

Application For Exclusive Occupation

In certain communities, the Chief and Council or its delegated authority has the ability to make decisions regarding the occupancy of homes on its reserve. Notwithstanding this recognized authority, a spouse or common-law partner resident on reserve retains the right to apply for exclusive occupation of the family home under section 20 of the **Family Homes on Reserves and Matrimonial Interests or Rights Act**.



Section 20(1) of the Act states:

“A court may, on application by a spouse or common-law partner whether or not that person is a First Nation member or an Indian order that the applicant be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.”

Cultural, familial, and political issues may face the spouse before he or she decides to apply for exclusive occupation. For example, the spouse taking care of the children may need a stable home to raise the children until they reach the age of 18. Before beginning a court application, it is recommended that the spouses try using alternative dispute resolution such as mediation.

Legal Assistance

This pamphlet is provided for informational purposes only and should not be considered as legal advice.

The applicant or respondent may choose to have a lawyer assist them at any point during the application. He or she would be responsible to pay the legal costs.

Individuals may also qualify for legal aid. Further information may be found by going to www.gov.pe.ca and searching for 'legal aid'

Individuals may also qualify for a referral through the Community Legal Information Association. Participating lawyers provide a 45 minute consultation for \$25 plus HST. The purpose of these sessions is to provide general information. Further information may be found by going to www.cliapei.ca.

For more information, contact:

The Centre of Excellence for Matrimonial Real Property

c/o National Aboriginal Lands Managers Association
1024 Mississauga Street, Curve Lake, ON
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Phone: 1-855-657-9992 or 1-705-657-9992

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Applying for an Exclusive Occupation Order for a Family Home on Reserve



A guide to navigating the Supreme Court rules of P.E.I when applying for Exclusive Occupation of the family home under section 20 of the Family Homes on Reserves and Matrimonial Interests or Rights Act

Background

The *Family Home on Reserves and Matrimonial Interests or Rights Act* (the “Act”) came into force on **December 16, 2013**. The Provisional Federal Rules (PFR’s) contained in the Act came into force **December 16, 2014** and apply (with some exceptions) to all First Nations with reserve lands. The PFR’s no longer apply to First Nations who have passed their own matrimonial real property (MRP) law, under this *Act*, or under the *First Nations Land and Management Act*. **It is important to determine which rules apply in your circumstances.**

NOTE: This Act only applies where the breakdown of the relationship occurred on or after December 16, 2014.

As per Clause 2.1 of the Definitions of the *Act*, a **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

Purpose of this Pamphlet

This pamphlet is to provide information on how a spouse or common-law partner can apply for an order for exclusive occupation of the **family home** on a reserve in Prince Edward Island. An exclusive occupation order may:

- Be for a short or long period of time
- Allows for one spouse or common-law partner to exclusively stay in the family home on reserve and
- Excludes the other spouse or common-law partner from coming to the family home on reserve or only allows them on the premises under certain conditions.

Application to the Supreme Court

All court forms for family law applications in the Supreme Court of Prince Edward Island can be found by going to <http://www.courts.pe.ca/supreme> and clicking on “Forms.”

To apply for an order for exclusive occupation, use **Form 14E, Notice of Application**. An order for exclusive occupation may also be requested in the context of a **Divorce Petition by Notice of Motion** as opposed to a Notice of Application.

Application Form

Where the relief claimed is filled in on the form (question 1 – the applicant makes application for), the applicant should state that he/she is applying for an order for exclusive occupation under section 20 of the *Family Home on Reserves and Matrimonial Interests or Rights Act*.

Where the ground for the application are filled in (question 2 – the grounds for the application are), the applicant should state some background information of the relationship including the names and ages of any children. The Applicant should also state the reasons why exclusive occupation should be granted, and state that the *Family Home on Reserves and Matrimonial Interests or Rights Act* is being relied on along with such other statutes and rules that may apply.

Where the documentary evidence is filled in (question 3 – state the documentary evidence that will be used), the applicant should name the individuals who will provide affidavit evidence. This normally would include the applicant but could also name other persons who may have relevant information and who may be credible and provide evidence willingly.

Pre-Motion Conference Notice and Memorandum

In Prince Edward Island, all family applications and motions are preceded by a conference. At this conference, the Applicant, Respondent, and a Justice of the Supreme Court will be present, unless for some reason the parties cannot be in the same room (such as an existing emergency protection order, no contact order, or similar order).

The applicant must complete **Form Practice Note 41B (Pre-Motion Conference Memorandum)**. This document is available at www.gov.pe.ca/courts/supreme then click on Practices and Procedures then on Practice Notes. The applicant should specify at question 6 (issues that haven't been settled) of **Form 41B** that 'possession of home' is in issue. The document would normally also give details of the relationship. **Form Practice Note 41A (Notice of Pre-Motion Conference)** must also be filled out. The Supreme Court family registrar will provide a date and time for the conference on filing of the documents at the Supreme Court of Prince Edward Island.

Service

After filing the documents, the applicant must serve a copy of the Notice of Application, Pre-Motion Conference Memorandum, and Notice of Pre-Motion Conference on the Respondent and the Chief and Council.

Service of documents must be effected by personal service on the person to be served except where a rule authorizes service by an alternative method. Personal service is effected by leaving a copy of the document with the person. The applicant should not be the individual who serves the documents.

After service

The person who served the document must properly complete **Form 16B Affidavit of Service** and it must be sworn to before a Commission of Affidavits (lawyer or court registrars offer this service) and filed with the court.

At the pre-motion conference, if no settlement can be reached, the Justice may assign a date and time for the application to be heard and the applicant may then prepare his/her affidavit, which may include information about:

- their relationship, including whether they have children;
- property owned by the couple, both on and off reserve;
- the family home on reserve;
- who else lives in the family home;
- whether there was any agreement between them, or previous court order;
- how long the applicant has resided on the reserve;
- whether either spouse or common-law partner has any medical condition;
- whether other suitable housing is available to either the applicant or the respondent; and
- whether there has been any family violence.

Once the applicant has his/her affidavit materials prepared (which should be done well in advance), they must be sworn to before a Commission of Affidavits and then served on the Respondent.

Again the applicant should not be the individual who serves the documents and proof of service must be completed and filed same as above. The proof of serve and the affidavit documentation would be filed at the same time at the Supreme Court of Prince Edward Island.

Next Steps

1. The person who has been served with a copy of the application is known as a respondent. A respondent can reply to the application by preparing his/her own affidavit, containing the same type of information. The respondent must complete **Form 38A Notice of Appearance** and may prepare an affidavit in response. Again, affidavits are not completed and filed **until after the pre-motion conference**. The documents must be served on the applicant and then filed with the Supreme Court of Prince Edward Island. The respondent can also bring a counter application (with the same form as a Notice of Application but change the title to Counter Application). This would need to be served and filed with the court.
2. The applicant may prepare a second affidavit, but only to reply to anything new in the Respondent's affidavit.
3. Attend court and present the application to the court. If the applicant is successful, he or she should provide a copy of the order to the Chief and Council of the First Nation and the Minister of Indigenous and Northern Affairs Canada.

Note: S. 41(2) states “On the council's request, the court that is seized of the application must, before making its decision, allow the council to make representations with respect to the cultural, social and legal context that pertains to the application and to present its views about