

This sample briefing note is for information only, the Centre of Excellence for Matrimonial Real Property does not provide legal advice. First Nations should retain their own lawyers to obtain advice on the proper interpretation of the FHRMIRA, the FNLMA and for any other legal advice.

EXTREMELY CONFIDENTIAL

BRIEFING NOTE TO COUNCIL

Application for Exclusive Occupation under Section 20 of FHRMIRA

Background

In 1986, the Supreme Court of Canada ruled in *Derrickson vs Derrickson* that courts cannot apply provincial or territorial family laws respecting Matrimonial **Real Property** on reserves. Real Property is land and the home located on that land.

To fill this legislative gap, Canada enacted the Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA) which came into force December 16TH, 2013.

Canada enacted this law to provide rights and protections to spouses and common-law partners living on reserves during a marriage or common law relationship, upon the breakdown of their relationship or on the death of a spouse or common law partner. The legislation provides

- authority for First Nations to enact their own law relating to MRP (s.s 7-11) and
- a set of provisional federal rules that will apply until such time as the FN enacts its own law (s.s 12-52)

Families retain the right to settle these matters amongst themselves however, if they cannot come to agreement, rights and remedies contained in the provisional federal rules are accessible through the provincial courts. These remedies only apply to relationships that have ended or where the spouse died on or after the coming into force of the Provisional Federal Rules on December 16, 2014 (*If your First Nation was granted the extension because you were a signatory to the First Nations Land Management Act, insert the appropriate date here*).

FHRMIRA Applications

When a resident of *insert name of FN here* First Nation makes an application under the Provisional Federal Rules, Section 41 (1) of FHRMIRA requires that the First Nation be notified. Section 41 (2) provides that the court hearing the application must, before making its decision, allow the council to make representation 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.

The following briefing note is intended to provide sufficient information upon which the First Nation can determine its position with respect to the application and whether or not it wishes to make representation to the court. The information contained herein is strictly confidential and must not be discussed outside of this closed session of council.

On insert date here, insert name of FN here, received notice of an application for **Exclusive Occupation** under section 20 of FHRMIRA.

Insert name of FN here, must indicate to the courts by insert date here if they wish to make representation on this matter. The Application is being heard at the insert name and address of court on insert date and time.

Lawyer for the Applicant is (insert name here)
The Court File Number is (insert file number here)

The facts of the situation are as follows:

- **Applicant's name and band number (if applicable):**

- **Respondent's name and band number (if applicable):**

- The Applicant is seeking Exclusive Occupation of the family home located at insert legal description (if available) and physical address (eg. 1234 main street) for a period of:
 - o Insert details here
- The Applicant is also seeking (list other remedies being sought by the applicant here eg. Division)
- The following other orders been made under *FHRMIRA* with respect to this family/property (ex: Emergency Protection Order): (Provide details if applicable)

Family Details:

- The following children also reside in the family home:
 - o Insert age, gender of child and relationship
 - o _____
 - o _____
- The Custodial Parent(s) is/are: _____
- The following Elders are living in the family home:
 - o Insert age and relation to family
 - o _____
 - o _____
- Other residents residing in the family home include:
 - o Insert age and relation to family
 - o _____
 - o _____

- The Applicant has resided on insert First Nation here for insert period of residency here
- The Applicant has resided in the family home at this address since insert period of residency here
- The following residents of the family home have medical conditions that require consideration: If so, insert details here
- To the best of my/our knowledge, there is/is not a history of violence within the family: If so, explain details here
- The spouses do/do not have a legally binding domestic contract: (if yes, provide details here)

Property Details:

- The property is held by *(choose either)*:
 - Certificate of Possession (insert name of all lawful possessor(s))
 - Custom Allotment (insert name of party(ies) to whom the home and/or land was allotted)
 - Rental Agreement (insert name of individual(s) to whom the agreement was issued)
- A mortgage is registered against the property: yes/no
- A Ministerial guarantee was issued for the mortgage: yes/no (if yes, are there any financial concerns that would impact on the First Nation's contingent liability? If so, explain details here)
- The following third party interests require consideration: (Provide details here ex: other people on the Certificate of Possession)

Housing Details:

- If the subject land and the family home are allotted by custom, the following housing policy issues require consideration. (Insert details here)
 - Example:
 - Is other suitable accommodation available? Yes/no
 - Is there a wait list for band housing? Yes/no (provide details here)
 - There is a business owned by the individual attached to the family home: yes/no

Any other considerations: (Insert details here)

Recommendations:

1. (Example: The council indicate to the Applicant and the courts its wish to make representation at the hearing.)
2. (Example: We recommend support for the application based on the following:
 - a. The Applicant is the custodial parent of three member children.
 - b. The application is consistent with the First Nation's commitment to protect and maintain the childrens' connection to the community, their culture and extended family whenever possible
 - c. The Respondent is currently residing with his/her parents

3. (Example: We recommend that Council not support this application for the following reasons:
 - a. The Applicant has only resided on the First Nation for 3 months since their marriage
 - b. The Respondent has resided at this address for 10 years
 - c. There are no children or elders residing in the family home
 - d. The Applicant has a criminal conviction for drug trafficking

4. (Example: Support for the application include the following conditions:
 - a. The mortgage and or rental fees be maintained in good standing
 - b. That the home and property be maintained in a good state of repair.
 - c. That the applicant observe all other FN By-Laws and policies]

5. (Example: we recommend that Chief & Council forward this application to legal counsel for review and if applicable, direct them to file the appropriate forms with the courts)

Prepared by: (insert name here)

Signature: _____

Date: _____