SUPREME COURT OF NOVA SCOTIA
Citation: *Toney v. Toney Estate*, 2018 NSSC 179

Date: 2018-07-25
Docket: Ken No 463237
Registry: Kentville

Between:

Marlene Ann Toney

Applicant

v.

Estate of Lawrence Leo Toney

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: May 17, 2018, in Kentville, Nova Scotia

Counsel: Kelly Richards, counsel for the applicant Marlene Toney

James A. Michael, counsel for the Annapolis Valley First Nation (interested party)

Katrina Toney, self-represented at the hearing (with Darlene Lamey making written submissions) (interested party)

Laura Toney, not appearing, not represented at the hearing (with Darlene Lamey making written submissions) (interested party)

Attorney General of Canada, not represented and not participating (interested party)

By the Court:

Summary of the Issue

[1] This decision interprets and applies the *Family Homes on Reserves and Matrimonial Interests or Rights Act* ("FHR").

[2] The applicant, the widow of a former chief of a band, seeks occupation of the family home on reserve lands held by the federal Crown in trust for the exclusive benefit of a First Nation band. Central to this application is the fact that the applicant is not an Indian or First Nation band member. Counsel for Annapolis Valley First Nation ("AVFN") candidly acknowledges that this fact is why this application is before me.

[3] The FHR purports to make major changes to the First Nations family property regime in the *Indian Act* and *First Nations Land Management Act* ("FNLMA").

[4] Unlike prior legislation relating to reserve lands, the FHR expressly recognizes the equality rights of spouses regardless of gender, race or ethnic origin.

[5] This context mandates an interpretation and application of the FHR that balances individual equality rights guaranteed by ss. 15 and 28 of the *Charter*, with collective aboriginal rights recognized in s. 35 of the *Constitution Act (1982)* and protected by s. 25 of the *Charter*.

[6] The FHR came into existence in June 2013 to 'fill a legislative gap' with respect to property rights between spouses on separation or the death of one of them. Its necessity arose from two 1986 Supreme Court of Canada decisions which held that provincial matrimonial property legislation was constitutionally inapplicable to reserve lands.

[7] Since 1986, Lawrence Toney, a former chief of the AVFN, lived with the applicant in a home built in 1979 for Lawrence Toney and his first wife as a small bungalow on reserve land with a $23,000.00 grant from Indigenous and Northern Affairs Canada (the "Department"). Over the 30 years that Lawrence and Marlene Toney occupied their family home, they spent over $140,000.00 of their own money in permanent improvements. Lawrence Toney obtained a Certificate of Possession for their home in 1998. Ms. Toney was an active member of the reserve community for many years until her multiple sclerosis became too severe.

[8] On July 9, 2016 Lawrence Toney died. The only substantial asset in his estate is his right and interest in the Certificate of Possession for the land on which their family home sits and the home itself. His will, approved by the Department, left his estate to his wife and alternatively to their two sons. Ms. Toney's only income is about $775.00 per month in a disability and CPP pension. She has no other place to live. She is not a band member or an Indian, and therefore not eligible to obtain assignment of the Certificate of Possession purported to be transferred to her in the will.

[9] Ms. Toney seeks an order for indefinite exclusive occupation of their family home pursuant to s. 21 of the FHR, and half the value of her late husband's interest in the home and outbuildings pursuant to s. 34 of the FHR.

[10] Counsel are unaware of any case law interpreting the FHR. This court found a few trial decisions that refer to the FHR, but none that contain a comprehensive analysis of the statute and, in particular, ss. 21 and 34, the sections that authorize courts to grant exclusive occupation of the family home and compensation to a surviving spouse for their interest in matrimonial assets.

[11] The court's interpretation and application of the FHR is in five parts:

a) The law respecting rights and interests on reserve land before the FHR.

b) The provisions of the FHR.

c) How the FHR affects tradition, custom, the *Indian Act* and other First Nation property laws.

d) The evidence.

e) The application of the FHR to these facts.

The law respecting property interests in reserve lands before the FHR

[12] The 1996 Report of the Royal Commission on Aboriginal Peoples ("*Report*"), which *Report*'s analysis is supported by several aboriginal law legal texts, is the primary source of the background.

[13] Before Europeans arrived, almost all of Canada was inhabited by aboriginal peoples. Whether foraging societies or more settled resource-based societies, kinship or families were the basic organizing unit. Groups of families formed communities, whether bands, tribes or nations. Depending on the nation, leaders came through the male or female lines of descent of key families.

[14] Band lands were communal property to which every member had unquestioned right of access; however, within bands or tribes and the territory occupied and claimed by each, family units or clans retained their autonomy. Day-to-day decision making about production and consumption occurred mostly at the household level. Aboriginal land systems combined principles of universal access and benefit within the group, universal involvement and consensus in management, and territorial boundaries. They were flexible according to social rules.

[15] Specific property arrangements varied widely among First Nations, but some basic principles were common to all. In no case were lands or resources considered a commodity that could be alienated to exclusive private possession. All aboriginal nations had systems of land tenure that involved allocations within the group, rules for conveyance of primary rights and obligations between individuals, and the prerogative to grant or deny access to non-members, but no right of outright alienation of land.

[16] Formal arrangements could be made between groups, based on mutual recognition of each other's needs and surpluses, but this required adherence to rules of conservation as well as norms respecting sharing and consumption. Members of the group either had equal access to the communal lands or were assigned places within them on an orderly basis.

[17] Aboriginal tenure systems generally incorporated two principles: permission must be sought to use another's territory, but no one can be denied the means of sustenance. The bundle of rights and obligations included use by the group itself, the right to include or exclude others (by determining membership), and the right to permit others to use land and resources.

[18] Aboriginal societies in North America evolved over thousands of years. The societies' interactions with their physical and social environment led to belief systems, cultures and forms of social organization that differed substantially from European patterns.

[19] Volume 2, c.3 and Volume 4, c.2 of the *Report* document that women were treated with equal standing in all First Nations before colonial control. In Volume 2, pp. 122 to 123, the commissioners note that in some societies the role of women, while distinctive, were broadly equivalent in importance to those of men; some societies were matrilineal in determining membership in the kinship group and property rights; in some other societies, women held less governmental power than men even if government incorporated familial spheres. In Volume 4, the

commissioners conclude that, in most traditional aboriginal societies, women were highly respected. Women were traditionally responsible for decisions about children, food preparation and the running of the camp. While clear divisions of labour around gender lines existed, women's and men's work were equally valued.

[20] The *Report* concludes that the position and role of aboriginal women was undermined by colonial ideas and values imported from Europe, that displaced and devalued women - not just aboriginal women, but women in general.

[21] Colonial and post-confederation legislation that applied to aboriginal people, including the *Indian Act*, found their conceptual origin in Victorian ideas of race and patriarchy. Their effect was to marginalize women and diminish their traditional or customary social and political role in community life. For example, after 1876 and the passage of the *Indian Act*, Indian women were denied the right to vote in band elections or to participate in reserve land decisions. Women could not control their own cultural identity. Their identity became dependent on the identity of their husband. The *Indian Act* created a legal fiction as to cultural identity. (Royal Commission on Aboriginal People Report, Volume 4, c. 2).

[22] Many other reports and legal texts support these conclusions.

[23] Bradford W. Morse, "Aboriginal and Treaty Rights in Canada" in Errol Mendes & Stephane, eds. *Canadian Charter of Rights and Freedoms*, 5th Edition (Markham: LexisNexis, 2013) c. 24 at p. 1235 writes:

> Through the introduction of sex-related rules in 1869, women were solely entitled to registration by direct descent from a registered Indian father or marriage to a registered Indian man, completely disregarding traditional Indian Nations' laws and values, including the existence of matrilineality as the determining factor among many. The Canadian government imposed European assumptions of patriarchal societies and marital assimilation in a manner destined to undermine the vitality of First Nations' cultural integrity, with the *Indian Act* as a primary vehicle.

(See also: Brian Crane QC, Robert Mainville & Martin Mason, *First Nations Governance Law* (Markham: LexisNexis, 2006), c. 2, and James Henderson, Marjorie Benson, & Isobel Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000), Part IV)

[24] The legal analysis of aboriginal issues by courts changed dramatically with the 1982 *Constitution Act* and *Charter of Rights and Freedoms*. Respect for aboriginal traditions and customs, the concept of the 'Honour of the Crown', and the

replacement of colonial patriarchal and paternalistic laws, founded on misguided gender-based policies like enfranchisement and assimilation, has slowly evolved over more than 30 years of significant judicial decisions, especially by the Supreme Court of Canada.

[25] Reserves are tracts of lands, which are defined under the *Indian Act*. Title is in the Crown, who holds the land for the benefit of a band. Reserve lands are not owned by individual Indians, but rather by the band a whole. Land can only be alienated to the federal Crown after a process that involves a vote by the band members. The *Indian Act* sets out a scheme for permits, leases and Certificates of Possession for those lands. It authorizes bands to make by-laws on land use.

[26] Provincial laws respecting real property do not apply to reserve lands.

[27] The federal government has exclusive jurisdiction over "Indians and lands reserved for the Indians". Provincial laws that govern possession or occupation of land are constitutional inapplicable on and to reserve lands. This includes provincial law respecting matrimonial property. (See: *Derrickson v Derrickson*, [1986] 1 SCR 285 and *Paul v Paul*, [1986] 1 SCR 306).

[28] The *Indian Act* has long been the primary legislation through which the federal government has exercised its s. 91(24) jurisdiction. The *Act* contains extensive provisions for possession and occupation of reserve lands but is silent on how to deal with matrimonial property issues in respect of reserve lands on the breakdown of a conjugal relationship or death of a partner.

[29] As already noted, the possessory interest in reserve lands is a collective interest belonging to each First Nation band. Lands are held by the Crown for the exclusive use and benefit of a band. They are held in common by all members of the band whose reserve it is. No one has rights of individual occupation or possession of particular reserve lands, except as allocated by the First Nation band council.

[30] Except for interests or rights created by the FHR, and before the FHR came into effect by land codes under the FNLMA, the land provisions of the *Indian Act* determined conclusively rights of possession or occupation of reserve lands.

[31] The demand for housing on reserve lands is great. There are long waiting lists. There is usually no or, at best, little funding for First Nation bands to construct housing on reserve lands.

[32] Where housing is constructed by and at the expense of the First Nation or through government funding of a First Nation, the housing usually is allotted through the First Nation council or housing committees without any accompanying written formalities.

[33] The allotment of a portion of reserve lands for a family residence can be made by other means. One such means is a Certificate of Possession, pursuant to s. 20(1) of the *Indian Act*. Some writers opine that the purpose for the provision of Certificates of Possession in the *Indian Act*, a concept foreign to First Nations, was as a method by the federal government to assimilate Indians by encouraging private ownership of land. The effect of a Certificate of Possession is that an individual band member obtains an interest in reserve property which cannot be reassigned by the band council. Most often, a Certificate of Possession is in the husband's name, a reflection of the colonial patriarchal system of land ownership, which, as noted above, was foreign to pre-colonization aboriginal societies.

[34] No First Nation member is lawfully in possession of reserve land unless a First Nation council has allocated possession of that land to him or her with the approval of the federal minister (s. 20(1)). Where the federal minister approves the council's allotment, the minister may issue a Certificate of Possession to the recipient as evidence to the recipient's right to possess that land exclusively (s.20(2)). Where the minister does not approve an allotment, the recipient may instead receive from the minister a renewable Certificate of Occupation (s. 20(5)). Where a person who is removed from lawful possession has made permanent improvements, that person may be paid compensation (s. 23).

[35] A First Nation member who is lawfully in possession of reserve land may, with the approval of the minister (s. 24), transfer his right to possession to the band or to another band member.

[36] A First Nation member who ceases to reside on a reserve may transfer to the band or another member his right of possession (s. 25(1)). If he does not transfer it within a time limit, the right of possession reverts to the band, subject to payment of compensation for permanent improvements (s. 25(2)).

[37] Neither a First Nation band nor any of its members may validly authorize anyone except a member of that First Nation to possess, occupy, use, reside upon or otherwise exercise rights on the band's reserve. The only way in which a non-First Nation member can validly use or occupy reserve land is by a permit issued pursuant to s. 28 of the *Indian Act*, a lease from the federal minister at the request of an Indian

lawfully in possession, or a ministerial direction authorizing a surviving spouse or common-law partner to occupy the reserve land that the deceased member occupied at the time of his or her death under s. 48 of the *Indian Act*.

[38] Purported transfers of possessory interests in reserve land, that do not confirm with *Indian Act* requirements, are not valid.

[39] In 1996, the federal Crown and several First Nations signed a Framework Agreement prescribing a regime for reserve land management that was an alternative to the default arrangement in the *Indian Act*. The FNLMA ratified the Framework Agreement and gave it legal effect. Participation in the alternative land management regime is open to any First Nation that chooses to sign the Framework Agreement.

[40] The FNLMA land regime comes into effect in respect of a First Nation and its reserve land upon preparation of a **land code**, negotiation of an agreement with the federal Crown, verification that the proposed land code and community approval process complies with FNLMA, and community approval. To be eligible for verification, the land code must include procedures that govern transfer of First Nation land by succession or testamentary disposition, rules to govern the First Nation when granting or expropriating rights or interests in reserve lands, and specification of a forum to resolve disputes respecting rights or interests in reserve lands. Once a land code is in force, the participating First Nation must enact rules and procedures for the use, occupation and possession of lands subject to the land code and for the division of interests or rights in lands on marriage breakdown.

[41] Several provisions of the *Indian Act* cease to apply to a First Nation when the **land code** comes into effect. These include the prohibition on granting non-band-member's rights or interests on reserve lands, and the requirement for federal approval of acquisitions, by inheritance or purchase from an estate, of rights of possession or occupation of reserve lands.

[42] Matters relating to wills and estates generally come within the province's exclusive constitutional authority over "property and civil rights in the province"; however, the federal *Indian Act* contains provisions dealing with the disposition of a First Nation member's property on death and with wills made by First Nation members. The Supreme Court of Canada has held these provisions to be constitutionally valid exercises of federal legislative authority.

[43] Sections 42 to 48 of the *Indian Act* confer on the minister jurisdiction over "matters and causes testamentary", including the carrying out of the terms of a deceased member's will and the appointment of an executor.

[44] While the *Indian Act* confirms that statutory Indians may devise and bequeath their property by will, the minister may declare void all or any part of a will on grounds which include: the terms of the will would impose hardship on anyone for whom the testator had a responsibility to provide (s. 45(1)(c)), or the will purports to dispose of reserve land in a manner contrary to the *Indian Act* or the interests of the First Nation band (s. 45(1)(d)).

[45] Section 48 of the *Indian Act* governs the disposition of estates of First Nation members who at the time of death were residents on a reserve and have no will or whose will is declared void. The *Act* provides for the disposition of the estate and includes the authority to direct that the surviving spouse has the right to occupy any reserve lands that were occupied by the deceased at the time of death (s. 48(3)(b)).

The FHR

[46] The FHR authorizes First Nations to make laws respecting the use, occupation and possession of family homes on reserves, and the division of the value of, and compensation for, any interests or rights held by spouses or common-law partners in structures and lands on reserve lands during a conjugal relationship, when the relationship breaks down or on the death of a spouse or common-law partner, where at least one of the spouses or common-law partners is an Indian or First Nation band member.

[47] The provisions authorizing such laws came into effect on December 16, 2013.

[48] The FHR also includes detailed "Provisional Federal Rules" ("Rules") intended to govern First Nation communities that have not enacted matrimonial property laws of their own. These Rules came into effect on December 16, 2014. They apply only to First Nations that have not yet enacted matrimonial property rules under the FHR. Any validly enacted First Nation laws oust the whole of the provisional federal rules in respect of that First Nation.

[49] If a First Nation has signed a self-government agreement with the federal government, under which it has power to manage its reserve lands, the Rules do not apply, even if the First Nation has not enacted matrimonial property laws of its own, unless the federal minister declares that the Rules apply to that First Nation.

[50] A First Nation enrolled under the FNLMA can oust the application of all the Rules by bringing into effect a land code, separate matrimonial property laws under that *Act*, or matrimonial property laws under the FHR.

[51] The purpose and application of the FHR is set out in ss. 4, 5 and 6. The sections read:

> **4.** 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.
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> **5.** 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*.
>
> **6.** This Act applies to spouses or common-law partners only if at least one of them is a First Nation member or an Indian.

[52] Sections 7 to 11 authorize First Nations (defined as *Indian Act* bands) to enact First Nation laws 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 spouses in or to structures and lands on its reserves, that apply during a conjugal relationship, when that relationship breaks down or on the death of a spouse or common-law partner.

[53] The laws must receive community approval and are effective when so approved.

[54] Sections 12 to 52 set out the Rules. They are a detailed scheme and set of procedures for the determination of rights of occupation of family homes on reserves on separation, and on the death of one of the partners.

[55] The FHR specifically identifies when and how these rules apply to First Nations who have adopted a land code pursuant to FNLMA, and to First Nations who manage reserves under self-government agreements with the federal

government. The FHR refers to the *Indian Act* but does not expressly state that it modifies or amends the provisions of the *Indian Act* that relate to interests or rights in reserve lands that are occupied as family homes or to other matrimonial interests or rights.

[56] It is agreed that AVFN has not entered a self-government agreement with the federal government, nor enrolled under FNLMA. It is not contested that the Rules apply to the Cambridge AVFN reserve.

[57] The Rules can be broken down into three parts:

a) ss. 13 to 27 deal with the entitlement of each spouse to occupancy of the family home during the conjugal relationship, the procedure to grant exclusive occupation through an emergency protection order in the event of domestic violence, and procedures to grant exclusive occupation on the separation of spouses and common-law partners, or to the surviving partner upon the death of one of them.

b) ss. 28 to 40 deal with the determination of the value of each spouse's interests and rights to the family home, and other matrimonial interests and rights, upon separation either during the lifetime of both partners or on the death of one of the spouses.

c) ss. 41 to 52 deal with the conduct of proceedings to determine rights and interests, the entitlement to notice to the affected First Nation and other affected persons and participation in the process, and the enforcement of orders resulting from process.

[58] Of particular relevance to the application before this court are s. 21, dealing with an application by a survivor for an order for exclusive occupation of the family home upon death of her partner, and ss. 34 to 40, respecting the determination of the value of matrimonial interests or rights on a death of a spouse and right to compensation.

[59] Section 21 reads:

> **21.** (1) 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.
>
> (2) 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).

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

[60] Section 34(1) states:

34. (1) 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).

[61] Section 34(3) to (5) applies to surviving 'non-members', such as the applicant in this case, and reads:

(3) 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.

(4) 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.

(5) 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.

(6) 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.

[62] Section 36 reads:

> **36.** (1) 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
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> (*a*) determining the amount payable to the survivor; and
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> (*b*) providing that the amount payable to the survivor be settled by
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> (i) payment of the amount in a lump sum,
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> (ii) payment of the amount by installments,
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> (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).

The Evidence

[63] The essential facts are not in dispute. They are contained in the affidavits of the applicant, her two sons, the current Director of Operations for AVFN and Katrina Toney, one of Lawrence Toney's daughters from his first marriage. There was no cross-examination on the affidavits.

[64] Lawrence Leo Toney, a member and resident of AVFN Cambridge reserve, died on July 9, 2016.

[65] He was married twice:

a) He married Connie Glover, who was not an Indian or member of AVFN. They had three children, born in 1978, 1980 and 1982. They separated, and Ms. Glover left the reserve with the children in or about 1982.

b) He commenced cohabitating with the applicant Marlene Toney in 1986 and they married in 1987. Marlene Toney is not an Indian or member of AVFN. They had two sons who are members of AVFN. One son lives on the Cambridge reserve and the other lives nearby.

[66] Sometime in 1978 or 1979, Indian and Northern Affairs gave AVFN about $23,000.00 towards the cost of building a 24 x 36 bungalow on Lot 1-1 on the reserve. Ms. Glover resided with their first three children in that residence until the early 1980s. Marlene Toney, the applicant, has resided in the residence with Lawrence Toney, and since his death, alone, since 1986.

[67] Lawrence Toney was chief of AVFN in the 1990s and Ms. Toney was the band manager for about two years until 1993, when she was diagnosed with multiple sclerosis. Thereafter, she was active within the reserve community until her health deteriorated.

[68] A health practitioner comes to her home twice a week to give assistance with needles and catheters. A friend provides regular, day-to-day assistance and maintenance in the home. Her nearby sons regularly assist her to maintain the residence.

[69] Since Lawrence Toney's death, the applicant's only income is her disability pension and the deceased's Canada Pension, in the amount of $772.00 per month. She will receive survivor benefits when she turns 60. She is presently 56 years old.

[70] On September 15, 2006, Lawrence Toney executed a Will naming the applicant as his executrix and sole beneficial. If she predeceased him, their son Blaine was to be executor and his assets were left to their two sons in equal shares.

[71] Pursuant to ss. 45 and 43(a) of the *Indian Act*, the Will was approved by the Department on September 27, 2016. Advertisement for creditors and potential heirs, as required by the *Indian Act*, was given on September 19, 2016.

[72] Lawrence Toney's estate consists primarily of his interest in the matrimonial home on Lot 1-1 and a Certificate of Possession for Lot 15.

[73] Lawrence Toney acquired a Certificate of Possession for Lot 1-1 on December 9, 1998. On October 27, 2000, he paid $3,000.00, and received a Certificate of Possession, for nearby Lot 15.

[74] In 1978, the Department gave AVFN $23,000.00 to build a home on Lot 1-1. It was a 24 x 36 bungalow. When Marlene Toney first moved in, it was a shell. It had electricity, but no light switch covers nor proper septic tank. She and Lawrence Toney made several expansions, alterations and improvements to the matrimonial home on Lot 1-1. The matrimonial home has doubled in size to 1,600 square feet plus a deck of 570 square feet, a car port of 775 square feet, a large garage of 1,500 square feet and a small garage of 480 square feet.

[75] Besides the $23,000.00 advanced by Indian Affairs to AVFN to build the bungalow in 1978 and a $5,000.00 forgivable RRAP loan in 1995, Marlene Toney and the late Lawrence Toney jointly spent more than $140,000.00 on improvements

to the residence. Evidence of that included receipts for materials and labour totalling $118,000.00 as well as evidence of the following additional work, for which receipts were not available:

a) Carpeting, the portion of the deck, patio and kitchen doors, 1986 to 1993

b) Construction of the rec room in the basement, 1993

c) Addition of bedrooms, 1996

[76] Some of this money was the result of loans taken out, and repaid, by Marlene and Lawrence Toney with the Royal Bank.

[77] For purpose of municipal taxation, it is assessed as residential exempt in the amount of $73,900.00. Marlene Toney and the Estate of Lawrence Toney carry replacement insurance on the residence in the amount of $400,000.00.

[78] The photographs of the residence show that it is an immaculate, well-maintained residence.

[79] The applicant has not produced a real estate appraisal of the market value of the property. Counsel represents that by reason of the very limited number of persons who could qualify to acquire the Certificate of Possession - status Indians who are members of AVFN, no fair market value appraisal could be obtained.

[80] It is Marlene Toney's evidence that if she is not successful in obtaining exclusive occupation of the matrimonial home, pursuant to s. 21 of the FHR, that she has no alternative accommodations or means to acquire alternative accommodations. Effectively, she will become dependent on welfare from the Nova Scotia Department of Community Services.

[81] A representative of the Department has indicated that they wish to convey the Certificates of Possession held in the name of Lawrence Toney to all the heirs of Lawrence Toney who are eligible to hold them. They consider all of Lawrence Toney's children as eligible, notwithstanding the provisions of Lawrence Toney's Will. Marlene Toney's fear is that the property will be sold, and she will have no place to live.

[82] AVFN filed a Statement of View confirming that AVFN is a Band under the *Indian Act*, comprising of two reserves that are set aside for the benefit and use of Band members. The AVFN Cambridge reserve is the main populated reserve,

consisting of 59 hectares. The St. Croix reserve consists of 126 hectares and is not populated year-round. The population of AVFN is 291 members, both on and off reserve. Band money was used to build the original residence occupied by Lawrence and Marlene Toney as their matrimonial home. Band-owned houses have never been allotted to non-band members and revenue from the federal government for housing and other needs is based on the number of AVFN band members. AVFN receives no funding for non-band members.

[83] Interests, such as the Certificates of Possession held by the late Lawrence Toney, are administered by the Department. AVFN relies upon the Department to administer, safeguard and protect its interests. AVFN cannot do anything with its lands without the approval of the Department.

[84] As a fiduciary, the federal Crown is heavily involved with and has the final say in any circumstance where the reserve land may be impacted. The Department has already approved the Will of Lawrence Toney, that included a clause giving a property interest to a non-Band member. At the same time, the Department has indicated that it will disburse the interest in the property as if there was no will.

[85] The Statement of View provides context with respect to the relationship between AVFN and the federal Crown in respect of this application.

[86] In his affidavit, Gerald Toney, Director of Operations for AVFN, confirms that the matrimonial home in question is located on reserve land of AVFN and that Lawrence Toney held a Certificate of Possession for it. He confirms that no non-band member has been issued a house by AVFN. He states that like most reserves across Canada, AVFN has a shortage of houses and there are approximately 25 families on a waiting list for housing. AVFN is unsure of how or when the Certificate of Possession respecting the matrimonial home will be dealt with by the federal government and the impact it may have on the residence that was allocated to Lawrence Toney.

[87] Katrina Toney filed an affidavit stating that she has been on the waiting list for housing on the Cambridge reserve for almost 20 years. Contrary to Marlene Toney's affidavits, she says the "tone" of Marlene Toney's relationship with her sisters and herself is not friendly.

[88] Her position is that if AVFN does not issue an Occupancy Permit to any of her father's children in need of housing who are eligible, she would support an

occupancy determined by AVFN to any member in the priority of the waiting list for reserve housing.

[89] In a supplementary affidavit, Gerald Toney confirmed the chronic shortage housing on the reserve and that Katrina and Laura Toney are currently among the 25 families on the waiting list. AVFN does not have records as to the date when they first applied for housing. Their applications would be processed in the normal course, according to policies of AVFN.

[90] Finally, Gerald Toney stated that the current practice of the council for AVFN is not to approve any new Certificates of Possession for property on the reserve. He is not aware of any instance, during his time, in which homes or lands occupied pursuant to a Certificate of Possession on reserve land were transferred for valuable consideration within the AVFN community.

How FHR affects practices, traditions and customs, and First Nation property laws

[91] Context for the analysis of the factors for determining whether to grant exclusive occupation and a s. 34 award is an understanding of how the FHR affects practices, traditions, customs and existing aboriginal property laws. How the FHR affects First Nation property laws such as the *Indian Act* and FNLMA is a matter of statutory interpretation. I incorporate my analytical approach to statutory interpretation from *Slaunwhite v Keizer,* 2010 NSSC 453, at paras 14 to 28 and 33 to 53.

[92] The *Indian Act* is a long-standing statute of general application. Brian Crane, Robert Mainville, and Martin W. Mason, *First Nations Governance Law*, (Markham: LexisNexis, 2006) describe it as ‘cradle to the grave’ legislation. As noted earlier, it contains provisions that relate to reserve lands generally. They include provisions that relate to lands and structures occupied as a family home.

[93] The FHR is a subsequent statute to both the *Indian Act* and FNLMA. It deals specifically with interests and rights in family homes on reserves on separation and death.

[94] As noted by Ruth Sullivan, *Sullivan on the Construction of Statutes*, Sixth Edition (Markham: LexisNexis, 2014), c. 13, courts look at the ‘statute book as a whole’ for context. The statute book consists of the complete text of all related legislation. Courts apply presumptions of coherence and consistency. Parliament is

presumed to know its own statute book and to draft each new provision or statute having regard to the substantive law embodied in the existing legislation. Effectively, related statutes fit together to form a coherent and workable scheme.

[95] The **Backgrounder** to the FHR, published on December 16, 2014, by Indigenous and Northern Affairs Canada, and the **Legislative Summary of Bill S-2**, published by the Library of Parliament Research Publications on January 24, 2012, provides detailed context to the FHR – the reason for it and the lengthy and extensive consultation process that lead to it receiving Royal Assent of the fourth iteration in June 2013. The **Backgrounder** reads in part as follows:

> For most Canadian individuals undergoing a breakdown of their marriage or common-law relationship, or on the death of a spouse or common-law partner, there is legal protection to ensure that the matrimonial real property assets are distributed equitably. Such was not the case for couples living on reserves governed by the *Indian Act*. For them, relationship breakdown or the death of a spouse or common-law partner has too often meant insecurity, financial difficulties or homelessness.
>
> The reason: the *Indian Act* does not address the issue of matrimonial real property rights and as a result of the Supreme Court of Canada decision *Derrickson* v. *Derrickson*, elements of provincial/territorial laws relating to this issue cannot be applied on reserves. The result was a legislative gap was created that affected everyone living on reserves, particularly women and children.
>
> The [FHR] ensures that people living on reserves have similar protections and rights as other Canadians.

[96] The uniqueness of the FHR is that the legislation recognizes and authorizes interests and rights in reserve lands to spouses and common-law partners, even if the beneficiary of the interest or right is not an Indian or First Nation band member.

[97] Clearly when Parliament passed the FHR and recognized the matrimonial status of both partners, irrespective of whether both were First Nation members or Indians, it was an intentional modification to the related general provisions of the *Indian Act*.

[98] Among the submissions to parliamentary committees during the lengthy consultative process was the submission by the National Aboriginal Law and Family Sections of the Canadian Bar Association dated May 2010. The submission identified clearly the balancing of the protection of the collective right and interests of bands in their reserve lands with the protection of individual rights of spouses to matrimonial property located on reserves. The submission clearly identifies that the

proposed bill (since enacted as FHR) overrode the pith and substance of ss. 18, 20, 28, 30 and 31 of the *Indian Act*. The submission read in part:

> Bill S-4 appears to balance two legitimate policy objectives:
>
> > protection of individual rights of spouses and common-law partners (in particular women) to matrimonial property located on reserve; and
> >
> > protection of the collective rights and interests of bands in their reserve lands.
>
> In attempting this balance, Bill S-4 could create long term rights to, and interests in, reserve lands for non-band members and non-aboriginal people. …
>
> These objectives are more than merely policy considerations; they are each rooted in concrete laws and legal principles. The first is based on existing legislation such as the federal *Divorce Act* and equality provisions including sections 15 and 18 of the *Charter*. The second is governed by the *Indian Act* and section 35 of the *Constitution Act, 1982*.
>
> …
>
> The rule of inalienability is a necessary bulwark against eroding Band ownership in reserve lands. Bill S-4 attempts to find a balance between that rule and protecting the family obligations toward dependent children and spouses of Band members, whether or not they are themselves Band members. Both domestic law and international treaties insist that inalienability cannot be an excuse for disregarding the interest of children or married or common law partners, but neither can domestic rights become the thread that unravels the fabric of Band ownership.

[99] The principles of statute interpretation mandate that the court read these provisions harmoniously, remedially, and so as to promote their purpose.

[100] Section 35(1) of the *Constitution Act (1982)* recognizes existing aboriginal and treaty rights, and s. 35(4) guarantees these rights equally to male and female persons. Section 35(4) is a rebuke of the European colonial patriarchal value system imposed on aboriginal peoples by colonial settlers in the 1800's through legislation such as the *Indian Act*. The provisional rules of FHR that give rights and protection to spouses and partners on separation and death create no conflict with gender equality rights when the affected persons are all First Nations people.

[101] The court's analysis would be more straight-forward if the provisions related only to matrices where both spouses were Indians or First Nation band members. The constitutional dichotomy between protection and promotion of gender equality

(*Charter*, ss. 15 and 28), and s. 25 of the *Charter*, an interpretive provision which makes clear that *Charter* rights shall not be construed so as to abrogate or derogate from any aboriginal and treaty rights, which existing rights are protected and promoted in s. 35 of the *Constitution Act* (1982), was not addressed by the parties in this case.

[102] To attempt to understand the import of these constitutional provisions, and their impact upon this decision, I read Guy Regimbald & Dwight Newman, *The Law of the Canadian Constitution* (Toronto: LexisNexis, 2017) c. 30, especially ¶¶ 30.169-30.177; Errol Mendes & Stephane Beaulac, eds., Canadian Charter of Rights and Freedoms, 5th ed. (Markham: LexisNexis, 2013), c. 24 by Bradford W. Morse, *Aboriginal and Treaty Rights in Canada*; James Youngblood Henderson, Marjorie L. Benson & Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000); Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property*, 3rd ed. (Toronto: Canada Law Book, 2013, loose-leaf) c. 32:Peter W. Hogg, *Constitutional Law in Canada* (Toronto: Carswell, loose-leaf) c. 28 and 36, especially ¶¶ 28.1, 28.5, 28.7-28.9 and 36.8; and a not-up-to-date edition of Jack Woodward, *Native Law* (Toronto: Carswell, loose-leaf) c. 2, 6, and 10.

[103] In order to be an aboriginal right protected by s. 35(1), the right must be integral to the distinctive culture of the community. Not all First Nation communities shared identical cultural values. The provisional rules appear to reflect the cultural norms of most First Nations (as I abstract them from the Royal Commission Report).

[104] "Even in the case of an established right, … statutes … that impinge or affect the exercise of aboriginal rights may, however, be valid if they meet the test for justifying an interference with a right recognized and affirmed under section 35(1)… If a prima facie interference is found, the analysis moves to the issue of justification … The first issue is whether there is a valid legislative objective. …[if so] the second part of the analysis determines whether the limit or infringement is justified". (Regimbald, ¶¶ 30.169-30.173)

[105] An aboriginal right to title is not absolute, but any infringement must be in furtherance of a compelling and substantial legislative objective and it must be consistent with the Crown's fiduciary duty. (Regimbald, ¶¶30.174-175)

[106] I conclude that:

(a) the FHR respects the principle of non-alienation of reserve lands. The Rules do not lead to non-Indians or non-band members acquiring permanent or

tangible interests in reserve lands pursuant to s. 21, or receiving compensation for the value of reserve lands – unlike Indians or band members, pursuant to s. 34.

(b) The FHR balances the equality rights of spouses under ss. 15 and 28 of the *Charter* with recognition of aboriginal and treaty rights under s. 35 of the *Constitution Act (1982).*

(c) The property provisions of the *Indian Act* and related property legislation are not helpful in` this analysis as they 'completely disregard traditional First Nations' core values'.

(d) In pre-colonial times, women appeared to have played, in most First Nations, an important and equal role in all aspects of tribal life and governance. Some were matrilineal societies.

(e) Interpretation of the FHR in a way that recognizes the role and status of spouses of both genders, whether or not they are members of the band, is not inconsistent with what appears to have been aboriginal values in pre-colonial times.

(f) Gender equality is a universal value that transcends nationality or race. In this context, the FHR promotes and protects a compelling and substantial legislative objective.

Section 21 Analysis

[107] Section 21(3) provides that the court must give attention to, among other things, 11 enumerated considerations in exercising its judicial discretion to determine:

a) whether to grant exclusive occupation; and, if so,

b) for how long; and,

c) on what conditions.

[108] These are my conclusions respecting each of the s. 21(3) considerations:

(*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;

[109] No children habitually reside in the family home. This factor does not support an order for exclusive occupation.

(*b*) the terms of the will;

[110] The deceased left his entire estate, which consisted primarily of a Certificate of Possession to the family home, to the applicant. This is a reflection as to his intent as to who would benefit from the family home. The applicant recognized that she cannot, by law, receive either of the Certificate of Possessions and states in one of her affidavits that she intends that the Estate would assign the Certificate of Possession to their two sons. However, in submissions, counsel advise that the Department intends that all five of the deceased's children will receive the deceased's interest in the Certificates of Possession.

[111] If that occurs, the applicant will not receive consent to continue residing in the family home by the majority of those with an interest in the Certificate of Possession for the land on which the family home sits. It further means that whatever value this court puts on the applicant's interest in the family home, which interest would be payable by the Estate as the present holder of the Certificate of Possession, would never be paid or collectible.

[112] This consideration strongly favors issuance of an order for exclusive occupation.

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

[113] There is no written agreement between the spouses. The Will and the fact that all their assets, except the two Certificates of Possession, were held jointly reflects an intent that the applicant would benefit from the Certificate of Possession. It was the applicant's and deceased's joint funds and efforts into permanent improvements in the family home, worth at least $140,000.00, that created whatever value exists: said differently, their marriage was a joint venture.

[114] This factor favors issuance of an order for exclusive occupation.

(*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;

[115] In their Statement of Views, and the two affidavits of the Director of Operations, AVFN established that, as with almost all reserves in Canada, there is a great need for, and a significant shortage of, housing on this reserve. It is a small reserve with 25 names on the waiting list for homes. AVFN has no independent financial means to build new housing, and the federal government has not recently made funding available for this purpose.

[116] AVFN submits that any order for exclusive occupation should be limited to a transition period of 12 months.

[117] Not stated by AVFN was that there is only one person residing in a well-kept home, in the midst of larger families in chronic need of shelter. The aboriginal tradition of communal sharing and the utilitarian theory would support maximizing utility for the well-being of the greater numbers.

[118] This factor strongly favors not issuing an order for exclusive possession.

(*e*) the medical condition of the survivor;

[119] In her first affidavit of May 2, 2017, the applicant states:

> 16. My late husband was Chief of the band in the early 90s and I was band Manager for 2 years. When I was diagnosed with MS, I stepped down and worked in the Social Development Department until my MS became too bad.
>
> …
>
> 18. Healthwise, I have good days and bad days. The band has a health centre and a health care practitioner comes to my home [twice] per week as I need assistance with needles and a catheter.
>
> …
>
> 20. I have an income of about $772.50 per month from my disability pension and my late husband's CPP. I will receive survivor's benefits when I turn 60.
>
> 21. I have help from a friend to take care of the regular day to day maintenance of the home and my sons help me when necessary (plowing in the winter, mowing etc). Our son Daniel lives on the Reserve and Blaine lives in Aylesford. Our niece

> lives across the road from me and helps out with outdoor work from time to time as well.

[120] Before his death, the deceased and the applicant paid for renovations to the residence to accommodate the applicant's disabilities. The applicant's serious health condition, in respect of which she is assisted by family, neighbours and the band's health centre, as well as the fact that the residence has been adapted to her specific needs is a factor favoring issuance an order of exclusive occupation.

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

[121] The applicant is about 56. She has resided in the family home since 1986 or about the age of 24. This long period of occupation favours issuance of an order for exclusive occupation for a lengthy period.

(g) the fact that the family home is the only property of significant value in the estate;

[122] Other than the contents of the home, the family home, situate upon lands for which the deceased held a Certificate of Possession, is the only significant asset of the Estate.

[123] AVFN in its submissions respecting the s. 34 application represents that there is little value in the family home situate on the lands for which the deceased held a Certificate of Possession. Stacey L. MacTaggart, "Lessons From History: The Recent Applicability of Matrimonial Property and Human Rights Legislation on Reserve Lands in Canada", (2015) UWO J Leg Stud, Article 3, at p. 10 writes:

> In light of the fact that some reserves face severe housing shortages and high poverty rates, there are many potential barriers to enforcing the payment of half of the value of the interest in the family home, even if it is court-ordered.

[124] In reality, even the interest of the deceased in the family residence, to the extent of the Estate's interest, has little real value. In the s. 34 analysis, this court assigns a value; but the court holds no illusion that value assigned will be realized.

[125] The applicant is without the means to care for herself without occupancy of the family home and the existing support that she receives from her family and neighbours in the band community.

[126] This factor strongly supports issuance of an order for exclusive occupation.

(h) the interests of any person who holds or will hold an interest or right in or to the family home;

[127] If the submission to the effect that the federal government will likely assign the deceased's Certificate of Possession for the lands under the family home to all his children is correct, then the fact that the applicant's two sons consent to the applicant remaining in the residence is irrelevant.

[128] Katrina Toney, the youngest daughter of the deceased and his first wife, filed an affidavit with the court. She was born in 1982 and moved away with her mother shortly after her birth. For a period during her teens, she resided with her oldest sister and an uncle on the reserve. Otherwise she has lived away from the community and at present lives in Bathurst, New Brunswick. She says she has applied, and is on the waiting list, for housing on the Cambridge Reserve. She says an older sister is presently incarcerated in HRM; she is told by her mother that this sister needs housing. She objects to the issuance of an order for exclusive occupation.

[129] Based on this evidence, it is apparent that the applicant will not receive the consent of the holder of the Certificate of Possession to the land upon which the family home is situate to continue to reside in the home.

[130] The evidence of the various relationships of those entitled to the Certificate of Possession and their connection go the Cambridge Reserve, does not detract from the factors favouring issuance of an order for exclusive possession to the applicant at this time.

(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;

[131] This appears to relate to a person other than the applicant. It is not relevant to this case.

(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

[132] There are no persons residing in the home other than the applicant. This factor is not relevant.

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

[133] As identified in Item (h) above, the only person who received notice and made a presentation to the court was Katrina Toney.

Section 21(3) mandates the court consider the above 11 considerations "among other things".

[134] Counsel for AVFN frankly acknowledged that if the applicant had been an Indian or AVFN band member, that its position may be different.

[135] I have concluded that this fact, in the context of parliament's legislative purpose in enacting the FHR, should not influence this decision.

[136] A factor that I have considered is that while the original cost of the bungalow of $23,000.00 was paid for by a grant by the federal government in the 1970s, the present condition of the residence is very substantially the result of the personal investment, through the joint efforts, resources and monies of the deceased and the applicant over many years. They have spent at least $140,000.00 in permanent improvements. Some of these expenditures were for the purpose of making the home more accessible to the applicant. AVFN submits that the fact that the applicant and deceased voluntarily made improvements over 30 years is not adequate reason to grant the applicant exclusive occupation. I disagree. This fact favors issuance of an order for exclusive occupation.

[137] The applicant is 56. She has no other place to live and is physically not well, with her needs being provided for within the community and in the family home she has occupied for 32 years.

[138] The totality of the circumstances dictates that the only fair outcome is to grant an order for exclusive occupation.

[139] Section 21(6) provides for this order to be varied or revoked if there is a material change in circumstances.

[140] Material changes in circumstances would include: the applicant re-partnering and the partner moving in, or the applicant's health requiring her to relocate to a care facility, or her failure to maintain the home and prevent waste. There are no doubt other possible material changes.

[141] I make it a condition of the order for exclusive occupation that the applicant not cohabitate with anyone during her occupation, other than with one of her children or grandchildren, and that she maintain the home and not commit waste.

[142] Subject to these conditions, the court makes the order for exclusive occupation indefinite.

Section 34 Analysis

[143] Section 34 of the FHR deals with compensation for property interest on reserve lands. It differs materially from the discretionary relief available pursuant to s. 21. Under s. 34, the survivor is presumptive entitled to the determination of value under four headings and payment of compensation for them.

[144] First, the survivor is entitled to one half of the value, on the date of the deceased's death, of the deceased's interest or right in the family home. This applies whether the survivor is an Indian or a member of the First Nation band, or not. (s. 34(1))

[145] The second, third and fourth amounts relate to structures or lands in which the deceased held an interest, other than the family home. There is a difference between the rights of survivors who are members of the First Nation and those who are not. The applicant is not a member.

[146] Second, the non-member survivor is entitled to one half of the value on the date of the deceased's death of any matrimonial interests or rights in any structures on reserves (but not the land itself), other than the family home. (s. 34(3)(a))

[147] Third, the non-member survivor is entitled to the greater of:

i. one half of the appreciation of value between the date that the conjugal relationship commenced and the date of the deceased's death in structures (but not lands) other than the family home, and

ii. the difference between the payments the survivor made to improvements to the structures, less the amount of debts and liability outstanding in respect of those payments on the date of death. (s. 34(3)(b))

[148] Fourth, the non-member survivor is entitled to the difference between the payments she made from the date the conjugal relationship commenced to the date of the deceased's death towards improvements on the lands and structures on a reserve, and any debts or liabilities outstanding with respect to those payments. The lands and structures in respect of which this entitlement applies are lands on reserve in which the deceased held a "matrimonial interest or right", which term is defined in s. 2(1) of the FHR as excluding the family home. (s. 34(3)(c))

[149] Section 34(4) provides that the "value of the interest or rights" is the difference between the amount a buyer would reasonably be expected to pay for interests or rights that are comparable, less any debts or liabilities outstanding in respect of the acquisition, improvement or maintenance of the lands and structures.

[150] Section 34(5) provides that, despite s. 34(4), the survivor and the executor of his estate may agree on the value "on any other basis".

[151] The applicant in this proceeding is also the executor of the deceased's Estate. The applicant states that because the reserve is so small, with so few potential purchasers, that she has been unable to obtain a fair market appraisal.

[152] She provides evidence that the family home is insured on a replacement basis for $400,000.00. She submits that she, as the survivor and executor of the Estate, choose to use the insurance replacement cost of the family home as the value of the interest and rights held by the deceased in the family home at the date of his death. She asks the court to fix her entitlement to compensation under s. 34(3)(a) at $200,000.00.

[153] AVFN submits that the replacement value is not an appropriate reflection of the value of the deceased's interest or right in the family home. It argues that value is limited by the ability of the estate to raise funds to compensate her because the home cannot be mortgaged, and it can only be transferred to other members of that First Nation – "a very small and relatively economically disadvantaged community".

[154] AVFN submits that the additions, renovations and improvements completed by the applicant and the deceased over the years, which I find cost them at least $140,000.00, have not increased the value of the family home to $400,000.00. AVFN refers this court to *Hempworth v Hempworth*, 2012 NSCA 117, a pre-FHR decision, wherein the court held that valuation based on replacement cost constitute a windfall, as the parties in that proceeding did not pay for the cost of materials, infrastructure and labour.

[155] AVFN notes that the family home was valued in 2017 for municipal tax assessment purposes at $73,900.00.

[156] I agree with AVFN that replacement cost, or more accurately the replacement cost fixed in the home insurance policy, is not an appropriate basis to determine the value for the purposes of this proceeding.

[157] Nor, however, do I accept that the municipal tax assessment is a reliable, fair or appropriate basis of valuation. Counsel acknowledge that the family home is exempt from municipal taxation; therefore, there would be no purpose to test the assessment one way or the other. More importantly, there is no evidence before the court as to the basis for the municipal assessment or its relationship to fair market value.

[158] Section 36(1)(a) of the FHR authorizes this court to determine the amount payable.

[159] The applicant has established that she and the deceased jointly, over 30 years, spent upwards of $140,000.00 of their own money, some borrowed and repaid, to make substantial additions to the first bungalow and to make substantial, permanent improvements and renovations to the family home.

[160] The most reliable, fair and appropriate value of the interest or right that was held by the deceased on the date of his death in the family home, inclusive of his interest in the Certificate of Possession, is $140,000.00.

[161] An award of $70,000.00, an amount equal to one-half the value of the deceased's interest in the family residence at the time of his death, is the appropriate value for the purpose of s. 34(3)(a). It is consistent with the purposes for which the FHR was enacted.

[162] On October 27, 2000, the deceased paid $3,000.00 for a Certificate of Possession for Lot 15 on the reserve. There is no evidence that any other monies were expended to build structures or to make improvements to Lot 15. There is no evidence that the lot appreciated in value since 2000. Therefore, there is no evidence upon which this court can determine a value and entitlement to compensation pursuant to s. 34(3)(a), (b) or (c) in respect of the deceased's Certificate of Possession for Lot 15.

[163] I will receive written submissions on costs, if the parties are unable to agree.

Warner, J.