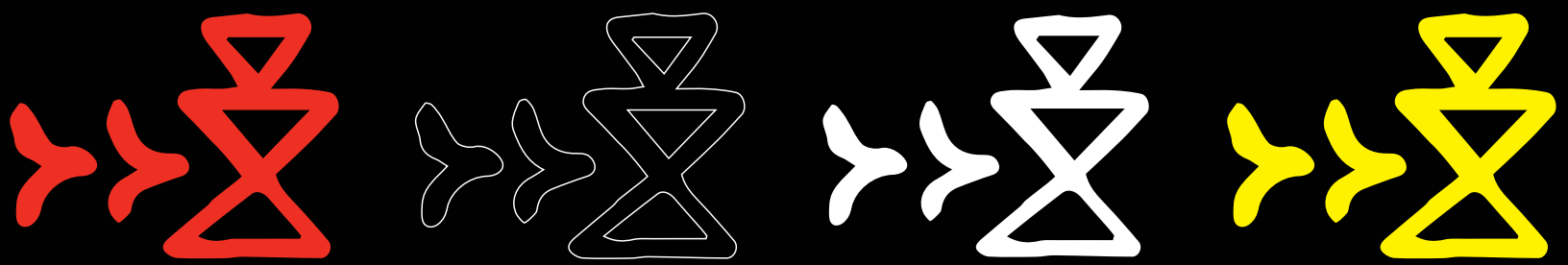




Mi'kmaw Matrimonial Real Property:

A Guide for Bear River, Millbrook, Paqtnkek,
Pictou Landing, and Sipekne'katik

March 2017



IMPORTANT

This guide contains general information and educational material for The Confederacy of Mainland Mi'kmaq member bands: Bear River First Nation, Millbrook First Nation, Paqtnkek Mi'kmaw Nation, Pictou Landing First Nation and Sipekne'katik. This publication is a general, plain-language guide about the rights, rules and processes found in each community's matrimonial real property laws. While every effort has been made to ensure accuracy this guide is neither a complete technical description nor an official interpretation of the subjects it discusses. This publication does not provide legal advice; if you have specific legal questions you should contact a lawyer.

The Legal Information Society of Nova Scotia offers a Lawyer Referral Service. This service provides an individual with an initial consultation of up to 30 minutes for a fee of \$20 plus tax. Please note that the lawyer will not do legal work for you during the initial consultation. The lawyer is there to review your legal questions and talk about the options you may have, and how much it may cost to have the legal work done.

For more information about hiring a lawyer, please see Part Seven: Hiring a Lawyer on page 19 of this guide.

Lawyer Referral Service: (800) 665-9779 (toll free) or (902) 455-3135 (Halifax area).

Mi'kmaw Matrimonial Real Property:

A Guide for Bear River, Millbrook, Paqtnkek,
Pictou Landing, and Sipekne'katik
March 2017

Table of Contents

- INTRODUCTION** 1
 - BENEFITS OF A BAND MRP LAW. 2

- PART ONE - WHEN DO BAND MRP LAWS APPLY?**..... 3

- PART TWO - FAMILY HOMES ON RESERVE** 4
 - NON-BAND OWNED FAMILY HOMES 5
 - BAND OWNED FAMILY HOMES. 7
 - EXCLUSIVE OCCUPATION ORDERS 7

- PART THREE - FAMILY REAL PROPERTY ON RESERVE** 13

- PART FOUR - EMERGENCY PROTECTION ORDERS** 15

- PART FIVE - ROLE OF CHIEF AND COUNCIL**..... 17

- PART SIX - OTHER PROVISIONS** 18
 - ENFORCEMENT 18
 - MEDIATION..... 18
 - ESTATES 18

- PART SEVEN - HIRING A LAWYER**..... 19

- FOR MORE INFORMATION** 20

- ABOUT THE AUTHOR** 21

- ENDNOTES** 22

List of Acronyms

CMM	The Confederacy of Mainland Mi'kmaq
CP	Certificate of Possession
EOO	Exclusive Occupation Orders
EPO	Emergency Protection Order
<i>FHRMIRA</i>	<i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>
INAC	Indigenous and Northern Affairs Canada
MRP	Matrimonial Real Property
NSSC	Nova Scotia Supreme Court
PFR	Provisional Federal Rules
RCMP	Royal Canadian Mounted Police



Introduction

If you live in one of the communities listed below, then this guide is for you. Each of these communities has enacted their own Band MRP Law. As a result, what happens to **Matrimonial Real Property** (MRP) upon the breakdown of a marriage, **Common Law** relationship, or the death of a **Spouse** has changed. The effective dates for each Band MRP law are below.

1. Bear River First Nation, December 16, 2014
2. Millbrook First Nation, December 1, 2014
3. Paqtnkek Mi'kmaw Nation, December 18, 2014
4. Pictou Landing First Nation, December 16, 2014
5. Sipekne'katik, September 25, 2015

By enacting their own MRP laws these communities will be governed by their Band MRP Law and not the federal legislation, *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)*.¹

Through the National Aboriginal Lands Managers Association, The Confederacy of Mainland Mi'kmaq (CMM) has been able to secure resources to produce this plain-language guide about the rights, rules and processes found in each community's MRP laws. This guide will, among other things, answer the following question:

- When will the band MRP law apply?
- What will happen to MRP after the breakdown of a marriage or Common Law relationship or the death of a Spouse?
- What is an Exclusive Occupation Order (EOO) and how do you get one?
- What is an Emergency Protection Order (EPO) and how do you get one?

Matrimonial Real Property:

The Real Property of a marriage or Common Law relationship that is divisible between Spouses on application to the NSSC by one of the Spouses.

Common Law:

Under the Band MRP Law is when two people live together in a marriage-like relationship for at least one year; or while living together in a marriage-like relationship become the parents of a Child; or when a couple enters into a Domestic Agreement.

Spouse:

Under the Band MRP Law means an individual who is married or who has in good faith married another person, but the marriage can be nullified; or is a Common Law partner of another person.

Note: Throughout this guide “Band MRP Law” refers to the collective grouping of the following band laws: *Bear River First Nation Matrimonial Real Property Law; Millbrook Band Family Real Property Law; Paqtnkek Mi'kmaw Nation Matrimonial Real Property Law; Pictou Landing First Nation Matrimonial Real Property Law; and the Sipekne'katik Matrimonial Real Property Law.*

A copy of each band's MRP law is available on The CMM website at: <http://cmmns.com/program/legal-services/>

Benefits of a Band MRP Law

Provincial laws regarding MRP do not apply on reserve. In 2014, the Federal government passed *FHRMIRA*, which was an attempt to “address a long-standing and unacceptable legislative gap regarding MRP on reserves.”² The bands, not wanting to be governed by *FHRMIRA*, created a drafting committee which The CMM hosted. The committee included a member from each community. Together they created a template MRP law.

The development of the Band MRP Law brought the community together to discuss important community concerns such as family breakdowns, death, domestic violence and the rights of children. Writing a MRP law provided **Band Members** with a safe way to deal with difficult situations that may arise.

There are many benefits to having a community-based MRP law. Some of these benefits include:

- Exercising jurisdiction over land and family law matters.
- Ensuring the protection and interests of children are a priority.
- Creating opportunities to resolve **Property** disputes through community-based process.
- Promoting fairness, rights and remedies, without discrimination on the basis of sex or sexual orientation.
- Protecting human rights of Band Members while balancing individual and collective rights.
- Recognizing the customs, traditions, practices and policies of the band.
- Clarifying how the **Family Home** and other MRP located on reserve can be **Disposed** of during a relationship, after the breakdown of a relationship or the death of a Spouse.

Glooscap First Nation and Annapolis Valley First Nation do not have a band MRP law. However, any First Nation can write a MRP law at any time. Once a First Nation has passed a MRP law, *FHRMIRA* will not apply to the MRP rights and interests located on the reserve.

Band Member: Means a person whose name appears on the band list of a First Nation.

Property: Land, possessions and other items a person has legal ownership of. There are two forms of property: Real Property and Personal Property.

Family Home: Means a structure where Spouses habitually reside during a relationship; or if the Spouses separate or one Spouse dies, the structure the Spouses habitually resided at on the date of separation or the death of a Spouse.

Dispose: Means to give, to sell, to exchange and any other means of disposal that has the effect of transferring a right or interest, such as a Will.



Part One

When Do Band MRP Laws Apply?



What happens to **Real Property** located on reserve upon the breakdown of a relationship or upon the death of a Spouse has changed. Now the MRP law enacted by the band will determine how MRP located on **First Nation Lands** will be valued and divided in the event of a relationship breakdown or the death of a Spouse.

Each Band MRP Law provides Spouses with rights and remedies during a relationship, when that relationship breaks down, and on the death of a Spouse in relation to:

1. The use, occupation and possession of Family Homes on reserve; and
2. The division of the value of any rights or interests in a Family Home and **Family Real Property** located on reserve.³

The Band MRP Law only applies when at least one person is a Band Member⁴ and the couple is:

- Married and living on reserve. A marriage under the Band MRP Law is valid if performed according to the law of the province or in accordance with Mi'kmaw custom;⁵ or
- Common Law partners living on reserve.⁶

The Band MRP Law does not apply to **Personal Property**, such as bank accounts, household goods, cars, and pensions; and any Property located off reserve.⁷

Real Property: Land and structures attached to the land, including homes and buildings.

First Nation Lands: Means any and all reserves of the First Nation, including any parcels of land allotted to the First Nation.

Family Real Property: Means a right or interest in band lands held by a Spouse that was acquired before or during the marriage or Common Law relationship. Family Real Property does not include the Family Home or Real Property given to a Spouse as an inheritance or gift, unless the inheritance or gift was intended for the use and enjoyment of both Spouses.

Personal Property: Assets other than Real Property that physically exist and are easily moved and not permanently attached to a dwelling or structure.





Part Two

Family Homes on Reserve

Each Band MRP Law has a number of general principles the **Court** will consider when interpreting the laws with respect to the use, occupation and possession of MRP. These are also applied to the division of the value of the Family Home and Family Real Property rights and interests on First Nation Lands.

Some general principles shared among the Band MRP Laws include:

- Decisions will be made in the best interest of a Band Member **Child**.⁸
- **Domestic Agreements** are encouraged as a means of dealing with the rights and obligations of each Spouse upon the breakdown of a relationship or the death of a Spouse.⁹
- The Band MRP Laws apply to same sex couples living in a marriage-like or Common Law relationship.¹⁰
- Only persons who have Indian status and are Band Members have a right to permanently live on or possess the First Nation Lands or structures located on reserve lands.¹¹
- The **Surviving Spouse**, whether or not they are a Band Member or recognized as a **Status Indian** is entitled to **Exclusive Occupation** of the Family Home for a period of time following the death of a Spouse.

A Domestic Agreement is one way a couple can plan for the division of MRP upon separation or the death of a Spouse. Through a Domestic Agreement a couple may divide their matrimonial rights and interests differently than what is provided for in the Band MRP Law. One thing a Domestic Agreement cannot do is give ownership over First Nations Lands to non-Band Member or a Band Member without Indian status.¹²

A Domestic Agreement is only enforceable under the Band MRP Law if it is:

- In writing;
- Signed and dated by the parties;
- The parties had legal capacity at the time of entering the agreement; and
- The document is witnessed.¹³

Court: Means the Nova Scotia Supreme Court.

Child: Under the Band MRP Law means a Child with Indian status who is under the age of 18 years; and includes a Child adopted under the laws of the province or in accordance with Mi'kmaw custom.

Domestic Agreement: Means an agreement in which the parties agree on their rights and responsibilities while they are married or in a Common Law relationship. A Domestic Agreement can cover what is to happen while the Spouses are living together, upon separation, if a marriage is annulled, and what is to happen upon the death of a Spouse or both Spouses.

Surviving Spouse: Under the Band MRP Law is the person the deceased was married to or in a Common Law relationship with at the time of death.

Status Indian: A person who is registered as an Indian, in accordance with the Indian Act (Canada).

Exclusive Occupation: Is the temporary right given to a Spouse to live in a Family Home located on reserve. The person not granted Exclusive Occupation must leave the Family Home.



Non-Band Owned Family Homes

Within our communities a **Certificate of Possession** (CP) is the highest form of ownership someone can have to a piece of reserve land. Homes not owned by the band are typically located on CP lands. In this situation the person legally owns the building, but not the land.

Under the Band MRP Law the right to own an interest in a Family Home located on First Nation Lands can only be transferred to a Band Member with Indian status.¹⁴ This is because the lands of each First Nation are for the exclusive use and benefit of its Band Members.

When dividing or sharing the value of the Family Home, the following rights and interests cannot be transferred to or held by a person who is not a Band Member with Indian status:¹⁵

- (a) A CP;
- (b) A **Certificate of Occupation**; or
- (c) Any other right to possess reserve lands in accordance with section 20 of the *Indian Act*,¹⁶ such as location tickets and any approvals of the **Minister** to occupy the land temporarily.

A. Disposal of Non-Band Owned Family Homes

Under each Band MRP Law, the consent of the other Spouse is required before a Family Home can be sold or Disposed of in any way. This requirement provides Spouses with protection that the Family Home cannot be sold, used as collateral or disposed of during the relationship without the consent of both Spouses. Consent is required from the other Spouse even if that Spouse is not a Band Member or a Status Indian.

A Spouse cannot give, sell, exchange or Dispose of the Family Home in any way, unless:

- (a) The other Spouse consents in writing; or
- (b) The other Spouse has released all rights or interests in the Family Home by Domestic Agreement; or
- (c) Where the Family Home is subject to a Ministerial Loan Guarantee, the band Council consents to or authorizes the transaction.¹⁷

Certificate of Possession:
A document prescribed under the Indian Act confirming that a band member is legally entitled to occupy and possess a specific piece of reserve land defined in the document.

Certificate of Occupation: An approval granted by the Minister for the short-term occupation to a piece of reserve land.

Minister: Means the Minister of INAC.

Scenario 1

A same sex couple has lived in a marriage-like relationship for the past five years. One Spouse is a Band Member and the other is not. During the relationship the Spouses lived in a Family Home on CP lands owned by the Band Member Spouse. As a result of financial difficulties, the Band Member Spouse owes a substantial debt to another Band Member. In order to repay the debt the Band Member Spouse has agreed to transfer the CP to the other Band Member.

Under the Band MRP Law

The Band Member Spouse cannot sell or transfer the CP to another Band Member unless the non-Band Member Spouse agrees to the sale or transfer. The sex or gender of a Spouse is not relevant to the application of the Band MRP Law.

B. Valuation and Division of Non-Band Owned Family Homes

The right to own a Family Home on reserve is limited to Band Members with Indian status. Under each Band MRP Law, both Spouses (whether or not they are a Band Member or a Status Indian) are entitled to an equal share of the value of a non-band owned Family Home located on reserve.¹⁸

Upon application, a Court may determine the value of a non-band owned Family Home and divide that amount between the Spouses.¹⁹ A Court will base the value of the Family Home on:

- What a buyer would reasonably be expected to pay a seller for comparable rights and interests, less any outstanding debts or liabilities related to the Family Home; or
- The amount mutually agreed upon by the parties.²⁰

When deciding the value of the Family Home a Court will also consider that Band Members collectively own First Nation Lands. As a result, the value of the Family Home will not automatically be the insured value or equivalent to the value of similar Property located off reserve.²¹

In situations where the Family Home is used for more than just residential purposes, the value of the Family Home will only include the parts of the building necessary for residential purposes.²² A Court may also divide the value of the Family Home in unequal shares or adjust compensation payments if the Court finds that equal division would be unfair and inequitable.²³

The date a Court will use for determining the value of the Family Home will be the earliest of the following:

- The date of divorce or the date the marriage is found void;
- The date Spouses began living separate and apart;
- The date Spouses showed the intention not to continue the marriage or Common Law relationship;
- The date a Spouse dies; or
- The date an application is made to a Court under the Band MRP Law for Exclusive Occupation of the Family Home; the division of Family Real Property; or irresponsible depletion meaning reckless, **Negligent** or willful damage to the Family Home or Family Real Property.²⁴



Negligent: When a person fails to exercise the degree of care in a situation where a reasonable person would have exercised care in the same circumstance.

Band Owned Family Homes

A **Band Owned Home** is the legal Property of the band. Spouses who live in a Band Owned Home do not hold a legal right or interest in the Property. As a result, neither Spouse is entitled to, or compensated for, the value of a Band Owned Home upon the breakdown of a relationship. If the Family Home is band owned, a Spouse can only apply to the Court for Exclusive Occupation of the Band Owned Home for a period of time.

Exclusive Occupation Orders

An EOO allows a Court to give a Spouse the right to live in the Family Home for a period of time. The other Spouse, who is not granted exclusive occupation, must leave. Having an EOO granted will not affect the interest of either Spouse or a third party (such as the band) may have in the home.

Under the Band MRP Law a Spouse can apply for an EOO after the death of a Spouse or the breakdown of a relationship. An EOO can be obtained for a Family Home, even if the Family Home is non-band owned, band owned or a leased Property.

An EOO allows a Court to provide short occupancy of the Family Home. Having access to EOOs:

- Allows a Spouse to stay in the Family Home for up to one year.
- Stops the other Spouse from entering the Family Home, or only entering under certain conditions.

An **Applicant** or **Respondent** can hire a lawyer to represent their interests at any time during the EOO process. If you hire a lawyer you will be responsible for your own legal fees (see page 19).



Band Owned Home: Means a home or residence owned by the band of a First Nation and includes section 10 and section 95 housing under the Indian Act.

Applicant: The person making an application to a Court.

Respondent: The person who must respond to or defend against an application.

Minor: A person who is under 18 years of age.

Note: After an EOO expires; the band's housing policy will determine what will happen to Band Owned Homes.

A. EOO upon the Death of a Spouse

Upon the death of a Spouse, the Surviving Spouse has an automatic right to occupy the Family Home for up to 180 days.²⁵ A Surviving Spouse can also apply to the Court to extend the EOO beyond the 180 days.

Exclusive Occupation of a non-band owned Family Home or Band Owned Home beyond the initial 180 days is only granted when:²⁶

- The Surviving Spouse is the primary caregiver or custodial parent of Band Member children who have Indian status; or
- If there are no Band Member children, the Surviving Spouse is a Band Member with Indian status.

When making the decision to extend the duration of the EOO a Court shall also consider the collective interests of Band Members in their First Nation Lands and the views of the Council regarding culture, social and legal contexts.²⁷

B. EOO upon Relationship Breakdown

A Spouse, upon the breakdown of a relationship, can only apply for Exclusive Occupation of the Family Home if:

- They are the primary caregiver or custodial parent of a Band Member Child; or
- They have Indian status and are a Band Member of the First Nation where the Family Home is located.

Each EOO granted as a result of a relationship breakdown cannot be made for any longer than 90 days. A Court can renew an EOO for a total period that does not go beyond one year.²⁸ When making an order for Exclusive Occupation a Court will:

- Give priority to the Spouse who is the primary caregiver or custodial parent of Band Member children with Indian status (whether or not the parent is a Band Member or a Status Indian).
- If the Spouses have joint custody with shared parenting of a Band Member Child, the Spouse with Indian status and band membership shall reside in the Family Home.
- If there are no Band Member children, the Spouse who is a Band Member and has Indian status shall reside in the Family Home.

Scenario 2

A non-Band Member father has lived on the reserve for 15 years. His Band Member wife has passed away leaving the father to care for their young children, who are Band Members with Indian status. The wife held a CP to the Family Home and lands. Now, the father finds himself looking for a new place to live for him and his children since the right to own the family home cannot be passed to a non-Band Member.

Under the Band MRP Law

The non-Band Member father would have a minimum of 180 days to stay in the home. This would give him time to search for a new home and develop a plan.

If both Spouses are Band Members and have Indian status, the Court will also consider the factors listed in section 8(6) of the Band MRP Law. These factors include:

- The best interest and welfare of any affected children;
- The financial positions and medical conditions of the Spouses;
- Any Domestic Agreements or existing **Court Orders**, including support orders;
- Access to other suitable and affordable housing;
- Any risk of violence or harm to a Spouse, Child or other person living in the Family Home;
- The length of time each Spouse lived in the Family Home;
- Whether a third party holds a right or interest in the Family Home;
- The interest of an elderly person or a person with a disability, who lives in the Family Home, and is being cared for by one of the Spouses;
- Any other exceptional circumstances related to a person, other than a Spouse or Child, who is occupying the Family Home;
- The collective rights of the First Nation and any financial interest of the band in the Family Home; and
- The collective interests of Band Members in their First Nation Lands and the views of the Council regarding culture, social and legal contexts.²⁹

In addition to the above, when a Court is making an EOO for the Bear River First Nation, the Court must also consider:

- If the Family Home is a Band Owned Home, who the band intended the home to be built for or allotted to.³⁰

Court Order: A written direction, finding, or command delivered by a Court or judge.



Scenario 3

Two Band Members with Indian status have been married for seven years. Two years into their marriage, the husband's grandmother and his niece, whom the grandmother was raising, came to live with the couple as the grandmother was having difficulties. The husband is her primary caregiver, while the wife must frequently travel for work. The Spouses decided to separate and both want to remain in the Family Home.

Under the Band MRP Law

One or both of the Spouses can apply for Exclusive Occupation of the Family Home. When deciding who will stay in the home a judge will consider, among other factors, the best interest of any Child living in the Family Home and the interests of any elderly person who also lives in the Family Home.

C. EOO Application Process

To apply for an EOO an application must be filed with the Nova Scotia Supreme Court (NSSC). If an EOO application is filed in Halifax, Sydney or Port Hawkesbury the application must be filed at the NSSC (Family Division).

To apply for an EOO you must:

1. Choose the proper Court.
2. File a Notice of Application in Chambers (if the application was filed at the NSSC, Form 5.03) or a Notice of Application (if the application was filed at the NSSC (Family Division), Form 59.07).
3. Set out the grounds for the order.
4. File an **Affidavit** and a **Statement of Property**.
5. Pay the filing fee or request a fee waiver, if you qualify.
6. Serve a copy of all documents filed with the Court to all **Required Persons**.
7. Respond to any new information brought forward by the Respondent or a Required Person.
8. Attend Court on the date and time specified in the application.

Court applications can be found on the Nova Scotia Family Law website at: <http://www.nsfamilylaw.ca/guide-making-application-court/what-you-need-file>

Along with the Notice of Application in Chambers or the Notice of Application you must also outline the grounds for the order. This section must include the following statement as one of the grounds for the order:

Exclusive Occupation of the family home, pursuant to

- section 8 of the [NAME of BAND MRPLAW], as the property is a Band Owned Home; or
- section 9 of the [NAME of BAND MRPLAW], as the property is not owned by the band.



Affidavit: A written statement confirmed by oath or affirmation, which is used as evidence in court.

Statement of Property: A supporting document that identifies all the property owned by the Applicant and must be included if the application is made under a Band MRP Law.

Required Persons: Is anyone who might be affected by an order made under a Band MRP Law and includes the other Spouse, adults living in a Family Home and the Council of the band.

D. Affidavits

In order for an EOO application to be accepted by the Court you must also file an Affidavit and a Statement of Property with the application.

If you are the Applicant, your Affidavit should include information about:

- The relationship and whether family violence has occurred.
- Any children of the relationship. Be sure to include if the children have Indian status and band membership.
- Any Real Property you own with the Respondent located on and off reserve.
- The Family Home and who is living in the home.
- How long you have lived on reserve and how long you have lived in the Family Home.
- Any elderly person or anyone with a disability who is living in the Family Home.
- Whether you or the Respondent have any medical conditions.
- Other housing available to you or the Respondent.
- Any existing Court Orders or agreements between you and the Respondent.



For more information about how to write an Affidavit see the Nova Scotia Family Law website at: <http://www.nsfamilylaw.ca/guide-making-application-court/writing-affidavit-application>

E. Statement of Property

In order for a Court to accurately value and divide the MRP they must be given a list of all the MRP that is to be divided. This is done through a Statement of Property (Form FD7). In a Statement of Property an Applicant must identify all the Property and debts they hold individually and with the other Spouse.

To find a copy of the Statement of Property go to the Nova Scotia Family Law website at: <http://www.nsfamilylaw.ca/guide-making-application-court/supporting-documents>.

F. Serving Court Documents

Once the EOO application has been filed with the appropriate Court, the filed documents must be delivered to the Respondent and other Required Persons *via* **Personal Service**. To fulfill the service requirement an Applicant must:

- Have all the documents you filed with the Court hand-delivered to the Respondent and all Required Persons. Either you or someone you appoint can deliver the package of documents.
- Serve the documents at least 10 days before the Court date. If the Court has arranged a special time to hear the application, the documents must be served 25 days before the Court date.
- Have the person who served the documents complete an Affidavit of Service (Form 31.05).

For more information about an Affidavit of Service see The Courts of Nova Scotia website at: http://www.courts.ns.ca/Supreme_Court/NSSC_forms.htm

G. Responding to an EOO Application

After a Respondent or other Required Persons have received the Court application they will be given an opportunity to respond. In order to do this, a Respondent must complete a Notice of Contest (if the application was filed at the NSSC, Form 5.08) or a Response to the Application (if the application was filed at the NSSC (Family Division), Form 59.08).

A Respondent or other Required Person will have to prepare an Affidavit. The Affidavit should contain the same type of information listed for an Applicant Affidavit on page 11.

Once the Respondent or other Required Person has submitted their response and Affidavit to the Court, the Applicant may prepare a second Affidavit to respond to anything new raised in the Respondent or Required Persons Affidavits.

If the Applicant is successful in getting an EOO, they must give a copy of the Court Order to the housing department of the band, the Council of the band and the local RCMP detachment that serves your community.

Personal Service: Is giving notice of a Court proceeding to a person, where someone hand-delivers the documents directly to that person. It cannot be done by mailing documents, using a courier, fax, or registered mail. If the person being served has a lawyer, that lawyer may accept service for their client.





Part Three

Family Real Property on Reserve

In addition to Family Homes, MRP that may also be divided among the Spouses includes Family Real Property. Family Real Property is any right or interest a Spouse may have acquired before or during a relationship. These rights and interests may include a hunting camp on reserve land, a rental unit on CP land or the allotment of First Nation Land to a Spouse for cultivation or livestock.

Family Real Property does not include any Property received by a Spouse as an inheritance or gift, unless it can be shown that the inheritance or gift was made with the intent that both Spouses own the Property together.³¹

The Band MRP Law also places limits on who can hold a right or interest in Family Real Property located on First Nation Lands. When dividing or sharing the value of the Family Real Property, the following rights and interests cannot be transferred to or held by a person who is not a Band Member with Indian status:³²

- (a) A CP;
- (b) A Certificate of Occupation; or
- (c) Any other right to possess reserve lands in accordance with section 20 of the *Indian Act*,³³ such as location tickets and any approvals of the Minister to occupy the land temporarily.

Upon the breakdown of a relationship a Spouse is entitled to an equal division of the value to any rights or interests in Family Real Property owned by the other Spouse.³⁴ A Court will base the value of the Family Real Property on:

- What a buyer would reasonably be expected to pay a seller for comparable rights and interests, less any outstanding debts or liabilities; or
- The amount mutually agreed upon by the parties.³⁵



When deciding the value of Family Real Property on reserve a Court will also consider that the members of the band collectively own First Nation Lands. As a result, the value of the Family Real Property will not automatically be the insured value or equivalent to the value of similar Property held off reserve.³⁶

A Court may also divide the value of Family Real Property in unequal shares or adjust compensation payments. This can be done when a Court finds that equal division would be unfair and inequitable.³⁷

The date a Court will use for determining the value of the Family Real Property will be the earliest of the following:

- The date of divorce or the date the marriage is found void;
- The date Spouses began living separate and apart;
- The date Spouses showed the intention not to continue the marriage or Common Law relationship;
- The date a Spouse dies; or
- The date an application is made to a court under the Band MRP Law for an EOO to the Family Home, the division of Family Real Property, or irresponsible depletion meaning reckless, Negligent or willful damage to the Family Home or Family Real Property.³⁸



Scenario 4

After 20 years of marriage a couple decide to divorce. During their relationship the Spouses lived in a Band Owned Home. At the time of separation the wife remained in the Band Owned Home and the Family Real Property consists of CP lands held by the wife. A mobile home was parked on the CP lot and the rental income was used to support the family. Last year, the wife's father gifted a hunting camp for the Spouses to use. At the hunting camp the husband built a boat dock and small windmill.

Under the Band MRP Laws

Each Spouse is entitled to half the value of all Family Real Property owned by one of the Spouses. Under the Band MRP Law a Court may determine the value of the CP lands, the mobile home, the hunting camp, the boat dock and the windmill.



Part Four

Emergency Protection Orders

An EPO is an order a **Designated Judge** can grant in urgent situations to provide immediate protection when family violence has occurred. Family violence can sometimes be difficult to recognize, especially when being victimized by it. Under the Band MRP Law “Family Violence” means any of the following acts or omissions committed by a Spouse against the other Spouse, any Child under the care of either Spouse, or any other person who lives in the Family Home:

Designated Judge: Is a person authorized by the lieutenant governor in council of the province to hear Emergency Protection Orders for on reserve Applicants.

- (a) An intentional application of force without authority or consent, excluding any act committed in self-defence;
- (b) An intentional or reckless act or omission that causes bodily harm or damage to Property;
- (c) An intentional, reckless or threatening act or omission that causes reasonable fear of bodily harm or damage to Property;
- (d) Sexual assault, sexual abuse or the threat of either;
- (e) Forcible confinement without lawful authority;
- (f) Criminal harassment, as defined in the *Criminal Code of Canada*.³⁹

An EPO allows a Designated Judge to order that a Spouse be excluded from the Family Home on an urgent basis (such as in situations of family violence). An EPO can increase the protections available to families on reserve by making it possible to remove a person from the home for up to 30 days.⁴⁰



Scenario 5

A Band Member and his non-Band Member partner have been living in a Common Law relationship for the past two years. The couple has a Child together, who is a Status Indian and a Band Member. In recent times the Band Member Spouse has become increasingly aggressive, to the point where the other Spouse fears for their safety and the safety of the Child.

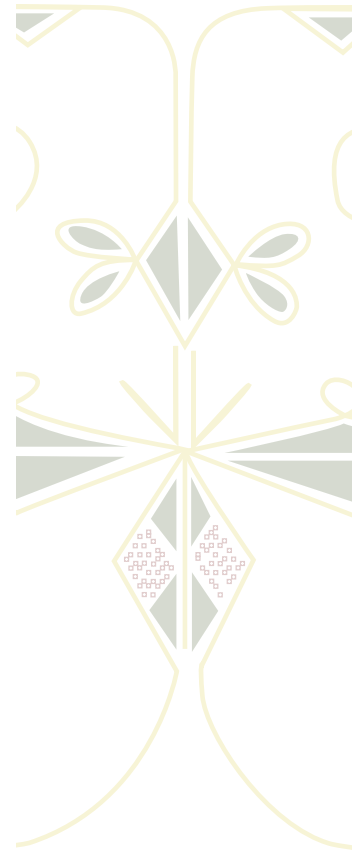
Under the Band MRP Law

The non-Band Member Spouse can apply for an EPO and gain Exclusive Occupation of the Family Home for up to 30 days. If the Band Member Spouse refuses to leave the house, they can be removed from the Property by a peace officer and charged with a criminal offence if they breach the conditions of the EPO.

A Spouse who has been forced to leave the Family Home as a result of family violence can still make an application for an EPO.⁴¹ In situations where a Spouse is not able to apply for an EPO in person, the Band MRP Law allows a peace officer or health care professional to apply for an EPO on behalf of a Spouse with that person's consent, or with leave of the Designated Judge if the person does not consent.⁴²

An EPO can help victims of family violence by doing the following:

1. Keep a person away from a Family Home.
2. Prohibit a person from making contact or communicating with other family members.
3. Grant Exclusive Occupation of the Family Home for a period of time.
4. Direct the police to remove a person from the Family Home and supervise the removal of personal belongings.
5. Direct police to seize and store weapons.
6. Specify provisions for the immediate protection of family members.
7. If the police are investigating a domestic disturbance, the investigating officer can obtain an EPO, even in the middle of the night.



Scenario 6

A Band Member, who has five children, was forced to leave her Family Home and community due to family violence and a chronic housing shortage. However, she could not find affordable housing off the reserve. Due to her financial situation, she was forced to live at a rundown boarding house with her five children. She went to the authorities for help to find housing for her and her children. The authorities responded by apprehending her five children.

Under the Band MRP Law

The woman is able to apply for an EPO. Even though she left the community she could still apply for an EPO and the authorities (a peace officer or health care professional) are able to make the application on her behalf. In addition to an EPO, the woman may apply for an EOO for the Family Home for up to one year.

Role of Chief and Council



When a community's collective rights or interest are engaged, the Council of the First Nation may make representations to the Court. The views of the Council are important for understanding the culture, social and legal contexts relevant to a proceeding. The Council is also responsible for any financial interests the band may have in the MRP of the Spouses located on First Nations Lands.

Mainly, the views of the Council are taken into consideration when:

- Making an EOO for a Band Owned Home; and
- Extending an EOO for a Surviving Spouse beyond 180 days.⁴³

Under the Band MRP Law, the Council is entitled to:

- Receive a copy of every application to the Court, with the exception of EPOs;
- To make representations to the Court on an application; and
- To receive a copy of any Court Order made under the law, including EPOs.⁴⁴

If the Council wishes to provide its views on an application (with the exception of EPOs), the Council may:

- Provide the parties and the Court with a written response to the application outlining the views of the Council; or
- Attend or send a designate to appear in Court as required.





Part Six

Other Provisions

Enforcement

It is an offence to breach a Court Order or decision made under the Band MRP Law. A person found guilty of an offence under the Band MRP Law is liable upon summary conviction to:

- (a) In the case of a first offence, a fine not exceeding \$2,000 or to imprisonment for a term not exceeding three months, or both; or
- (b) In the case of subsequent offences, a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year, or both.⁴⁵

Mediation

When Spouses have a dispute about matters under the Band MRP Law they should make a reasonable attempt to resolve the matter through mediation. Mediation can be done by a mutually agreed upon mediator in accordance with the traditions, customs and practices of the band. If Spouses take part in mediation they are not prevented from seeking a remedy from the Court, especially in urgent circumstances.⁴⁶



Estates

The Band MRP Law states that the division of Real Property, upon the death of a Spouse, shall be done in accordance with the *Indian Act*.⁴⁷ The *Indian Act* sets out the following rules and limits for giving away a right to possession or occupation of First Nation Lands in a Will:⁴⁸

- A right to possession or occupation on reserve cannot be transferred to a non-Band Member.
- If a right to possession or occupation is left to a non-Band Member, the right will be offered for sale to the highest bidder among Band Members.
- Once the Minister approves the sale, the money received will be given to the non-Band Member beneficiary of the right.
- If a right to possession or occupation is not sold within six months, the Minister may give the right back to the band, at no cost; and decide whether or not to compensate the non-Band Member for the right.



Part Seven

Hiring a Lawyer

Dealing with the breakdown of a relationship or the death of a Spouse can be overwhelming. It may not be something you are comfortable doing yourself. You may need the help of a lawyer who practices in Family Law or Wills and Estates and has knowledge of the laws that apply to Status Indians who live on reserve.

Lawyers often bill their clients on an hourly rate, but some lawyers will bill you a flat fee for their service. A lawyer may also charge for disbursements - faxing, phone calls, photocopying, postage fees, etc. Be sure to ask your lawyer about their fee structure in order to avoid surprises. When you hire a lawyer, you should receive a retainer letter. In the retainer letter the lawyer will set out what legal services they are agreeing to provide to you and how they will bill you for their time and services. If the fees change, your lawyer should advise you immediately and obtain instructions from you before doing any more work. A retainer letter is the best way to make sure you and the lawyer are both clear in your expectations and obligations.

When you go see a lawyer bring any information relevant to the Court Order you are seeking. You will be asked a lot of questions. You will need to be accurate and honest in your answers. If you do not understand your lawyer, you must speak up and ask them to go over the part you did not understand.

Some questions you may want to ask a lawyer before hiring them are:

- How long have you been practicing law?
- How long have you been practicing in Family Law or Wills and Estates?
- Do you have experience dealing with matters for Status Indians living on reserve?
- What are the complications that might arise in dealing with your matter? Could these complications result in additional fees?
- Do you bill on an hourly rate or a flat fee?

Make sure to discuss the next steps if you have decided to hire this lawyer.

For more information on how to hire a lawyer, contact the Nova Scotia Barristers' Society at (902) 422-1491 or visit online at www.nsbs.org





For More Information

Centre of Excellence for Matrimonial Real Property

c/o National Aboriginal Lands Managers Association
1024 Mississauga Street
Curve Lake, Ontario, K0L 1R0
Website: <http://coemrp.ca>

Indigenous and Northern Affairs Canada

10 Wellington, North Tower Gatineau, Quebec
Ottawa, Ontario K1A 0H4
Toll-Free: 1-800-567-9604
Website: <http://www.aadnc-aandc.gc.ca/eng/1100100010002>

Legal Information Society of Nova Scotia

5523 B Young Street Halifax, Nova Scotia
Toll-Free: 1-800-665-9779
Tel: 1-902-454-2198
Website: <http://www.legalinfo.org/>

Mi'kmaw Family Healing Centre

Truro, Nova Scotia
Toll-Free: 1-800-565-4741
Tel: 902-893-8483

The Confederacy of Mainland Mi'kmaq

PO Box 1590 Truro, Nova Scotia B2N 5V3
Toll-Free: 1-877-892-2424
Tel: 1-902-895-6385
Website: www.cmmns.com

The Nova Scotia Native Women's Association

PO Box 805 Truro, Nova Scotia B2N 5E8
Tel: 902-893-7402



About the Author



Angelina Amaral, BA, MEd, JD, is a member of the Miawpukek (Conne River) First Nation of Newfoundland and Labrador; and is of Portuguese heritage. She has two children, Miguel and Jayden Amaral. Through the help and support of her parents, Adelia (John) and Miguel Amaral, she has been able to earn an undergraduate degree in psychology from Cape Breton University, a Masters of Education: Life Long Learning from Mount Saint Vincent University; and a law degree from the Schulich School of Law.

After articling through the *Ku'tawtinu: Shared Articling Initiative*, Angelina, was called to the Bar in June of 2015.



End Notes

¹ SC 2013, c 20.

² Center of Excellence for Matrimonial Real Property, *Matrimonial Real Property (MRP) Toolkit*, (17 July 2015) at 11.

³ *Paqtnkek Mi'kmaw Nation Matrimonial Real Property Law, 2014; Pictou Landing First Nation Matrimonial Real Property Law, 2014; Bear River First Nation Matrimonial Real Property Law, 2014; Sipekne'katik Matrimonial Real Property Law, 2015; and Millbrook Band Family Real Property Law, 2014*, at s 4(1) [collectively, "Band MRP Law"].

⁴ *Ibid* at s 4(2).

⁵ *Ibid* at s 3(2).

⁶ *Ibid* at s 4(2).

⁷ *Ibid* at s 4(4).

⁸ Band MRP Law, *supra* note 4 at preamble.

⁹ *Ibid* at preamble and s 5(1).

¹⁰ *Ibid* at s 3(3).

¹¹ *Ibid* at s 3(10).

¹² *Ibid* at s 5(2).

¹³ *Ibid* at s 5(3).

¹⁴ *Ibid* at s 13(3).

¹⁵ *Ibid* at s 13(3).

¹⁶ *Indian Act*, RSC 1985, c I-5 at ss 20(3) and 20(4) [*Indian Act*].

¹⁷ Band MRP Laws, *supra* note 4 at s 7(2).

¹⁸ *Ibid* at s 13(2).

¹⁹ *Ibid* at s 13(1).

²⁰ *Ibid* at s 15(1).

²¹ *Ibid* at s 15(2).

²² *Ibid* at s 3(7).

²³ *Ibid* at s 16(4).

²⁴ *Ibid* at s 15(3).

²⁵ *Ibid* at s 6(3).

²⁶ *Ibid* at ss 8(2) and 9(2).

²⁷ *Ibid* at s 8(7)(d).

²⁸ *Ibid* at ss 8(4) and 9(5).

²⁹ *Ibid* at s 8(6)(a-m).

³⁰ *Bear River First Nation Matrimonial Real Property Law, 2014* at s 8(6)(n).

³¹ Band MRP Laws, *supra* note 4 at s 3(8).

³² *Ibid* at s 13(3).

³³ *Indian Act, supra* note 17 at ss 20(3) and 20(4).

³⁴ Band MRP Laws, *supra* note 4 at s 14(1).

³⁵ *Ibid* at s 15(1).

³⁶ *Ibid* at s 15(2).

³⁷ *Ibid* at s 16(4).

³⁸ *Ibid* at s 15(3).

³⁹ *Ibid* at s 11(9).

⁴⁰ *Ibid* at s 11(1).

⁴¹ *Ibid* at s 11(2).

⁴² *Ibid* at s 11(3).

⁴³ *Ibid* at ss 8(6) and 8(7).

⁴⁴ *Ibid* at s 18(3).

⁴⁵ *Ibid* at s 22.

⁴⁶ *Ibid* at s 20.

⁴⁷ *Ibid* at s 17.

⁴⁸ *Indian Act, supra* note 17 at ss 46(1)(d), 50(1), 50(2) and 50(3).

Notes: _____

Produced by

