



ON-RESERVE MATRIMONIAL REAL PROPERTY RIGHTS

As of December 16, 2014

Under the Provisional Federal Rules as
contained in the *Family Homes on Reserves and
Matrimonial Interests or Rights Act*

Centre of Excellence for Matrimonial Real Property

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Introduction

This booklet on Matrimonial Real Property (MRP) was produced by the Centre of Excellence for Matrimonial Real Property (COEMRP) under the auspices of the National Aboriginal Land Managers Association (NALMA) to help you understand your rights under the recent *Family Homes on Reserves and Matrimonial Interests or Rights Act* (the *Act*).

This booklet is provided strictly for informational, not legal, purposes. Refer to the *Act* itself in all legal matters and seek the advice of a competent lawyer should you find yourself in the kind of situation covered by the *Act*.

Provincial laws already address some aspects of family law, such as laws applying to personal property. However, there was no law in place to protect interests and rights related to matrimonial real property on reserves, thus this *Act* was enacted to address those issues.

We invite you to visit the COEMRP website for more information:

www.coemrp.ca

CENTRE OF EXCELLENCE
FOR MATRIMONIAL REAL PROPERTY



Terminology & Acronyms

Act	Abbreviated form of the <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i> .
Common-law partners	Persons who have been living together in a conjugal relationship for at least one year.
CP	Certificate of Possession, document giving evidence of a member's right to lawful possession of reserve lands pursuant to the <i>Indian Act</i> .
Domestic agreement	A signed document made by the spouses where they agree on their rights and obligations.
EPO	Emergency Protection Order, issued by the courts to protect the family members from violence, and the home from damage.
Exclusive Occupation Order	An order providing for the sole occupancy of the home to one of the spouses for a set period of time. It does not involve a change in ownership.
Family home	The family matrimonial home (the structure only, not the land) situated on a reserve where the family normally lives. It will also be referred to as the "home".
MRP	Matrimonial Real Property, the immovable property used by a couple and their family, the most common example being a family home and the land it is situated on.
Personal property	Refers to movable assets, such as cars, money in the bank, household goods.
PFR	Provisional Federal Rules are interim rules defined in sections 12-52 and 54-55 of the Act, which took effect on December 16, 2014 for those First Nations without their own MRP law.
Real property	Refers to immovable property, the most common example being a house and the land it is situated on.
Spouse	An individual who is one of the married partners or common-law partners living in a conjugal relationship or family unit.

Who is this booklet for?

If you are living on reserve in a marriage or common-law partnership, and at least one of you is a member of the First Nation, and

- you have questions about your rights to live in the family home on the reserve,
- you are facing divorce or separation issues,
- you are concerned about possible abuse to you and/or other family members or property destruction,
- you are worried about where and how you will live after separation,
- you are concerned with what happens financially after marriage breakdown or the death of your spouse,
- you are confused about your rights, either as a member or non-member,
- you are uncertain how to protect your rights and interests,
- you are uncertain of the role of the Courts, the Chief & Council, and the Police,

then this booklet was created for you.

While it cannot answer all of your questions, it may prove to be useful to you.

NOTE

- If your First Nation is signatory to either the ***First Nation Land Management Act*** or to a ***Self-Government Agreement***, then this *Act* may NOT apply to you.
- If your First Nation has enacted its own MRP law under this *Act*, the Provisional Federal Rules contained in this *Act* no longer apply.

What are my rights under the New Law?

***Family Homes on Reserves and Matrimonial Interests or Rights Act (the Act)* is now in effect.**

This *Act* applies to married couples and common-law spouses living on reserve, where at least one of them is a First Nation member or an Indian as defined in the *Indian Act*. It seeks to provide basic protections and rights to individuals living on reserves regarding the family home and other matrimonial interests and/or rights, during a conjugal relationship, in the event of a breakdown of that relationship, and on the death of a spouse.

Does this new *Act* apply to you?

If you are living on a reserve and are married or in a common-law relationship where at least one of you is a member of the First Nation or an Indian, then you should know your rights.

The *Act* deals with what is referred to as Matrimonial Real Property (MRP). The family home is the most common type of MRP, and it is usually the most valuable asset.

What are your rights to the family home in the event that the relationship ends or your spouse dies? What if there are children or elders involved?

If your First Nation is signatory to either the ***First Nation Land Management Act*** or to a **Self-Government Agreement**, then this *Act* may not apply to you. If your First Nation has enacted its own MRP law under this *Act*, the Provisional Federal Rules contained in this *Act* no longer apply.

It is important that you determine which rules apply in your circumstances. You may wish to obtain that information directly from the Band Office, or your lawyer may do so on your behalf. Be proactive. Make yourself aware of the rules **BEFORE** you need them.

What are my rights under the New Law? (Cont'd)

Consider this scenario from the past:

A mother and her children are homeless in the city. They lived in their First Nation community for 15 years. Before leaving for the city, they had endured ongoing abuse by the father and husband. Because he was the only one who held the right to the family home, they are now living in a shelter miles away from their friends, family and support system, leaving behind a comfortable home and prosperous business.

Now, the Act addresses these issues.

With the Provisional Federal Rules (PFRs) defined in the Act, the woman described above could make application for a court order to obtain exclusive occupation of the home for a fixed amount of time, allowing her to consider the social and educational needs of the children. As an alternative, under the PFRs, she could also apply for a determination of a fair financial settlement for the family real property.

Any matrimonial personal property (such as cars, clothing, etc.) is dealt with in accordance with the family laws of the province.

If you are married or in a common-law relationship on reserve where the Provisional Federal Rules apply, you should understand that you have these rights under the Act, whether you are a member or a non-member of the First Nation. When in doubt, consult your lawyer.



When does this law apply?

First Nation members who are married or in a common-law union and living off reserve are governed by the laws of the province in which they live. They have the same rights and responsibilities as any other couple in that province.

The *Family Homes on Reserves and Matrimonial Interests or Rights Act* aims to ensure that families living on reserve have access to similar rights as those living off reserve

The *Act* has two major parts:

- 1) The First Nation Law-Making Mechanism sections came into effect as of the 16th of December 2013. These sections grant authority to First Nation Councils to enact their own MRP law.
- 2) The Provisional Federal Rules came into effect as of the 16th of December 2014. These interim rules provide a means for individuals to deal with their MRP matters.

With some exceptions, as described on page 6, the *Act* and its Provisional Federal Rules apply to all First Nations who have not yet passed their own Matrimonial Real Property law. Even if your First Nation intends to pass its own law, the *Act* and its rules apply in the meantime.

Consult with your Band Office to determine if your First Nation has enacted an MRP law. If so, request a copy.

You can obtain a copy of the *Act* from the Aboriginal Affairs and Northern Development Canada website: www.aandc-aadnc.gc.ca or from the COEMRP website: www.coemrp.ca

When does this law apply?

As of December 16, 2013, First Nations have the authority to pass their own MRP law and some have already done so. You should check with your Band Office to see if your First Nation has such a law and, if so, obtain a copy of it.

Some First Nations have not yet enacted their own MRP law. As a result, you may have rights and protections under the Provisional Federal Rules of the Act.

THE MRP LEGISLATIVE TIMETABLE

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

**Royal Assent :
19 June 2013**

**First Nation Law-Making
Mechanism Sections**

**In Effect:
16 December 2013**

**ALL SECTIONS OF THE ACT
GO INTO EFFECT**

16 December 2014

**and
Remain in Effect Until Such Time
as the First Nation Passes Its
Own MRP LAW**



**KNOW YOUR
RIGHTS!
CONSULT A
LAWYER WHEN
CONCERNED.**

What do I do if we separate or divorce?

The breakdown of a marriage or common-law partnership is rarely without complication or anxiety.

Consider this hypothetical situation:

A man lived in a common-law relationship in his First Nation community for 18 years and is now separating. He contributed to building the family home and made payments on the housing loan, but his name is not on the Certificate of Possession. Upon separation he was asked to leave the home he helped build for 18 years.

What are his rights with respect to the Matrimonial Property?

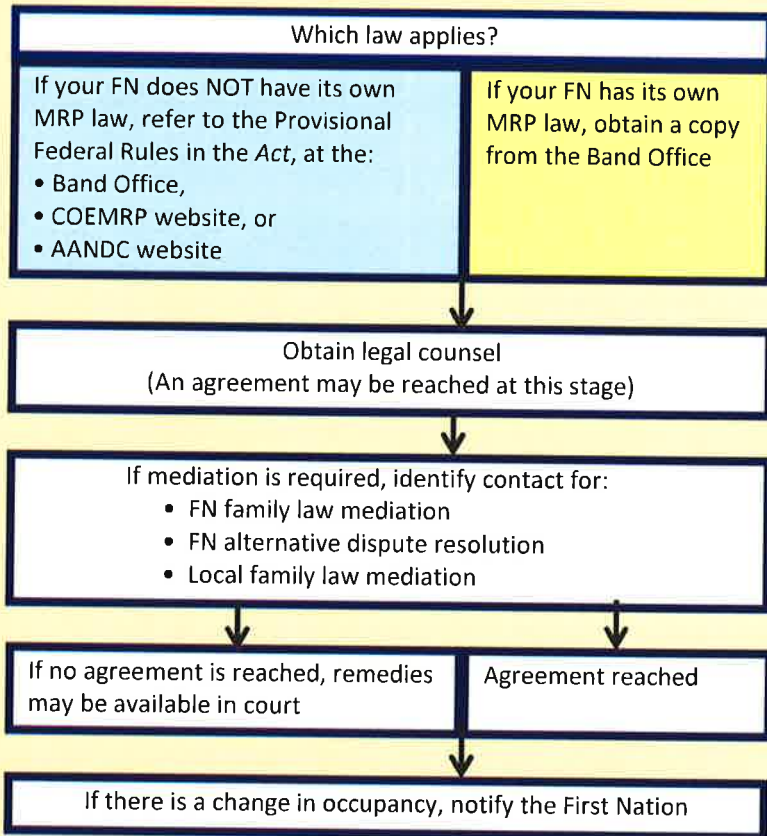
Under the rules of the Act, the spouses may choose to apply for

- *a division of assets, or*
- *exclusive occupation of the matrimonial home*

Courts across Canada consider marriages and common-law unions to be economic unions, not unlike a business partnership. Should the union fail, the assets should be divided fairly. The courts make no judgment as to who was at fault.

Of course there are many different scenarios. The flowchart on the following page may help guide you through the issues should you find yourself dealing with a breakdown in your family.

What do I do if we separate or divorce?



Results may be no change, or may include any one or a combination of:

- Transfer of property
- Financial compensation
- Exclusive occupation for a fixed time period

What do I do if we separate or divorce? (Cont.)

Resolving the issues

In the event of a marriage breakdown, questions arise about who gets to live where, about the division of property, and the resolution of disputes. The parties involved may be able to work out these issues themselves, for instance, if there was a domestic or inter-spousal agreement, while often it may be necessary to bring in third parties to arrive at an acceptable solution.

If you have questions about your legal rights under the Act, you should consult your own lawyer. Legal counsel may be able to assist in reaching an agreement.



It is important to note that going to court should be your last option. Resolving any issues out of court is always a better first choice.

Mediation

Mediation may work very well and should be considered as a first step whenever possible. Some First Nations provide family law mediation, where a neutral mediator meets with representatives from both parties and tries to find common ground between them. Sometimes, a First Nation will encourage the parties to agree to a traditional Alternative Dispute Resolution, such as a committee involving members and elders who are experienced in family law and understand property rights on reserve.

If the meetings prove successful, a separation agreement is made in writing, signed by the parties, and witnessed. This agreement might be used by the courts to formalize family matters.

What do I do if we separate or divorce? (Cont.)

Legal recourse

If traditional dispute resolution approaches do not resolve matters in a way that you think is fair or acceptable, you may decide that a legal approach is required. However, it is advisable, when possible, to use other methods before going to court to resolve matters. With your lawyer, you may seek to obtain court orders with respect to both occupancy of the family home and/or division of family assets and a financial settlement.

An Exclusive Occupation Order for the matrimonial home for one of the spouses could result from the divorce or separation; and this Order can be issued to a First Nation member or non-member, although it does **not** change the ownership of the property.

Some of the matters that the court will take into consideration in issuing an Exclusive Occupation Order include:

- the best interests of any children involved
- the terms of any domestic agreement between spouses
- the collective interest of the First Nation
- financial and/or medical issues of the spouses
- the history of family violence
- the relevant property rights and interests

Protecting the collective interests of the First Nation

This *Act* requires that an applicant for an order send a copy of the application to the First Nation (**except in the case of EPOs or where the judge has made a Confidentiality Order**). The Band Council may then request an opportunity to present its views to the court regarding the cultural, social and legal context that pertains to the application.

What do I do if there is violence or abuse?

Family violence is not tolerated

All individuals have the right to feel safe in their home and community. Both women and men can be victims of family violence. It can have lasting harmful effects on victims and a tragic impact on children.

Threatening, hitting, kicking, punching, stalking and harassing another person are crimes. Having sex with a person against that person's will is also a crime. Being married does not change this. A person committing these acts can be arrested, charged, convicted and jailed. Psychological, emotional and financial abuse should also not be tolerated by the affected spouse.

The Act specifies the use of Emergency Protection Orders (EPO) and Exclusive Occupation Orders to enforce these principles and rights.

If you feel that you are in danger...

If you or your children are experiencing family violence, you are not alone. There is help available to you.

If you are being threatened, or physically or sexually assaulted, call the police.

Once safety has been ensured, there are additional steps you may want to take to organize your life over the longer term. You may make application for:

- an Emergency Protection Order (described on page 16), and/or
- an Exclusive Occupation Order (described on pages 13 and 17).

Again, you do not need to feel alone; there are community resources to help you along the way.

What do I do if there is violence or abuse?

If violence has occurred, or if your household is in imminent danger, call the police. You may also decide to temporarily leave your home to ensure safety

Which law applies?

If your FN does NOT have its own MRP law, refer to the Provisional Federal Rules in the Act, at the:

- Band Office,
- COEMRP website, or
- AANDC website

If your FN has its own MRP law, obtain a copy from the Band Office

If your FN does NOT have its own MRP law, under the PFR, the EPO may keep the abuser away for 90 days.

Under FN MRP law, check for EPO provisions.

Apply for an Emergency Protection Order

Obtain legal counsel

Results may include either or a combination of:

- Application for an Emergency Protection Order
- Application for exclusive occupation

What do I do if there is violence or abuse? (Cont.)

Emergency Protection Orders

If the PFRs apply, an Emergency Protection Order (EPO) allows a court to order that a spouse or common-law partner be excluded from the family home on an urgent basis (usually in situations of family violence). An EPO can increase the protection to families on reserve by making it possible to remove the offending spouse from the home for up to 90 days.

For example, an EPO can be used to do the following:

- Keep an abuser away from a home, workplace, school, or other premises where specific family members might be present.
- Remove another person from the home if needed.
- Prohibit an abuser from making contact with specific family members.
- Direct the police to remove an abuser, and/or supervise the removal of the abuser's personal belongings.
- Direct police to seize (and store) weapons from the family home.
- Specify any other provision for the immediate protection of family members.

Obtaining an EPO

- You can apply to the courts directly for an EPO.
- You can apply whether or not you have left your home.
- If you need assistance or are not able to apply for an EPO in person, a peace officer or other trusted third party may apply on your behalf to ensure the immediate protection of your person or your property at risk of harm.

NOTE: Under the Provisional Federal Rules, an EPO can last up to 90 days. Before the order expires, you may also apply for an Exclusive Occupation Order so that you can continue residing in the family home for a longer term if no further resolution has been reached.

What do I do if there is violence or abuse? (Cont.)

Exclusive Occupation Order

An Exclusive Occupation Order allows a court to provide short or long-term occupancy of the family home to the exclusion of one of the spouses or common-law partners. The duration of the order could range from a set number of days to a much longer period, such as until dependent children reach the age of majority.

Each province has its own court system, and some have special courts of Family Law, with judges who specialize in such matters. The Act provides you with access to these courts and spells out provisions to issue and enforce court orders.

You should understand that these provisions are now available to help you protect your rights, your family, and your family home. Obtain professional legal advice to determine if you need such court orders and how to exercise these rights in your province.

NOTE

If a First Nation has its own MRP law, it may or may not include provisions for Emergency Protection Orders or for Exclusive Occupation Orders.

It is important for you to obtain a copy of your FN's MRP law to determine what rights and protections are available to you.

Spousal Consent to Transfer of Assets

The Provisional Federal Rules affirm that consent is required for the sale, transfer, or encumbering of the family home. If you have not given free and informed written consent, you (whether an FN member or not), should obtain legal advice immediately.

What do I do if my spouse dies?

Regardless of any of the factors listed below, under the Act's Provisional Federal Rules, you have an automatic right to remain in your home for 180 days.

If you are living on a First Nation reserve and the Act's PFRs apply, you have rights upon the death of your spouse. Those rights may vary depending on these factors.

- 1) Whether or not you are a member of that First Nation.
- 2) The type of right or interest, if any, in the matrimonial real property.
- 3) Whether or not there is a valid will.

The three factors are explained below.

Factor 1: Are you a member of the First Nation?

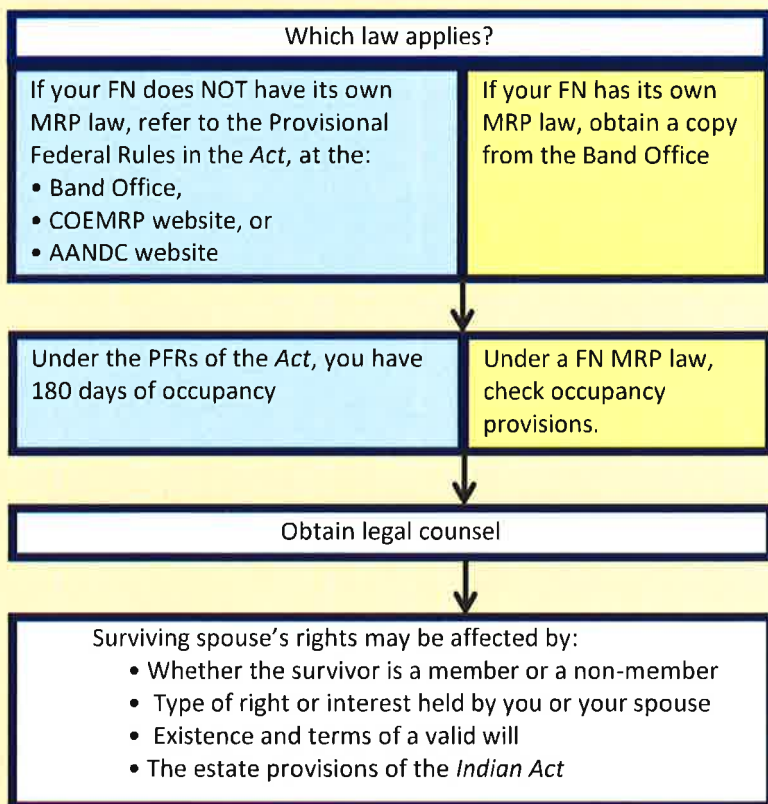
Whether or not you are a member of the First Nation, you are entitled to share in the value of the interest or right that was held by your spouse in or to the family home, as well as certain other matrimonial rights or interests, despite any directives in the will.

If you are a member of the First Nation, on whose reserve the matrimonial real property is located, you may also be entitled to share in the value of the right or interest in land that was held by your spouse.

If you are **not** a member of the First Nation, there can be no transfer of real property to you. However, you may be entitled to compensation. The value of such compensation will be determined by a number of factors. You should obtain the advice of a lawyer.

In either case, you may be entitled to exclusive occupation beyond the 180 days, particularly if there are children or other dependents. Your lawyer will be able to assist you in determining and applying for any occupation of the matrimonial home.

What do I do if my spouse dies?



Results may include any one or a combination of:

- Transfer of property
- Compensation through agreement or court order
- Exclusive occupation for a fixed time period

What do I do if my spouse dies? (Cont.)

Factor 2: Type of right or interest

One of the factors affecting succession (transfer of deceased's property in sequence) of the matrimonial real property is the type of right or interest that the spouses had in the property.

(A) Lawful possession (CP or lease)

The possession could be

- a) as joint tenants
- b) as tenants in common
- c) with sole possession by the surviving spouse
- d) with sole possession by the deceased

Joint Tenants (both were in lawful possession, wholly and indivisibly)
If you and the deceased held the property as joint tenants, you now assume full possession of the real property (land and house).

Tenants in Common (both were in lawful possession of a divisible percentage of the property)

You retain your original interest in the property; the remaining portion becomes part of the assets of the deceased and will be disposed of according to a valid will if any, or by the Intestacy section (48) of the *Indian Act*.

Sole lawful possession by the surviving spouse

No transfer of the property, however, there may be a settlement payment to anyone specified in a will.

Sole lawful possession by the deceased

You may be entitled to all or part of the property, or to a settlement payment. The terms or percentage will be determined by the will if any, or by the Intestacy section (48) of the *Indian Act*.

In any of the cases above where the result is a transfer of the property, the executor or administrator is responsible for submitting the appropriate documents to AANDC.

What do I do if my spouse dies? (Cont.)

(B) Custom allotments

Many First Nations do not subscribe to the provisions of the *Indian Act* or other legislation in allotting land to members. They have their own ways of determining where families will live and follow their own customs and traditions for dealing with land on reserve.

The PFRs in the *Act* will not apply to the value of the lands that have been allotted according to custom (not recognized by federal government). However, they will apply to structures on custom allotments that are recognized by the First Nation or the courts.

It is important for you to understand the policies involving land allotment on your reserve.

Factor 3: Is there a will?

The existence of a valid will is another factor affecting succession of the matrimonial real property.

If the deceased left a valid will, disposition of the property will follow the dictates of the will, or the survivor may apply, under the PFR, for a court order to determine entitlement.

Once the matrimonial share has been distributed, the remainder of the assets will be distributed to the remaining heirs or beneficiaries as per the will, or where there is no will, section 48 of the *Indian Act*.

If the survivor is a member of the FN, there may be a transfer of property.

Both members and non-members may be entitled to compensation, and/or to a provision for exclusive occupation of the matrimonial home beyond the 180 days for a fixed period of time.



Where can I get help?

Whenever a family breaks up or there is a death of a spouse, it is a time of stress for all involved. In the worst of circumstances, you may feel overwhelmed and even helpless.

The first potential source of help may be found in your own community. Your family and friends can often provide the quickest assistance, at least until you have an opportunity to sort things out. The Band Office should be able to direct you to sources of support within the community, such as social services, a list of approved mediators, property records and other information to assist you.

Of course, sometimes you may get too much advice from uninformed sources. Much of this advice may even be conflicting and it is best to keep in mind that not everyone is unbiased. Not everyone is necessarily looking out for your best interests.

In legal matters you should have a lawyer who represents you. How do you find such a lawyer that is qualified in matters of family law and family property? Each province has a variety of services to put you in touch with a lawyer. You may also be able to get Legal Aid to help you pay for legal services.

Check online or by phone with your provincial government to get specific assistance. The Centre of Excellence for Matrimonial Real Property and the Aboriginal Affairs and Northern Development Canada websites also provide information in this regard.

The websites are:

www.coemrp.ca

www.aandc-aadnc.gc.ca

You should discuss your situation and ask any questions before you make a decision to engage a lawyer. You need to feel comfortable with and have confidence in your lawyer.

Where can I get help? (Cont.)

Help is available from the police and the courts. If violence, real or threatened, is part of the situation, the police have a serious role to play to ensure your safety and protect the community peace.

As discussed elsewhere in this booklet, if the PFR apply, the provincial courts have the power to issue court orders related to protection and property matters. Under the *Act*, you have access to a court to protect yourself and your property interests. The court can issue instructions to the police to enforce its orders.

For example, if you and your ex-spouse agree to a 50-50 split of the value of the family home under a court order, and a payment schedule, but some months later, your spouse doesn't honour the agreement, you may request that the court take action on your behalf.

With rights come responsibilities. The *Act* gives you certain rights but it is your responsibility to understand these rights to the best of your ability and to be diligent in pursuing them. If you don't understand them, talk to your lawyer. Carefully follow your lawyer's advice and keep proper records of important matters. Be timely in responding to instructions or requests from authorities.

It may take time to sort everything out. Be patient. Stay involved. And keep a positive attitude towards the future.



Centre of Excellence for Matrimonial Real Property

Hosted by the National Aboriginal Land Managers Association (NALMA), COEMRP is available to assist First Nations communities and their members in matters related to Matrimonial Real Property Rights and to First Nations' MRP law making



Other Reference Material

Role of Chief & Council

COEMRP has prepared a brochure, "Role of Chief & Council", that outlines and defines their responsibilities under the Provisional Federal Rules as contained in the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

MRP Toolkit

The COEMRP has published a comprehensive Toolkit to guide First Nations professionals in MRP matters and the development of their own MRP law.

Training

The Centre also provides training courses across the country. First Nations are encouraged to take advantage of these offerings by contacting the Centre at:

Centre of Excellence for Matrimonial Real Property
c/o National Aboriginal Land Managers Association
1024 Mississauga St, Curve Lake, Ontario K0L 1R0

Website: www.coemrp.ca

Email: info@coemrp.ca

Phone: 1-855-657-9992 or 1-705-657-9992