Family Homes on Reserves and Matrimonial Interests and Rights and its Relationship to Quebec Family Law: A Comparison and Constitutional Analysis

A Report Prepared for the
National Aboriginal Lands Managers Association

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June 17, 2014

Contents

Map of First Nation Reserves in Quebec

I. Introduction

This report has been prepared on behalf of the National Aboriginal Lands Managers Association.[1] The Association has asked that I examine the interaction and application of the FHRMIRA (hereinafter the "FMA") within the context of Quebec.[2] Quebec's family law is governed by the Quebec Civil Code.[3] The primary objectives of this report are to:

1) identify the differences that exist between the new FMA and the Civil Code and,
2) whether Quebec matrimonial law will prevail over the provisions of the FMA and,
3) whether the interim provisions of the FMA and First Nations matrimonial laws (hereinafter referred to as "FNM Codes") created pursuant to the Act will be enforceable by Quebec courts.

II. Executive Summary

It is my opinion that there are some important differences that may result between the applications of Quebec matrimonial law as compared to the application of the interim provisions of the FMA. These differences generally result because under the FMA First Nation reserve residents have greater options for dealing with marital property issues and conflicts than Quebec residents generally. However, many of the differences can be justified due to the unique political, cultural and legal regimes that exist on reserves as compared to Quebec generally. Differences between Quebec law and FNM Codes, however, may be of a greater or lesser extent depending on the issues and solutions that a First Nation adopts in its own FNM Code. First Nations have extensive jurisdiction and scope to develop their own Codes to be more or less consistent with provincial law based on their own perceived needs. However, as discussed below, these differences are not relevant to which family law regime will now apply (federal, provincial or First Nation). To the extent that any differences exist between the federal legislation and Quebec family law, the federal legislation will prevail.

In regard to whether Quebec laws are the "last word" on the matter and prevail over the FMA, there is no justification for that assertion under constitutional law doctrine. Notwithstanding the views of the Quebec government that its laws are "supreme", the interim provisions of the FMA and of First Nation Codes will most likely prevail although there is some potential for overlap in areas both outside and within the core of federal jurisdiction under s. 91(24) if the provincial laws are not seen as in conflict with the FMA or FNM Codes. To the extent that Quebec family law matters do not impair the core of s. 91(24) Quebec laws may apply provided that they do not come into "operational conflict" with the provisions of the FMA or FNM Codes. In the interest

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[1] In preparing this report, I would like to thank Omid Milani (Ph.D. Candidate, Uottawa).
[2] The National Aboriginal Land Managers Association is also host for the *Centre of Excellence for Matrimonial Real Property* which is the organization designated by the Minister of Indian and Northern Affairs for the purposes of s. 10, 11(4) and 11(5) of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20. The Centre is responsible under the legislation to receive First Nation matrimonial laws and amendments and will be a valuable resource for current information on First Nation specific laws enacted pursuant to the legislation.
[3] *Civil Code of Quebec,* S.Q. 1991, c. 64

of co-operative federalism, courts have increasingly narrowed the scope of what constitutes operational conflict between federal and provincial authority.[4]

Notwithstanding this general trend there are specific cases previously decided from the Supreme Court of Canada that have held that *relationships within Indian families,* and the *disposition of matrimonial homes and possession of reserve lands* are matters that may go to the core of s. 91(24). The core includes the "basic, minimum and unassailable content" of the federal power over Indians which is defined as "matters that go to the status and rights of Indians".[5]

> It appears to me to be unquestionable that for the provincial *Adoption Act* to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness", to strike at a relationship integral to a matter outside of provincial competence.[6]

In this decision, Chief Justice Laskin held that although the provincial law could not apply because of the doctrine of interjurisdicitonal immunity, the provincial law was nonetheless of general application and could therefore be referentially incorporated under s.88 of the *Indian Act* and become valid hybrid federal law. He also found that there were no provisions in the *Indian Act* that would have the effect of displacing the relevant provincial law of adoption. Even if the child was adopted by non-Indian parents the status of the child as an Indian would not be affected.

Thus, even where a provincial law of general application impairs the core of federal power, s.88 of the *Indian Act* may nonetheless allow its application as such laws are referentially incorporated as federal law provided it is not in conflict with the FMA or FNM Codes.[7]

The phrase "subject to the terms of … any other act of the Parliament of Canada" expressly establishes a presumption that the "free-standing" federal law such as the FMA should prevail over referentially incorporated provincial laws (hybrid federal laws) where there is inconsistency between them is logical and consistent with statutory interpretation principles generally.[8]

Overlap of Quebec provincial laws of general application that impair the core of federal authority *but do not conflict* with the FMA or FNM Codes may still be apply since the FMA is not expressly included in s. 88.[9]

If the FMA was expressly included in s.88 then provincial law would be ousted regardless of any inconsistency or conflict between federal and provincial laws as the free standing federal law

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[4] *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. 3.
[5] *NIL/TU,O Child and Family Services v. BCGSEU,* [2010] 4 C.N.L.R. 284 (S.C.C.) at para. 71.
[6] *Natural Parents v. Superintendent of Child Welfare,* [1976] 2 S.C.R. 751
[7] See discussion infra.
[8] See Kerry Wilkins, "Still Crazy After All These Years: Section 88 of the Indian Act at Fifty" (2008) 38 Alta. L. Rev. 458.
[9] See *Picard c. Laine,* [1975] C.S. 795 (Que. C.S.) where the court held that Quebec provincial law that dealt with encroachment of land could not be incorporated into s. 88 because it was inconsistent with s.20 of the *Indian Act.* The court recommended that the matter be resolved by consulting the Band Council and the Minister of Indian Affairs.

would be regarded as exclusively occupying the field (not as a matter of division of powers doctrine but as a matter of statutory interpretation). Currently, however, this greater protection from provincial/federal hybrid laws only applies, based on the express wording of s. 88 itself to provisions under the *Indian Act* (including by-laws made thereunder) and the *First Nations Fiscal Management Act.* It has been recommended that s. 88 be amended to include the FMA.[10] I would argue that given my opinion that the FMA Codes are based on inherent First Nation authority and not delegated federal authority, s. 88 should also make express reference to FNM Codes in addition to the FMA itself.

However, if s.88 is found not to referentially incorporate provincial laws that impact Indian lands because the wording of the provision only references "Indians" as opposed to "lands reserved for Indians" than provincial law does not become referentially incorporated and would be inapplicable to reserve lands (do not become hybrid federal law).[11]

It terms of enforcement of the FMA within Quebec, it is my opinion that the imposition of judicial responsibility to adjudicate the provisions of FMA on to the Superior Courts of the province of Quebec is constitutionally valid and that the FMA can determine at which level of provincial court certain matters should be addressed. Thus, it is acceptable for the FMA to allow for justices of the peace or provincial court judges to decide at first instance applications for emergency protection orders. Less certain is the question of whether Quebec courts have jurisdiction to administer the laws of a FMA Code where the source of authority is regarded as vesting in the inherent sovereignty (self-governance) of the First Nation as opposed to being sourced in the federal government as a form of delegated municipal power. Since it is my opinion that the FMA r*ecognizes* First Nation authority rather than *granting* First Nation authority, the issue of whether provincial courts can adjudicate such laws involves complex questions of First Nation jurisdiction within the Canadian constitution that are beyond the

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[10] Wendy Grant-John, *Report of the Ministerial Representative Matrimonial Real Property Issues on Reserves*, (2007) at para. 243. An online copy of the full report is available on the website of the Centre of Excellence for Matrimonial Real Property Law: http://www.coemrp.ca/resources/reports. S.88 currently reads:

> 88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

The consequential amendment recommended by Wendy Grant-John would also reference the *Family Homes on Reserves and Matrimonial Interests or Rights Act* in addition to the *First Nations Fiscal Management Act*.

[11] The Supreme Court of Canada has not definitely decided this issue. However, in the recent *Tsilhqot'in Nation v. British Columbia*, [2008] 1 C. N.L.R. 112 at para. 1039 Justice Vickers held after carefully reviewing the legal authorities on the issue that s. 88 does not incorporate provincial laws that impact on Aboriginal lands (reserve lands and Aboriginal title lands). As a result, provincial laws that have any impact on Aboriginal lands or regulate their use would be inapplicable as a result of the doctrine of interjurisdictional immunity. Note that this case is on appeal to the Supreme Court of Canada and was argued in February, 2014. A decision has yet to be released from the Court.

mandate of this research report.[12] It would be less legally uncertain and uncontroversial for a First Nation to agree to the source of authority as delegated when confronted with the issue but in doing so to indicate clearly that such a position is "without prejudice" to their view that their authority is inherent and independent of federal authority. Interestingly, the Act lacks a non-derogation clause that would clearly indicate that nothing in the Act is meant to abrogate or derogate from Aboriginal and Treaty rights, although there is a preamble statement that mirrors what a non-derogation clause would entail.[13]

The following provides a more detailed analysis of the above conclusions. I will begin by first providing a very brief comment on the history of the circumstances that lead the federal government to enact this statue.

I will then comment on the mischaracterization of this legislation in public and professional discourses as addressing a perceived gap in the law of matrimonial property rights on reserve. I describe below that this characterization is not accurate as the need to address this issue is more directly a function of the imposition of Canadian unilateral colonial (and patriarchal) authority and the social fall-out of this colonial history and the concomitant marginalization and oppression of First Nation political and legal authority.

I will then provide a brief overview of the major features of the legislation. After this overview, a comparison of some key differences between Quebec family law and the FMA will be provided. Originally I wished I could also provide a comparison with a FNM Code and Quebec family law as a First Nation case study but due to time constraints and other factors I am unable to do so.[14] Thus, the comparison provided is between the provisional regime of the FMA and the Quebec Civil Code and not between a FNM Code and the Quebec Civil Code.

I will then provide a constitutional analysis to determine the constitutionality of the legislation in light of a challenge by Quebec. I will then follow up with a review of how the enforcement of the FMA will be provided and the role of Quebec courts.

III. FMA Background History

The FMA is the final outcome of a lengthy history of debate and dialogue concerning issues of unfairness and lack of mechanisms to address concerns about housing rights given that many of

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[12] For an account of the issues involved see John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010). In particular, Borrows makes the compelling argument that existing courts are capable of recognizing inherent Indigenous law (First Nation laws) and describing the constitutional relationship between Canada's legal traditions at page 215.

[13] The preamble statement reads as follows: *Whereas this Act is not intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation.* According to principles of statutory interpretation, preamble statements have no legal force, but they can aide in the interpretation of existing provisions as I argue below in reference to the source of authority of First Nations to enact laws in this area.

[14] In this regard, I have met with representatives from Kiti gan Zibi First Nation which is in the process of drafting a matrimonial property law Code for the community.

the land and housing rights have historically been issued to men leaving women sometimes vulnerable as a result of land and housing policies of many First Nation communities. In addition, women that experienced a breakdown of a conjugal relationship had no recourse to provincial family law which ensured that spouses would receive equal division of property regardless of who actually legally owned the property.[15] In addition, emergency protection legislation in some provinces might also be found inapplicable to the extent that it allowed for an order of possession of the matrimonial home (although no court case had conclusively decided this specific issue). I do not intend to go into any detail regarding the history and rationale for the development of this legislation. The history and political, social and legal context that surrounded its enactment is well documented by Wendy Grant-John, Ministerial Representative on Matrimonial Real Property Issues on Reserves.[16] However, I do want to briefly comment on how the policy response to the issue has been characterized as a "gap" in the law.

IV. The Perceived Gap

It is misleading to characterize the unfairness regarding matrimonial property law that has been identified as an issue needing to be addressed as a "legal gap" in the law on First Nations reserves. Indigenous societies were not devoid of laws that addressed family relations and property matters when a domestic relationship ended.[17] The reason for the need to develop a federal government policy solution was due to the marginalization and suppression of Indigenous traditional institutions and the imposition in their place of imposed patriarchal colonial legal authority.

> The lack of protection First Nation women in particular experienced in situations of marital breakdown and family violence is related to the history of gender-based discrimination under the Indian Act. The effects of the long history of discrimination under the Indian Act and other federal policies leading to the exclusion of First Nation women from leadership, landholding and citizenship are still being felt today. Continuing systemic inequalities must be taken into account in developing solutions for matrimonial real property issues on reserves.[18]

Notwithstanding this colonial history, inherent governance authority continues to exist albeit marginalized and wounded from colonial intolerance and decades of denial of Indigenous humanity and peoplehood authority. Thus the systemic inequality that exists today is the direct

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[15] The leading case is *Derrikson v. Derrikson*, [1986] 2 C.N.L.R. 45, where the Supreme Court of Canada held that provincial law regarding the division of matrimonial property and the right to possession of reserve land was inapplicable to First Nations who fell within the exclusive jurisdiction of the federal government.

[16] Wendy Grant-John, supra note 11.

[17] Customary law governed how such matters were to be resolved. For reported accounts of Navajo domestic law and how property is divided see *Apache v. Republic National Life Insurance*, 3 Nav. 4 250 (1982). See also *Naize v. Naize*, No. SC-CV-16-96, slip op. at 7-8 (Nav. Sup. Ct., 1997). See also Wendy Grant-John, Ibid, Appendix C regarding the history of events leading to the enactment of this legislation including the reference to First Nation traditional laws.

[18] Wendy Grant-John, supra note 11 at para. 19.

result of a "history of gender-based discrimination under the *Indian Act* and other federal policies leading to the exclusion of First Nation women from leadership, landholding and citizenship."[19]

The result of colonial policies which oppressed Indigenous legal institutions and concurrently devalued women's legal status and authority produced not a gap in the law of matrimonial property on First Nation reserves but a kind of colonial inflicted Indigenous institutional paralysis. In other words the legislation should be seen more as the Federal government's attempt to clean up its own mess.

Unfortunately, federal government authorities and others continue to misrepresent and mislead Canadians and Aboriginal authorities that the only viable solution is a federal legal response that mirrors provincial standards but in doing so, federal officials tend to mislead us to believe that Indigenous governments are incapable of dealing with the issue by failing to give sufficient recognition of First Nation inherent legal authority to do so. Instead, and more accurately, the issue is mainstream failure to acknowledge the impact of colonial history on the present capacity and ability to fairly address matrimonial property law and not on the existence of a gap in the law. As Wendy Grant-John noted in her report: "The relevant standard in federal analysis is what the law provides off reserves, while for First Nations the relevant standard is recognition of the validity of First Nation values and traditions in relation to land and family".[20] Yet, there is a consistent misrepresentation regarding this issue that is particularly prevalent in literature authored by federal government officials that I reviewed in the preparation of this report.

Canada is a multijuridical state and not just a bijuridical state (French civil law and English common law). First nations' laws do matter.

V. Policy Response

In response to the potential for unfairness in the rights of spouses to live in the matrimonial home or to have a share of its value upon marital breakdown and to allow for emergency occupation orders notwithstanding who has formal title to the home, the federal government has enacted legislation that directly responds to these concerns. Importantly, the legislation recognizes the power of First Nations (Indian Act Bands) to enact their own matrimonial property laws. This power is recognized in section 7. Whether this is a recognition of inherent authority or delegated federal government authority remains to be determined. As I discuss later in this report, it is my opinion that it is a recognition of power not a delegation of power. I will now provide an outline of the main features of the legislation.

VI An Overview of the FMA

[19] Ibid.
[20] Ibid at para. 69.

Although the *First Nations Land Management Act*[21] provides a regime to regulate matrimonial real property issues, as it does not provide First Nations with a mandatory regime, it cannot resolve the above-mentioned problems. The FMA addresses issues concerning family real property on reserves. It 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 structures and lands on its reserves".[22] The federal provisional rules in the Act will be applicable until a First Nation has such laws in force. The rules will apply to a First Nation under the FNLMA in specific circumstances. Also, First Nations that have the power to manage their reserve lands under a self-government agreement may choose to have the interim federal rules apply to them or adopt their own Code as per s.7 of the FMA. This is not likely possible with regard to First Nations in Quebec governed by the James Bay Cree and Northern Quebec land claims agreement (discussed later in this report).

In the event of the divorce or the death of a spouse, the division of matrimonial property, both real and personal, is determined in accordance with provincial laws,[23] however, the *Constitution Act*, which specifies that the Parliament of Canada has exclusive legislative authority with respect to 'Indians and Lands reserved for the Indians,' provincial laws may not apply to this matter. Filling this "legislative gap", the Act provided remedies upon the breakdown of a conjugal relationship or the death of a spouse which includes:

- Use, occupation and possession of family homes on reserves;
- Exclusive occupation in cases of family violence; and
- Division of value of interests or rights held in structures or lands on reserves.

Following a nation-wide consultation in 2006,[24] a legislative framework was proposed; a framework which is fairly similar to the *FMA*'s final framework. The Act defines a number of terms such as "family home"[25] and "matrimonial interests or rights".[26] Sections 4 to 6 of the Act

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[21] *First Nation Land Management Act*, S.C. 1999, c.24, sections 8 to 14 (hereinafter FNLMA)

[22] *FHRMRA*, Section 7 (1)

[23] *The Constitution Act*, 1982, 92(13). This section of the Constitution gives jurisdiction over "property and civil rights" to the provinces and is the provision that Quebec relies upon to enact the *Civil Code*.

[24] First Nation political representatives refused to call the process "consultation" but rather a "dialogue" to avoid the implication that the process was sufficient to meet the degree of consultation required by the courts in their interpretation of the honour of the Crown principle first established in *Haida Nation v. B.C. (Min. of Forests)*, [2004] 3 S.C.R. 511.

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

[26] "Matrimonial interests or rights" means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners (*a*) that were acquired during the conjugal relationship; (*b*) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or (*c*) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship. It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights." The Act also distinguishes between categories of property rights. Under the Act, 'interest

deal with the purpose and application of the Act. Clause 5 confirms that the Act does not affect title to reserve lands and that reserve lands continue to be 1) set apart for the use and benefit of the First Nation and 2) lands reserved for the Indians continue to be lands within the meaning of section 91(24) of the Constitution.

Enactment of First Nation Laws is the subject of clauses 7 to 11. The Act must be submitted to the members of the first Nation for approval, and are approved if: 1) At least 25% of eligible voters participated in the vote; 2) A majority of those who participated in the vote approve the laws. A [First Nation] council may, by resolution, increase the percentage of eligible voters required.

The remainder of the Act contains largely interim provisions that apply until such time as a First Nation adopts their own FNM Code. Sections 13 to 27 refer to the occupation of the family home. In accordance with section 13, "each spouse or common-law partner may occupy the family home during the conjugal relationship, whether or not that person is a First Nation member or an Indian." In the event that either of the spouses or common law/*de facto* partners dies, "[a] survivor who does not hold an interest or right in or to the family home may occupy that home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian."

Section 15 of the FMA relates to the conditions of the consent of spouse or common-law/de facto partner who hold an interest or right in or to the family home. Section 16 is about obtaining emergency protection orders form a designated judge in situations of family violence. The judge can make an order for a period of up to 90 days. This clause provides that the judge, in making the order, must take a number of considerations into account.

Section 17(8) originally stated that on a rehearing, the court could only extend the duration of the emergency protection order by an additional 90 days. That clause was amended by the Standing Senate Committee on Human Rights to instead state that the court "[m]ay extend the duration of the order beyond the period of 90 days referred to in subsection 16(1)." Individuals can also apply for a court order awarding exclusive occupation of the family home on a non-urgent basis for a prescribed period, whether or not they are First Nation members or Indians.

Clauses 28 to 40 establish the regime for the division of matrimonial interests or rights on the breakdown of the conjugal relationship, and on the death of a spouse or common-law partner. In both situations, the calculation of the entitlement amount depends on whether or not a spouse or common-law/*de facto* partner is a member of the First Nation on whose reserve the property is situated. Also, the calculation of the division of matrimonial rights and interest can be subject to changes; it is notable that a person can apply to a court for a variation of the distribution on the breakdown of the relationship or on the death of a spouse or common-law partner, on the grounds that the legislated distribution is unconscionable in their particular set of circumstances.

An order to transfer certain rights and interests to land or structure can be made by a court upon application of spouse or common-law/*de facto* partner who is a First Nation member but not non-

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or right' means interest in or to reserve land pursuant to the Indian Act and under specified instruments, as well as interests in or to structure on reserve land that are recognized by the First Nation or by court order.

members. Courts are also required to allow the council of a First Nation on whose reserve the affected lands and structures are located "to make representations with respect to the cultural, social, and legal context that pertains to the application and to present its views about whether or not the order should be made"; applications for emergency protection orders and orders relating to confidentiality are exceptions to this rule.

Section 43 relates to the jurisdiction of courts in the case of the breakdown of a conjugal or common-law relationship, while clause 44 provides that "a court that is seized of a matter related to the distribution of property on the death of a spouse or common-law/de facto partner has jurisdiction to hear and determine an application made under section 21, 35, 36, 39 or 40 by the survivor, the executor of the will or the administrator of the estate."

Clause 52 is about the enforcement of orders relating to the amounts payable following the breakdown of a conjugal relationship, or the death of a spouse or common-law partner, Clause 53 grants the Governor in Council broad discretion to make any regulations it deems necessary for carrying out the purposes and provisions of the Act. Clause 55 provides that the provisional federal rules do not apply to a First Nation that is subject to the FNLMA and that has neither a land code nor conjugal real property laws in force, until three years after the provision comes into force.

It is notable that prior to passing the FMA, reaction to Bill S-2 was primarily negative. And most comments emphasized that issues such as inadequate consultation, a failure to recognize First Nations' inherent jurisdiction over the issue, and the need to improve access to justice have not been addressed.[27] The Standing Senate Committee on Human rights consideration of Bill S-2's predecessor, Bill S-4, which reiterates the above-mentioned shortcoming, included among others: "difficulties accessing the legal system, access to alternative dispute resolution mechanisms, shortcomings in consultation process prior to drafting of the bill, a commitment to take non-legislative action (e.g., creation of a legal aid fund)".[28]

VII. Matrimonial Property Law Comparison of FMA and Quebec Civil law

The FMA recognizes a number of potential interests in land that members may possess either individually or jointly. They range from a quasi-tenure right (Certificate of Possession) to custom allotments (not recognized by the *Indian Act*). Quebec First Nations have historically relied on CPs as a significant means of allocating interests to individual band members. As of August 2013 there were 11,321 CPs outstanding in Quebec. Of the 32 distinct Indian reserves in Quebec, 26 have instruments registered in the Indian Land Registry System while 6 reserves do not.

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[27] Anna Gray and Marlisa Tiedemann, *Bill S-4, Family Homes on Reserves and Matrimonial Interests or Rights Act,* (Ottawa: Parliamentary Information and Research Service, 2010) at 10.
[28] *Ibid* at 10

Currently there are no Quebec First Nations that have operational status under the FNLMA. However, Abenakis de Wolniak, Mashteuiatsh and Innue Essipit First Nations have signed on to the Framework Agreement.[29] These First Nations, as per section 55 of the FMA, have three years (June 19th, 2016) to bring their matrimonial property laws as required under the FNLMA into force or the federal interim rules under the FMA will apply. Quebec First Nations that join the FNLMA process after December 16th, 2014 will have the interim federal rules apply until their own Code is enacted either under the FNLMA or the FMA.

This remainder of this part of the report deals with a select number of issues that arise from a comparison between the FMA and Quebec Civil law. In terms of Quebec family law and the FMA, there are more similarities than differences, although in some cases Quebec law provides greater protection or rights than the FMA and in other cases the opposite is true. A comparison of key areas is offered below. See Appendix A for a Comparison Chart. Consequent to this comparative review, I raise a number of issues that are not necessarily unique to the Quebec context which may be of interest more generally.

A. Definitions of Conjugal Relations in Quebec

It is curious that there is no reference to traditional marriages or marriages by customary law of First Nations. However, the FMA defines "spouse" broadly to include "either of two persons who have entered in good faith into a marriage that is voidable or void."

In Quebec, there is considerable latitude under the Civil Code as to who can qualify as an "officiant" for the purpose of solemnizing a marriage. As a result, couples wishing to get married according to First Nation customary law may do so provided the Elder or other person who is to conduct the marriage is otherwise qualified and completes the necessary application for designation as an officiant.[30] This would be considered a civil union under Quebec law. Interestingly the Civil Code has been amended to address certain First Nations communities. In terms of the Cree, Inuit and Naskapi communities of Northern Quebec, s. 152 of the Code allows for local control over civil status registry duties and the maintenance of such records dealing with vital statistics. Section 366 of Code allows a designated officiant to also be competent to solemnize marriages in Mohawk communities as per an agreement between the government and the Mohawk community.

In Quebec there are three kinds of conjugal relationships that are defined. Two are legally recognized and the third is not legally recognized. In Quebec there are conjugal relationships established by marriage and civil union which are legally recognized in Quebec and to which the specific rules of matrimonial law apply. The third kind of conjugal relationship is called a *de facto* union (conjoint de fait). In the other provinces of Canada this kind of relationship would be called a common-law marriage and depending on the province the matrimonial property laws that apply to marriage may or may not apply to such common law relationships. However, in

[29] Schedule of First Nations per Sections 2 and 45 of the FNLMA: http://laws-lois.justice.gc.ca/eng/acts/F-11.8/page-16.html#h-23. See also the signatories to the Framework Agreement maintained by the Land Management Resource Centre: http://www.labrc.com/Member-Communities.html

[30] See http://www.justice.gouv.qc.ca/english/formulaires/mariage/sj893-a.pdf

Quebec, there is no legal significance given to such *de facto* relationships.[31] The partners under such a relationship are considered no different in law than roommates. The partners can, of course, enter into binding contracts that can settle matters in anticipation of possible separation etc… But there is no assumption of a mutual ownership of family property (defined as patrimony in Quebec civil law) as is the case if matrimonial property laws would apply.

From one perspective, the FMA may be seen as creating a two-tiered system in Quebec. It may be seen as creating rights for *de facto* partners that currently are not recognized in Quebec (both the idea of shared property between *de facto* spouces and emergency protection legislation does not exist in Quebec law). From another perspective, the imposition of a certain legal status regarding property within a *de facto* partnership context goes against public policy in Quebec where freedom and autonomy are highly respected in the relationship context and one of the reasons why Quebec has not extended its matrimonial property law regime to *de facto* relationships. Quebec leaves it up to the couples within *de facto* relationships to determine for themselves how to order their affairs including property during and after a relationship breakdown.

As mentioned, there are valid policy reasons why law-makers in Quebec do not wish to apply its matrimonial property law regime to *de facto* unions. This policy was summarized by the Supreme Court of Canada in 2002, (although speaking of jurisdictions that did not include common-law unions within matrimonial law regimes the same rationale is equally applicable to *de facto* unions in Quebec). The court stated:

> It is by choice that married couples are subject to the obligations of marriage. When couples undertake such a life project, they commit to respect the consequences and obligations flowing from their choice. The choice to be subject to such obligations and to undertake a life-long commitment underlies and legitimates the system of benefits and obligations attached to marriage generally, and, in particular, those relating to matrimonial assets. To accept the respondent Walsh's argument — thereby extending the presumption of equal division of matrimonial assets to common law couples — would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system. In effect, to presume that common law couples want to be bound by the same obligations as married couples is contrary to their choice to live in a common law relationship without the obligations of marriage.[32]

Notwithstanding valid policy reasons for treating *de facto* unions differently from marriage and civil unions, under the FMA, however, *de facto* relationships are given legal recognition and are treated the same as common-law marriages for the purposes of the Act. Indeed, the French language version of the Act replaces the term "common-law marriage" with "conjoint de fait". Thus in Quebec, those living on First Nation reserves will have the benefits of the FMA matrimonial property rights regime regardless of whether the union is one that is the result of marriage, civil union or *de facto*.

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[31] In *Diabo v. Goodleaf*, [2009] R.D.F. 814 (Que. S.C.), the court held that Quebec law does not allow for partition of family property as between two *de facto* spouses.

[32] *Nova Scotia (Attorney General) v. Walsh* [2002] 4 S.C.R. 325 at para. 201.

Because of this, one can anticipate potential *Charter* challenges arising in Quebec by *de facto* partners who are treated less favourable because they live off a reserve than *de facto* partners who live on reserve. The *Charter* equality rights jurisprudence would need to be reviewed to assess the likelihood of success of such a challenge. It is beyond the mandate of this report to go into any depth regarding this emerging potential issue, but one can anticipate that the legislation may be defended by reference to s. 15(2) or s. 25 of the *Charter* given the unique socio-political circumstances around marital property issues within First Nation communities.

B. Family Patrimony

In Quebec, a marriage or civil union results in the creation of "family patrimony" which includes all property held by either spouse and includes all residences provided they are used by the family (which can include for example cabins and cottages etc.). Under Quebec law, land and houses affixed to the land are considered "immovables". Other property such as furniture and financial assets are considered "movables" and are considered part of the family patrimony as well. These categories are considered roughly equivalent to common law concepts of real property and personal property. The Civil Code presumes an equal share of the value of the family patrimony in terms of immovables (includes family home and land) and moveables (i.e cars and furniture) between the spouses (except *de facto* unions).

Unique to civil law regimes like Quebec is a third category that may have relevance to the FMA particularly in relation to the James Bay and Northern Quebec Agreement. In the Civil Code, "superficie" rights exist in structures on land (such as a house) that can be owned independently of the land itself are unique to civil law jurisdictions. It is defined as "ownership of the constructions, works or plantations situated on an immovable belonging to another person, the owner of the subsoil."[33] This particular kind of interest is specifically recognized in the Cree/Naskapi (of Quebec) Act discussed more fully below.

An interesting question arises as to whether the same constitutional barriers existed prior to the enactment of the FMA in Quebec because of the concept of superficie than they did in common law jurisdictions regarding matrimonial property issues if houses (structures) are viewed as capable of separate ownership from the land and not necessarily regarded as fixtures (which means the house is a part of the land itself). In other words, if a couple on reserve had a superficie right to the house, it might be argued that provincial law could nonetheless apply in the division of property including the house if it is legally separate from the land interest. Both the *Derrickson* and *Paul* [34] cases might have been distinguishable and thus not determinative of the issue regarding the extent to which provincial law may apply in Quebec. However, this is a complex issue. Questions arise as to the existence and extent of a distinct kind of federal common law as opposed to the general common law which may exist in dealing with "federal

[33] Sections 1110 - 1113

[34] *Paul v. Paul*, [1986] 2 C.N.L.R.74 (S.C.C.) held that the disposition of the matrimonial home on reserve was within the core of the exclusive power of the federal government under s. 91(24) and therefore provincial law is inapplicable.

matters" even within Quebec.[35] The issue may now largely be moot since the FMA now extends a right to the value of the house separate from the land regardless of who has title and whether any one of the partners are a member or not of the First Nation.

The FMA does provide a similar presumption of an equal share of the value of the immovable and moveables and in this respect is similar to the Quebec Civil Code. However, in the case of non-First Nation member spouses (including *de facto* unions) there is an important exception. The Act does not allow a non-member to benefit from the value of the land nor from its appreciation. The FMA interim provisions make this distinction and the distinction is said to exist because "of the fact that reserve lands are set aside for the use and benefit of a specific First Nation, and as a result, only members of that First Nation can benefit from a division of the value in any interest or right in or to reserve **land** [distinct from the home or other structures on the land] held by the other spouse or common law partner."[36] The common law normally treats the home/house as a fixture and thus part of the land. However the FMA treats the "matrimonial home" as a separate interest/right from the land.

There is no reference to any case law for this prohibition. Indeed, provincial courts have overcome the prohibition of partition of land situated on a reserve by ordering compensation in lieu of such a proprietary disposition.

This prohibition is said to be a result of the fact that the lands are held for the use and benefit of a First Nation. Yet it is not apparent that a calculation based on the value of the land (as an individual possessory interest/right) is necessarily inconsistent with the Band's collective interest/right in the reserve. Land value is not the same as a possessory right to a share in the land. Arguably, it is only when a non-member has a right or interest to possession that such a right would be inconsistent with the Band's interest/right.

This distinction is significant and will result in potential unfairness as between the spouses where one spouse is a non-member spouse.

Courts have been unable to partition a share (or force a sale) of a home where only one spouse is entitled to possession of the matrimonial home (CP or Occupation) under provincial family laws because of various land provisions in the Indian Act.[37] However courts have been prepared to issue a compensation order for money in proportion to their share in the home. The Supreme Court of Canada recognized this as a valid option since "compensation in lieu of a division of property is not a matter for which provision is made under the *Indian Act* and in my view there is no inconsistency or "actual conflict" between such a provision for compensation between spouses and the *Indian Act.*"[38]

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[35] *Roberts v. Canada*, [1989] 1 S.C.R. 322 where the court noted that some parts of the common law do qualify as special federal common law and one of those areas is the law of Aboriginal title. See also Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2012) at 7-29-7-30. Enclaves of federal common law may thus exist in relation to Aboriginal lands in Quebec surrounded by a sea of civil law.

[36] Department of Justice, "Family Homes on Reserves and Matrimonial Interests or Rights Act – a comprehensive overview" (March 6th, 2014) at 16. (emphasis in original)

[37] *Derrikson*, supra note 15 at 62

[38] Ibid at 63

Moreover the court expressly acknowledged that this is an appropriate response to ensure fairness "where property exists but cannot be divided because no division can be made of reserve lands."[39]

> All family assets having been taken into account, where an equal division is not possible because some assets, in this case lands on a reserve, cannot be divided, I fail to see why a compensation order could not be had.[40]

The Court in *Derrikson* did not make any distinction between whether the spouse was a member of the Band in question or a non-member. That distinction is irrelevant. Commentators have also viewed the matter in a similar manner. Shin Imai, for example, concluded that courts can "make a compensation order against the Indian spouse, entitling the *non-Indian spouse* to their share of the assets…"[41] Accordingly, the only thing preventing a compensation order in lieu of recognizing a right to the value in the land prior to the FMA was the protections against seizure of property situated on a reserve in s. 89 of the *Indian Act.* Section 89(1) of the Indian Act states that:

> "subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."

Although prior to the FMA, "compensation orders" in lieu of division were allowed, they were not necessarily effective because of s. 89 of the *Indian Act.* Courts have, however, allowed family maintenance orders under provincial laws to be enforced on reserve provided the beneficiary is an "Indian" but not if the beneficiary is a non-Indian.[42] However, an express exception to the prohibition in s. 89(1) of the *Indian Act* is now provided in s. 52 of the FMA. Section 7(2) (b) likewise allows an order of a court based on a First Nations Code to be enforced on a reserve notwithstanding s. 89 of the *Indian Act*.

Importantly, a court has discretion under s. 29 (i) to vary the amount owed if that amount would be *unconscionable.* The question is whether the inherent unfairness built into the Act of a non-member partner not being allowed to benefit from the value of the land could give rise to a finding that there is an unconscionable amount in the favour of the member spouse since the Act itself is the source of the unconscionable amount? If this is not possible since the Act is explicit on this matter, is this same limitation something that would bind a First Nation in the development of its own matrimonial laws or code? This would allow the Band to avoid the necessity of a finding of unconscionability before an adjustment could be made thereby providing greater latitude to ensure fairness prevails. There does not appear to be any reason preventing a First Nation Code to lower the standard of when a variation of a compensation order can be made by a court or other authorized authority as determined by the FNM Code.

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[39] Ibid.
[40] Ibid.
[41] Shin Imai, *Aboriginal Law Handbook, 3rd Edition,* (Toronto: Carswell, 2008) at 311. (emphasis mine)
[42] *Potts v Potts*, [1992] 1 C.N.L.R. 182 (Alta. C.A.)

Even more, could a First Nation in the development of its own Code allow for the non-member spouse to directly benefit from the value of the land itself? This would not likely be possible as such a rule would defy various provisions of the *Indian Act*, the FMA and the entire history of colonial law that imposes restrictions on a Band's ability to alienate its collective interest in lands. This is not to say that such a challenge by a Band ought not to be made, but it would involve overturning centuries of settled law (unjust as it may be).

It is ironic if this prohibition against non-members receiving their fair share in the value for the land or comparable compensation in lieu of the value of the land (because the applicant is unable to meet the standard of unconscionability) were to prevail as the limitation is actually sourced in the English imposed racist doctrine of discovery and the imposed prohibition on alienation coupled with the historical denial of governance jurisdiction that has been a thorn in Aboriginal – Crown relations since the late 1700s.

Alternatively First Nations could also address this issue indirectly by how they develop their citizenship codes. They could extend membership to the Band by including non-Indian spouses as members of the Band. This option, of course, raises other complex issues that would need to be addressed.

In addition, s. 33 of the FMA provides spouses the opportunity to set out the amount to which each is entitled and how to settle the amount payable and to have a court make an order to enforce that agreement. Arguable, this would potentially allow the parties to decide for themselves whether to off-set the unfairness to the non-member spouse of the exclusion from the settlement amount the value of the land itself. There is also authority that a separation agreement between spouses may affect the right of possession.[43]

C. Exclusive Occupation Orders

Under Quebec Civil law, an applicant can upon dissolution of a marriage, get a court order for use of the family residence during the proceedings.[44] Also under s. 410 the court may order right to use the family residence to the spouse that has custody of a child. Also, the right to the use of the house, failing agreement between the spouses, is in the discretion of the court. As a result of the decision of *Paul v. Paul* of the Supreme Court of Canada, Quebec law which would allow one spouse to occupy the matrimonial home to the exclusion of the other that has a Certificate of Possession under s.20 of the Indian Act would be inapplicable because it would be in "actual conflict' with provisions of the Indian Act.[45]

The interim provisions of the FMA set out a right of one spouse to have exclusive possession of the "family home" regardless of whether he or she is a member of the First Nation on such terms

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[43] *Kwakseestahla v. Kwakseestahla*, [1998] B.C.J. No. 283 (B.C. S.C.)
[44] Section 500.
[45] *Paul v. Paul*, supra note 34. If the interest was a customary allotment, the court would not be able to decide the issue as there would be no legal right to adjudicate upon : *Macmillan v. Augustine*, [2004] 3 C.N.L.R. 170 (N.B.Q.B.)

and for a period that the court specifies having regard to a number of factors listed in s. 20(3) of the FMA including the terms of any agreement between the parties. The FMA essentially nullifies the impact of the *Paul* decision so that spouses may obtain occupation orders of any duration as a result of the federal rules. These rules are applicable to any interest or right under the *Indian Act* or any interest or right recognized by the First Nation (which would include customary allotments). As a result, the legal regime both on and off reserve as it pertains to exclusive occupation orders is now similar to what would be possible under Quebec family law.

D. Emergency Protection Orders

Most provincial jurisdictions have enacted family violence emergency protection legislation. These statutes typically offer protection to victims of family violence. Measures provided include emergency intervention orders which may grant the right for only the victim spouse to remain in the home.

In the case of Quebec, however, there is no specific provincial legislation specifically providing for civil emergency protection orders, except in the case of youth.[46] Interestingly, the Quebec legislation specifically provides for a degree of control by First Nations to establish a "special youth protection program".[47] As a result, the FMA will provide additional protections for on-reserve families than currently does not generally exist off-reserve in Quebec.

E. Potential Application of the Canadian Charter of Rights and Freedoms (s. 15 (2) and s. 25)

There are a number of possible situations that may prompt citizens within Quebec to challenge the legislation as a violation of equality based on racial grounds. For example a non-member spouse may challenge the exclusion of the value of the land from a partition order. In addition, a spouse that is unable to benefit from the emergency protection order regime (or other matters that may be regarded as additional rights that off-reserve members are not entitled) to may challenge the provisions that created the discrimination as a violation under s.15(1). These challenges will likely face defences of justification based on s.15(2) as an ameliorative program (*Cunningham*) or s. 25 of the Charter as "other rights" that are exempt from Charter challenge (*Kapp*). It is beyond the scope of this research paper to go into any detailed analysis of the likely outcome of such potential challenges.

The above is a brief overview of some key areas of comparison between Quebec family law and the FMA. Further research is likely necessary to ensure that important differences or similarities are not overlooked.

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[46] *Youth Protection Act*, (1977) S.Q. c. P-34.1. However, Quebec courts may issue interim "safeguard" orders for exclusive occupation of a house on application by a spouse discussed below.
[47] Ibid., s. 37.5 (See Appendix B)

VIII. Implication of the FMA on the James Bay and Northern Quebec Agreement

Following the extension of Québec in accordance with the *Quebec Boundaries Extension Act* of 1912, a vast area of the Northwest Territories fell under the jurisdiction of the Québec Government. The *James Bay and Northern Québec Agreement* (JBNQA) 1985,[48] which takes precedence over the federal *Indian Act*,[49] recognizes three categories of lands.[50] This agreement involves "[t]he Government of Canada, and three Quebec Crown Corporations, namely Hydro-Quebec, the James Bay Development Corporation and the James Bay Energy Corporation, as well as the Grand Council of the Crees, which represents eight different Indian Bands, and the Northern Quebec Inuit Association, representing fourteen communities, and the Government of Quebec."[51] The *JBNQA*, which is a fairly lengthy agreement, containing 31 sections in more than 450 pages, establishes a comprehensive land regime. Despite the [purported] comprehensiveness of the Agreement,[52] the Agreement does not deal with settlement of the land issues in the event of a conjugal relationship breakdown or the death of a spouse.

The regime is "[c]omposed of three groups: category I, category II and category III lands. Within category I there are two sub-groups, category IA and IB. IA lands are set aside for the exclusive use and benefit of the respective James Bay Cree bands."[53] "The category I lands is where the Cree inhabit. "Eight Cree communities come under the jurisdiction of the JBNQA: the Mistassini, Waswanipi, Nemaska, Waskaganish, Eastmain, Wemindji, Chisasibi, and the Whapmagoostoo Bands."[54]

In addition to the *JBNQA*, the *Cree-Naskapi (of Quebec) Act* 1984 deals with the issue of property[55] in relation to succession.[56] In this Act, which replaces the *Indian Act*,[57] the Cree's authority to self-govern the land-related issues exceeds a typical municipality.[58] In Part XIII of the Act, it is mentioned that the Act "[a]pplies only in respect of the succession of a Cree beneficiary or Naskapi beneficiary who dies after the coming into force of this Part and who, at the time of his death, was domiciled on Category IA land (in the case of a Cree beneficiary)".[59] Nevertheless, although family homes and real matrimonial property are important issues in

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[48] *An Act approving the* Agreement *Concerning* James Bay and Northern Québec, CQLR c C-67
[49] John Ciaccia, *Philosophy of Agreement*, in the *JBNQA*
[50] Section 5
[51] John Ciaccia, *Philosophy of Agreement*, in the *JBNQA*
[52] John Ciaccia, *Philosophy of Agreement*, in the *JBNQA*
[53] Thomas Isaac, "Aboriginal Self-Government in Canada: Cree-Naskapi (of Quebec) Act", 7 *Native Studies Review 2* 1991, at 21
[54] *Ibid* at 21; for an explanation of the two other categories of land see *ibid* at 22
[55] The act recognized three forms of properties: movable property, immovable property, and traditional property (the latter is defined in section 174 of the act)
[56] Sections 173-186
[57] The *Indian Act* is still used to determine which of the Cree and Naskapi beneficiaries are "Indians".
[58] Thomas Isaac, "Aboriginal Self-Government in Canada: Cree-Naskapi (of Quebec) Act", 7 *Native Studies Review 2* 1991, at 23
[59] Section 173

relation to First Nations' lands and one of the objectives of the Act is "[t]o control the disposition of rights and interests in Band lands",[60] the Act is silent about the management of matrimonial property in the event of a conjugal relationship breakdown. Only in the afore-mentioned section, the Act provides rules about the succession regime after the death of a spouse or a partner.[61] In addition the Act recognizes *de facto* relationships for the purposes of succession of property.

There is no mention of a regime to deal with family homes, matrimonial property management, and so forth in the event of a conjugal relationship breakdown or the death of [either of] spouses or partners. These issues have not been explicitly addressed in the *JBNQA*. However, according to s. 4 Quebec laws do apply provided they are not in conflict with or overlap matters covered by the Cree-Naskapi Act.[62] In addition the JBNQA is to prevail where there is inconsistency between the Act and the Agreement. Thus, the Civil Code family law provisions would therefore apply unless there are specific provisions in the Act or regulations that deal with the matter. Importantly, the Act also states that "where there is any inconsistency or conflict between the provisions of this Act and any other Act of Parliament, this Act shall prevail to the extent of the inconsistency or conflict."[63] Arguably then the provisions of the *Cree Naskapi Act* and the Agreement would prevail over the FMA as a result of this provision. Indeed, the judiciary have characterized the Cree-Naskapi Act as kind of superior "supra-legislation".[64] It may be that the combination of sections 3 and 4 would prevent Cree-Naskapi communities from developing their own matrimonial law code as per section 7(3) of the FMA. It would also appear that the by-law making authority of Cree Bands or Cree Regional Authority under the Act may not include the power to enact matrimonial property laws.[65] Moreover, the Bands under the *Cree-Naskapi Act* are not *Indian Act* Bands and are Bands separately incorporated. Thus, s. 7(3) may not apply to such Bands as that provision references "First Nation' which is defined as an *Indian Act* Band in the FMA. If Cree-Naskpi Bands are able to adopt a FNM Code, it may be that where the province has not covered a matter, (a gap in provincial law) then such Bands may be able to adopt such matters to fill in the gaps left in provincial law such as emergency protection provisions. The issue of the relationship between the FMA and the *Cree-Naskapi Act*

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[60] Evelyn J. Peters, "Aboriginal Self-Government Arrangements in Canada: an Overview", (Kingston: Queen's University, Institute of Intergovernmental Relations 1987) at 11

[61] The Act defines consorts (conjoints) in section 174 and that includes "[a]n unmarried man and an unmarried woman who live together as husband and wife, taking into account Cree or Naskapi custom."

[62] Section 4 reads as follows:

> 4. Provincial laws of general application do not apply to the extent that they are inconsistent or in conflict with this Act or a regulation or by-law made thereunder or to the extent that they make provision for a matter that is provided for by this Act

[63] Section 3(1) *Cree-Naskapi Act*.

[64] *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557. Justice LeBel and Deschamps, in dissent, but not on this point said at para. 92:

> [T]he Agreement has the added feature of statutory implementation through legislation enacted by both federal and provincial legislative bodies, includes a paramountcy clause, and clearly allows that there was an intention to elevate the Agreement to supra-legislative status. Having demonstrated that the Agreement is binding law and that it is paramount over conflicting laws of general application, we will now discuss its constitutional status.

[65] Sections 45 and 62 respectively.

and JBNQA are complex and beyond the scope of this paper. Further legal analysis and research is recommended.

IX. The Effect of Exercising Federal Jurisdiction under s. 91(24) in relation to Quebec Matrimonial Property Law.

Even if Quebec is of the view that its laws are "supreme" in the area of matrimonial property law and that such laws apply equally on reserve as off, that position would not be substantiated as a result of the application of relevant constitutional law doctrine concerned with the division of powers between s. 91 (federal) and s. 92 (provincial) of the *Constitution Act, 1982*. It is clear, in my opinion, that the federal legislation would generally prevail based on the constitutional principles of federal parmountcy, interjurisdicitonal immunity, and s. 88 of the *Indian Act*. In this section, I will examine in turn each of these constitutional principles and the effect of s. 88 of the *Indian Act* in terms of the validity of Quebec family law in light of the new FMA.

But before addressing a conventional division of powers analysis and understanding of s. 91(24), it is important to note that the supposedly "plenary" nature of s. 91(24) is increasingly being questioned given the broader recognition of Aboriginal peoples rights to self-determination and self-government and in particular the principle that Aboriginal peoples have a right to consultation before any government action is taken that may affect an asserted right or interest.[66] The idea that the federal government can unilaterally enact law governing "Indians" is very problematic in light of growing recognition of Indigenous human rights including the right to self-determination as peoples at international law. Indeed, the FMA's highly consultative background and the recognition of First Nations authority to enact laws within the legislation itself is evidence of this "new" qualified understanding of s. 91(24).[67]

A. Application of the Doctrine of Paramountcy

Because the federal government has exclusive jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the Constitution (as against the provinces), the federal laws including the FMA will prevail where they conflict with provincial laws. This is the outcome of the doctrine of federal paramountcy. This principle has evolved over the years to be consistent with an approach to the Constitution that stresses co-operative federalism and a tolerance for a significant degree of jurisdictional overlap to ensure effective overall governance. Consequently, the degree of incompatibility needed to trigger the application of the doctrine of paramontcy has increasingly narrowed over the years.[68] Accordingly in order for the doctrine to apply and displace the provincial law, the provincial law must be in "actual conflict" with the federal law in the sense that it is not possible to comply with both the applicable federal and

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[66] *Haida*, supra note 24.
[67] For further discussion of s. 91(24) as a conditional federal power see Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy" (2013) 51 Alta. L. R. 181.
[68] *Canadian Western Bank v. Canada*, supra note 4 at para. 70.

provincial law. Duplication of norms and the addition of requirements by the provincial law may still allow citizens to comply with the provincial law without violating the applicable federal law unless to apply the provincial law would frustrate the purpose of the federal law even though there is no direct violation of the federal law's provisions.[69]

Thus even if the federal government has substantially covered the field of matrimonial law in the FMA, that does not necessarily mean that Quebec family law is automatically displaced. If the provincial law can apply harmoniously in practical application and does not frustrate the purpose of the FMA, the provincial law may still validly apply.

For example, subject to the doctrine of interjursdictional immunity and/or the application of s. 88 of the *Indian Act*, the *Youth Protection Act* of Quebec allows a court, for the protection of the child, to remain with only one of the parents. In addition, a spouse in Quebec may be able to obtain a "safeguard" order (interim measure) for exclusive possession of the house. The FMA also allows for emergency protection orders that may result in the same or different outcome.

In *Chatterjee v. Attorney General of Ontario*, the Supreme Court of Canada allowed the provincial *Civil Remedies Act* (CRA) to be relied upon for the forfeiture of property that constitutes the proceeds of crime owned by the accused Chatterjee. It was also recognized that the *Criminal Code* sentencing provisions also allow for the forfeiture of property as part of the sentencing process. Notwithstanding the potential in some cases for actual conflict between a criminal code sentence and an application by Attorney General for the forfeiture of property under the CRA, the court found that the overlap did not constitute a real operational conflict on the facts of the particular case. The court held:

> If such operational interference were demonstrated, or if it were shown that the CRA frustrated the federal purpose underlying the forfeiture provisions of the *Criminal Code*, the doctrine of federal paramountcy would render inoperative the CRA to the extent of the conflict or interference. However, this is not the case. Where forfeiture is sought and refused in the criminal process, the various doctrines of res judicata, the issue estoppel and abuse of process are available to prevent the Crown from re‑litigating the sentencing issue. Given the flexibility of these remedies there is no necessary operational conflict between the *Criminal Code* and the CRA such as to render the latter inoperative in relation to federal offences generally. If in particular circumstances there arises a conflict between the forfeiture provisions of the *Criminal Code* and the CRA then to the extent that dual compliance is impossible the doctrine of paramountcy would render the CRA inoperable to the extent of that conflict, but only to that extent.[70]

Although provincial law may apply because the doctrine of paramountcy is not triggered on the facts of a particular case, nonetheless, constitutional law doctrine recognizes that there is a *core* aspect of federal power where provincial laws cannot tread even if they are compatible with the

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[69] Ibid at para. 73.
[70] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 (CanLII), (Headnote)

federal law.[71] Thus, we must consider the application of the doctrine of interjurisdictional immunity to the subject matter of the FMA.

B. Interjurisdictional Immunity Doctrine and the Core of s. 91(24)

In the above example, it might be that the exclusive occupation order may not offend the doctrine of paramountcy (although there is a compelling argument based on *Paul v. Paul* that it would) that finding does not end the constitutional analysis required. The court would also have to determine if the provincial law falls within the "core" area of s. 91(24).

Courts have held that it is matters that go to the "status and rights of Indians" that characterize the core of s. 91(24). This is what the courts have called "Indianness" for the purpose of division of powers analysis. In NIL/TU,O, Chief Justice McLachlin in a concurring judgment provided a useful list of what matters fall within the core. It is useful to set out the list from the judgement:

> Indian status: *Natural Parents v. Superintendent of Child Welfare*, 1975 CanLII 143 (SCC), [1976] 2 S.C.R. 751, *per* Laskin C.J., writing for himself and three other Justices, at pp. 760-61, and *per* Beetz J., writing for himself and Pigeon J., at p. 787;
>
> The "relationships within Indian families and reserve communities": *Canadian Western Bank*, at para. 61;
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> "[R]ights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.": *Four B*, at p. 1048;
>
> The disposition of the matrimonial home on a reserve: *Paul v. Paul*, 1986 CanLII 57 (SCC), [1986] 1 S.C.R. 306;
>
> The right to possession of lands on a reserve and, therefore, the division of family property on reserve lands: *Derrickson v. Derrickson*, 1986 CanLII 56 (SCC), [1986] 1 S.C.R. 285, at p. 296;
>
> Sustenance hunting pursuant to Aboriginal and treaty rights, such as the killing of deer for food: *Dick*;

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[71] In the example provided, it may be that an interim safeguard order for exclusive use of the family home, may not be sufficiently distinguishable from the *Paul v. Paul*, supra note 34, and a court may find that such an order is indeed in actual conflict with the *Indian Act* (particularly if the order is inconsistent with the right of the spouse to possess or occupy the family home under the *Indian Act*). The Supreme Court of Canada has yet to rule on whether provincial emergency protection orders involving interim exclusive use of the family home based on reasons of protection and security from violence would be found to conflict with the property provisions of the *Indian Act.* Arguably it would be difficult to distinguish the *Paul* case given that in *Paul* the order at issue in *Paul* was for interim occupation under the Family Law legislation of British Columbia.

> The right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands: *Delgamuukw* and *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 (CanLII), 2002 SCC 31, [2002] 2 S.C.R. 146; and
>
> The operation of constitutional and federal rules respecting Aboriginal rights: *Paul v. British Columbia*, among others.[72]

As can be seen, matters concerning the possession of land and the family home have been considered as falling with the core. In *Canadian Western Bank*, the court generalized the cases to find that matters concerning relationships within Indian families fall within the core and would arguably overlap with much of what provincial family law matters are concerned with. Thus provincial law would be potentially inapplicable under the doctrine of interjursidictional immunity provided that the overlap is of such a nature that it triggers the doctrine. Mere overlap with the core may not be sufficient given recent jurisprudence concerning the scope of the doctrine's reach.

The trend within constitutional law jurisprudence is to both narrow the doctrine of interjursdicitional immunity and to treat s. 91(24) as no different in this regard from any other head of federal jurisdiction under s. 91.[73]

The trend towards narrowing the scope of the applicability of the doctrine of interjursdictional immunity was expressly endorsed in *Canadian Western Bank*. In that case the debate over what level of intrusion into the core power of a federal matter would trigger the doctrine of interjurisdicitonal immunity was resolved by requiring that the provincial law "impair" the core federal matter as opposed to merely "affect" or touch on that matter. It was not until the 2010 decision of NIL/TU,O that the Supreme Court of Canada clarified that this standard of impairment was equally applicable to cases dealing with the application of provincial laws impacting Indians.[74] The majority decision written by Justice Abella overturned a long-standing line of authority that examined labour relations issues differently in the context of s.91(24) than in other contexts.[75] Justice Abella stated that:

> There is no reason why, as a matter of principle, the jurisdiction of an entity's labour relations should be approached differently when s. 91(24) is at issue. The fundamental nature of the inquiry is – and should be - the same as for any other head of power.[76]

The court concluded that the agency in question was created to provide child welfare services which was a provincial undertaking. The fact that the agency was created to provide exclusive child welfare services to First Nation communities (and came about through a tri-partite

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[72] Supra note 5 at para. 71
[73] There is some uncertainty whether this trend has been fully endorsed by the courts in reference to the scope of the core of s. 91(24). See discussion below.
[74] Supra note 5.
[75] Ibid at para 19
[76] Ibid at para. 20

agreement between the collective First Nations, the province and the federal government including the fact that the federal government provided a significant proportion of the funding for the agency) did not change the fact that the agency provided child welfare services which falls within provincial jurisdiction under s. 92 of the Constitution. Significantly, the majority made the following observations about the legitimacy of provincial authority dealing with Aboriginal matters. Justice Abella stated:

> [B]y expressly recognizing, affirming and giving practical meaning to the unique rights and status of Aboriginal people in the child welfare context, and by expressly respecting Aboriginal culture and heritage, represents a commendable, constitutionally mandated exercise of legislative power. *The very fact that the delivery of child welfare services is delegated to First Nations agencies marks, significantly and positively, public recognition of the particular needs of Aboriginal children and families.* It seems to me that this is a development to be encouraged in the provincial sphere, not obstructed.[77] (emphasis mine)

Justice Abella reminded us that this result is consistent with the co-operative nature of Canada's constitutional landscape today which adopts an approach that "accepts the inevitability of overlap between the exercise of federal and provincial competencies"[78]

The promotion of provincial jurisdiction by the court in regards to the particular needs of Aboriginal children and families suggests that the court may be quite sympathetic to provincial legislation designed to meet the needs of Aboriginal families concerned with matrimonial property matters. In other words, the court is going to be less willing to deny the application of otherwise valid provincial law simply because it implicates Aboriginal peoples.

Chief Justice McLachlin in a separate, but concurring judgement also affirmed this generous approach to the reach of provincial law. Not only did McLachlin C.J. expressly state that the court prefers the narrower view of when operations are federal and fall within the core, she insisted on a narrow definition on the scope of s.91(24) core authority. Chief Justice McLachlin held that the scope of the core of s. 91(24) is admittedly narrow. Moreover, she stated that a narrow core

> recognizes that Indians are members of the broader population and, therefore, in their day-to-day activities, they are subject to provincial laws of general application … Only where the activity is so integrally related to what makes Indians and lands reserved for Indians a fundamental federal responsibility does it become an intrinsic part of the exclusive federal jurisdiction, such that provincial legislative power is excluded.[79]

In this perspective McLachlin's judgment is consistent with Abella's.

However, and importantly for the purposes of the relevant constitutional issues regarding the FMA, McLachlin relies on the decided cases to illustrate examples of what falls within this

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[77] Ibid at para. 41
[78] Ibid at para 42 - what of the Indigenous sphere of authority?
[79] Ibid at para. 73

exclusive federal core power notwithstanding this clarification of the doctrine. Within the illustrated examples are the well-known cases that deal with matrimonial real property on reserves including matters that pertain to the "relationships within Indian families and reserve communities".

Although NIL/TU,O does clarify what is in the core. It also clarifies that it is the standard of "impairment" that will be applied. It may not be enough then that provincial matrimonial property law simply overlaps with the FMA or has a minor incidental impact. It would have to be shown that the provincial law impairs the core matter: "relationships within Indian families".

> Only if the operation's normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights can provincial labour legislation be ousted, provided the impact of the provincial legislation would be to *impair this essentially federal undertaking*.[80]

Arguably impairment would exist if there is provincial law that would actually "impair" relationships within Indian families subject to the FMA or a First Nation's Code.

This trend has implications for the FMA. The more rigorous test of "impairment" adopted for determining whether provincial law intrudes on the core of a federal head of power applied in recent cases such as *Canadian Western Bank* and *NIL/TU,O* effectively narrows the scope of what is considered within the core of s.91(24), and in doing so opens the ground for provincial law to apply to matrimonial law matters on reserve notwithstanding the FMA.

The result is that provincial laws of general application will increasingly be characterized as applying of their own force and do not need the benefit of s. 88 of the *Indian Act* to referentially incorporate them into federal law for their application unless the law impairs Indian family relationships.

The Supreme Court of Canada's NIL/TU,O decision is subject to significant criticism because of its failure to appreciate the existence of Indigenous authority over child welfare matters separate and apart from federal or provincial authority. Moreover, the court fails to appreciate the distinct but valid policy reasons why a different constitutional approach to division of powers issues is not only appropriate but necessary in the context of dealing with Aboriginal peoples in a post-colonial society. For example, there is no appreciation from the court as to how a broad and generous reading of s. 91(24) jurisdiction can be understood as a means to foster inherent and distinctive jurisdictional space under s. 35(1) of the Constitution.[81]

C. Application of s.88 of the Indian Act

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[80] Ibid at para. 74.

[81] John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 4th Edition (Lexis Nexis, 2012) at 748.

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts

This provision has the effect of referentially incorporating provincial laws that are found to not apply of their own force because they impair the core of "Indianness". In other words, if the Quebec law of general application dealing with a safeguard order granting exclusive interim occupation of a family home on reserve was found to be impairing the right of a spouse to live in the family home based on the *Indian Act* the provincial law would be incorporated as hybrid federal law. S. 88 gives such provincial laws the force of federal law. However, provincial law being incorporated into federal law via s. 88 of the *Indian Act* that ***conflicts*** with the *Indian Act* or other federal statute is excluded from being incorporated. If a safeguard order was found not to conflict with s. 20 of the Indian Act, for example, it would not be included. However, if it was found not to conflict, then it would be included but subject to the terms of the FMA because such incorporation is subject to "any other Act of Parliament" which would include the FMA. If the safeguard order conflicted with an order made under s.16 of the FMA for an emergency protection order, then s. 16 of the FMA would prevail to the extent of the inconsistency. The same result would likely occur if a First Nation Code provided for such an emergency protection order.

However, s. 88 goes farther than conventional constitutional law on paramountcy which requires actual conflict. S. 88 expressly states that in regard to the *Indian Act* provisions or the First *Nations Fiscal Management Act* (FNFMA) the provincial law will not be applicable where the provincial law merely overlaps or deals with the same subject matter as anything covered in the *Indian Act* or the FNFMA. Actual conflict between the laws is not necessary. Indeed the provincial law may act in harmony with the federal law, but will nonetheless be exempt from application to Indians as a result of the express language in s.88.

However, by the language of s. 88 itself, only the FNFMA and the *Indian Act* can benefit from this broader protection against provincial law. S. 88 has yet to be amended to include the FNLMA or the FMA. There are important implications regarding this omission. If a provincial law of general application affects the core of Indianness and that matter is governed by the FNLMA or the FMA, s. 88 will allow it to apply to Indians unless the provincial law is in actual conflict with the terms of the federal law. One possible negative implication of there being greater room for provincial law to apply is that it might encourage forum shopping by spouses to see where they can get the better deal: provincial law or the FMA? As noted above in the Executive Summary, it has been recommended that s. 88 be amended to make explicit reference to the FMA. I would also recommend including the FNLMA as well to ensure consistency.

Before examining the issue of judicial enforcement of the FMA or FNM Codes by the Quebec courts, I would first like to briefly discuss the issue of restricting the Act to deal only with on-reserve property owned by conjugal partners.

D. Application of FMA to Off-Reserve Family Assets

The Act is restricted in its application to lands and structures situated on the reserve. This is made clear in the definition of family home and in the operation of s. 28 concerned with the division of matrimonial interests or rights which are "situated on the reserve of that First Nation." This means that the valuation of assets under the Act only applies to interests situated on the reserve to which a spouse is a member. Arguably this would exclude assets of the spouse situated on a reserve to which the spouse is not a member or on provincial lands generally. This is a very restrictive definition of "interest and rights". Multiple proceedings is thus likely a possibility in order to effectively deal with all property held by couples. This is very problematic and restrictive and will result in a multiplicity of proceedings (contrary to the need to make justice more accessible for First Nations people).

This decision to restrict the Act to property situated only on the reserve is curious. The constitutional law division of powers principles have evolved, as discussed above, to significantly embrace co-operative federalism and to recognize a degree of overlap between federal and provincial jurisdictions. In my opinion, it would be possible to expand the reach of the federal Act to include provincial assets as long as the intrusion into the provincial sphere was "incidental" of an otherwise valid federal legislative scheme. In *Canadian Western Bank*, Justice Binnie and LeBel noted that "pith and substance" of constitutional interpretation is founded:

> On the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example … it would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights …[82]

One could say the same about how impossible it would be for Parliament to make effective laws in relation to Indian matrimonial property without affecting property and civil rights in the province. Indeed, one could argue that the failure of the Act to extend its reach beyond the confines of reserves to include all family assets regardless of where they are located is to fall on the side of inefficient, ineffective and impractical legislation.

It is beyond the scope of this report to go into a detailed analysis of the likely outcome a division of powers challenge if Parliament had extended the reach of the Act to include off reserve property. In my opinion any such external reach into provincial authority would succeed against a constitutional challenge by the province as the impact would likely be minimal and incidental given the overall focus of the Act to deal with matrimonial property on reserve by First Nation members of particular reserves. Indeed my preliminary opinion would not change if the federal government included all "Indians" regardless of their place of residence on or off reserve in such legislation since s. 91(24) includes two heads of power "lands reserved for Indians" and "Indians". The existence of the "double aspect" doctrine in constitutional law would justify the

[82] Supra note 4 at para. 29

application of provincial laws to Indians, but if the federal government decided to enter the field, its plenary authority under s. 91(24)[83] would likely oust any provincial law considered to be in conflict with the federal legislation. It should not be forgotten that s. 88 exists because the federal government has chosen not to enact, "one by one, its own measures duplicating, for Indians"[84], the substance of existing provincial laws.

I can only speculate as to why Parliament took such a restrictive and potentially ineffective approach. Perhaps it is the uncertainty of constitutional challenge, but most likely it is the uncertainty of the application of a First Nations Code's reach although there is nothing in section 7 that would necessarily restrict a First Nation in creating its own matrimonial property law regime to include assets of spouses located off reserve.

Section 7 acknowledges that a First Nation has the power to enact laws in relation to interests or rights "on its reserves". However this provision simply recognizes what governance powers First Nations possess in this area. It says nothing of the extent of its governance power in this area. In any event one must recognize that to create an effective Band Code, the Band may need to intrude to some extent on provincial jurisdiction but in my opinion such an intrusion would likely be considered only incidental to the main purpose of the Code to deal with interests and right of its members on reserve. This conclusion would hold regardless of whether the source of the authority to extend to assets held by spouses off-reserve is viewed as an exercise of existing inherent power implicitly recognized in s. 7 of the Act or as a logical extension of delegated federal authority.[85]

It is important to be reminded that the preamble states that the federal government recognizes that Aboriginal peoples possess an inherent right to self-government although it would prefer implementation of the right through negotiations. This preamble statement does not therefore exclude legislative recognition of self-governing authority. Indeed, the following preamble statement indicates that Parliament does not wish the Act to be used to the prejudice of First Nations as determinative of the extent or scope of self-government authority. The Act is intended to "advance the exercise in a manner consistent with the *Constitution Act, 1982* of First Nations law-making power …"[86]

X The Source of the First Nation's Power to Make Matrimonial Laws

The preamble seems to suggest that the authority recognized in s. 7 is delegated authority by default since the Act has come about not through a self-government agreement, but by regular parliamentary process (notwithstanding a highly "consultative" process leading up to its enactment). In addition, the term First Nation in s. 7 is defined in the Act as meaning a "band"

[83] There is much criticism as discussed above about characterizing s.91(24) as plenary …
[84] Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185
[85] As discussed below the more compelling view of s.7 of the Act is that it is a recognition of existing governance rights and not an enabling provision for exercising federal authority.
[86] Preamble provisions.

as defined under the *Indian Act*. The conventional view is that the "band" is a creature of the *Indian Act* and therefore the powers it possess are only those expressly delegated by federal legislation.

However, the Band is also an organic polity and not just a form of delegated power akin to municipalities. In this regard it is interesting to note that the language used in s. 7 refers to the First Nation as having "**the power to enact**". Unlike s. 81 of the *Indian Act*, there is no reference to Band "by-laws" which is the language usually associated with subordinate bodies exercising delegated authority. It is therefore open to interpretation that the Act is not delegating authority but actually recognizing inherent governance authority. Indeed, some lower courts have recognized that Bands possess two sources of governance authority. The first comes as delegated federal authority under the *Indian Act* and other federal statutes. The other source comes from inherent governance authority separate from federal or provincial power. In *Bone v. Sioux Valley Indian Band*[87] the court held that the power of a band to choose its council in a customary manner is not dependent on the *Indian Act*. "Rather it is an inherent power of the Band; it is a power the Band has always had, which the *Indian Act* only interferes with in limited circumstances …"[88] Likewise, the power recognized in s.7 may be defined as inherent notwithstanding that the FMA interferes with it in limited circumstances (i.e. imposes a publishing requirement and a process for ratification).

Although the preamble indicates that it was not the intent of Parliament to "recognize" inherent First Nation authority independent of a negotiated self-government agreement there is the possibility that the legislation itself does indeed recognize as oppose to delegate such authority in any event.[89] There is a body of case law that would support a finding that the Act is not enabling of First Nation authority, but simply recognition of pre-existing authority.[90]

The federal government recognizes by way of policy that Aboriginal peoples possess an inherent right to self-government. This right to self-government, however, can only come into fruition through negotiated agreements. This aspect of the recognition is contested. Where negotiations are not pursued or fail, Aboriginal peoples nonetheless argue that the right is judiciable and can be recognized by the courts. The courts have indicated their ability to decide the matter as long as the asserted right is not framed too broadly (*Pamajewon*, SCC). Although the minor conditions in s. 7 suggest federal control over First Nation law making authority, there existence is also consistent with the view that they represent a tailored admission of an inherent right to law making authority where the conditions are not contested (a compromise on the full extent of the right) from the federal government's point of view.

However, all that is possible in this report is to highlight the fact that the assumption that powers of First Nations under the FMA are delegated is contentious and subject to question. More analysis is required to fully explore this issue.

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[87] [1996] 3 C.N.L.R. 54 at para. 32
[88] Ibid.
[89] It should be noted that s. 4 of the FMA states that the Act is to" provide for the enactment of First Nation laws" which could be interpreted as an enabling provision as opposed to a recognition of inherent power.
[90] For example see *Campbell v. A.G. B.C.* [2000] 4 CNLR 1 (B.C. S.C.)

What would happen if a First Nation decides to enact a Code that does not address emergency protection provisions? Does the provisional rules apply then or do we presume the First Nation by not including them in their own Code has implicitly decided that such a regime does not apply on their reserve?

One policy of the Act is the need to address unfairness in matrimonial property and family violence issues regarding the matrimonial home and that the Federal government will do so if First Nations do not. The "opt out" nature of the overall structure is consistent with this policy perspective. To be consistent with this policy objective, it would make sense that the provisional rules would fill in the gap left by the First Nation in their own Code. Another policy of the Act would be one that supports First Nation jurisdiction and autonomy to decide how the First Nation government and its citizens wish to deal with the issue and that a decision not to include emergency protection provisions is a legitimate decision of self-government and one that should be respected.

The FMA does not provide a clear answer to these questions. A First Nation that does not want the emergency protection provisions should expressly state that the provisions of the FMA on such matters do not apply in order for the Band government to protect its authority to decide the matter. It is another question, however, whether provincial provisions would nonetheless apply. Based on case law interpreting the impact of band by-laws on the application of provincial law to reserves, most likely the First Nation law will prevail.[91] Without such an express provision, and given the preference for cooperative federalism a court might find that there is no operational conflict between a First Nation Code and provincial law or for that matter the continued application of the provisional provisions of the FMA.[92] However, if the provincial law is dealing with occupation of lands or a matrimonial home, the provincial law will not likely apply on constitutional division of powers grounds as explained above.

XI. Enforcement of Federal Law within Quebec (Indian Act and Delegated Authority)

The superior courts of the province (which possess general jurisdiction) are the appropriate forum to apply federal law although federal law may expressly stipulate otherwise and appoint an alternative forum for adjudicating federal law (for example the Federal Court of Canada may be chosen as the forum in the federal statute provided the federal government has plenary power over the subject matter under adjudication). Moreover, it is possible for the federal government to stipulate provincial courts and tribunals other than the superior courts.[93]

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[91] *R v. Billy* [1982] 1 C.N.L.R. 99 (B.C. C.A.), *St. Mary's Indian Band v. Canada* [1996] 2 C.N.L.R. 214 (Fed. T.D.)

[92] *R. v. Blackbird*, [2005] 2 C.N.L.R. 309 (Ont. C.A.)

[93] Peter Hogg, supra note 35 at 7-4. The case of *Papp v. Papp* [1970] 1 O.R. 331 (Ont. C.A.) is referenced in relation to the ability of the federal government to stipulate the superior court as the appropriate forum. The case of *R. v. Trimarchi* (1987) 63 O.R. (2d) 515 is identified in the same respect as concerning the appointment of provincial courts.

The FMA expressly assigns jurisdiction to the provincial superior court which in the case is the Quebec Superior Court (per s. 2(1) of the FMA) and any other court including the Quebec provincial court under s.43(5) if it already has been seized of the matter. If a court other that the Superior court was seized of a matter concerning the application of a spouse or "conjoint de fait" then this provision recognizes that such a court has jurisdiction to hear an application under the FMA. Even if there were no express provisions in the FMA concerning which courts have jurisdiction, the default position is that the superior courts (s. 96 courts) would have jurisdiction as they are courts of original jurisdiction under the Constitution.[94]

This is consistent with the FMA legislation. The superior court of the province has jurisdiction but for s. 16 of the Act which accords jurisdiction to a "designated judge" for the purposes of making an emergency protection order. This could include a judge of the superior court. However this provision will only take effect once the Lieutenant governor in council has authorized a "designated judge" under s. 2(1) of the FMA. The Act is intentionally flexible as to which court can be a designated judge to allow different provinces to hear emergency protection orders most consistent with their existing provincial processes. In the case of Quebec, however, there is no specific provincial legislation specifically providing for civil emergency protection orders, except in the case of youth (as discussed above). Superior courts have jurisdiction to issue an interim injunction against one or the other spouse to leave the family residence pending a final determination of their rights following relationship breakdown. However, this may not apply to *de facto* conjugal partnerships in Quebec. As a result, these relationships would be limited to protective orders available under the Criminal Code (i.e. peace bonds).

At time of writing, the Lieutenant Governor in Council for Quebec has not yet appointed a designated judge. Provinces have until December 16th, 2014 to designate a judge which is when the provisional rules become enforceable. If an appointment has not been made by then, the emergency protection order provisions may not be relied on as the provisions are dependent on the jurisdiction of a designated judge. Quebec law may then apply subject to the question of constitutionality discussed above.

However, it may be possible for a First Nation Band Code to include emergency protection orders and expressly appoint the Superior Court of Quebec (or perhaps the provincial courts which may be more accessible) to have jurisdiction to issue such orders under the First Nation's own Code. The Federal Department of Justice overview of the FMA indicates that a First Nation may choose to enact their own laws "with regard to all or part of what is included in the federal provisional rules – for example, they may choose not to involve the courts…"[95]

Generally speaking, the policing authority responsible for policing the reserve will enforce only quasi-criminal by-laws. By-law enforcement officers appointed by the band council will enforce those of an administrative nature. Other members of the community may effectively "enforce" bylaws either by their own informal methods or by available formal routes.

The Emergency Protection Order provisions of the Act and a First Nations Code that provides similar protections from family violence may be considered quasi-criminal. Indeed they are

[94] Ibid.
[95] Supra note 36 at 9.

being treated as such as there are current plans for providing police forces with training on section 16 (emergency protection provisions) of the FMA.

In conclusion, the above confirms that conventional constitutional law principles would support the right of the federal government to assign the forum or forums to administer the provisions of the FMA.

XI Conclusion

This report was asked to address some of the key differences between the FMA and Quebec family law. In general the FMA provides similar protections as would Quebec family law with the major exception of not extending the concept of patrimony to *de facto* couples (common law couples). In any event this issue is somewhat moot given that under constitutional law doctrine the FMA would prevail where provincial law conflicts with the application of the FMA. In some circumstances provincial law may not apply because it unjustifiably intrudes on the core of federal power under s. 91(24) which have been defined to include family relations on reserve. Finally, the federal government has the constitutional authority to stipulate which judicial forum is to administer the provisions of the FMA. It remains somewhat uncertain the extent to which a First Nation in reference to its own Family law Code may do the same. The Act suggests that is does under s. 7(2) (a).

Appendix A: Comparison Chart

FHRMIRA vs. Civil Code of Quebec

Civil Code of Quebec	***FHRMIRA***
Definition of the Family Patrimony[96] • The residences used by the family or the rights which give the family the use of them; • The household furniture used to furnish or decorate the residences; • The motor vehicles used for family transportation; • The rights accrued in a retirement plan during the marriage or civil union; and • The earnings registered during the marriage under the Act respecting the Quebec Pension Plan or equivalent programs.	*Family Home* and *Matrimonial Interest or Rights* Definition[97] "Family home means a structure — that need not be affixed but that must be situated on reserve land — where the spouses or common law partners habitually reside or, if they have ceased to cohabit or one of them has died, where they habitually resided on the day on which they ceased to cohabit or the death occurred. If the structure is normally used for a purpose in addition to a residential purpose, this definition includes only the portion of the structure that may reasonably be regarded as necessary for the residential purpose." "Matrimonial interests or rights" means interests or rights, other than interests or rights in or to the family home, held by at least one of the spouses or common-law partners (*a*) that were acquired during the conjugal relationship; (*b*) that were acquired before the conjugal relationship but in specific contemplation of the relationship; or (*c*) that were acquired before the conjugal relationship but not in specific contemplation of the relationship and that appreciated during the relationship. It excludes interests or rights that were received from a person as a gift or legacy or on devise or descent, and interests or rights that can be traced to those interests or rights.
Equal Rights and Being Bound to Live Together	Occupation of Family Home; Equal for Each spouse or Partner[99]

[96] The *Civil Code of Quebec* (*CCQ)*, s. 415
[97] The *FHRMIRA*, s. 2
[99] The *FHRMIRA*, s. 13

"The spouses have the same rights and obligations in marriage. [T]hey are bound to live together." [98]	
Award for Occupation of Family Residence after Death, Divorce, etc[100]	A Survivor who does not hold an interest or right to the family home may occupy that home for 180 days after the death of a spouse or common-law partner[101]
Possibility of Renunciation of Rights in the Family Patrimony After Marriage Breakdown, Death of a Spouse, etc.[102]	Consent to and Possibility of Disposition and Encumbrance of Matrimonial Interests or Rights During the conjugal Relationship[103]
Partition of the Family Patrimony (*Separation from Bed and Board or Dissolution of a Marriage by Divorce*)[104] Determination of the Family Patrimony Value[105]	Equal Division of the Value of Interests and Rights after Breakdown of a Conjugal Relationship[106] The conditions of evaluation for First Nation members[107] and non-First Nation members.[108]
Matrimonial Regime[109]	Enforcement of a Written Agreement After Breakdown of a Conjugal Relationship[110]
Partition of the Family Patrimony (*Dissolution of a Marriage by the Death of either Spouse*)[111] Determination of the Family Patrimony Value[112]	Equal Division of the Value of Interests and Rights after Death of a Spouse or Common-law Partner[113] The Conditions of Evaluation for First Nation Members[114] and Non-first Nation Members

[98] The *CCQ*, s. 392
[100] "In the event of separation from bed and board, divorce or nullity of a marriage, the court may, upon the application of either spouse, award to the spouse of the lessee the lease of the family residence. The award binds the lessor upon being served on him and relieves the original lessee of the rights and obligations arising out of the lease from that time forward." The *CCQ*, s 409
[101] The *FHRMIRA*, s 14
[102] The *CCQ*, s 423
[103] The *FHRMIRA*, s 15
[104] The *CCQ*, s 416
[105] "The net value of the family patrimony is determined according to the value of the property composing the patrimony and the debts contracted for the acquisition, improvement, maintenance or preservation of the property composing it on the date of death of the spouse or on the date of the institution of the action in which separation from bed and board, divorce or nullity of the marriage, as the case may be, is decided; the property is valued at its market value." The *CCQ*, s 417
[106] The *FHRMIRA*, s 28
[107] The *FHRMIRA*, s 28(2)
[108] The *FHRMIRA*, s 28(3)
[109] The *QCC*, s. 431-447
[110] The *FHRMIRA*, s 33
[111] The *CCQ*, s 416
[112] The *CCQ*, s 417
[113] The *FHRMIRA*, s 34
[114] The *FHRMIRA*, s 34(2)

	differ in that non-members are not entitled to a portion of the value of land.[115]

Appendix B: Extract from Youth Protection Act

37.5. In order to better adapt the application of this Act to the realities of Native life, the Government is authorized, subject to the applicable legislative provisions, to enter into an agreement with a first nation represented by all the band councils of the communities making up that nation, with a Native community represented by its band council or by the council of a northern village, with a group of communities so represented or, in the absence of such councils, with any other Native group, for the establishment of a special youth protection program applicable to any child whose security or development is or may be considered to be in danger within the meaning of this Act.

The program established by such an agreement must be compatible with the general principles stated in this Act and with children's rights thereunder, and is subject to the provisions of Division I of Chapter III thereof. In particular, the powers provided for in section 26 may be exercised with respect to the record relating to the case of a child to whom such an agreement applies.

The agreement shall specify the persons to whom it applies and define the territory in which the services are to be organized and provided. It shall identify the persons or authorities that will be entrusted with exercising, with full authority and independence, all or part of the responsibilities assigned to the director, and may provide, as regards the exercise of the entrusted responsibilities, procedures different from those provided for in this Act. The agreement shall contain provisions determining the manner in which a situation is to be taken in charge by the youth protection system provided for in this Act.

The agreement shall also provide measures to evaluate its implementation, and specify the cases, conditions and circumstances in which the provisions of the agreement cease to have effect.

To the extent that they are in conformity with the provisions of this section, the provisions of an agreement shall have precedence over any inconsistent provision of this Act and, as regards the organization and provision of services, of the Act respecting health services and social services

[115] The *FHRMIRA*, s 34(3)

(chapter S-4.2) or of the Act respecting health services and social services for Cree Native persons (chapter S-5).

Any agreement entered into under this section shall be tabled in the National Assembly within 15 days of being signed, or, if the Assembly is not in session, within 15 days of resumption. It shall also be published in the *Gazette officielle du Québec.*[116]

[116] *Youth Protection Act* (1977) S.Q. c. P-34.1