Matrimonial Real Property, the FHRMIRA, & the Quebec Civil Code

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Matrimonial real property and the FHRMIRA

This chapter gives a brief overview of when and how First Nation family laws, the federal Family Homes on Reserves and Matrimonial Interests and Rights Act (FHRMIRA) and the Civil Code of Quebec (Quebec family law) apply to families who are members of and living in First Nation communities in Quebec.

Quebec family law in governed by the Civil Code. Quebec citizens adhere to the Civil Code for all matters concerning family homes, family land, children's care, family breakdowns, domestic violence, separation and other matters regarding couples and nuclear family units[1].

In other Canadian provinces and territories, family law is governed by the Family Law Act. Some provinces have transitioned to the Family Relations Act. Almost all of what is covered in this chapter also applies to couples on other provinces in the very same way, except the Civil Code is replaced with the Family Law Act.

The FHRMIRA applies when at least one member of the couple is a First Nation member (or Indian as defined by the Indian Act), and the couple is living on reserve. The FHRMIRA defines "couples" as two people unified by marriage or by common-law relationship.

It provides protections and rights to individuals regarding the family home, the land on which the home is built, other family assets, and other matrimonial interests and rights in the event of a breakdown of their conjugal relationship, and/or the death of a spouse. There are also Provisional Federal Rules, which are a part of the FHRMIRA, and which provide specific protections.

Before proceeding with clients' cases, it is very important to determine which part applies to your First Nation. And also, what the Indigenous statuses of your clients are: Are both partners of the couple members of the First Nation Community? Is only one of the two? Are children involved? There are many more considerations to look at if you read one. Hopefully this chapter will steer you in the right direction regarding which set of rules to abide by in any given case.

[1] Please note that the word "couple" and the word "family" are used interchangeably. Regarding issues that relate to family homes, matrimonial interests, family rights, mediation, separation of property, etc, it is assumed that a couple is/was a family, and that within a family, with or without children, there is/was a couple.

The FHRMIRA contains two main parts. You must determine which part applies to your First Nation

PART 1
First Nation Law Making Mechanism, Sections 7-11 of the Act, allow for communities to enact their own laws regarding matrimonial real property situated on their reserves.

PART 1 applies to

- First Nations that have enacted matrimonial real property laws under this Act.
- First Nations with a self-government agreement unless they have reserve land and opt into Provisional Federal Rules.
- First Nations with land codes in place under the First Nations Land Management Act (FNLMA) prior to Dec-16-2014
- First Nations without land codes in place who were on schedule to the FNLMA and received an extension until June-19-2016 before the PFR began to apply.

ABOVE/RIGHT - A comparison illustrating how Parts 1 and 2 of the FHRMIRA function

PART 2
Provisional Federal Rules (PFR) are in interim set of rules that provide specific protections to individuals living on reserve until a First Nation community establishes its own Matrimonial Real Property (MRP) law.

PART 2
Provisional Federal Rules automatically apply to all other First Nations with reserve land, except those listed on the left.

PFRs provide the following rights and protections

- Equal right to occupancy of the family home
- Requirement of spousal consent for the sale or disposal of the family home
- Emergency Protection Orders
- Exclusive Occupation Orders
- Entitlement of each member spouse or common-law partner to an equal division of the value of the family home and any other matrimonial interests or rights
- Order for the transfer of matrimonial real property between member spouse or common-law partners
- Requirement for spousal consent for any transfers or encumbrances of reserve land on which the family home is situated.

About the FHRMIRA

This much-needed Family Homes on Reserves and Matrimonial Interests and Rights Act contains a lot of common sense and is a more modern and equitable approach to matrimonial management and First Nations empowerment. It is a must-read if you deal regularly with family breakdowns, conflicts over property between separated couples, and matrimonial issues.

Section 7 of the FHRMIRA recognizes the power of First Nations (those Bands still under the Indian Act) to enact their own matrimonial property laws. This seems to be a recognition of power (not a delegation of power), which means that if a Band has its own family and matrimonial laws, then they would have to go

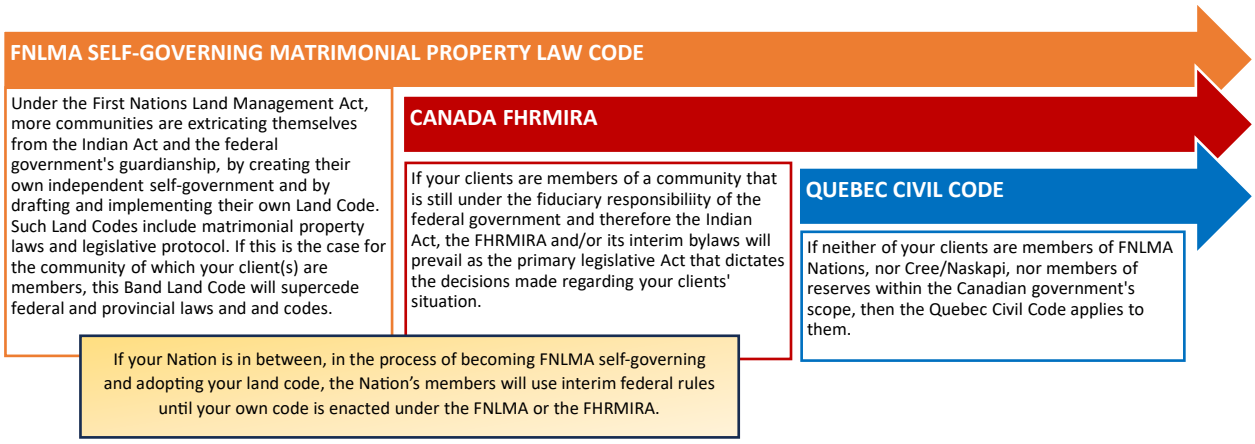
ahead to use them to their full extent. If a Band does not have such laws actively in place, the FHRMIRA and the provisional federal rules of the FHRMIRA would fill in. Provisional federal rules in the FHRMIRA (sections 12+) are designed for First Nations who are moving towards having their own matrimonial land laws.

Section 7 states that a First Nation has the power to enact laws regarding "the use, occupation and possession of family homes on its reserves and the division of the value of any interests or rights held by spouses or common-law partners in or to structure and lands on its reserves". The rules also apply to First Nations under the FNLMA (First Nations Land Management Act) but that almost goes without saying, since they are self-governing. An FNLMA First Nation managing their lands under their self-governing agreement may choose to adopt their own code, or to have the interim federal rules apply to them.

The Quebec Civil Code

In Quebec, first and foremost, if a spouse (or ex-spouse[2]) is an Indigenous person living "on reserve", then there are two other bodies of legislation that will apply to them first. For Indigenous families living "on reserve", the Quebec Civil Code is the last law that will apply for them. Where there are differences between the federal legislation (FHRMIRA) and Québec family law, the federal legislation will prevail.

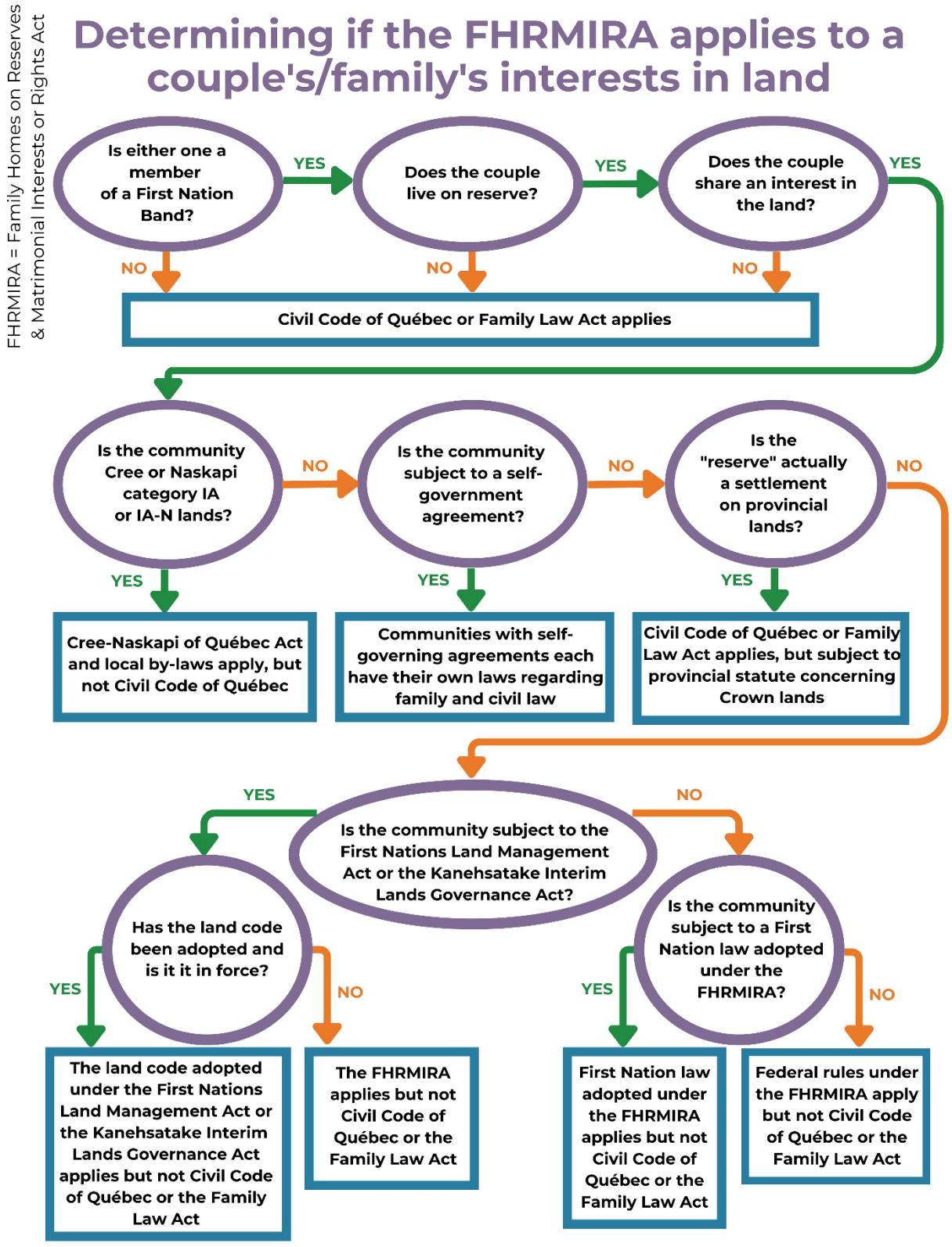
BELOW – A process chart showing which bodies of legislation prevail depending on a couple's community land laws



If neither people concerned are First Nation members, if the couple doesn't live on the reserve, if the land or home in question are not located within the community, then the Civil Code applies as it would to any non-Indigenous couple in Quebec.

[2] When the word spouse is used, it includes all genders, non-married couples (common-law) and it includes the notion of ex-spouse, and all degrees of separation in between. Further details regarding married people and common-law unions will be explored in this section.

BELOW – A flow chart showing the process to determine in the FHRMIRA applies to a couple's or family's interests in land



If a First Nation has its own Land Code, ideally the marital property sections are thorough, detailed and actively in force, which would mean neither reference to the FHRMIRA nor the Québec Civil Code would be needed.

Since many Nations do not have their own Land Code, the next best thing is the FHRMIRA. The FHRMIRA has been developed to address the unique political, cultural, and legal aspects that exist in First Nation communities. Moreover, The FHRMIRA provides First Nation reserve residents with more options for dealing with marital property issues than the Civil Code provides Québec residents with. The FHRMIRA was created with a lot of First Nations consultation and recognizes each Band's inherent pre-existing governance authority over itself. It is international law that governments recognize Indigenous Human Rights, including the right to self-determination, the right to self-government and the right to consultation, which makes the FHRMIRA the closest body of legislation to respect and adhere to Indigenous culture. That said, this right to self-government can only be fulfilled through negotiated agreements, and not all Bands have negotiated their Land Codes yet.

The Québec Civil Code applies only if and when the FHRMIRA and federal legislation do not apply if there are inconsistencies or gaps in legislative protocol. However, Québec laws may only apply as long as they do not conflict (in practical, operational ways) with the FHRMIRA. The FHRMIRA may have extensively covered the field of matrimonial law, the Quebec Civil Code may still apply if it can do so harmoniously with the FHRMIRA. For example, the Youth Protection Act of the Quebec (which often comes into play during matrimonial collapses) does not conflict with or frustrate the FHRMIRA, and therefore it can apply.

What about Section 88 of the Indian Act?

Delving a bit deeper, for those who may have heard other accounts, courts have seen provincial laws occasionally prevail over the Indian Act, using section 88 to justify their precedency, but provincial laws cannot prevail over the FHRMIRA or FHRMIRA Codes.

The Supreme Court's decision to amend section 88, to render provincial laws that impact First Nation lands inapplicable, and to oust the provincial laws altogether from Indigenous land management is still on hold. If they could amend section 88, as it has been encouraged by so many, the tug-of-war between federal and provincial entities would be put to rest. The Supreme Court of Canada has been stalling this decision since 2007.

Québec's particularities, how the FHRMIRA will be provided, and the role of Québec courts

Certificates of possession

Historically, Québec First Nations have used CPs (certificates of possession) as instruments to allocate property interests to band members. A certificate of possession was recognized as quasi-tenure right. Tenure means the legal right to live in a house or use a piece of property. Quasi means "almost as if".

De facto

Marriage means different things to different people, and it always will. The FHRMIRA defines "spouse" as "either of two individuals who have entered in good faith into a marriage that is voidable or void." I suspect that definition will change to become broader as time brings about new notions of committed relationships.

In Quebec, there are three types of conjugal relationships.

Married couples	Legally recognized by Quebec, specific matrimonial rules apply
Civil unions	Legally recognized by Quebec, specific matrimonial rules apply
De facto unions (aka conjoints-de-fait, aka common-law couples)	Not legally recognized in Quebec, in terms of matrimonial rights, law, and rules regarding separation: partners under this type of relationship are considered roommates Called "common-law" elsewhere in Canada, is sometimes legally recognized in some other Canadian provinces to certain degrees

Quebec leaves it up to couples within de facto relationships to decide how to negotiate their affairs including property during the relationship and in the event of a breakdown. This is on purpose to not impose legal status on people and to let them decide what conditions of relationship they want to have. While this type of freedom and autonomy is highly valued by Quebecers, it leaves little legal structure when emergency protection is needed or when shared property needs to be divided fairly in the heat of conflict. That said, being a de facto couple, or a common-law couple, means people can choose to be in committed relationships without the government slapping a legal label on them and binding them to marital obligations.

Family patrimony

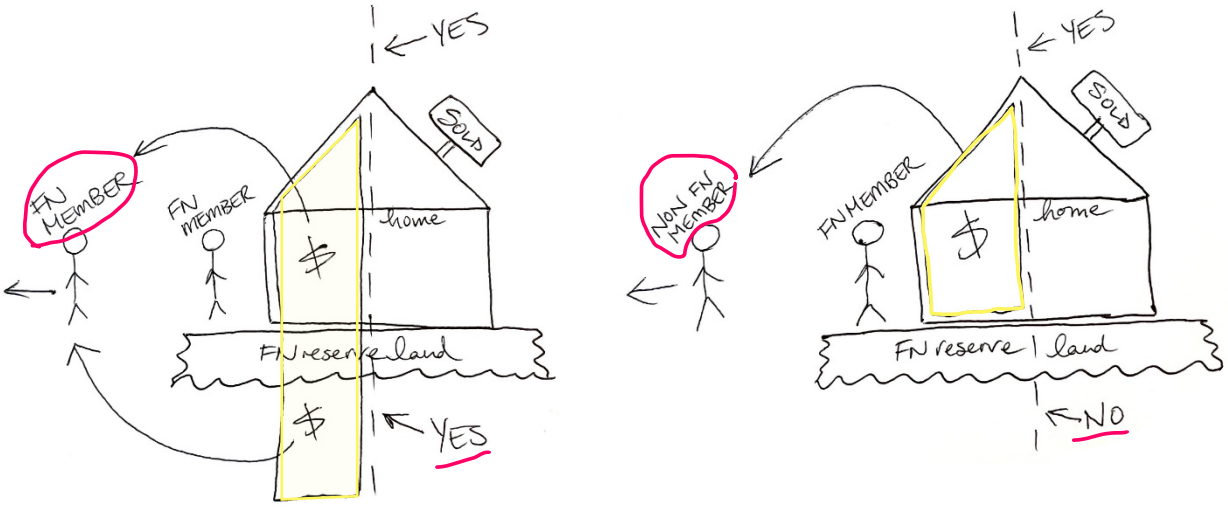
Within Quebec marriages and civil unions (not de factos), family patrimony is created, which includes all property and residences held by either spouse. Houses and other buildings affixed to the land are called "immovables". Furniture and other financial assets are considered "movables". All are considered part of the family patrimony. Immovables are considered equivalent to real property (common law). Movables are considered personal property (common law). The Quebec Civil Code splits the value of immovables, including homes and lands, and movables between the separating couple. This is so for married or civil union couples, but not de facto.

Superficie rights: the distinction between the land, and the house on the land

In the Quebec Civil Code, "superficie" rights exist in structures on land that can be owned independently of the land itself. Having superficial rights includes the right to build, own, implant structures on land that belongs to another. The subsoil owner owns the land. In Indigenous context, subsoil owners are the First Nations Band, and/or the Crown, and in Quebec, the Quebec government. The superficiairy (the person/people who have superficie rights) can construct and own the buildings on the land. Common-law considers the house to be a merged part of the land. The Quebec Civil code and the FHRMIRA consider the house as a separate right from the land, and to be evaluated and divided as a distinct piece of the family assets.

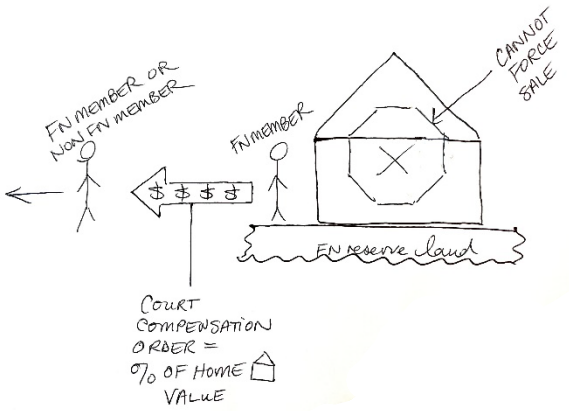
When the right of superficie ends, the buildings can be dismantled, or they become the property of the subsoil landowner. This issue used to come up more often for Cree and Naskapi communities and was relevant because of the JBNQA, but it is becoming moot since the FHRMIRA now expands the right to the value of a house separate from the land, no matter who has title and whether one of the spouses are First Nation members. Regarding this issue of "equal share of immovables and movables", the FHRMIRA is similar to the Civil Code. That said, in the case of non-First Nation spouses, the FHRMIRA does not allow a non-First Nation member to benefit from the value of the land nor from its appreciation. Reserve lands are set aside for the use and benefit of a specific First Nation and its members only. Only members of that First Nation can benefit from the division of the value of the reserve land. A non-FN member can only benefit from their portion of the house's value (or other type of structure's value).

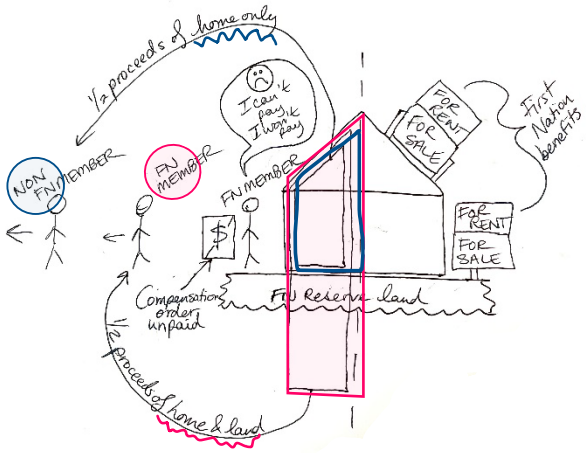
BELOW – Illustrations showing who can benefit from the sale of home & land, versus home only



When it comes down to dividing the home and its value, and selling the home is not accepted by the spouse who has the Certificate of Possession, courts will usually issue a compensation order[3] for money equalling the departing spouse's share. They believe this is a good way to ensure fairness where property cannot be divided- because no division can be made of reserve lands. The Supreme Court has approved saying that monetary compensation between spouses, instead of a division of property, is not in conflict with the Indian Act. If the compensation order goes unpaid, the legal system has allowed for maintenance orders[4], including the said compensation order, to be enforced according to the provincial laws in place, keeping in mind that at the end of the line, the beneficiary of reserve land value has to be the First Nation or a member of the First Nation.

BELOW/RIGHT – Illustrations that depict what happens when the CP spouse does not want to sell





Exclusive occupation and emergency protection

During separation proceedings, a spouse can get a court order for exclusive use of the family home. Exclusive occupation usually goes to the spouse who has custody of the children, a spouse whose health conditions make moving extremely challenging, or a spouse who relies on the home for their work and who cannot accomplish that work elsewhere.

Quebec Civil law favors the children first, and then the spouse who has the more vital need, regardless of which spouse owns the certificate of possession to the property. The interim provisions of the FHRMIRA echo those principles. The FHRMIRA allows exclusive possession of the family home regardless of whether that spouse is a First Nation member or not.

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[3] In the cases discussed in this section, a compensation order is the court's requirement that one spouse pay compensation to the other spouse for the loss of valued assets resulting from their separation. It makes no difference who initiated the separation.

[4] A maintenance order, often called a family maintenance order, means a provision for the payment of maintenance in an order, judgment or family law arbitration award that is enforceable. For example, if a person doesn't pay their child support, the province is permitted by the court to find the means to force the person to pay what is owed. A compensation order can be enforced by a maintenance order, if necessary.

The Indian Act sections that would have historically been in conflict with these provisions are now void. The FHRMIRA allows the local court to make their decision based on factors they judge fair and establish the period of occupation. Factors include children's best interests, "pre-conflict" agreements between spouses, collective interest of the First Nation community, financial situation, medical condition, underlying reasons for breakdown of relationship, alternate suitable accommodation, matters related to violence or psychological abuse, matters related to elderly persons or persons with disabilities residing in the home, etc. The FHRMIRA provides additional protection for families, especially youth and victims of violence, needing emergency protection orders put into place.

Forms

The Assessment of Matrimonial Real Property and Statutory Declaration form
This form (ISC form # 83-166E) is used by a member of a First Nation who owns land on the reserve and wants to submit a land transaction affecting that land. The purpose of the form is to establish whether an interest in, or to, the family home is affected by the proposed transaction, and whether the free and informed consent has been given by the other spouse to proceed with the land transaction. **Assessment of Matrimonial Real Property and Statutory Declaration Form**, **Instructions for Assessment of Matrimonial Real Property and Statutory Declaration**

The Statutory Declaration of Spouse or Common-Law Partner form
This form must be completed by the spouse of a First Nation member where this member owns land on which the family home is situated and who wants to submit a land transaction affecting that land. The Statutory Declaration of Spouse or Common-Law Partner form is used to show that consent has been obtained. **Statutory Declaration of Spouse or Common-Law Partner**

The Statutory Declaration of Executor of a Will or an Administrator of an Estate form
This form is used by the Executor of the Will or the Administrator of the Estate of a deceased member of a First Nation. This consent form requires the Executor or Administrator to declare that they will observe provisions of the Indian Act or FHRMIRA in carrying out their duties. **Statutory Declaration of Executor or a Will or Administrator of an Estate**

The Statutory Declaration of Executor of a Will or Administrator of an Estate who is also the Surviving Spouse or Common-Law Partner form
This form is used by the surviving spouse who is also the Executor of the Will or the Administrator of the Estate of a deceased member of a First Nation. This form must be completed by the Executor or Administrator wanting to distribute the estate of a deceased individual and held an interest on reserve, in order to demonstrate compliance with s. 38(1) of the FHRMIRA. **Statutory Declaration of Executor of a Will or Administrator of an Estate who is also the Surviving Spouse or Common-Law Partner**

The Statutory Declaration of the Surviving Spouse or Common-Law Partner form
This form is used to obtain the consent of the surviving spouse of a deceased member of a First Nation. In certain circumstance the Executor of a Will or Administrator of an Estate will seek consent from the surviving spouse, the surviving common-law partner(s), or both as required. For clarity, in some cases, there may be a spouse (e.g., the couple remain legally married but are separated) and also a common-law partner(s). In that case, the form Statutory Declaration of the Surviving Spouse or Common-Law Partner must be completed by the spouse and the common-law partner(s). **Statutory Declaration of Surviving Spouse or Common-Law Partner**

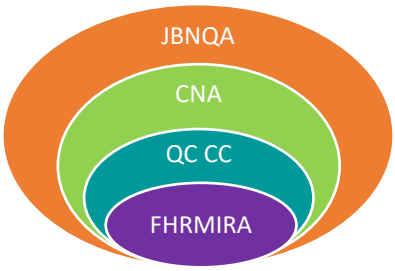
The Transfer of a Right to Possession of Reserve Land by Court Order is not a form you will commonly use, but here is the link nonetheless:
Transfer of a Right to Possession of Reserve Land by Court Order (under the FHRMIRA)

The James Bay Northern Quebec Agreement

The JBNQA is a 450-page agreement involving the Grand Council of the Crees, the Northern Quebec Inuit Association, the Canadian government, the Quebecois government, Hydro-Quebec, the James Bay Development Corporation, and the James Bay Energy Corporation. It was signed in 1975, it prevails over the Indian Act. It does **not** deal with cases of matrimonial property, or the collapse of conjugal relationships.

The Cree-Naskapi Act, signed in 1984, does deal with succession in cases of the death of a spouse or partner. The Cree-Naskapi Act, recognizes de facto relationships, including unmarried partners who live together as committed life partners, considering Cree or Naskapi conjugal tradition. However, the Act contains only mentions of death and succession, and it continues to overlook the issue of land settlement during instances of conjugal breakdown.

Because of this gap in the JBNQA and the CNA, the Quebec Civil Code becomes important to fill those gaps. Quebec laws can and do apply as long as they are not in conflict with or do not overlap with the JBNQA or the CNA. And if neither the JBNQA, nor the CNA, nor the Civil Code can preside over a conjugal situation, the FHRMIRA becomes the fourth recourse.



RIGHT – A relational graphic showing the hierarchy of legislation for Cree, Inuit and Naskapi couples

Conclusion

Overall, the FHRMIRA and the Quebec Civil Code are very much the same. The main difference is that the FHRMIRA treats common-law (de facto) couples as if they were married, and Quebec does not- based on principle. But this issue matters very little, because in most cases, the FHRMIRA takes precedence over provincial laws, whether Quebec or another province, and furthermore, the FHRMIRA states that a Band's individual Land Code takes precedence over any and all legislation, including the FHRMIRA itself. A lower tier of legislation only comes into effect if there is a lack, gap or inconsistency with the legislation that overshadows it.

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