







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



# Poitras v. Khan, 2016 SKQB 346

▶ Issue: Is a will that was signed by the deceased 2 years prior to meeting her husband (Mr. Khan, a non-member), and that left the entirety of her estate to her children, valid?

- ▶ Ruling: The Court confirmed the validity of the will, and sent Mr. Khan back to Court.
- ► Analysis:
- 1. Saskatchewan Wills Act s. 17(1) v. Indian Act, s. 46(1)(c)
- 2. Mother's wishes for her children
- 3. Mr. Khan could utilize the SK *Family Property Act and the Dependents' Relief Act, 1996*
- 4. Very different result had Ms. Poitras passed away a few months later

## McMurter v McMurter, 2016 ONSC 1225

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

8

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## Hepworth v Hepworth, 2012 NSCA 117

9

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

## Dunstan v Dunstan, 2002 BCSC 335

10

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

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# MRP laws under framework agreement of *FNLMA*

► Several First Nations and Canada signed the Framework Agreement in 1996, and in 1999 the *FNLMA* ratified the Framework Agreement.

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

## Kumagai v. Campbell Estate, 2018 BCCA 24

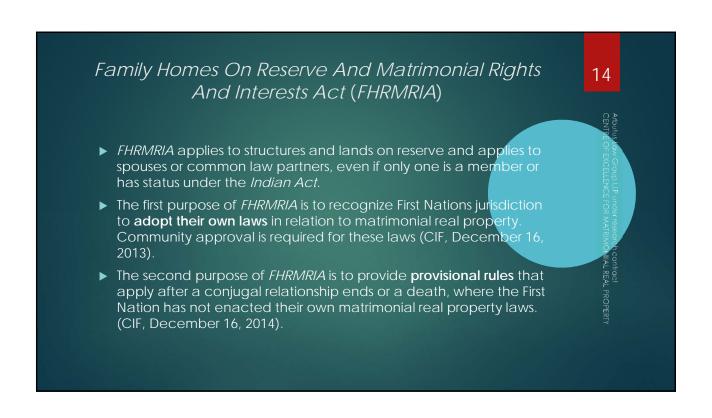
- ▶ **Issue**: What is the value of the family property?
- ▶ Ruling: The court increased the value of the family home, and increased the amount of Mrs. Kumagai's entitlement.
- ▶ Analysis: Mrs. Kumagai could not develop the residential property on her own, but this wasn't a "legal impediment" to appraise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

12

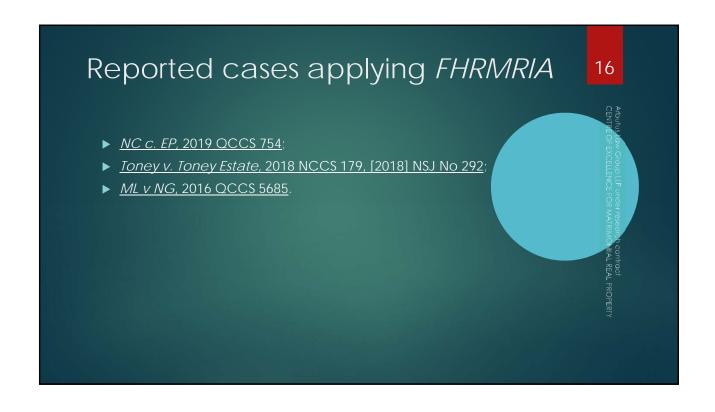
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# Pre-FHRMRIA cases Court decisions prior to FHRMRIA have limited use today, especially in regards to possession and occupation orders. Pre-FHRMRIA cases are still useful in reflecting the court's methods and approaches to evaluate land and the homes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



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



### NC v EP, 2019 QCCS 754 17 Issue: Is the plaintiff (NC) entitled to half the value of the matrimonial home that she resided in with the defendant (EP), until the date of their separation? Ruling: NC entitled to compensation for her contribution to the family home which the court determined was half the value of the home, minus the value of the down-payment made by EP, which came from an inheritence. Analysis: Civil Code of Quebec articles 1493-1495 were relied on to establish unjust enrichment. NC non-member, EP was a member had property registered in his name. NC made mortgage payments, paid for furniture and paid son's expenses. NC entitled to value of home, minus the down payment paid by EP. Court decided that FHRMIRA applied but would have had the same result. Court made a mistake - down payment would not have been deducted under **FHMIRA** Shows a lack of familiarity with FHRMIRA, and especially with rights of a common law spouse, which is not part of the Civil Law of Quebec.

### Toney v. Toney Estate, 2018 NCCS 179, [2018] NSJ No 292 18 ▶ Issue: Is a non-member entitled to exclusive occupation of the matrimonial home, and half the value of her deceased husband's estate under FHRMRIA? ▶ Ruling: An exclusive occupation order granted with conditions for indeterminate period of time. \$70,000 compensation order issued for half interest in matrimonial home at time of death – parcel of land was excluded Analysis: Court looked at the history and rationale for FHRMRIA. The First Nation intervened to state that if exclusive occupation order issued should be limited due to housing shortage on reserve. ▶ The Court weighed all the circumstances and decided the fairest outcome was to grant the exclusive occupation order (with conditions). The Court used the value of renovations put into the home as the divisible value of the home, \$140,000 (rejecting the replacement value, insurable value and municipal tax assessment) The other parcel of land was not included in the divisible value, because there was no evidence there were any buildings on the land.

# ML v NG, 2016 QCCS 5685

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

# Community Specific MRP Laws enacted under *FHRMRIA*

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

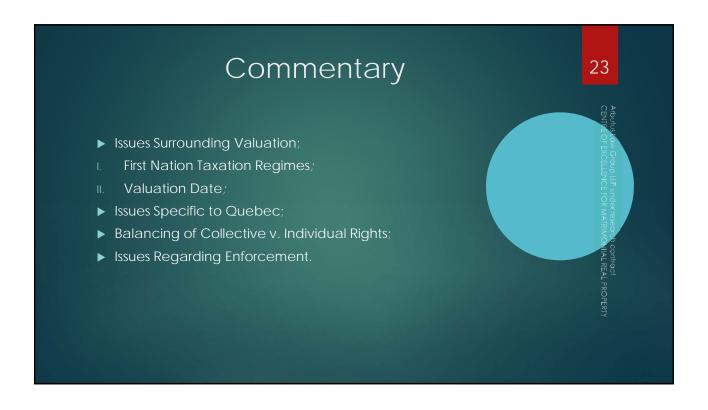
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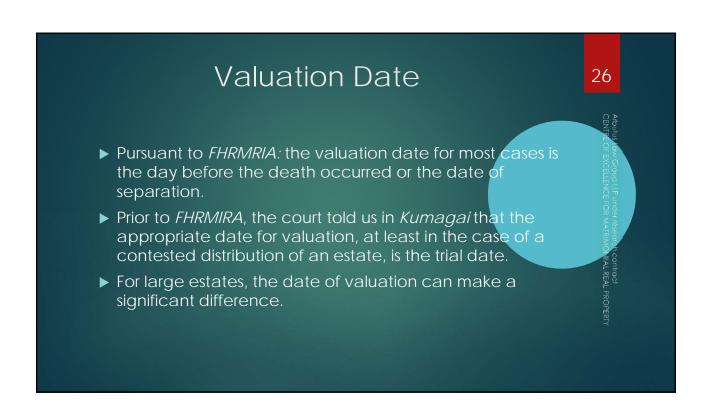
### Ms. v Mr., 2019-06-12 Akwesasne Court 21 ▶ Issue: Is the applicant entitled to exclusive occupation of the matrimonial home under the Akwesasne Couple's Property Law? ▶ Ruling: 2 year exclusive occupation order issued for Ms. and her 3 children, and Mr. ordered to stay away from home during that period. Ms. was ordered to keep home safe and preserve value of home while paying hydro and mortgage bills, but accounts stay in Mr.'s name while order in effect. If order not respected could face \$1000-\$10,000 fine and orders enforceable by the Mohawk police. ▶ Analysis: Judge took into account the dysfunction of relationship, the cooperation of Mr. and the uncooperative nature of Ms. Also that parties are at different places in their healing and best interests of children to heal. Emphasis also on the need to support the 'good mind' (Kanikonri:io) of both parties for their own health and wellbeing but also the children's. Both parties agreed the children need their mother and father, also to continue to work together for the best interest of their children.







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



### Issues Specific to Quebec 27 A lack of awareness of FHRMIRA. ▶ Two judgments in Quebec (NC v EP and ML v NG) made some questionable findings. ▶ In ML v NG, the Court applied FHRMIRA's Provisional Federal Rules even though the couple separated before the coming into force of the Rules. ▶ In NC v EP, the judge deducted the amount of the down payment made for the matrimonial home, because it came from an inheritance, even though this is contrary to fact that inheritances are not deducted from the value of the matrimonial home under FHRMIRA, ▶ The courts, knowingly or perhaps unknowingly, failed to apply the concept of 'common law partners' which exists in FHRMIRA, but which is absent in the civil law in Quebec. ▶ Both judgments also heavily relied on the Civil Code of Québec to support the division of the value of the family home. FHRMIRA was mentioned as a secondary support and not a primary source of law,



### Protecting Vulnerable Spouses and Children 29 FHRMIRA was meant to ensure a legal regime was in to protect vulnerable spouses and children, who often suffered and were ousted from their homes and communities following violence, separation or death - results are mixed Exclusive occupation orders have been issued that would not have been possible before - but not that many Perhaps more mediated solutions, but we don't have number ▶ Lack of the use of courts linked to many factors: Cost of lawyer and access to justice issues ▶ Fear of family services being informed Lack of awareness of FHRMRIA Valuation date under FHRMIRA may result in vulnerable spouses being denied the benefit of an increase in the value of family property. Non-member spouses cannot share in the value of land on reserve, even though this seemed to be included in compensation orders pre-FHRMIRA. ▶ No emergency protection orders have been issued under FHRMIRA.



