

# Caselaw Review of the *FHRMIRA*

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## Objectives of Report

- ▶ Analyze how the Courts have dealt with the division and valuation of matrimonial real property on reserve before and since *FHRMIRA*
- ▶ Determine how Courts have interpreted *FHRMIRA* to find fair and just solutions during a separation or death
- ▶ Discuss whether *FHRMIRA* helped balance individual v. collective rights of First Nations
- ▶ Discuss issues that First Nations and Courts have to address as *FHRMIRA* continues to be implemented

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## Roadmap of Presentation

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- ▶ Introduction
- ▶ Pre-*FHRMRIA* case law
- ▶ MRP Laws under the jurisdiction of the Framework Agreement under the *FNLMA*
- ▶ Use of pre-*FHRMRIA* case-law today
- ▶ *FHRMRIA* jurisprudence today
- ▶ Community specific MRP laws enacted under *FHRMIRA*
- ▶ Commentary
- ▶ Impact of *FHRMIRA*
- ▶ Conclusion: Future of *FHRMIRA* before the courts

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## Introduction

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- ▶ Outside of reserve lands, provincial legislation addresses the division and value of matrimonial real property;
- ▶ The *Indian Act* does not address the issue of matrimonial real property division and valuation on reserve;
- ▶ The SCC stated that provincial/territorial laws relating to matrimonial real property on reserve do not apply;
- ▶ Provincial/territorial courts struggled and often failed to find fair and just solutions pre-*FHRMIRA*.

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## Filling the Legislative Gap

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- ▶ The law making powers under *FHRMIRA* came into force in December 2013, and the Provisional Federal Rules came into force in December 2014;
- ▶ *FHRMIRA* created a legal regime to address:
  1. Use, occupation and and possession of family homes on reserve; and
  2. Division of the value of real property on reserve after the separation, divorce or death of spouses or common law partners (including non-members).

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## Pre- *FHRMIRA* cases

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- ▶ *Poitras v. Khan*, 2016 SKQB 346
- ▶ *McMurter v McMurter*, 2016 ONSC 1225
- ▶ *Hepworth v Hepworth*, 2012 NSCA 117
- ▶ *Dunstan v Dunstan*, 2002 BCSC 335

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## Poitras v. Khan, 2016 SKQB 346

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- ▶ **Issue:** Is a will that was signed by the deceased 2 years prior to meeting her husband (Mr. Khan, a non-member), and that left the entirety of her estate to her children, valid?
- ▶ **Ruling:** The Court confirmed the validity of the will, and sent Mr. Khan back to Court.
- ▶ **Analysis:**
  1. Saskatchewan *Wills Act* s. 17(1) v. *Indian Act*, s. 46(1)(c)
  2. Mother's wishes for her children
  3. Mr. Khan could utilize the *SK Family Property Act and the Dependents' Relief Act, 1996*
  4. Very different result had Ms. Poitras passed away a few months later

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## McMurter v McMurter, 2016 ONSC 1225

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- ▶ **Issues:** If and how Mr. McMurter's on-reserve properties could be used as security for arrears?
- ▶ **Ruling:** Mr. McMurter's Certificates of Possession (CP) could be used as security against arrears. Court did not make orders relating to other joint properties held jointly on reserve.
- ▶ **Analysis:** *Security for spousal support* – Mrs. McMurter is a member, first case using CP as security for arrears under *Divorce Act*.
- ▶ Regarding other outstanding property matters, there was insufficient info for Court, but granted leave for parties to make application under FHRMIRA in future – problematic because of separation occurred before *FHRMIRA* came into force.

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## Hepworth v Hepworth, 2012 NSCA 117

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- ▶ **Issue:** Whether the trial judge erred in the valuation of the matrimonial home.
- ▶ **Ruling:** The Appeal Court ruled that the trial judge erred in how the matrimonial home was valued, but did not err in including matrimonial home in the division of property.
- ▶ **Analysis:** Matrimonial home was valued as the same of another home sold on the reserve - \$40,000. The court rejected much higher valuations linked to an appraisal and the replacement value.
- ▶ Despite no CP being issued, other evidence reflected Mr. Hepworth was in possession of home therefore was considered matrimonial assets and included within the compensation order.
- ▶ Mrs. Hepworth was entitled to \$20,000 - half her interest in the \$40,000 home, minus a compensation award already paid.

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## Dunstan v Dunstan, 2002 BCSC 335

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- ▶ **Issue:** Could the provincial court order a restraining order to prevent Mr. Dunstan from selling their cattle & horses, matrimonial home and ranch?
- ▶ **Ruling:** Restraining order issued to prevent Mr. Dunstan from selling the cattle & horses, as well as the matrimonial home, which was on designated lands. No restraining order issued for ranch located on reserve.
- ▶ **Analysis:** A restraining order to stop the selling of cattle and horses was accepted because not covered by *Derrickson*, as it was an order restraining an individual and was not a charge against real or personal property.
- ▶ The matrimonial home was a leasehold interest on designated lands and, as such, provincial laws of general application applied. Therefore, the court could issue a restraining order without fettering into federal jurisdiction.
- ▶ The ranch was on regular reserve lands and thus subject to federal jurisdiction. Provincial laws did not apply thus no restraining order issued.

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## MRP laws under framework agreement of *FNLMA*

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- ▶ Several First Nations and Canada signed the Framework Agreement in 1996, and in 1999 the *FNLMA* ratified the Framework Agreement.
- ▶ The *FNLMA* comes into effect for a signatory First Nation when: 1) a land code is prepared and verified, 2) negotiation of an agreement with Canada, 3) the community approves the Code.
- ▶ Once approved, 40 sections of the *Indian Act* dealing with land management cease to apply.
- ▶ First attempt to address legislative gap to protect vulnerable spouses in cases of violence, divorce or death with regard to their matrimonial home and other real property on reserve.
- ▶ Only one reported case dealing with community specific matrimonial-real property law, *Kumagai v. Campbell Estate*.

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## Kumagai v. Campbell Estate, 2018 BCCA 24

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- ▶ **Issue:** What is the value of the family property?
- ▶ **Ruling:** The court increased the value of the family home, and increased the amount of Mrs. Kumagai's entitlement.
- ▶ **Analysis:** Mrs. Kumagai could not develop the residential property on her own, but this wasn't a "legal impediment" to appraise the value of the property at the highest value and best possible use.
- ▶ The court took the position that a party would have to prove there was a "legal impediment" to developing the land to its highest value and best possible use (such as zoning regulations). Otherwise, the highest value and best possible use is to be used when valuating a piece of land.
- ▶ The Tzeachten's Land Code and Land Use Plan was used by the appraiser and the court. The court rejected the appraisal which treated the residential lands as a single, non-developable parcel.
- ▶ The date of the hearing rather than the date of death was used as the appraisal start-date because it was fair and in accordance with the BC *Family Law Act*.

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## Pre-*FHRMRIA* cases

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- ▶ Court decisions prior to *FHRMRIA* have limited use today, especially in regards to possession and occupation orders.
- ▶ Pre-*FHRMRIA* cases are still useful in reflecting the court's methods and approaches to evaluate land and the homes on reserve.
  - ▶ Caution: Although courts had ability to grant compensation orders *pre-FHRMIRA*, *FHRMRIA* made changes to that process in some cases (date of valuation, whether value of land is divisible for non-members spouses).

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## *Family Homes On Reserve And Matrimonial Rights And Interests Act (FHRMRIA)*

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- ▶ *FHRMRIA* applies to structures and lands on reserve and applies to spouses or common law partners, even if only one is a member or has status under the *Indian Act*.
- ▶ The first purpose of *FHRMRIA* is to recognize First Nations jurisdiction to **adopt their own laws** in relation to matrimonial real property. Community approval is required for these laws (CIF, December 16, 2013).
- ▶ The second purpose of *FHRMRIA* is to provide **provisional rules** that apply after a conjugal relationship ends or a death, where the First Nation has not enacted their own matrimonial real property laws. (CIF, December 16, 2014).

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## Federal Provisional Rules

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- ▶ Can be broken down into three parts:
  1. **ss. 13-27** rights to occupy home during relationship/ granting of emergency protection orders to give exclusive occupation in cases of domestic violence etc./ procedures for granting exclusive occupation upon death of spouse/common law partner or separation.
  2. **ss. 48-40** valuation of each of the spouses interest in family home, and other matrimonial assets upon of death or separation.
  3. **ss. 41-52** how to determine rights and interests/ the need to give notice to affected First Nations and others/ enforcement of orders.

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## Reported cases applying *FHRMRIA*

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- ▶ *NC c. EP*, 2019 QCCS 754;
- ▶ *Toney v. Toney Estate*, 2018 NCCS 179, [2018] NSJ No 292;
- ▶ *ML v NG*, 2016 QCCS 5685.

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## NC v EP, 2019 QCCS 754

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- ▶ **Issue:** Is the plaintiff (NC) entitled to half the value of the matrimonial home that she resided in with the defendant (EP), until the date of their separation?
- ▶ **Ruling:** NC entitled to compensation for her contribution to the family home which the court determined was half the value of the home, minus the value of the down-payment made by EP, which came from an inheritance.
- ▶ **Analysis:** *Civil Code of Quebec* articles 1493-1495 were relied on to establish unjust enrichment.
  - I. NC non-member, EP was a member had property registered in his name.
  - II. NC made mortgage payments, paid for furniture and paid son's expenses.
  - III. NC entitled to value of home, minus the down payment paid by EP.
  - IV. Court decided that FHRMIRA applied but would have had the same result.
- ▶ Court made a mistake – down payment would not have been deducted under FHRMIRA
- ▶ Shows a lack of familiarity with FHRMIRA, and especially with rights of a common law spouse, which is not part of the Civil Law of Quebec.

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## *Toney v. Toney Estate*, 2018 NCCS 179, [2018] NSJ No 292

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- ▶ **Issue:** Is a non-member entitled to exclusive occupation of the matrimonial home, and half the value of her deceased husband's estate under *FHRMIRA*?
- ▶ **Ruling:** An exclusive occupation order granted with conditions for indeterminate period of time. \$70,000 compensation order issued for half interest in matrimonial home at time of death – parcel of land was excluded
- ▶ **Analysis:** Court looked at the history and rationale for *FHRMIRA*. The First Nation intervened to state that if exclusive occupation order issued should be limited due to housing shortage on reserve.
- ▶ The Court weighed all the circumstances and decided the fairest outcome was to grant the exclusive occupation order (with conditions).
- ▶ The Court used the value of renovations put into the home as the divisible value of the home, \$140,000 (rejecting the replacement value, insurable value and municipal tax assessment).
- ▶ The other parcel of land was not included in the divisible value, because there was no evidence there were any buildings on the land.

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## ML v NG, 2016 QCCS 5685

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- ▶ **Issue:** Is the home exempt from the division of matrimonial assets because it will be held in the name of Huron-Wendat Nation until it is paid in full?
- ▶ **Ruling:** The home should be divided equally between each spouse.
- ▶ **Analysis:** The court relied heavily on ss. 415-416 of the *Civil Code of Quebec* which states the family home is part of the family patrimony and therefore to be divided equally on separation. Also ss. 28-29 of *FHRMRIA* was relied on which outlines spouses (even non-members) are entitled to half of the value of the home, and allows court to vary amount paid if it is 'unconscionable.'
- ▶ Respondent took out loan from the Nation to pay for home, argued that because loan not paid in full and home in Nation's name, home should not be included, and court rejected this argument. Court stated the loan analogous to a mortgage.

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## Community Specific MRP Laws enacted under *FHRMRIA*

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- ▶ At least 15 First Nations that have adopted MRP Laws under *FHRMRIA*.
- ▶ We are aware of only one reported court judgement rendered under one of those MRP laws and it was issued June 12, 2019 by the Akwesasne Court of the Mohawks of Akwesasne.
- ▶ The names of the parties have been redacted. Therefore the parties and the judgement are referred to as *Ms. v. Mr.*

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## Ms. v Mr., 2019-06-12 Akwesasne Court

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- ▶ **Issue:** Is the applicant entitled to exclusive occupation of the matrimonial home under the Akwesasne *Couple's Property Law*?
- ▶ **Ruling:** 2 year exclusive occupation order issued for Ms. and her 3 children, and Mr. ordered to stay away from home during that period. Ms. was ordered to keep home safe and preserve value of home while paying hydro and mortgage bills, but accounts stay in Mr.'s name while order in effect. If order not respected could face \$1000-\$10,000 fine and orders enforceable by the Mohawk police.
- ▶ **Analysis:** Judge took into account the dysfunction of relationship, the cooperation of Mr. and the uncooperative nature of Ms. Also, that parties are at different places in their healing and best interests of children to heal. Emphasis also on the need to support the 'good mind' (Kanikonri:io) of both parties for their own health and wellbeing but also the children's.
- ▶ Both parties agreed the children need their mother and father, also to continue to work together for the best interest of their children.

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## MRP Laws Adopted under the Jurisdiction of a Self-Governance Agreement

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- ▶ We are unaware of any judgments respecting matrimonial real property issued by a court under a matrimonial real property law adopted pursuant to jurisdiction recognized in a self-governance agreement.

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## Commentary

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- ▶ Issues Surrounding Valuation;
  - I. First Nation Taxation Regimes;
  - II. Valuation Date;
- ▶ Issues Specific to Quebec;
- ▶ Balancing of Collective v. Individual Rights;
- ▶ Issues Regarding Enforcement.

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## Issues Surrounding Valuation

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- ▶ Methods for determining valuation difficult because value of property on and off reserve so different.
- ▶ How land and property is held varies greatly across different First Nations.
- ▶ Large variety in how courts value land and homes, creating uncertainty and some unfairness (*Hepworth v. Hepworth*)
- ▶ Clarity needed around what is acceptable and not acceptable considerations for valuation (*Kumagai v Campbell Estate*).

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## Valuation: First Nation Taxation Regimes

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- ▶ First Nations property taxation regimes under the *First Nations Fiscal Management Act* require the assessed value of taxable properties to be determined "as if the land or improvements are held in fee simple off the reserve."
- ▶ Rationale : properties should not be devalued because they are on reserve.
- ▶ Although the market value of on-reserve properties may be lower, this is not always the case.

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## Valuation Date

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- ▶ Pursuant to *FHRMIRA*: the valuation date for most cases is the day before the death occurred or the date of separation.
- ▶ Prior to *FHRMIRA*, the court told us in *Kumagai* that the appropriate date for valuation, at least in the case of a contested distribution of an estate, is the trial date.
- ▶ For large estates, the date of valuation can make a significant difference.

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## Issues Specific to Quebec

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- ▶ A lack of awareness of *FHRMIRA*.
- ▶ Two judgments in Quebec (*NC v EP* and *ML v NG*) made some questionable findings.
  - ▶ In *ML v NG*, the Court applied *FHRMIRA*'s Provisional Federal Rules even though the couple separated before the coming into force of the Rules.
  - ▶ In *NC v EP*, the judge deducted the amount of the down payment made for the matrimonial home, because it came from an inheritance, even though this is contrary to fact that inheritances are not deducted from the value of the matrimonial home under *FHRMIRA*,
  - ▶ The courts, knowingly or perhaps unknowingly, failed to apply the concept of 'common law partners' which exists in *FHRMIRA*, but which is absent in the civil law in Quebec.
- ▶ Both judgments also heavily relied on the Civil Code of Québec to support the division of the value of the family home. *FHRMIRA* was mentioned as a secondary support and not a primary source of law,

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## Issues Regarding Enforcement

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- ▶ *FHRMIRA* s. 52 provides enforcement options when options are limited because the applicant is not a member or status Indian.
- ▶ First option – Council:
  - ▶ But seems unlikely a Council would enforce an order on behalf of a non-member.
- ▶ Second option – Court:
  - ▶ available only after Council refuses to act.
- ▶ No case law yet.
  - ▶ S. 52 may have limited use, because it is a cumbersome and lengthy process.
- ▶ Also – would s. 52(2) stand up to close legal scrutiny?
- ▶ Very little case law generally on enforcement issues under *FHRMIRA*

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## Protecting Vulnerable Spouses and Children

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- ▶ *FHRMIRA* was meant to ensure a legal regime was in to protect vulnerable spouses and children, who often suffered and were ousted from their homes and communities following violence, separation or death – *results are mixed*
  - ▶ Exclusive occupation orders have been issued that would not have been possible before – but not that many
  - ▶ Perhaps more mediated solutions, but we don't have number
- ▶ Lack of the use of courts linked to many factors:
  - ▶ Cost of lawyer and access to justice issues
  - ▶ Fear of family services being informed
  - ▶ Lack of awareness of *FHRMIRA*
- ▶ Valuation date under *FHRMIRA* may result in vulnerable spouses being denied the benefit of an increase in the value of family property.
- ▶ Non-member spouses cannot share in the value of land on reserve, even though this seemed to be included in compensation orders pre-*FHRMIRA*.
- ▶ No emergency protection orders have been issued under *FHRMIRA*.

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## Easier Access to Remedies?

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- ▶ Remedies are now available where they didn't exist before
  - ▶ Exclusive occupation orders and emergency protection orders
- ▶ Particularly, *FHRMIRA* has increased options available to non-members and members who are not on the CP/lease etc.
- ▶ Occupation orders: Although not a lot of cases, presumably there have been agreements regarding occupation that didn't make it to court, that were fueled by *FHRMIRA*.
- ▶ Compensation orders: there is no real indication that, overall, there is easier access to remedies than before.
- ▶ Emergency protection orders: none issued so far.
- ▶ Until awareness is increased and access to justice issues have not been addressed, *FHRMIRA* will likely continue to be used in a limited way.

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## Protecting Communal Interests of the First Nation

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- ▶ Difficult to say whether communal property rights are better protected under FHRMIRA.
- ▶ Before *FHRMIRA*, there was no ability to transfer interests in on-reserve property to non-members or non-Indians (no change).
- ▶ Since *FHRMIRA*, an interest in land or real property cannot be transferred to non-members, but rights to occupy on-reserve property can be granted.
- ▶ Sometimes non-members are allowed to stay in the family home after the death of a spouse, even if the First Nation is against it, and even if there is a long list of members waiting for homes (ex. *Toney*).

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## Balancing of Collective v. Individual Rights

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- ▶ Non-members can share only in the value of the on-reserve structures (28(3)(a) and 34(3)(a) *FHRMIRA*).
- ▶ Prior to *FHRMIRA*, the courts issued compensation orders for half the value of the couple's estate, which seemed to include the value of the land (*Hepworth v Hepworth* and *George v George*).

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## Conclusion: Future of *FHRIMRA* Before The Courts

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## Lack of Familiarity of Judges and Lawyers with *FHRMIRA*

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- ▶ Judges would benefit from training on *FHRMIRA*.
- ▶ Both Québec cases, judges are clearly not comfortable with the Provisional Federal Rules, and instead rely on the regular provincial legal regime to determine the amount of a compensation order.
- ▶ More provincial and territorial law societies and organizations need more training sessions on *FHRMIRA*.
- ▶ Legal regime under *FHRMIRA* should be included in the bar courses for every province and territory

## Areas Where More Guidance Needed with Future Case Law

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- ▶ Until more *FHRMIRA* cases interpreted by court, it will be difficult to predict how the courts will use and interpret its provisions (particularly around how to weigh factors for various types of orders).
- ▶ Important for some of these decisions to be heard by appeal courts, as many of the *FHRMIRA* cases to date were heard by lower courts which are not binding on courts in other provinces or territories.
- ▶ It will be useful to see how individuals and the courts deal with the enforcement options in *FHRMIRA*, particularly section 52.
- ▶ Need for more a more structured and consistent approach to valuation.
  - ▶ Would be beneficial for the Courts if the COEMRP or another entity developed a proposed method to value structures and land on reserve.

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