#### Explanation

This provision ensures that all members of the public have access to the laws.

## Notice of amendments

### Clause 11(4) – Notice of amendments

If a First Nation amends its laws, the council must, without delay, send a copy of the amended laws to the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

#### What the provision does

Requires that the First Nation send, to the Minister, the organization, if any, and the Attorney General of the province, a copy of any amendments made to their law.

#### Explanation

Ensures that the Minister, the organization, if any, and the Attorney General of the province receive copies of all amendments that the First Nation makes to their law on family homes on reserves and matrimonial interests or rights.

## Notice on repeal

### Clause 11(5) – Notice on repeal

If a First Nation repeals its laws, the council must, without delay and in writing, notify the Minister, the organization designated by the Minister, if any, and the Attorney General of any province in which a reserve of the First Nation is situated.

#### What the provision does

Requires that the First Nation notify the Minister the organization designated by the Minister, if any, and the province of the repeal of their laws.

#### Explanation

Ensures that the Minister, the organization designated by the Minister, if any and the province are made aware of the repeal of First Nation laws. This is necessary as the Minister is responsible for maintaining a list of the First Nations that have enacted matrimonial real property laws as required in subsection 11(6) of the *Act*.

## List

### Clause 11(6) – List

The Minister must maintain a list of First Nations whose laws are in force and must publish in any manner that the Minister considers appropriate the list and any amendments to the list.

**What the provision does**

Requires that the Minister maintain and publish a list of First Nations whose laws are in force.

**Explanation**

The Minister's list will permit the public to find out if a First Nation has enacted their own law on family homes on reserves and matrimonial interests or rights.

**PROVISIONAL FEDERAL RULES****APPLICATION****First Nations with reserve lands**

Clause 12(1) – First Nations with reserve lands

Sections 13 to 52 only apply to a First Nation that has reserve lands and that is not referred to in subsection (2) or (3) if the First Nation laws that it enacts under section 7 are not in force.

**What the provision does**

Specifies to which First Nations the provisional federal rules apply.

**Explanation**

This section must be read with section 55 of this *Act*.

As a general rule, every First Nation with reserve land will be subject to the provisional federal rules, once in force, until laws made by the First Nation pursuant to section 7 of this *Act* are in force. However, First Nations that are on the schedule to the *First Nations Land Management Act* would not be subject to the federal rules until three years from Royal Assent (June 19, 2013) of this *Act*. Further, the *Act* will not apply to First Nations under the *First Nations Land Management Act* with land codes or matrimonial real property laws in place at that time. Similarly, a First Nation under a self-government agreement would not be subject to the federal rules unless it continues to have reserve land, and elects to have the federal rules apply under subsection 12(3).

***First Nations Land Management Act***

Clause 12(2) – *First Nations Land Management Act*

Sections 13 to 52 only apply to a First Nation, as defined in subsection 2(1) of the *First Nations Land Management Act*, if

(a) on the day on which this subsection comes into force, the land code that the First Nation adopts under section 6 of that *Act* is not in force; and

(b) the First Nation laws that it enacts under section 7 of this Act or the rules and procedures that it establishes under section 17 of that Act are not in force.

**What the provision does**

Provides that the provisional federal rules will apply to First Nations on the schedule to the *First Nations Land Management Act* unless the First Nation has enacted a law under section 7 of this Act or under section 17 of the *First Nations Land Management Act* or unless the First Nation has a land code under section 6 of the *First Nations Land Management Act* in force on the day that section 12 of this Act comes into force.

**Explanation**

This section must be read with section 55 of this Act.

First Nations operating under their own land code, adopted pursuant to the *First Nations Land Management Act*, must enact rules and procedures dealing with the use, occupation and possession of reserve land and the division of interests in reserve land on marriage breakdown. To respect the agreement already existing between Canada and these First Nations, the provisional federal rules will not apply to signatory First Nations:

- (a) that have a law in force pursuant to section 7 of this Act;
- (b) that have a matrimonial real property law in force pursuant to section 17 of the *First Nations Land Management Act* on the date subsection 12(2) comes into force;
- (c) that, on the date subsection 12(2) comes into force, have a land code in force pursuant to section 6 of the *First Nations Land Management Act*;
- (d) for three years following the date of Royal Assent (June 19, 2013) of this Act, and which do not fall under (a), (b) or (c).

**Self-governing First Nations that retain reserve land**

Clause 12(3) – Self-governing First Nations that retain reserve land
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Sections 13 to 52 only apply to a First Nation that has the power to manage its reserve land under a self-government agreement into which the First Nation has entered and to which Her Majesty in right of Canada is a party if

(a) on the recommendation of the parties to the agreement, the Minister makes a declaration, by order, that those sections apply to the First Nation; and

(b) the First Nation laws referred to in section 7 that it enacts under that section or under the self-government agreement are not in force.

**What the provision does**

Specifies that a First Nation that has reserve lands and is a signatory to a self-government agreement is not subject to the provisional federal rules unless the First Nation wishes to have them apply and has not already enacted a law on family homes

on reserves and matrimonial interests or rights pursuant to section 7 of this *Act* or to the self-government agreement.

**Explanation**

A First Nation that is a signatory to a self-government agreement is not subject to the federal provisional rules provided by the *Act*. That First Nation could adopt a matrimonial real property law pursuant to their self-government agreement. If the First Nation still retains reserve land, then they can request that the Minister make a declaration to have the provisional federal rules in this *Act* apply.

**Declaration**

Clause 12(4) – Declaration

In the declaration referred to in paragraph (3)(a), the Minister must specify that sections 13 to 52 apply to the First Nation until the First Nation laws referred to in section 7 that it enacts under that section or under the self-government agreement come into force.

**What the provision does**

Specifies the content of the Ministerial declaration.

**Explanation**

The declaration must specify that the self-governing First Nation which still holds reserve land has opted to accept the provisional federal rules until such time as they adopt a family home on reserves and matrimonial interests or rights law according to section 7 of the *Act* or until their matrimonial real property laws under their self-government agreement come into force.

**List**

Clause 12(5) – List

The Minister must maintain a list of First Nations in respect of which the Minister has made a declaration and must publish in any manner that the Minister considers appropriate the list and any amendments to the list.

**What the provision does**

Requires that the Minister maintain and publish a list of First Nations where he has made a declaration.

**Explanation**

The Minister’s list will permit the public to find out which First Nations the Minister has made a declaration that the provisional federal rules apply.

## Notice on coming into force

Clause 12(6) – Notice on coming into force

If a First Nation in respect of which the Minister has made a declaration enacts the First Nation laws referred to in section 7 under that section or under the self-government agreement and those laws come into force, the First Nation must notify the Minister in writing without delay.

### What the provision does

Requires that the self-governing First Nation, for which a declaration has been made, notify the Minister when they establish a law on family homes on reserves and matrimonial interests or rights according to section 7 of the *Act* or according to their self-government agreement.

### Explanation

Allows the Minister to maintain and publish an accurate list as referred to in subsection 12(5).

## FAMILY HOME

### Occupation

#### During conjugal relationship

Clause 13 – During conjugal relationship

Each spouse or common-law partner may occupy the family home during the conjugal relationship, whether or not that person is a First Nation member or an Indian.

### What the provision does

Sets out that both of the spouses or common-law partners have the right to occupy the family home during the conjugal relationship.

### Explanation

Provides a right of occupation to the family home to the spouse or common-law partner whether or not that individual is a First Nation member, where they have established a family home on reserve.

## After death

### Clause 14 – After death

When a spouse or common-law partner dies, a survivor who does not hold an interest or right in or to the family home may occupy that home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian.

#### What the provision does

Sets out a right, for the survivor, to occupy the family home for 180 days after the death of their First Nation member spouse or common-law partner.

#### Explanation

Provides an automatic right of occupation of the family home to a survivor where they have established a family home on reserve. This provision is not generally found in provincial and territorial family law legislation because of the different context due to different notions of land ownership off reserve. It was specifically added to meet the unique needs identified for the reserve context during the consultations.

## Consent of spouse or common-law partner

### Clause 15(1) – Consent of spouse or common-law partner

Subject to the *Indian Act*, a spouse or common-law partner who holds an interest or right in or to the family home must not dispose of or encumber that interest or right during the conjugal relationship without the free and informed consent in writing of the other spouse or common-law partner, whether or not that person is a First Nation member or an Indian.

#### What the provision does

Requires the consent of the spouse or common-law partner for an individual to dispose of or encumber an interest in or right to the family home.

#### Explanation

Provides 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 or not that spouse or common-law partner is a First Nation member. The provisions of the *Indian Act* regarding transfer of the right or interest will continue to apply even where the spouse or common-law partner consents to the transaction.

## Setting aside

### Clause 15(2) – Setting aside

If a spouse or common-law partner disposes of or encumbers their interest or right in or to the family home without the required consent of the other spouse or common-law partner, a court may, on application by the other spouse or common-law partner, by order, set aside the transaction and impose conditions on any future disposition or encumbrance of that interest or right by the spouse or common-law partner to whom the interest or right reverts.

### What the provision does

Provides recourse against the disposition or encumbrance of the family home without consent.

### Explanation

A court may void a disposition or encumbrance if consent was not obtained and impose conditions on any future disposition or encumbrance.

### Exception

### Clause 15(3) – Exception

However, the disposition or encumbrance may not be set aside if the other contracting party acquired it for value and acted in good faith.

### What the provision does

Prevents the court from setting aside a disposition or encumbrance where a third party acquired the interest in good faith and for a reasonable value.

### Explanation

Protects the interests of a third party in a transaction when that person acted reasonably but was still either unaware that there was a spouse or common-law partner who should have provided consent or believed that consent had been obtained. Where a disposition or encumbrance cannot be set aside, the spouse or common-law partner may still have recourse under subsection 15(4).

## Damages

### Clause 15(4) – Damages

A spouse or common-law partner who has not given consent to a transaction for which it was required may, without prejudice to any other right, claim damages from the other spouse or common-law partner.

**What the provision does**

Provides that the spouse or common-law partner who has not consented to a transaction respecting the family home is entitled to damages.

**Explanation**

Under the *Act*, a spouse or common-law partner is ordinarily entitled to half of the value of the family home. This provision protects that entitlement where there has been a sale or encumbrance of the family home.

**Proof of consent**

Clause 15(5) – Proof of consent
---------------------------------

The spouse or common-law partner who disposed of or encumbered the interest or right in or to the family home has the burden of proving that the other spouse or common-law partner consented to the disposition or encumbrance.

**What the provision does**

Requires that the spouse or common-law partner holding a right in or an interest to the family home, prove that the other spouse or common-law partner consented to the disposition or encumbrance of the family home.

**Explanation**

Puts the burden of proving that consent was obtained on the individual who made the disposition or encumbrance.

**Authorization**

Clause 15(6) – Authorization
------------------------------

Subject to the *Indian Act*, a court may, on application by the spouse or common-law partner who holds an interest or right in or to the family home, by order, authorize that person, subject to any conditions that the court considers appropriate, to dispose of or encumber that interest or right without the required consent of the other spouse or common-law partner if the court is satisfied that the other spouse or common-law partner cannot be found, is not capable of consenting or is unreasonably withholding consent.

**What the provision does**

Allows a court to permit a spouse who holds the interest or right to dispose of it or encumber it without the consent of the other spouse or common-law partner where consent cannot reasonably be obtained.

**Explanation**

It would still be possible to dispose of or encumber the family home without the consent of the other spouse or common-law partner in certain conditions – where that person

cannot be found, is not capable of consenting, or is unreasonably withholding consent. Any disposition or encumbrance will remain subject to the existing requirements set out in the *Indian Act*.

## Emergency Protection Order

### Order of designated judge

Clause 16(1) – Order of designated judge

On *ex parte* application by a spouse or common-law partner, a designated judge of the province in which the family home is situated may make an order for a period of up to 90 days that contains one or more of the provisions referred to in subsection (5) and that is subject to any conditions that the judge specifies, if the judge is satisfied that

(a) family violence has occurred; and

(b) 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.

### What the provision does

Provides that a designated judge of the province where the family home is situated, following an *ex parte* application, may make an emergency order, for up to 90 days, if they are satisfied that both elements set out in paragraphs 16(1) (a) and (b) are met: (a) family violence has occurred; and (b) there is a serious or urgent situation that requires an immediate response to protect a person from the risk of harm, or property from the risk of damage.

### Explanation

A judicial proceeding is said to be *ex parte* when it is requested or heard at the instance of and for the benefit of one party only, and without notice to or argument from any other affected person. Because the situation is serious or urgent, an *ex parte* proceeding is used. The length of the emergency order - up to 90 days – reflects the immediate need to protect the person who is at risk of harm or the property that is at risk of damage. Consistent with other provisions of the *Act*, the designated judge considering the application for an emergency order must be a designated judge of the province where the family home is located.

### Applicant

Clause 16(2) – Applicant

The spouse or common-law partner may make the application even if that person has been forced to vacate the family home as a result of family violence.

**What the provision does**

Specifies that an applicant is not barred from applying for an emergency order because they have been forced to leave the family home due to family violence.

**Explanation**

Provides an opportunity for a person who has left the family home because of family violence to apply for an emergency order for temporary exclusive occupation.

**Acting on behalf of applicant**

Clause 16(3) – Acting on behalf of applicant
--

A peace officer or other person may also make the application on behalf of the spouse or common-law partner with that person's consent, or if that person does not consent, with leave of the designated judge granted in accordance with the regulations.

**What the provision does**

Sets out that a peace officer or other person can apply for an emergency order on behalf of the spouse or common-law partner, if consent is provided, or with leave of the designated judge provided in accordance with the regulations if no consent is provided by the spouse or common-law partner.

**Explanation**

Should a spouse or common-law partner not be able to apply for an emergency protection order, a peace officer or other person may apply on behalf of that spouse or partner to ensure the immediate protection of the person or property at risk of harm. In situations where the applicant has not provided consent to apply for an emergency protection order, the designated judge can provide an order (following the regulations to the *Act*) granting leave for an application to be made on behalf of that applicant.

**Considerations**

Clause 16(4) – Considerations
-------------------------------

In making the order, the designated judge must consider, among other things,

- (a) the history and nature of the family violence;
- (b) the existence of immediate danger to the person who is at risk of harm or property that is at risk of damage;
- (c) the best interests of any child in the charge of either spouse or common-law partner, including the interest of any child who is a First Nation member to maintain a connection with that First Nation;
- (d) the interests of any elderly person or person with a disability who habitually resides in the family home and for whom either spouse or common-law partner is the caregiver;

(e) the fact that a person, other than the spouses or common-law partners, holds an interest or right in or to the family home;

(f) the period during which the applicant has habitually resided on the reserve; and

(g) the existence of exceptional circumstances that necessitate the removal of a person other than the applicant's spouse or common-law partner from the family home in order to give effect to the granting to the applicant of exclusive occupation of that home, including the fact that the person has committed acts or omissions referred to in subsection (9) against the applicant, any child in the charge of either spouse or common-law partner, or any other person who habitually resides in the family home.

### **What the provision does**

Sets out factors that the designated judge must consider in determining whether or not to make an emergency order.

### **Explanation**

Provides a non-exhaustive list of key considerations intended to assist the designated judge in deciding whether or not to make an emergency order.

### **Content of order**

Clause 16(5) – Content of order
---------------------------------

The order may contain

(a) a provision granting the applicant exclusive occupation of the family home and reasonable access to that home;

(b) a provision requiring the applicant's spouse or common-law partner and any specified person who habitually resides in the family home — whether or not they are First Nation members or Indians — to vacate the family home, immediately or within a specified period, and prohibiting them from re-entering the home;

(c) a provision directing a peace officer, immediately or within a specified period, to remove the applicant's spouse or common-law partner and any specified person who habitually resides in the family home — whether or not they are First Nation members or Indians — from the family home;

(d) a provision prohibiting any person who is required to vacate the family home under a provision referred to in paragraph (b) from attending near the family home;

(e) a provision directing a peace officer, within a specified period, to accompany the applicant's spouse or common-law partner or any specified person to the family home or other location in order to supervise the removal of personal belongings; and

(f) any other provision that the designated judge considers necessary for the immediate protection of the person who is at risk of harm or property that is at risk of damage.

**What the provision does**

Sets out the provisions that a designated judge may incorporate in an emergency order.

**Explanation**

The listed provisions, including the broader provision in (f), are considerations relevant to the temporary exclusive occupation of the family home for emergency protection.

**Notice of order**

Clause 16(6) – Notice of order

Any person against whom the order is made and any person specified in the order are bound by the order on receiving notice of it.

**What the provision does**

Sets out that a person against whom the order is made or any person specified in the order is bound by the order as soon as they receive notice of it.

**Explanation**

Since section 16 is an *ex parte* proceeding, the order takes effect upon its being made, but the person against whom the order is made is bound by the order as soon as they receive notice of it. This provision ensures the right of an individual to notice of a judicial order that concerns them.

**Service by peace officer**

Clause 16(7) – Service by peace officer

A peace officer must serve a copy of the order on the persons referred to in subsection (6) either directly or, if authorized by the court in the province in which the designated judge has jurisdiction, by substituted service in the manner, under the circumstances and on the conditions prescribed by regulation. The peace officer must inform the applicant as soon as each service is effected.

**What the provision does**

Directs a peace officer to provide notice of the order to a person against whom the order is made or any person specified in the order either directly, or as provided by the court in the province where the designated judge has jurisdiction, or in a way consistent with the regulations to this *Act* and then to inform the applicant as each service is effected.

**Explanation**

This provision serves the following five purposes: (1) removes the usual duty from an applicant who is the spouse or common-law partner to provide notification of the emergency order in the case of family violence; (2) minimizes the risk of harm to an

applicant who is either a victim or witness of family violence; (3) provides for direct service of the notice of an order, or for alternative methods of delivering a notice which are to be outlined by the court in the province where the designated judge has jurisdiction (which is the province where the family home is located); (4) establishes that other means of delivering notice of an order can be used in specific situations and under the conditions provided for in the regulations to this *Act*; and (5) ensures that the applicant is aware that the notice has been served for purposes of enforcement.

### **No personal liability**

Clause 16(8) – No personal liability

An action or other proceeding must not be instituted against a peace officer for any act or omission done in good faith in the execution or intended execution of the peace officer's duties under this section.

### **What the provision does**

Protects the peace officer from personal liability for good faith acts or omissions in the course of their duties under this *Act*.

### **Explanation**

Peace officers are routinely granted immunity for acts or omissions conducted in the course of their duties under an Act.

### **Definition of “family violence”**

Clause 16(9) – Definition of “family violence”

For the purposes of this section, “**family violence**” means any of the following acts or omissions committed by a spouse or common-law partner against the other spouse or common-law partner, any child in the charge of either spouse or common-law partner, or any other person who habitually resides in the family home:

- (a) an intentional application of force without lawful authority or consent, excluding any act committed in self-defence;
- (b) an intentional or reckless act or omission that causes bodily harm or damage to property;
- (c) an intentional, reckless or threatened act or omission that causes a reasonable fear of bodily harm or damage to property;
- (d) sexual assault, sexual abuse or the threat of either;
- (e) forcible confinement without lawful authority; or

(f) criminal harassment.

### **What the provision does**

Provides a listing of behaviours that, when committed by a spouse or a common-law partner against the other spouse or common-law partner, any child in the charge of either spouse or common-law partner, or any other person who habitually resides in the family home, constitutes family violence.

### **Explanation**

The definition sets out the acts or omissions that form the basis for an emergency order under this *Act*.

### **Order sent to court for review**

Clause 17(1) – Order sent to court for review
---

Immediately after making an order under section 16, a designated judge referred to in paragraph (a) or (c) of the definition “**designated judge**” in subsection 2(1) must forward a copy of the order and all supporting materials to the court in the province in which the designated judge has jurisdiction.

### **What the provision does**

Requires a justice of the peace who is appointed by the lieutenant governor in council of the province (i.e. a designated judge under paragraph (a) of the definition “designated judge” in subsection 2(1)) and a judge of the court established under the laws of the province (i.e. a designated judge under paragraph (c) of the definition “designated judge” in subsection 2(1)) who grants an emergency order under section 16 of this *Act* to immediately forward a copy of the order and all supporting materials to the superior court of the same province or territory where the designated judge has jurisdiction.

### **Explanation**

As section 16 of this *Act* is an *ex parte* proceeding, all orders of the justice of the peace and the provincial court judge are subject to an automatic review process by the superior court. This process is triggered when the designated judge forwards a copy of the order and supporting materials under this subsection.

### **Review by court**

Clause 17(2) – Review by court
--------------------------------

The court must review the order within three working days after the day on which it is received or, if a judge is not available within that period, as soon as one becomes available.

**What the provision does**

Directs the court to review the emergency order within three working days after receipt of the order from the designated judge or, if a judge is not available within that period, as soon as one can be made available.

**Explanation**

As section 16 is an *ex parte* proceeding, a very short period for review by the superior court is set out to ensure that the principles of fundamental justice are met. At the same time, due to the geographical distance between some of the reserves and the superior courts, as well as the case loads of many superior courts, it might not be possible to have a review of the order within three working days and therefore the review is to occur as soon as a judge can be made available.

**Decision**

Clause 17(3) – Decision
-------------------------

The court, on reviewing the order and the materials, must, by order,

(a) confirm the order if the court is satisfied that there was sufficient evidence before the designated judge to support the making of the order; or

(b) direct a rehearing of the matter by the court if the court is not satisfied that the evidence before the designated judge was sufficient to support the making of all or part of the order.

**What the provision does**

Provides that, after the review of the designated judge's (i.e. justice of the peace or provincial court judge) order and supporting materials, the court has two options: (1) confirm the designated judge's order if it satisfied that there was sufficient evidence before the designated judge to support the granting of the emergency order; or (2) direct a rehearing.

**Explanation**

As section 16 is an *ex parte* order, section 17(3) ensures that the court has reviewed both the emergency order and its supporting materials before making a decision to either confirm the order, or direct a rehearing to assess the merits of the application and to hear both parties.

**Notice**

Clause 17(4) – Notice
-----------------------

The court must give notice to the parties and any person specified in the order made by the designated judge of its decision and of any consequent procedures.

**What the provision does**

Directs that the court must provide notice of its decision, and any subsequent procedures, to the parties and to any person specified in the order, after the review of the emergency order.

**Explanation**

The explicit requirement that the parties are to be notified of the court's decision, and any consequent procedures flowing from that decision, ensures that the principles of fundamental justice and procedural fairness are met. Consequent procedures might include: the summons of individuals to the rehearing and the content of the notice requirement (including the consequences of a failure to comply with the order), the right to apply to the court to either set aside the order or, if the order is confirmed, to change any of its conditions, how long the order remains in force or whether or not it stays in force when a rehearing is directed.

**Confirmed order**

Clause 17(5) – Confirmed order
--------------------------------

An order that is confirmed is deemed to be an order of the court.

**What the provision does**

Deems the original emergency order by the justice of the peace or provincial court judge to be an order of the court, after it is confirmed.

**Explanation**

Ensures that the court's decision to confirm the original emergency order is an order of the court and may be enforced in accordance with the applicable rules and procedures.

**Rehearing — order continues**

Clause 17(6) – Rehearing – order continues
--

If the court directs that a matter be reheard, the order continues in effect and is not stayed unless the court orders otherwise.

**What the provision does**

Preserves the original order of the justice of the peace or provincial court judge while waiting for a rehearing of the matter, unless the court orders otherwise.

**Explanation**

The designated justice granted an *ex parte* order for reasons related to family violence and the immediate need for protection of the person who is at risk of harm or the property that is at risk of damage. Therefore, until the court deems it otherwise, the emergency order continues in effect, even if a court directs that the matter be reheard.

## Evidence at rehearing

### Clause 17(7) – Evidence at rehearing

The materials referred to in subsection (1) must be considered as evidence at the rehearing, in addition to any evidence presented at the rehearing, including evidence on the collective interests of the First Nation members, on whose reserve the family home is situated, in their reserve lands.

#### **What the provision does**

Directs that at the rehearing the court may consider both new evidence and the evidence that was originally presented to the designated judge (i.e. the justice of the peace or provincial court judge) including evidence on the collective interests of First Nation members on the reserve lands where the family home is situated.

#### **Explanation**

The rehearing is to be conducted as a new hearing to ensure that all of the original evidence and any additional relevant evidence is before the court and that the principles of fundamental justice are met, such as the right of the person against whom the order is made to be heard and to examine and cross-examine the applicant and any witnesses. Given the urgent nature of an emergency protection order when first issued, the person against whom the order is made is not heard nor is evidence presented regarding the collective interests of First Nation members in the reserve lands where temporary exclusive occupation of the family home is being sought. This provision provides for such presentations to occur at a rehearing.

## Order on rehearing

### Clause 17(8) – Order on rehearing

On a rehearing, the court may, by order, confirm, vary or revoke the order made under section 16, and may extend the duration of the order beyond the period of 90 days referred to in subsection 16(1).

#### **What the provision does**

Sets out the decisions that the court may make, following a rehearing of the matter, and states that, if the order is varied, the court can extend the duration of the order beyond the 90-day limit of the original emergency order granted by the designated judge.

#### **Explanation**

The court may confirm, vary or revoke the original emergency order. Previously, the total possible duration of an emergency protection order was 180 days to provide short-term relief to the applicant on an emergency basis, based on an original order of 90 days, plus a possible extension of up to 90 days on a rehearing. The Senate amendment provides that a court can determine the length of the extension, if any.

## Section 18 application

Clause 17(9) – Section 18 application

If an application is made under section 18 and a rehearing has been ordered but has not begun, that application must be heard at the rehearing.

### What the provision does

Directs that, if an application is made under section 18 (to revoke or vary the order), and a rehearing has been ordered by the court but not yet begun, the application under section 18 will be heard at the rehearing.

### Explanation

To avoid duplication of proceedings, this provision ensures that the same matter is not being addressed through two separate proceedings.

## Application to vary or revoke order

Clause 18(1) – Application to vary or revoke order

Any person in whose favour or against whom an order is made under section 16 or 17 or any person specified in the order may apply to the court in the province in which the designated judge has jurisdiction to have the order varied or revoked

(a) within 21 days after the day on which notice of the order made under section 16 is received, or within any further time that the court allows; and

(b) at any time if there has been a material change in circumstances.

### What the provision does

A distinction is made between an emergency order under section 16 (order granted by a designated judge) and under section 17 (order by the court at a rehearing) as to when and under what circumstances any person in favour of whom or against whom an order is made or any person specified in the order can apply to have the order revoked or varied.

### Explanation

For an emergency order granted by a designated judge, there is a time limit of 21 days to apply for a revocation or variation as the duration of the order is limited to a maximum of 90 days. If further time is required, the court has the discretion to extend that time limit. After the 21 days or after a rehearing, however, any person in favour of whom or against whom an order is made or any person specified in the order can apply to have the order revoked or varied if there has been a material change in circumstances.

## **Confirm, vary or revoke order**

Clause 18(2) – Confirm, vary or revoke order

The court may, by order, confirm, vary or revoke the order, and may extend the duration of the order beyond the period of 90 days referred to in subsection 16(1).

### **What the provision does**

Sets out the decisions the court must make following a hearing of the matter. If the order is varied, the court may extend the duration of the emergency order beyond the maximum period of 90 days specified for the original emergency order granted by the designated judge.

### **Explanation**

Previously, the total possible duration of an emergency protection order was 180 days, based on an original order of 90 days, plus a possible extension of up to 90 days. The Senate amendment provides on application that a court may determine the length of the variation or extension, if any, of the original order at its discretion.

## **Evidence at hearing**

Clause 18(3) – Evidence at hearing

The supporting materials for the order made by the designated judge must be considered as evidence at the hearing, in addition to any evidence presented at the hearing, including evidence on the collective interests of the First Nation members, on whose reserve the family home is situated, in their reserve lands.

### **What the provision does**

Directs that, in addition to any evidence presented at a hearing to vary or revoke an original emergency order, the court is to consider the materials produced in support of the original emergency order. The evidence to be considered at the hearing includes evidence on the collective interests of First Nation members on the reserve lands where the family home is situated.

### **Explanation**

The hearing is to be conducted as a new hearing to ensure that all the original material and any additional relevant evidence is before the court and that the principles of fundamental justice are met, such as the right of the person against whom the order is made to be heard and to examine and cross-examine the applicant and witnesses. Either party, as well as the First Nation itself, can bring evidence of the collective interests of First Nation members in the reserve lands where the family home is located and temporary exclusive occupation is being sought.

## Confidentiality

### Clause 19(1) – Confidentiality

Subject to subsection (2), on application by the parties or on its own motion, the court in the province in which the designated judge has jurisdiction may make an order that contains one or more of the following provisions and that is subject to any conditions that the court specifies:

- (a) a provision excluding members of the public, other than the parties, from all or part of a rehearing referred to in section 17 or a hearing referred to in section 18;
- (b) a provision prohibiting the publication or broadcasting of any information from the rehearing or hearing, including the name of a party, witness or child in the charge of either party or any information likely to identify any of those persons; and
- (c) a provision prohibiting disclosure to the public of any information in a court document or record related to a proceeding under section 17 or 18.

### What the provision does

Allows a court to protect the privacy of a party or witness to an emergency order application, or a child affected by the order, by (1) limiting public access to the hearings; (2) prohibiting the publication or broadcast of the hearings or any information that could identify the parties, witnesses or children; or (3) prohibiting public disclosure of court records including any evidence submitted to the court.

### Explanation

To protect vulnerable victims and witnesses of family violence from harm that could be caused by the public revelation of their identities or information regarding such violence, which can include sexual abuse of children, the court is provided with the possibility of issuing a confidentiality order by application or on its own accord.

### Conditions

#### Clause 19(2) – Conditions

The court may only make the order if it is satisfied that

- (a) the order is necessary for the safety of a party or witness or the safety or physical or emotional well-being of a child; or
- (b) protecting a party, witness or child from an undue hardship or adverse effect that could be caused by making the information public outweighs the public's right to the information.

**What the provision does**

Sets out the criteria to be applied by the court in assessing whether or not to grant a confidentiality order.

**Explanation**

Since a confidentiality order potentially restricts the openness of court proceedings and the freedom of the press, they can be granted only where: (1) it is necessary for the safety of a party, witness or child; (2) it is necessary for the physical or emotional well-being of a child; or (3) the salutary effects of the order in protecting a party, witness or child from undue hardship or adverse effect, outweighs the deleterious effects on public access to the information.

***Exclusive Occupation Order*****Court order**

Clause 20(1) – Court order
----------------------------

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.

**What the provision does**

Allows the court to order that one spouse or common-law partner may have exclusive occupation of the family home for a specified period of time, regardless of whether that person is a First Nation member or an Indian.

**Explanation**

This application would ask for a court order for one spouse or common-law partner to temporarily have exclusive occupation of the family home for a specified period of time as part of the family law consequences of the breakdown of a marriage or common-law partnership. Unlike the emergency protection orders in clauses 16 through 19, family violence is not necessarily involved and the court may determine the maximum time period.

**Interim order**

Clause 20(2) – Interim order
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The court may make, on application by either spouse or common-law partner, an interim order to the same effect, pending the determination of the application under subsection (1).

### **What the provision does**

Allows the court to make an interim order for exclusive occupation that applies until the court has made a final decision on the initial application.

### **Explanation**

An interim order may be provided while the court considers the application for exclusive occupation of the family home.

### **Considerations**

Clause 20(3) – Considerations
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In making an order under this section, the court must consider, among other things,

(a) the best interests of any children who habitually reside in the family home, including the interest of any child who is a First Nation member to maintain a connection with that First Nation;

(b) the terms of any agreement between the spouses or common-law partners;

(c) the collective interests of First Nation members in their reserve lands and the representations made by the council of the First Nation on whose reserve the family home is situated with respect to the cultural, social and legal context that pertains to the application;

(d) the period during which the applicant has habitually resided on the reserve;

(e) the financial situation and the medical condition of the spouses or common-law partners;

(f) the availability of other suitable accommodation that is situated on the reserve;

(g) any existing order made on a matter related to the consequences of the breakdown of the conjugal relationship;

(h) any family violence;

(i) any acts or omissions by one of the spouses or common-law partners that reasonably constitute psychological abuse against the other spouse or common-law partner, any child in the charge of either spouse or common-law partner, or any other family member who habitually resides in the family home;

(j) the existence of exceptional circumstances that necessitate the removal of a person other than the applicant's spouse or common-law partner from the family home in order to give effect to the granting to the applicant of exclusive occupation of that home, including the fact that the person has committed acts or omissions that constitute family

violence, or reasonably constitute psychological abuse, against the applicant, any child in the charge of either spouse or common-law partner, or any other family member who habitually resides in the family home;

(k) the interests of any elderly person or person with a disability who habitually resides in the family home and for whom either spouse or common-law partner is the caregiver;

(l) the fact that a person, other than the spouses or common-law partners, holds an interest or right in or to the family home; and

(m) the views of any person who received a copy of the application, presented to the court in any form that the court allows.

### **What the provision does**

Sets out the factors that a court will consider in determining whether to grant an order for exclusive occupation for a specified period of time.

### **Explanation**

The court is directed to consider a number of relevant factors in making its decision. Some of these factors such as the interest of any child who is a First Nation member to maintain a connection with that First Nation, are specifically adapted to meet the unique needs identified for the reserve context during the consultations. Further, a judge must consider the period of time that the applicant has habitually resided on the reserve which is intended to serve as an indication of the individual's ties to the community. A First Nation council can bring evidence on the cultural, social, legal context and the collective interests of First Nation members in their reserve lands where the family home is located

### **Content of order**

Clause 20(4) – Content of order
---------------------------------

An order made under this section may contain provisions such as

(a) a provision requiring the applicant's spouse or common-law partner and any specified person — whether or not they are First Nation members or Indians — to vacate the family home, immediately or within a specified period, and prohibiting them from re-entering the home;

(b) a provision requiring the applicant's spouse or common-law partner to preserve the condition of the family home until that person vacates it;

(c) a provision directing the applicant to make payments to the other spouse or common-law partner toward the cost of other accommodation; and

(d) a provision requiring either spouse or common-law partner to pay for all or part of the repair and maintenance of the family home and of other liabilities arising in respect of the family home, or to make payments to the other spouse or common-law partner for those purposes.

**What the provision does**

Sets out for the court some of the provisions that may be included in the order for exclusive occupation where appropriate.

**Explanation**

The court may include in the order any of these provisions, or other provisions not listed here, as is appropriate in the individual circumstances before the court.

**Emergency protection order revoked**

Clause 20(5) – Emergency protection order revoked

An existing order made under any of sections 16 to 18 in favour of or against one of the spouses or common-law partners is revoked when the court makes an order under this section, except to the extent specified in that order.

**What the provision does**

Provides that any existing emergency protection order is automatically revoked when a court grants an order for exclusive occupation for a specified period of time, except where the court specifies that a particular portion of the original order is to continue.

**Explanation**

Ensures that, where there may be two orders concerning the same family home, they are coherent.

**Application to vary or revoke order**

Clause 20(6) – Application to vary or revoke order

Any person in whose favour or against whom an order is made under subsection (1), any person specified in the order, or the holder of an interest or right in or to the family home may apply to the court to have the order varied or revoked if there has been a material change in circumstances. The court may, by order, confirm, vary or revoke the order.

**What the provision does**

Allows individuals who are directly affected by an order to apply to the court to have the order revoked or varied where there has been a material change in circumstances.

**Explanation**

As court orders under subsection 20(1) may be for a longer period of time than the emergency protection orders, circumstances may change in significant ways that justify the court reviewing and perhaps changing the original exclusive occupation order before its time has elapsed.

**Notice to affected persons**

Clause 20(7) – Notice to affected persons

An applicant for an order under this section must, without delay, send a copy of the application to any person who is of the age of majority or over, whom the applicant is seeking to have the court order to vacate the family home, to any person who holds an interest or right in or to the family home and to any other person specified in the rules regulating the practice and procedure in the court.

**What the provision does**

Directs the applicant to send copies of their application to certain individuals who could be directly affected if the court grants the order.

**Explanation**

Allows certain individuals who could be directly affected by the court order to be aware of the application and to decide whether or not to ask the court to hear their views before the order is made.

**Order after death**

Clause 21(1) – Order after death

A court may, on application by a survivor whether or not that person is a First Nation member or an Indian, order that the survivor 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.

**What the provision does**

Allows the court to order that a survivor may have exclusive occupation of the family home for a specified period of time, regardless of whether or not that person is a First Nation member or an Indian.

**Explanation**

This application would ask for a court order for a survivor to temporarily have exclusive occupation of the family home for a specified period of time following the death of their spouse or common-law partner. The court may determine the maximum time period.

## **Interim order**

Clause 21(2) – Interim order

The court may make, on application by the survivor, an interim order to the same effect, pending the determination of the application under subsection (1).

### **What the provision does**

Allows the court to make an interim order for exclusive occupation that applies until the court has made a final decision on the initial application.

### **Explanation**

An interim order may be provided while the court considers the application for exclusive occupation of the family home.

### **Considerations**

Clause 21(3) – Considerations

In making an order under this section, the court must consider, among other things,

- (a) the best interests of any children who habitually reside in the family home, including the interest of any child who is a First Nation member to maintain a connection with that First Nation;
- (b) the terms of the will;
- (c) the terms of any agreement between the spouses or common-law partners;
- (d) the collective interests of First Nation members in their reserve lands and the representations made by the council of the First Nation on whose reserve the family home is situated with respect to the cultural, social and legal context that pertains to the application;
- (e) the medical condition of the survivor;
- (f) the period during which the survivor has habitually resided on the reserve;
- (g) the fact that the family home is the only property of significant value in the estate;
- (h) the interests of any person who holds or will hold an interest or right in or to the family home;
- (i) the interests of any elderly person or person with a disability who habitually resides in the family home and for whom the survivor is the caregiver;

(j) the existence of exceptional circumstances that necessitate the removal of a person from the family home in order to give effect to the granting to the survivor of exclusive occupation of that home, including the fact that the person has committed acts or omissions that constitute family violence, or reasonably constitute psychological abuse, against the survivor, any child in the charge of the survivor, or any other family member who habitually resides in the family home; and

(k) the views of any person who received a copy of the application, presented to the court in any form that the court allows.

### **What the provision does**

Sets out the factors that a court will consider in determining whether or not to grant an order for exclusive occupation for a specified period of time.

### **Explanation**

The court is directed to consider a number of relevant factors in making its decision. Some of these factors, such as the interest of any child who is a First Nation member to maintain a connection with that First Nation and the period during which the survivor has habitually resided on the reserve, are specifically adapted to meet the unique needs identified for the reserve context during the consultations. Further, a First Nation council can bring evidence on the cultural, social, legal context and the collective interests of First Nation members in their reserve lands where the family home is located

### **Content of order**

Clause 21(4) – Content of order
---------------------------------

An order made under this section may contain provisions such as

(a) a provision requiring the survivor to preserve the condition of the family home;

(b) a provision requiring any specified person, whether or not that person holds an interest or right in or to the family home, to vacate it immediately or within a specified period, and prohibiting them from re-entering the home; and

(c) a provision requiring the executor of the will, the administrator of the estate or the holder of an interest or right in or to the family home to pay for all or part of the repair and maintenance of the family home and of other liabilities arising in respect of it.

### **What the provision does**

Sets out for the court some of the provisions that may be included in the order for exclusive occupation where appropriate.

### **Explanation**

The court may include in the order any of these provisions, or other provisions not listed here, as is appropriate in the individual circumstances before the court.

## **Notice of order**

Clause 21(5) – Notice of order

The survivor must, without delay, give notice of an order made under this section to those who received a copy of the application. However, a peace officer must serve a copy of the order on those persons if the court so directs.

### **What the provision does**

Directs the survivor to send copies of the order to individuals who received a copy of the application because they could be directly affected by the order. Where the court directs, the copy may be served by a peace officer.

### **Explanation**

Ensures that certain individuals who could be directly affected by the court order are aware of it, while allowing the court to remove the usual duty from the survivor to provide notification of the order where there is some reason, such as a risk of harm to the survivor in the case of family violence.

## **Application to vary or revoke order**

Clause 21(6) – Application to vary or revoke order

The survivor, the executor of the will or the administrator of the estate, any person specified in an order made under subsection (1) or the holder of an interest or right in or to the family home may apply to the court to have that order varied or revoked if there has been a material change in circumstances. The court may, by order, confirm, vary or revoke the order.

### **What the provision does**

Allows individuals who are directly affected by an order to apply to the court to have the order revoked or varied where there has been a material change in circumstances.

### **Explanation**

As court orders under subsection 21(1) may be for a longer period of time than the emergency protection orders, circumstances may change in significant ways that justify the court reviewing and perhaps changing the original exclusive occupation order before its time has elapsed.

## **Notice to affected persons**

Clause 21(7) – Notice to affected persons

An applicant for an order under this section must, without delay, send a copy of the application to the executor of the will or the administrator of the estate, if the applicant knows who those persons are, to the Minister, to any person who is of the age of

majority or over, whom the applicant is seeking to have the court order to vacate the family home, to any person who holds an interest or right in or to the family home and to any other person specified in the rules regulating the practice and procedure in the court.

**What the provision does**

Directs the applicant to send copies of their application to certain individuals who could be directly affected if the court grants the order.

**Explanation**

Allows certain individuals who could be directly affected by the court order to be aware of the application and to decide whether or not to ask the court to hear their views before the order is made. The Minister is included because of his or her responsibilities for estate administration under the *Indian Act*.

**Other Provisions**

**Family violence**

Clause 22 – Family violence

For greater certainty, a designated judge or a court may find that family violence has occurred for the purposes of this Act whether or not, in respect of the act or omission in question, a charge has been laid, dismissed or withdrawn or a conviction has been or could be obtained.

**What the provision does**

Specifies that a court or designated judge may find that family violence has occurred even in the absence of any formal criminal court proceedings or charges laid related to the act or omission in question.

**Explanation**

For the purposes of this *Act*, a court or designated judge may determine that family violence has occurred regardless of whether or not the police have laid charges or a court has determined whether or not the acts or omissions constituted criminal offences.

**Interest or right not affected**

Clause 23 – Interest or right not affected

For greater certainty, an order made under any of sections 16 to 18, 20 or 21 does not change who holds an interest or right in or to the family home nor does it prevent an executor of a will or an administrator of an estate from transferring such an interest or right to a named beneficiary under the will or to a beneficiary on intestacy, or a court from ordering the transfer of such an interest or right under section 31 or 36.

### **What the provision does**

Specifies that a grant of exclusive occupation or other similar order does not affect the underlying interest in or right to the family home.

### **Explanation**

Orders for exclusive occupation focus only on who may or may not inhabit the family home and do not act as transfers of interests or rights. This is particularly important in the reserve context where only a member of the First Nation on whose reserve the family home is located can hold a right to the family home.

### **Notice**

#### Clause 24 – Notice

The person in whose favour an order is made under section 17, 18 or 20 must, without delay, give notice of the order to any person against whom the order is made and any person specified in the order. However, a peace officer must serve a copy of the order on those persons if the court so directs.

### **What the provision does**

Provides that a person in favour of whom a revision, modification or revocation of an emergency protection order or of an exclusive occupation order is made must notify any person against whom the order is made or who is affected by the order. Directs a peace officer to provide notice of the order where the court directs.

### **Explanation**

The order takes effect upon being made, but this provision ensures the individual's right to notice of a judicial order that affects them. This provision ensures that the applicant is aware of the order, but also allows for the court to remove the usual duty from the applicant spouse or common-law partner to provide notification in appropriate circumstances, such as in the case of family violence, and minimizes the risk of harm to the applicant who is either a victim or witness of family violence.

### **Contiguous property**

#### Clause 25 – Contiguous property

For the purposes of sections 16, 20 and 21, if the reserve land on which the family home is situated is the object of an interest or right referred to in subparagraph (a)(i) of the definition “**interest or right**” in subsection 2(1), exclusive occupation of the family home includes exclusive occupation of the portion of that land that is contiguous to the family home and that is strictly necessary for the use and enjoyment of the family home.

### **What the provision does**

Provides that where the family home is on land for which a certificate of possession was issued under the *Indian Act*, the order for exclusive occupation will include the portion of

the land that is contiguous to the family home and that is necessary for the use and enjoyment of the family home.

**Explanation**

Where the family home is located on land for which a certificate of possession exists, as possession of that land was granted to an individual, it may be necessary where a person other than that individual who holds the certificate of possession is granted exclusive occupation of the family home to have use of some of the land that is the subject of the certificate of possession, for example, to gain access to the family home. Where the land on which the family home is situated is held collectively, this would not be necessary.

**Leases**

Clause 26 – Leases

When an order made under any of sections 16 to 18, 20 or 21 grants exclusive occupation of the family home to a spouse or common-law partner or survivor who is not a lessee under the lease for the family home, the spouse or common-law partner or survivor is bound by the lease during the period of the order.

**What the provision does**

Where a spouse, common-law partner or survivor who is granted exclusive occupation of a leased premise is not named in the lease, this provision deems that person to be a lessee.

**Explanation**

This provision protects the third party landlord, the original lessee and the person deemed to be the lessee by ensuring that the terms of the lease apply to all.

**Offence**

Clause 27 – Offence

Any person who contravenes an order made under any of sections 16 to 19, a provision referred to in paragraph 20(4)(a) contained in an order made under section 20 or a provision referred to in paragraph 21(4)(b) contained in an order made under section 21 is guilty of an offence punishable on summary conviction and liable

(a) in the case of a first offence, to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding three months, or to both; or

(b) in the case of a subsequent offence, to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year, or to both.

**What the provision does**

Creates an offence and sets out the penalties for anyone who contravenes an order for exclusive occupation, an emergency order, or a confidentiality order.

**Explanation**

The penalties are consistent with the lower range of the penalties imposed in similar legislation.

**DIVISION OF THE VALUE OF MATRIMONIAL INTERESTS OR RIGHTS**

**Breakdown of a Conjugal Relationship**

**Division of value**

Clause 28(1) – Division of value

When a conjugal relationship breaks down, each spouse or common-law partner is entitled, on application made under section 30, to an amount equal to one half of the value, on the valuation date, of the interest or right that is held by at least one of them in or to the family home and to the amounts referred to in subsections (2) and (3).

**What the provision does**

Sets out the entitlement of each spouse or common-law partner to half the value of any interest or right held by one or both in or to the family home, as well as the amounts described in subsections (2) and (3).

**Explanation**

Provides a presumptive entitlement to each spouse or common-law partner of a half share in the interest in or right to the family home, held by one or both of them.

**First Nation members**

Clause 28(2) – First Nation members

A spouse or common-law partner who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that are held by the other spouse or common-law partner is also entitled to an amount equal to the total of

(a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “**matrimonial interests or rights**” in subsection 2(1) that are held by the other spouse or common-law partner in or to structures and lands situated on a reserve of that First Nation,

(b) the greater of

(i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that are held by the other spouse or common-law partner in or to structures and lands situated on a reserve of that First Nation, and

(ii) the difference between the payments that the spouse or common-law partner made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that are held by the other spouse or common-law partner, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and

(c) the difference between the payments that the spouse or common-law partner made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of interests or rights that are held by the other spouse or common-law partner that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments.

### **What the provision does**

Provides a formula to determine the amount to which a spouse or common-law partner (who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other) will be entitled from that other spouse or common-law partner (who is also a member of that First Nation) on relationship breakdown.

### **Explanation**

A spouse or common-law partner who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other spouse or common-law partner (who is also a member of that First Nation) is entitled to:

- one-half of the value of the structures or lands that are situated on the reserve, that were acquired by the other spouse or common-law partner either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship;
- the greater of either one-half of the appreciation in the value of certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to

those structures or lands less any remaining outstanding debt incurred for those contributions; and

- where certain other structures or lands held by the other spouse or common-law partner that are situated on the reserve did not appreciate in value, the amount of any monetary contributions they may have made to them less any remaining outstanding debt incurred for those contributions.

Interests or rights that were received as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights are excluded.

### **Non-members**

Clause 28(3) – Non-members
----------------------------

A spouse or common-law partner who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that are held by the other spouse or common-law partner is also entitled to an amount equal to the total of

(a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “**matrimonial interests or rights**” in subsection 2(1) that are held by the other spouse or common-law partner in or to structures situated on a reserve of that First Nation,

(b) the greater of

(i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that are held by the other spouse or common-law partner in or to structures situated on a reserve of that First Nation, and

(ii) the difference between the payments that the spouse or common-law partner made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that are held by the other spouse or common-law partner, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and

(c) the difference between the payments that the spouse or common-law partner made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to the following lands and structures situated on a reserve of that First Nation, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments:

(i) lands that are the object of matrimonial interests or rights that are held by the other spouse or common-law partner, and

(ii) structures that are the object of interests or rights that are held by the other spouse or common-law partner that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship.

### **What the provision does**

Provides a formula to determine the amount to which a spouse or common-law partner (who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other) will be entitled from that other spouse or common-law partner (who is a member of that First Nation) on relationship breakdown.

### **Explanation**

A spouse or common-law partner who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other spouse or common-law partner (who is a member of that First Nation) is entitled to:

- one-half of the value of the structures that are situated on the reserve, that were acquired by the other spouse or common-law partner either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship;
- the greater of either one-half of the appreciation in the value of certain other structures held by the other spouse or common-law partner that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to those structures less any remaining outstanding debt incurred for those contributions; and
- the difference between the amount of any monetary contributions to certain lands or structures held by the other spouse or common-law partner and any remaining outstanding debt incurred for those contributions.

Non-member spouses and common-law partners cannot benefit from the value or appreciation of land situated on reserve as such land is set aside for the use and benefit of Indians. The exception is to the extent that they have directly contributed to improvements to that land.

Interests or rights that were received as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights are excluded.

## Determination of value

### Clause 28(4) – Determination of value

For the purposes of subsections (1) to (3), the value of the interests or rights is the difference between

(a) the amount that a buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question, and

(b) the amount of any outstanding debts or other liabilities assumed for acquiring the interests or rights or for improving or maintaining the structures and lands that are the object of the interests or rights.

#### What the provision does

Sets out how the value of the interest or right will be determined.

#### Explanation

The value to be divided between spouses or common-law partners, rather than being based on the replacement cost of comparable accommodation (on the same reserve if it were available) would be the difference between what a buyer would be reasonably expected to pay for similar interests and any debts related to the interest or rights.

## Agreement by parties

### Clause 28(5) – Agreement by parties

Despite subsection (4), on agreement by the spouses or common-law partners, the value of the interests or rights may be determined on any other basis.

#### What the provision does

Allows spouses or common-law partners to choose another method of valuation to which they can agree.

#### Explanation

The provisional federal rules are intended to encourage couples to settle their affairs where possible by agreement without the involvement of the courts.

## Definition of “valuation date”

Clause 28(6) – Definition of “valuation date”

For the purposes of this section, “**valuation date**” means

(a) in the case of spouses, the earliest of the following days:

(i) the day on which the spouses separated with no reasonable prospect of reconciliation,

(ii) the day on which the judgment granting their divorce was rendered,

(iii) the day on which the marriage was declared a nullity,

(iv) the day on which one of the spouses made an application related to the consequences of the breakdown of the marriage, and

(v) the day on which one of the spouses 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 earliest of the following days:

(i) the day on which one of the common-law partners manifested the intention not to continue the conjugal relationship,

(ii) the day on which one of the common-law partners made an application related to the consequences of the breakdown of the conjugal relationship, and

(iii) the day on which one of the common-law partners 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.

### What the provision does

Sets out how the valuation date will be selected for the purpose of determining the value for division.

### Explanation

The valuation date is the point in time at which the value of matrimonial interests or rights is fixed for the purposes of the *Act*. The valuation date is the earliest of a number of possible dates, set out in this section. Courts will refer to the facts of each particular case in determining which of the possible valuation dates will apply.

## Variation of amount

Clause 29 – Variation of amount
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On application by a spouse or common-law partner, a court may, by order, vary the amount owed to or by the applicant under section 28 if that amount would be unconscionable, having regard to, among other things,

- (a) the applicant's financial responsibility related to the care and upbringing of the children in the applicant's charge;
- (b) the amount of debts or other liabilities referred to in that section incurred by each spouse or common-law partner;
- (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;
- (d) the fact that one of the spouses or common-law partners may obtain exclusive occupation of the family home on agreement or under an order referred to in section 20;
- (e) the availability of accommodation that is comparable to the family home and that is situated on the same reserve as the family home;
- (f) the duration of the conjugal relationship;
- (g) the terms of any agreement between the spouses or common-law partners;
- (h) the reduction of the value of the interests or rights in question as a result of acts or omissions by the applicant's spouse or common-law partner including the disposition of any such interest or right for less than its fair value, the improvident depletion of any such interest or right, the disposition or encumbrance of the interest or right in or to the family home without the applicant's required consent, and the encumbrance of that interest or right after the valuation date as defined in subsection 28(6); or
- (i) other determinations that the court may make on any matters related to the consequences of the breakdown of the conjugal relationship.

### What the provision does

Provides for a court to vary the share to which a spouse or common-law partner is entitled if that share would be unconscionable in the circumstances, including those set out in the provision.

**Explanation**

The court is directed to consider a number of factors in determining whether the result would be unconscionable, but can also consider factors that are not listed but are raised by the other spouse or common-law partner because of the specific circumstances.

**Amount payable**

Clause 30(1) – Amount payable
-------------------------------

On application by one of the spouses or common-law partners made within three years after the day on which they ceased to cohabit, a court may, by order, determine any matter in respect of each spouse's or common-law partner's entitlement under sections 28 and 29 including

(a) determining the amount payable by one spouse or common-law partner to the other; and

(b) providing that the amount payable be settled by

(i) payment of the amount in a lump sum,

(ii) payment of the amount by instalments,

(iii) the transfer of an interest or right under an order referred to in section 31,

(iv) the set-off or compensation of any amounts owed by one spouse or common-law partner to the other, or

(v) any combination of the methods referred to in subparagraphs (i) to (iv).

**What the provision does**

Grants the court authority to determine the amount payable by one spouse or common-law partner to the other and how that amount should be paid.

**Explanation**

Sets a cut-off of three years to apply for a division, after the couple cease to cohabit. The court can determine how much each spouse or common-law partner is owed by the other, and how that amount should be paid, including the possibility of setting off any amounts owed against one another.

## Extension of time

Clause 30(2) – Extension of time

On application by a spouse or common-law partner, a court may, by order, extend the period of three years by any amount of time that it considers appropriate, if the court is satisfied that the applicant failed to make an application within that period for either of the following reasons:

(a) circumstances existed that were beyond the control of the applicant; or

(b) only after the period expired did the applicant become aware of any interests or rights referred to in subsections 28(1) to (3).

### What the provision does

Allows the court to extend the time limit for the spouse or common-law partner to apply for a division under two specific circumstances.

### Explanation

This section allows the court to extend the three year limitation period for an application for division where the applicant can establish that they fit within paragraph (a) or (b).

## Order to transfer interests or rights

Clause 31(1) – Order to transfer interests or rights

When a conjugal relationship breaks down, a court may, on application by a spouse or common-law partner who is a First Nation member, order that an interest or right, referred to in subparagraph (a)(i) or paragraph (b) or (c) of the definition “**interest or right**” in subsection 2(1), in or to any structure or land situated on a reserve of that First Nation be transferred to the applicant if the court is satisfied that

(a) the spouses or common-law partners agreed in writing to the transfer of the interest or right, the consent of both parties was free and informed and the agreement is not unconscionable, having regard to, among other things, the factors listed in section 29;

(b) the applicant had previously held the interest or right before the cessation of cohabitation; or

(c) the transfer is appropriate in the circumstances because the spouses or common-law partners hold more than one such interest or right in or to structures and lands situated on a reserve of that First Nation.

### What the provision does

Sets out certain narrow circumstances under which an interest in or right to a structure or land may be transferred.

### **Explanation**

An interest in or right to a structure or land situated on reserve may only be transferred between First Nation members of the same First Nation on whose reserve the structure or land is located, and even then only in one of the situations in paragraphs (a), (b) or (c).

### **Clarification**

Clause 31(2) – Clarification
------------------------------

A transfer may be ordered under subsection (1)

(a) in the case of a First Nation that is not referred to in any of paragraphs (b) to (d), despite section 24 of the *Indian Act*;

(b) in the case of a First Nation as defined in subsection 2(1) of the *First Nations Land Management Act*, subject to any land code or First Nation law as defined in that subsection to which the First Nation is subject;

(c) in the case of a First Nation that has entered into a self-government agreement to which Her Majesty in right of Canada is a party, subject to any First Nation law enacted under the agreement; or

(d) in the case of the Mohawks of Kanesatake, subject to any land governance code adopted, or any Kanesatake Mohawk law enacted, under the *Kanesatake Interim Land Base Governance Act*.

### **What the provision does**

Specifies that a transfer under subsection 31(1) remains subject to certain conditions.

### **Explanation**

In the case of a First Nation with its own land code or law – either under the *First Nations Land Management Act*, a self-government agreement or the *Kanesatake Interim Land Base Governance Act* – the transfer can only be ordered where it is consistent with that land code or law. In the case of any other First Nation, a transfer may occur despite section 24 of the *Indian Act* (which requires the consent of the Minister).

### **Improvident Depletion**

Clause 32 – Improvident depletion
-----------------------------------

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.

**What the provision does**

Allows the court to grant an order to protect and preserve the value of the family home or any matrimonial interests or rights.

**Explanation**

This provision allows a court to intervene to protect the interest of the spouse or common-law partner if the other spouse or common-law partner intends to deliberately lessen the value of the family home or matrimonial interests or rights.

**Enforcement of agreements**

Clause 33 – Enforcement of agreements

If spouses or common-law partners enter into a written agreement, after they cease to cohabit, that sets out the amount to which each is entitled and how to settle the amount payable by one of the methods referred to in subparagraph 30(1)(b)(i), (ii) or (iv) or any combination of those methods, a court may, on application by one of them, make an order to enforce that agreement if the court is satisfied that the consent of both parties to the agreement was free and informed, and that the agreement is not unconscionable, having regard to, among other things, the factors listed in section 29.

**What the provision does**

Allows a spouse or common-law partner to apply to the court to enforce a provision of a written agreement, where they can satisfy the court that there was sufficient consent and that the agreement is not unconscionable.

**Explanation**

Written agreements between the parties would be enforceable on application to a court, except where the court found that the agreement was unconscionable or that consent had not been freely given.

**Death of a Spouse or Common-Law Partner**

**Entitlement of survivor**

Clause 34(1) – Entitlement of survivor

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).

### **What the provision does**

Sets out the entitlement of a survivor to half the value of any interest in or right to the family home that was held by the deceased as well as the amounts described in subsections 34(2) and (3).

### **Explanation**

Provides a presumptive entitlement to a survivor of a half share in the family home, where the deceased had an interest in or right to that home. The entitlement is intended to ensure that a survivor is no worse off after the death that they would have been had they divorced the day before the death.

### **First Nation members**

Clause 34(2) – First Nation members
-------------------------------------

A survivor who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

(a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “**matrimonial interests or rights**” in subsection 2(1) that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation,

(b) the greater of

(i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures and lands situated on a reserve of that First Nation, and

(ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and

(c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures and lands situated on a reserve of that First Nation that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had

appreciated during the conjugal relationship, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments.

### **What the provision does**

Provides a formula to determine the amount to which a survivor (who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other) will be entitled on the death of their First Nations member spouse or common-law partner.

### **Explanation**

A survivor who is a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the deceased spouse or common-law partner (who was also a member of that First Nation) has the same entitlement they would have had under clause 28(2) had they divorced the day prior to the death:

- one-half of the value of the structures or lands that are situated on the reserve that were acquired by the deceased spouse or common-law partner either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship;
- the greater of either one-half of the appreciation in the value of certain other structures or lands held by the deceased that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to those structures or lands less any remaining outstanding debt incurred for those contributions; and
- where certain other structures or lands held by the deceased that are situated on the reserve did not appreciate in value, the amount of any monetary contributions less any remaining outstanding debt incurred for those contributions.

As in the case of relationship breakdown, interests or rights that were received by the deceased as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights are excluded.

### **Non-members**

Clause 34(3) – Non-members
----------------------------

A survivor who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights that were held by the deceased individual is also entitled to an amount equal to the total of

(a) one half of the value, on the valuation date, of matrimonial interests or rights referred to in paragraphs (a) and (b) of the definition “**matrimonial interests or rights**” in subsection 2(1) that were held by the deceased individual in or to structures situated on a reserve of that First Nation,

(b) the greater of

(i) one half of the appreciation in value, between the day on which the conjugal relationship began and the valuation date inclusive, of matrimonial interests or rights referred to in paragraph (c) of that definition that were held by the deceased individual in or to structures situated on a reserve of that First Nation, and

(ii) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to structures situated on a reserve of that First Nation that are the object of matrimonial interests or rights referred to in that paragraph (c) that were held by the deceased individual, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments, and

(c) the difference between the payments that the survivor made towards improvements made, between the day on which the conjugal relationship began and the valuation date inclusive, to the following lands and structures situated on a reserve of that First Nation, and the amount of debts or other liabilities outstanding on the valuation date that were assumed to make the payments:

(i) lands that are the object of matrimonial interests or rights that were held by the deceased individual, and

(ii) structures that are the object of interests or rights that were held by the deceased individual that would have been matrimonial interests or rights referred to in that paragraph (c) if they had appreciated during the conjugal relationship.

### **What the provision does**

Provides a formula to determine the amount to which a survivor (who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the other) will be entitled from the deceased (who was a member of that First Nation), in the same way that they would have been under clause 28(3) on relationship breakdown.

### **Explanation**

A survivor who is not a member of the First Nation on whose reserve are situated any structures and lands that are the object of interests or rights held by the deceased (who was a member of that First Nation) is entitled to:

- one-half of the value of the structures that are situated on the reserve that were acquired by the deceased either during the conjugal relationship, or before the conjugal relationship but in specific contemplation of the relationship;
- the greater of either one-half of the appreciation in the value of certain other structures held by the deceased that are situated on the reserve or, the amount of any monetary contributions made by them to improvements to those structures less any remaining outstanding debt incurred for those contributions; and

- the difference between the amount of any monetary contributions to certain lands or structures held by the deceased and any remaining outstanding debt incurred for those contributions.

Non-member survivors also do not benefit from the value or appreciation of land situated on reserve, as that land was set aside for the use and benefit of Indians. The exception is to the extent that they have directly contributed to improvements to that land. Interests or rights that were received by the deceased from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights are again excluded.

### **Determination of value**

Clause 34(4) – Determination of value

For the purposes of subsections (1) to (3), the value of the interests or rights is the difference between

(a) the amount that a buyer would reasonably be expected to pay for interests or rights that are comparable to the interests or rights in question, and

(b) the amount of any outstanding debts or other liabilities assumed for acquiring the interests or rights or for improving or maintaining the structures and lands that are the object of the interests or rights.

### **What the provision does**

Sets out how the value of the interest or right will be determined.

### **Explanation**

The entitlement of the survivor, rather than being based on the replacement cost of comparable accommodation (on the same reserve if it were available) would be the difference between what a buyer would be reasonably expected to pay for similar interests and any debts related to the interest or rights.

### **Agreement by parties**

Clause 34(5) – Agreement of parties

Despite subsection (4), on agreement by the survivor and the executor of the will or the administrator of the estate, the value of the interests or rights may be determined on any other basis.

### **What the provision does**

Allows the survivor and the executor or administrator to choose another method of valuation to which they can agree.

## **Explanation**

Again, the provisional federal rules are intended to encourage settlement of these questions by agreement wherever possible.

## **Definition of “valuation date”**

Clause 34(6) – Definition of “valuation date”
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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

(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.

## **What the provision does**

Sets out how the valuation date will be selected for the purpose of determining the value for division in the case of an application by a survivor.

## **Explanation**

The valuation date is the point in time at which the value of matrimonial interests or rights is fixed for the purposes of the *Act*. The valuation date is the earliest of a number of possible dates, set out in this section. Courts will refer to the facts of each particular case in determining which of the possible valuation dates will apply.

## **Variation of amount**

Clause 35 – Variation of amount
---------------------------------

On application by an executor of a will or an administrator of an estate, a court may, by order, vary the amount owed to the survivor under section 34 if the spouses or common-law partners had previously resolved the consequences of the breakdown of

the conjugal relationship by agreement or judicial decision, or if that amount would be unconscionable, having regard to, among other things, the fact that any children of the deceased individual would not be adequately provided for.

### **What the provision does**

Provides for a court to vary the share to which a survivor is entitled if that share would be unconscionable in the circumstances, including those set out.

### **Explanation**

The court is directed to consider a number of factors in determining whether or not the result would be unconscionable, but can also consider factors that are not listed but are raised by the executor or administrator in the specific circumstances.

### **Determination by court**

Clause 36(1) – Determination by court
---------------------------------------

On application by a survivor made within 10 months after the day on which the death of their spouse or common-law partner occurs, a court may, by order, determine any matter in respect of the survivor's entitlement under sections 34 and 35 including

- (a) determining the amount payable to the survivor; and
- (b) providing that the amount payable to the survivor be settled by
  - (i) payment of the amount in a lump sum,
  - (ii) payment of the amount by installments,
  - (iii) if the survivor is a First Nation member, by the transfer of an interest or right, referred to in subparagraph (a)(i) or paragraph (b) or (c) of the definition "interest or right" in subsection 2(1), in or to any structure or land situated on a reserve of that First Nation, or
  - (iv) any combination of the methods referred to in subparagraphs (i) to (iii).

### **What the provision does**

Grants the court authority to determine the amount payable to the survivor and how that amount should be paid.

### **Explanation**

This provision sets a cut-off of ten months after the death for the survivor to apply for a division. The court can determine how much the survivor is owed, and how that amount should be paid. The ten month period would balance the desire to allow the survivor time to take the necessary steps with the need to settle the estate to the benefit of any children or other beneficiaries.

## Extension of time

Clause 36(2) – Extension of time

On application by the survivor, a court may, by order, extend the period of 10 months by any amount of time that it considers appropriate, if the court is satisfied that the survivor failed to make an application within that period for any of the following reasons:

- (a) the survivor did not know of the death of their spouse or common-law partner until after the period expired;
- (b) circumstances existed that were beyond the control of the survivor; or
- (c) only after the period expired did the applicant become aware of any interests or rights referred to in subsections 34(1) to (3).

### What the provision does

Allows the court to extend the time limit for the survivor to apply for a division under three specific circumstances.

### Explanation

This section allows the court to extend the ten month limitation period for an application for division where the survivor can establish that they fit within paragraph (a), (b) or (c).

### Clarification

Clause 36(3) – Clarification

A transfer may be ordered under subsection (1)

(a) in the case of a First Nation that is not referred to in any of paragraphs (b) to (d), despite sections 24 and 49 of the *Indian Act*;

(b) in the case of a First Nation as defined in subsection 2(1) of the *First Nations Land Management Act*, subject to any land code or First Nation law as defined in that subsection to which the First Nation is subject;

(c) in the case of a First Nation that has entered into a self-government agreement to which Her Majesty in right of Canada is a party, subject to any First Nation law enacted under the agreement; or

(d) in the case of the Mohawks of Kanésatake, subject to any land governance code adopted, or any Kanésatake Mohawk law enacted, under the *Kanésatake Interim Land Base Governance Act*.

**What the provision does**

Specifies that a transfer of interests or rights remains subject to certain conditions.

**Explanation**

In the case of a First Nation with its own land code or law – either under the *First Nations Land Management Act*, a self-government agreement or the *Kanesatake Interim Land Base Governance Act* – the transfer can only be ordered where it is consistent with that land code or law. In the case of any other First Nation, a transfer may occur despite section 24 of the *Indian Act* (which requires the consent of the Minister).

**Variation of trust**

Clause 36(4) – Variation of trust

On application by a survivor, an executor of a will or an administrator of an estate, the court may, by order, vary the terms of a trust that is established under the terms of the deceased individual's will so that the amount that is payable to the survivor may be paid.

**What the provision does**

Allows the court to vary the terms of any trust set up under the deceased's will, if necessary to allow for payment to the survivor.

**Explanation**

Self-explanatory

**Notice to affected persons**

Clause 36(5) – Notice to affected persons

An applicant for an order under this section must, without delay, send a copy of the application to the following persons, to the Minister and to any other person specified in the rules regulating the practice and procedure in the court:

(a) in the case where the applicant is the survivor, to the executor of the will or the administrator of the estate, if the applicant knows who those persons are; or

(b) in the case where the applicant is the executor of a will or an administrator of an estate, to the survivor.

**What the provision does**

Directs the applicant to send copies of their application to certain individuals who could be directly affected if the court grants the order.

**Explanation**

Allows certain individuals who could be directly affected by the court order to be aware of the application and to decide whether or not to ask the court to hear their views before the order is made. The Minister is included because of his or her responsibilities for estate administration under the *Indian Act*.

**Notice to beneficiaries**

Clause 36(6) – Notice to beneficiaries

On receipt of the copy of the application, the executor of the will or the administrator of the estate or, if neither has been appointed, the Minister must, without delay, send a copy of the application to the named beneficiaries under the will and the beneficiaries on intestacy.

**What the provision does**

Provides that the executor of the will or administrator of the estate who receives notice of the application must notify the beneficiaries of the will or estate. If neither an executor nor an administrator has been appointed the Minister must make the notification.

**Explanation**

The executor or administrator act on behalf of the beneficiaries, and if those beneficiaries are made aware of the application, they may decide to ask the executor or administrator to in turn ask the court to hear their views before the order is made. In the absence of an executor or administrator, the Minister has the responsibility of notifying the beneficiaries of the application.

**Survivor's choice**

Clause 37 – Survivor's choice

If a court decides, after the death of a spouse or common-law partner, that an amount is payable to the survivor under section 30 or 36, the survivor may not, in respect of the interest or right in or to the family home and of the matrimonial interests or rights, benefit from the deceased individual's will or sections 48 to 50.1 of the *Indian Act*.

**What the provision does**

Provides that once a court has made a determination on an application for the division of the value of the family home and other matrimonial interests or rights, the survivor who made the application cannot also benefit from the deceased's will or under the intestacy provisions of the *Indian Act* in respect of the same interests or rights.

**Explanation**

The provisional federal rules seek to ensure that the survivor is not disadvantaged by providing access to the same recourse that would have been available had the couple divorced instead the day before the death. However, where the survivor chooses to

apply for a division instead of taking their portion under a will or intestacy, they also should not be allowed to effectively “double-dip” or it would be unfair to other beneficiaries. The survivor would still be able to receive any specific personal bequests or movables.

### **Distribution of estate**

Clause 38(1) – Distribution of estate

Subject to subsection (2), an executor of a will or an administrator of an estate must not proceed with the distribution of the estate until one of the following occurs:

- (a) the survivor consents in writing to the proposed distribution;
- (b) the period of 10 months referred to in subsection 36(1) and any extended period the court may have granted under subsection 36(2) have expired and no application has been made under subsection 36(1) within those periods; or
- (c) an application made under subsection 36(1) is disposed of.

### **What the provision does**

Prevents the executor or administrator from distributing the estate until either the survivor consents in writing to the distribution, the time period during which the survivor must apply to the court for a determination of entitlement has expired, or any application by the survivor has been disposed of by the court.

### **Explanation**

This provision protects the assets of the deceased’s estate until after the survivor has had the opportunity to consider whether to choose to inherit from the estate or to apply to the court under this *Act* for a share of the value of the family home and any matrimonial interests or rights.

### **Advances to dependants**

Clause 38(2) – Advances to dependants

Subsection (1) does not prohibit reasonable advances to survivors or other dependants of the deceased spouse or common-law partner for their support.

### **What the provision does**

Allows for certain limited payments to the dependants of the deceased from the deceased’s estate, despite the prohibition in section 38(1).

### **Explanation**

The executor or administrator, although prohibited from distributing the estate, may nevertheless make reasonable advances from the estate’s assets to support dependants of the deceased.

## Two survivors

Clause 38(3) – Two survivors

When there are two survivors — a common-law partner and a spouse with whom the deceased individual was no longer cohabiting — and an amount is payable to both under an order referred to in section 36, the executor of the will or the administrator of the estate must pay the survivor who was the common-law partner before paying the survivor who was the spouse.

### What the provision does

Sets out the order of payment in the rare event that an individual dies leaving a married, separated spouse and a subsequent common-law partner with whom they are living at the time of death.

### Explanation

This provision requires the deceased's executor or administrator to pay the common-law partner before paying the separated, married spouse. This is because the common-law partner was living with the deceased at the time of death and is presumed to be more dependent than the separated, married spouse who is presumed to have had time to resolve some or all of the consequences of the breakdown of their relationship with the deceased.

This provision addresses the only possible circumstance where in law there could be two survivors, that is, on the day of death, the deceased was separated but not divorced from a married spouse, and in a common-law relationship that had begun after the separation.

## Improvident depletion

Clause 39 – Improvident depletion

On application by a survivor, 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 survivor in an order made under section 21 or any interest or right that might be transferred to the applicant in an order made under section 36; or

(b) the value of the interests or rights that will be used to determine the amount that might be payable to the survivor in an order made under section 36.

### What the provision does

Allows the court to grant an order to protect and preserve the value of the family home or any matrimonial interests or rights.

**Explanation**

This provision allows a court to intervene to protect the interest of the survivor if there is an intention to deliberately lessen the value of the family home or matrimonial interests or rights.

**Enforcement of agreements**

Clause 40 – Enforcement of agreements

If a survivor and the executor of the will or the administrator of the estate enter into a written agreement that sets out the amount to which the survivor is entitled and how to settle the amount payable by one or both of the methods referred to in subparagraph 36(1)(b)(i) or (ii), a court may, on application by one of them, make an order to enforce that agreement if the court is satisfied that the consent of the survivor to the agreement was free and informed and that the agreement is not unconscionable.

**What the provision does**

Allows a survivor, executor or administrator to apply to the court to enforce a provision of a written agreement, where they can satisfy the court that there was sufficient consent and that the agreement is not unconscionable.

**Explanation**

Written agreements are enforceable by application to a court, except where the court finds that the agreement is unconscionable or that consent was not freely given.

**NOTICE TO COUNCIL AND VIEWS OF COUNCIL****Notice of application**

Clause 41(1) – Notice of application

An applicant for an order under this Act, except under sections 16 and 19, must, without delay, send a copy of the application to the council of any First Nation on whose reserve the structures and lands in question are situated.

**What the provision does**

Requires that an applicant send a copy of an application made under the *Act* to the council of the First Nation on whose reserve the family home or other matrimonial interests or rights are situated, except in the case of the applications for an emergency protection order or a confidentiality order.

**Explanation**

Provides the council with notice of pending applications concerning any matter touching on the reserve of their First Nation. There is no notice requirement where the spouse or common-law partner is applying for an emergency protection order under section 16 because of the urgent and immediate nature of the circumstances or for a confidentiality order under section 19 because of the confidential nature of the proceeding.

**Representations by council**

Clause 41(2) – Representations by council

On the council's request, the court that is seized of the application must, before making its decision, allow the council to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about whether or not the order should be made.

**What the provision does**

Requires the court to take representations with respect to the cultural, social and legal context, and the views of the council with respect to the granting of the order into consideration when making orders.

**Explanation**

Provides the court with an opportunity to have important information concerning the cultural, social and legal context of the application and the effect of the order on reserve lands.

**Notice of order**

Clause 42 – Notice of order

When the court makes an order under this Act, except under section 19, the person in whose favour the order is made must send, without delay, a copy of the order to the council of any First Nation on whose reserve the structures and lands in question are situated.

**What the provision does**

Provides the council of the First Nation with copies of all orders concerning any matter touching on the reserve of their First Nation.

**Explanation**

Allows the council to intervene to aid in the enforcement of those orders.

## JURISDICTION OF COURTS

### Definition of “application”

Clause 43(1) – Definition of “application”

For the purposes of this section, “application” means an application made under any of sections 15, 20, 29 to 33, 48 or 52.

### What the provision does

Sets out the applications referred to in this section.

### Explanation

The purpose of this section is to avoid a multiplicity of proceedings in different courts on the breakdown of a particular conjugal relationship. Applications for an emergency order are not included as they have their own procedure, and applications concerning a survivor are dealt with in the next section.

### Divorce proceeding pending

Clause 43(2) – Divorce proceeding pending

When a divorce proceeding — as defined in subsection 2(1) of the *Divorce Act* — between spouses is pending, the court that has jurisdiction to hear and determine the matter has jurisdiction to hear and determine an application by one of the spouses.

### What the provision does

Provides the court that is hearing a particular divorce proceeding with the jurisdiction to also hear related applications under this *Act*.

### Explanation

To reduce the burden on spouses, the *Act* encourages them to resolve all matters on the breakdown of a conjugal relationship at one hearing. Under this section, a court that is already hearing the spouses’ divorce proceeding will be able to also hear applications under this *Act*.

### Other proceedings pending

Clause 43(3) – Other proceedings pending

When a proceeding, other than a divorce proceeding, related to the consequences of the breakdown of a spouse’s or common-law partner’s conjugal relationship is pending, the court that is seized of the matter has jurisdiction to hear and determine an application by the spouse or common-law partner.

**What the provision does**

Provides the court that is already hearing other matters related to the breakdown of a conjugal relationship with the jurisdiction to also hear applications under this *Act*.

**Explanation**

Under this section, a court that is already hearing a matter related to the breakdown of a conjugal relationship, other than a divorce proceeding – for example, an application for spousal or child support – will also have the jurisdiction to hear and determine applications under this *Act*.

**No pending proceedings**

Clause 43(4) – No pending proceedings

If no divorce proceeding is pending and no court is seized of a matter referred to in subsection (3), the court that has jurisdiction to hear and determine an application by a spouse or common-law partner is the court in the province in which the structures and lands in question are situated or, if that property is situated in more than one province, the court in one of those provinces whose jurisdiction is accepted by both spouses or common-law partners or, in the absence of agreement, either the court in the province in which they habitually reside or, if they have ceased to cohabit, in which they habitually resided on the day on which they ceased to cohabit.

**What the provision does**

Sets out which court has jurisdiction where there are no other pending court proceedings.

**Explanation**

This provision determines which court will have jurisdiction to determine applications where the spouses or common-law partners have not initiated any other court proceedings. The court in the province in which the structures and lands are situated will have jurisdiction, or if that property is situated in more than one province, the court in one of those provinces that the spouses or common-law partners agree to, or where they do not agree, the court in the province in which they habitually reside or resided on the day on which the relationship broke down.

**Exception**

Clause 43(5) – Exception

Despite subsection (4), if the court in a province that is seized of the matter referred to in subsection (3) is not a court as defined in subsection 2(1), the court that has jurisdiction to hear and determine an application by the spouse or common-law partner is the court, as defined in subsection 2(1), in that province.

**What the provision does**

Provides that matters under this *Act* are to be heard by the superior courts of the provinces and territories.

**Explanation**

Matters under this *Act* are to be heard by the superior courts of the provinces and territories, as specified by the definition of “court” in subsection 2(1). Some provincial laws may provide that specific matters relating to the breakdown of a conjugal relationship will be heard by the province’s statutory courts, but this provision specifies that those courts may not hear applications under this *Act*, even when other matters related to the breakdown are before the provincial statutory courts.

**Proceedings on death**

Clause 44(1) – Proceedings on death
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A court that is seized of a matter related to the distribution of property on the death of a spouse or common-law partner has jurisdiction to hear and determine an application made under section 21, 35, 36, 39 or 40 by the survivor, the executor of the will or the administrator of the estate.

**What the provision does**

Provides that the court already hearing matters regarding the distribution of the estate has jurisdiction to also hear applications by the survivor under this *Act*.

**Explanation**

The provisional federal rules seek to encourage all matters relating to the death of a spouse or common-law partner to be heard together where possible, although again this provision is limited to the superior courts of the provinces and territories.

**No pending proceedings**

Clause 44(2) – No pending proceedings
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If no court is seized of a matter referred to in subsection (1), the court that has jurisdiction to hear and determine the application is the court in the province in which the structures and lands in question are situated or, if that property is situated in more than one province, the court in the province in which both spouses or common-law partners habitually resided on the day on which the death occurred or, if they ceased to cohabit before the death, in which they habitually resided on the day on which they ceased to cohabit.

**What the provision does**

Provides jurisdiction to the superior court of a province in which the structures and lands in question are situated, or if that property is situated in more than one province, the superior court in the province in which both spouses and common-law partners habitually resided at the time of death or relationship breakdown.

**Explanation**

Self-explanatory

**Exception**

Clause 44(3) – Exception
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Despite subsection (2), if the court in a province that is seized of the matter referred to in subsection (1) is not a court as defined in subsection 2(1) and the Minister has not consented to the exercise of jurisdiction by the court or directed the matter to the court under section 44 of the *Indian Act*, the court that has jurisdiction to hear and determine the application is the court, as defined in subsection 2(1), in that province.

**What the provision does**

Provides that applications by a survivor under this *Act* are to be heard by the superior courts of the provinces and territories.

**Explanation**

This subsection is similar to subsection 43(5). Matters under this *Act* are to be heard by the superior courts of the provinces and territories, as specified by the definition of “court” in subsection 2(1).

**Possibility of joinder**

Clause 45 – Possibility of joinder
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An application made under this *Act*, except under sections 16, 18 and 19, may be heard in the same proceeding as another application related to the consequences of the breakdown of the conjugal relationship or the death.

**What the provision does**

Allows for the possibility of joining applications made under this *Act* with other court proceedings related to the breakdown of the conjugal relationship or the death of a spouse or common-law partner.

**Explanation**

To reduce the burden on spouses, common-law partners and survivors, the federal provisional rules allows where possible for the opportunity to resolve at one hearing all matters related to the breakdown of a conjugal relationship or the death of a spouse.

Applications under this *Act* do not have to be heard with other proceedings, however, and can still proceed separately where desired or where necessary.

### **Right of appeal – divorce proceeding**

Clause 46(1) – Right of appeal – divorce proceeding

An order made under this *Act* in a divorce proceeding as defined in subsection 2(1) of the *Divorce Act* is deemed, for the purposes of section 21 of that *Act*, to be an order made under that *Act*.

#### **What the provision does**

When an order is made under the provisions of this *Act* during a divorce proceeding (as described in subsection 2(1) of the *Divorce Act*), that order is deemed to be an order made under section 21 of the *Divorce Act*, so any right of appeal available would be a right of appeal under the *Divorce Act*.

#### **Explanation**

This provides for the purposes of appeal during divorce proceeding, an order made under this *Act* is considered an order under the *Divorce Act*. This is also to reduce the burden on spouses.

### **Right of Appeal – other proceeding**

Clause 46(2) – Right of appeal – other proceeding

Any other order made under this *Act*, except under any of sections 16 to 19, may be appealed to the court exercising appellate jurisdiction over the court that made the order.

#### **What the provision does**

With the exceptions of sections 16 to 19, the provision allows for a right of appeal to the court of appeal that has jurisdiction over the court that made the order.

#### **Explanation**

Any other order made under this *Act* (that is not made during a divorce proceeding) may be appealed to the court with appellate jurisdiction over the court that made the original order. The exceptions to this right of appeal are sections 16 to 19 of this *Act* which concern aspects of emergency protection orders. The *Act* contains specific provisions which deal with the review, varying and revoking of emergency protection orders.

## RULES OF PRACTICE AND PROCEDURE

### Definitions

#### Clause 47(1) – Definitions

The following definitions apply in this section.

#### “appellate court”

“**appellate court**”, in respect of an appeal from a court, means the court exercising appellate jurisdiction with respect to that appeal.

#### What the provision does

Defines the term “appellate court” to mean the court exercising jurisdiction over an appeal.

#### Explanation

Self-explanatory

#### “competent authority”

“**competent authority**”, in respect of a court in a province, a court established under the laws of a province or an appellate court in a province, means the body, person or group of persons ordinarily competent under the laws of that province to make rules regulating the practice and procedure in that court.

#### What the provision does

Defines the term “competent authority” to mean the authority in a province that is ordinarily competent to make rules regulating that province’s court practices and procedures.

#### Explanation

Self-explanatory

### Rules

#### Clause 47(2) – Rules

Subject to subsection (3), the competent authority may make rules applicable to any proceedings under this Act in a court, or appellate court, in a province, and to any proceedings under section 16 in a court established under the laws of a province, including, without limiting the generality of the foregoing, rules

(a) regulating the practice and procedure in the court, including the addition of persons as parties to the proceedings;

(b) respecting the conduct and disposition of any proceedings under this Act without an oral hearing;

- (c) regulating the sittings of the court;
- (d) respecting the fixing and awarding of costs;
- (e) prescribing and regulating the duties of officers of the court;
- (f) respecting the transfer of proceedings under this Act to or from the court; and
- (g) prescribing and regulating any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act.

**What the provision does**

Permits competent authorities in the province to make rules applicable to any proceeding under this *Act* in a court or appellate court.

**Explanation**

Applications under this *Act* will be heard and determined by the provincial and territorial superior courts. This provision allows the provincial and territorial authorities to make rules regulating how applications under this *Act* may be heard and processed in those courts.

**Exercise of power**

Clause 47(3) – Exercise of power

The power to make rules conferred by subsection (2) on a competent authority must be exercised in the like manner and subject to the like terms and conditions, if any, as the power to make rules conferred on that authority by the laws of the province.

**What the provision does**

Provides that the power of the competent authority in subsection (2) is to be exercised in a like manner to the power set out in the laws of the province.

**Explanation**

Self-explanatory

**Not statutory instruments**

Clause 47(4) – Not statutory instruments

Rules made under this section by a competent authority that is not a judicial or quasi-judicial body are deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*.

**What the provision does**

Provides that rules made by a non-judicial or quasi-judicial competent authority will not be statutory instruments within the meaning of the *Statutory Instruments Act*.

**Explanation**

The federal *Statutory Instruments Act* prescribes the process through which federal regulations and statutory instruments are made, registered and published. The rules made by the provincial and territorial competent authorities will not be subject to the federal regulatory process.

**OTHER PROVISIONS****Determination by court — interest or right**

Clause 48 – Determination by court – interest or right
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For the purposes of this Act, a court may, by order, determine whether a spouse, a common-law partner, a survivor or an estate of a deceased spouse or common-law partner holds an interest or right in or to a structure or land situated on a reserve, on application by one of the spouses or common-law partners, the survivor, the executor of the will, the administrator of the estate or the council of the First Nation on whose reserve the structure or land is situated.

**What the provision does**

Allows a court to make a determination of whether a spouse, common-law partner, survivor or estate holds an interest in or right to a structure or land situated on a reserve, on the application of certain persons or the First Nation council.

**Explanation**

Prior to determining any of the questions concerning value, a court may first need to determine whether an individual does or does not hold a certain interest or right.

**Proceedings on death**

Clause 49(1) – Proceedings on death
-------------------------------------

When a spouse or common-law partner makes an application under any of sections 29 to 33 and both spouses or common-law partners or one of them dies before the application is disposed of, the application may be continued by or against the executor of the will or the administrator of the estate of the spouse or common-law partner who dies.

**What the provision does**

Allows certain pending applications under this *Act* to be continued where the applicant, the other spouse or common-law partner or both die before it is decided.

**Explanation**

Self-explanatory

### **Application by a survivor**

Clause 49(2) – Application by a survivor

When a survivor makes an application under section 36, 39 or 40 and the survivor dies before the application is disposed of, the application may be continued by the executor of the will or the administrator of the estate of the survivor.

#### **What the provision does**

Allows certain pending applications made by the survivor under this *Act* to be continued where the survivor dies before it is decided.

#### **Explanation**

Self-explanatory

### **Application by executor or administrator**

Clause 49(3) – Application by executor or administrator

When an executor of a will or an administrator of an estate makes an application under section 35 or 40 and the survivor dies before the application is disposed of, the application may be continued against the executor of the will or the administrator of the estate of the survivor.

#### **What the provision does**

Allows certain pending applications made by an executor or administrator under this *Act* to be continued where the survivor dies before it is decided.

#### **Explanation**

Self-explanatory

### **Notice to Minister or Council**

Clause 50 – Notice to Minister or Council

When a court makes an order under this *Act*, except under section 19, the applicant must, without delay, send a copy of the order to the Minister or, if the order is in respect of any structure or land situated on the following reserves or land base, to the council of the First Nation:

(a) a reserve of a First Nation that is subject to a land code as defined in subsection 2(1) of the *First Nations Land Management Act*;

(b) a reserve of a First Nation that is on the list referred to in subsection 12(5); or

(c) the Kanesatake Mohawk interim land base as defined in subsection 2(1) of the *Kanesatake Interim Land Base Governance Act*.

**What the provision does**

Requires the spouse or common-law partner to send a copy to the Minister or the First Nation of an order, under this *Act*, made in their favour.

**Explanation**

Provides the First Nations listed in paragraphs (a), (b) and (c) with a copy of all court orders touching on their reserve, with the exception of the confidentiality order. In the case of other First Nations, the Minister is provided with a copy.

**Provincial laws of evidence**

Clause 51 – Provincial laws of evidence

Subject to this Act, the laws of evidence of the province in which any proceedings under this Act are taken, including the laws of proof of service of any document, apply to those proceedings.

**What the provision does**

Allows the rules of evidence under provincial law to apply.

**Explanation**

To encourage the hearings of applications under the federal provisional rules in the same proceedings as other matters related to the breakdown or death, provincial rules of evidence are applied.

**Enforcement of orders**

Clause 52(1) – Enforcement of orders

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.

**What the provision does**

Provides that a non-member, non-Indian spouse, common-law partner or survivor in whose favour an order was made can ask the First Nation council to enforce, on the reserve, the order against the member spouse or common-law partner.

### **Explanation**

Section 89(1) of the *Indian Act* precludes enforcement of orders against property of an Indian on reserve by a non-Indian.

Section 89(1) of the *Indian Act* reads as follows: *Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.*

To execute an order in favour of a non-member or non-Indian spouse, common-law partner or survivor, the First nation council, to whom the prohibition in section 89(1) does not apply, could decide to enforce, on behalf of the non-Indian spouse or common-law partner, the order against its member.

### **Payment into court**

Clause 52(2) – Payment into court

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.

### **What the provision does**

Provides for the possibility to have an order that is made in favour of a non-member spouse, common-law partner or survivor varied to order payment into court, where the original order could not be enforced on the reserve.

### **Explanation**

If for any reason, the First Nation does not enforce an order against its member, the court can vary its order to require payment into court. In this case, if the First Nation member does not respect the order, the court can demand that they appear before them to provide reasons.

## **REGULATIONS**

### **Governor in Council**

Clause 53(1) – Governor in Council

The Governor in Council may make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of this Act, including regulations making rules that are applicable to any proceedings under this Act and prescribing anything that by this Act is to be prescribed.

### **What the provision does**

Allows the Governor in Council to make regulations for carrying out the purposes and provisions of this *Act*, including (but not limited to) making rules applicable to proceedings.

### **Explanation**

As the federal provisional rules rely on the provincial superior courts and encourage one hearing for all related matters, it may be necessary to make regulations to ensure that matters under this *Act* can be dealt with within existing provincial processes. Similarly, regulations may be needed to give effect to the family violence provisions in certain provinces. Further, sufficient authority for regulations to be made is provided. For example, it ensures there is authority, pursuant to clause 16(7), to prescribe by regulations how an emergency protection order may be served.

### **Regulations prevail**

Clause 53(2) – Regulations prevail

Any regulations that may be made under subsection (1) to provide for uniformity in the rules made under section 47 prevail over those rules.

### **What the provision does**

Allows for regulations made under subsection (1) to provide for uniformity in rules made by provincial and territorial competent authorities to prevail over any inconsistent provincial and territorial rules, at least until such time as the provincial and territorial rules can be amended where necessary.

### **Explanation**

Self-explanatory

## **TRANSITIONAL PROVISIONS**

### **Commencement of application**

Clause 54(1) – Commencement of application

**If, under section 12, sections 13 to 52 begin to apply to a First Nation,**

**(a) sections 28 to 33 apply to spouses or common-law partners in respect of structures and lands situated on a reserve of that First Nation if they ceased to cohabit on or after the day on which those sections began to apply to that First Nation; and**

**(b) sections 14, 21 and 34 to 40 apply to survivors in respect of structures and lands situated on a reserve of that First Nation if the death occurred on or after the day on which those sections began to apply to that First Nation.**

### **What the provision does**

Specifies which spouses, common-law partners or survivors may apply under the provisional federal rules for a division of property on the breakdown of the conjugal relationship or death of a spouse or common-law partner.

### **Explanation**

The determination of whether sections 13 to 52 apply to the breakdown of a conjugal relationship or death depends on when the conjugal relationship actually broke down or the death occurred. A conjugal relationship that broke down or a death that occurred prior to the coming into force of section 12-52 of the *Act* would be governed under the law in force at that time.

### **Cessation of application**

Clause 54(2) – Cessation of application
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**If, under section 12, sections 13 to 52 cease to apply to a First Nation,**

**(a) proceedings commenced under those sections in respect of structures and lands situated on a reserve of that First Nation must be completed as if those sections had not ceased to apply;**

**(b) section 15 continues to apply to spouses or common-law partners in respect of the family home situated on a reserve of that First Nation if the interest or right in or to the family home was disposed of or encumbered before the day on which that section ceased to apply to that First Nation, and sections 41 to 51 continue to apply in respect of proceedings taken by those spouses or common-law partners under section 15;**

**(c) sections 28 to 33 continue to apply to spouses or common-law partners in respect of structures and lands situated on a reserve of that First Nation if they had ceased to cohabit before the day on which those sections ceased to apply to that First Nation, and sections 41 to 52 continue to apply in respect of proceedings taken by those spouses or common-law partners under any of sections 29 to 33; and**

**(d) sections 14, 21 and 34 to 40 continue to apply to survivors in respect of structures and lands situated on a reserve of that First Nation if the death occurred before the day on which those sections ceased to apply to that First Nation, and sections 23, 25 to 27 and 41 to 52 continue to apply in respect of proceedings involving those survivors taken under section 21, 35, 36, 39 or 40.**

### **What the provision does**

Specifies the point in time where the provisional federal rules will cease to apply to a First Nation after that First Nation's laws are in force.

### **Explanation**

Proceedings that were commenced under the provisional federal rules and certain situations that arose prior to a First Nation's law coming into force will continue to be governed by those rules.

### **Subsection 12(2)**

Clause 55 – Subsection 12(2)

**Subsection 12(2) does not apply to a First Nation that, on the day on which this section comes into force, is a First Nation as defined in subsection 2(1) of the *First Nations Land Management Act* for a period of three years after that day.**

### **What the provision does**

Provides First Nations that have signed onto the First Nation Land Management Framework Agreement, with a three-year exemption from the application of the provisional federal rules from the date of Royal Assent (June 19, 2013).

### **Explanation**

This provision comes into force on the date of Royal Assent and provides a three-year delay before the application of the provisional federal rules to First Nations that, on that date, are on the schedule of the *First Nations Land Management Act*.

This allows First Nation who are on the schedule of the *First Nations Land Management Act* on the date of Royal Assent and that do not have a land code in place time to develop and ratify their land codes and enact their own laws dealing with family homes and matrimonial interests and rights on reserves pursuant to the *First Nations Land Management Act*. After three years, the provisional federal rules will apply to First Nations on the schedule to the *First Nations Land Management Act* if they have not brought into force their land code, or have not brought into force a matrimonial real property law under section 17 of the *First Nations Land Management Act* or section 7 of this *Act*.

## **COMING INTO FORCE**

### **Order in council**

Clause 56(1) – Order in council

**The provisions of this Act, except sections 12 to 52, 54 and 55, come into force on a day or days to be fixed by order of the Governor in Council.**

### **What the provision does**

Specifies that the day or days on which provisions of the *Act* come into force are to be fixed by the order of the Governor in Council with the exception of the sections noted.

**Explanation**

Certain provisions of the *Act* come into force on a date to be provided by the Governor in Council which includes section 7 related to the power of First Nations to enact their matrimonial real property laws under the *Act*. The provisional federal rules are excluded from coming into force on the date specified.

**Provisional federal rules**

Clause 56(2) – Provisional federal rules
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**Sections 12 to 52 comes into force one year after the day on which section 7 comes into force.**

**What the provision does**

Specifies that one year after the date section 7 came into force in accordance with subsection (1) the federal provisional rules in sections 12 to 52 come into force.

**Explanation**

The provisional federal rules come into force one year after the date that section 7 and the First Nation law-making authority comes into force. The transition period provides time for First Nations to develop and enact their own matrimonial real property laws before the application of the provisional federal rules.