

SKAWAHLOOK FIRST NATION

SUMMARY OF SPOUSAL PROPERTY LAW

Introduction:

Skawahlook's Land Advisory Committee has prepared a draft Spousal Property Law. This Law is to ensure that property on reserve that is held by spouses in a marriage or in a common-law relationship can be fairly dealt with if the relationship ends. Currently there is no law in Canada that deals with reserve property on the break-up of a marriage or marriage-like relationship. This Law enables the BC Supreme Court to treat spouses fairly regarding the division of property on reserve when relationships end. It also gives spouses a set of ground-rules they can use to negotiate fair settlements between them without going to court. Importantly, the Law protects the interests of the Band by ensuring that no non-members can get permanent interests in Skawahlook reserve lands. A person who holds a permanent interest in land can pass that interest on to their heirs (e.g. sons, daughters) in their will because a permanent interest in land is an interest which survives a person's death. However, non-members can get short- or long-term non-permanent interests in Skawahlook reserve lands under the Law, in certain circumstances. Some examples of this are set out below.

Key Points:

- The Law applies equally to married or common-law spouses and to same sex marriages (see "Spouse" in definitions section).
- The Law applies only to spousal property that is on Skawahlook reserve land (section 3 and definitions section).
- Under the Law, no non-member spouse can receive a permanent interest in Skawahlook reserve land (sections 8, 22(2)). However, a non-member spouse can obtain the right to live in a matrimonial home on a Skawahlook reserve under certain circumstances; for example when that spouse has primary responsibility for a child of the marriage (section 33(1)(b)) or through a Domestic Contract (section 8) or where a judge orders it (section 22(1)(d)). For example, where non-member spouses are elderly or disabled, or where they have been long-term residents of the reserve, it could be argued that they should be able to live on reserve for the balance of their life after marriage breakdown. Non-members cannot, however, receive any permanent interest in Skawahlook reserve lands that they can pass on in a will to their heirs.
- Under the Law, spouses are encouraged to agree on how they will possess or divide their spousal property on reserve if their relationship ends (Part 2)
- Part 3 of the Law encourages spouses to utilize the traditional Sto:lo dispute resolution process, Qwi:qwelstom, to resolve disputes between them on relationship breakdown, including disputes about the possession and/or division of property on Skawahlook reserve lands.

- The Law sets out when and how spouses can use the BC courts to assist them to resolve disputes over spousal property on reserve (Part 4).
- Council has the opportunity to appear before the courts to describe the unique circumstances involved with reserve lands, and Band members' interests in these lands, if an issue is brought before the courts under the Law (section 19(2)).
- The court can make a number of different orders concerning the possession and/or division of property on reserve, depending on the circumstances. For example, the court can order that one spouse lease a matrimonial home to the other spouse for a specified period of time (section 22(1)(d)). Another example is that the court can order that a spouse who is a member make a payment to a spouse who is not a member where the non-member spouse can prove that he or she made a contribution to the acquisition, upkeep or improvement of the home that he or she should be compensated for (section 22(1)(e)).
- The courts can also make an order for emergency exclusive occupation of a matrimonial home for up to 90 days to a spouse, even if that spouse is a non-member, if family violence has occurred or if a spouse or child requires immediate protection (section 34).
- The Law can be amended, but only with the consent of a majority of eligible voters at a meeting where at least 10% of Skawahlook's eligible voters are present (section 35).

SKAWAHLLOOK FIRST NATION SPOUSAL PROPERTY LAW

WHEREAS the Skawahlook First Nation has an inherent right to self-government which emanates from its people, culture, language, and land and which is recognized and affirmed by section 35 of the *Constitution Act, 1982* and;

WHEREAS our Nation, as an aspect of our inherent right of self-government, has the jurisdiction to address real property issues such as spousal property upon the breakdown of marriage and common law relationships, and this inherent right has not been extinguished and;

WHEREAS our Nation also chose to assume control of its Indian reserve lands pursuant to the *First Nation Lands Management Act*, S.C. 1999, c. 24 by entering into the *Individual Agreement on First Nation Land Management between Skawahlook First Nation and Her Majesty the Queen in Right of Canada* and by adopting the *Skawahlook First Nation Land Code*, and section 88 of the *Land Code* requires our Nation to adopt a law concerning spousal real property and;

WHEREAS our Nation encourages its members to resolve any spousal property issues internally, with the assistance of family, Qwi:qwelstóm, other community members or other individuals before turning to the courts and;

WHEREAS our Nation wishes to see spousal property disputes resolved in a way that is as fair as possible to both spouses, and wherever possible, in a way that is in keeping with the best interests of their children and;

WHEREAS our Nation has chosen for this Law to apply to both common law and married spouses and;

WHEREAS spouses who are not members of the Skawahlook First Nation cannot hold any permanent interest in Skawahlook reserve land and;

WHEREAS it is essential to the health and survival of our Nation that we maintain our community and existing lands, and that Skawahlook members be able to live in the Skawahlook community if they wish to do so and;

WHEREAS this Law will apply in conjunction with federal and provincial laws concerning the division of personal property, real property off-reserve, spousal support, child support, and divorce;

THEREFORE BE IT RESOLVED, that the Skawahlook First Nation hereby enacts the following Law:

PART 1 - INTERPRETATION AND APPLICATION

A. Short Title

1. This Law may be cited as the "Skawahlook First Nation Spousal Property Law".

B. Interpretation

2. For the purposes of this Law, the following definitions shall apply:

"Certificate of Possession" means documentary evidence issued under the *Skawahlook First Nation Land Code* or formerly issued under s. 20(2) of the *Indian Act* of a member's allotment for part of the land described thereon;

"Child" means a person under the age of 19 who is

- a) the offspring of at least one Spouse, or
- b) adopted, under Canadian law or Aboriginal custom, by at least one Spouse

and it includes "children";

"Common-Law Spouse" means a person who has lived with another in a marriage-like relationship for a period of not less than two consecutive years but is not married to the other person;

"Community Land" means any Skawahlook Land that is not subject to a Certificate of Possession;

"Council" means the Chief and Council of Skawahlook First Nation;

"Court" means the Supreme Court of British Columbia;

"*Divorce Act*" means the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) as amended over time or any future law enacted in replacement of it;

"Domestic Contract" means:

- a) an agreement between Spouses who are married to each other, entered into when they were married or when they intended to marry, made in writing and signed by the parties and witnessed by an

individual who is at least 19 years of age, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of Spousal Property;

- b) an agreement between Spouses who are living together in a marriage-like relationship, entered into during the relationship or in contemplation of the relationship, made in writing and signed by the parties and witnessed by an individual who is at least 19 years of age, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of Spousal Property; or
- c) a separation agreement between Spouses who are living separate and apart made in writing and signed by the parties and witnessed by an individual who is at least 19 years of age, in which they agree on their respective rights and obligations on separation with respect to the possession or division of Spousal Property.

“*Family Relations Act*” means the *Family Relations Act*, R.S.B.C. 1996 c. 128 as amended over time or any future law enacted in replacement of it;

“First Nation Land Register” means the register maintained by the Department of Indian Affairs and Northern Development pursuant to the *Framework Agreement*;

“Interest in Skawahlook Land” means any Certificate of Possession, lease, sub-lease, easement or licence held by either or both spouses under the *Skawahlook First Nation Land Code*, but does not include rental agreements for Skawahlook First Nation property. For greater certainty, where there is a Matrimonial Home affixed to or situated on Skawahlook Land that is the subject of the Interest, the Interest includes both the land and the Matrimonial Home;

“Matrimonial Home” means a dwelling that is ordinarily used for a family purpose and is:

- a) owned by one or both Spouses, and
- b) is affixed to or situated on Skawahlook Land;

“Member” means a person whose name appears or is entitled to appear on the Skawahlook band membership list;

“Relationship” means

- a) in the case of married Spouses, the period during which the Spouses are married; or

- b) in the case of common law Spouses, the period during which the Spouses live together, starting two years after they began living together in a marriage-like manner;

“Report” means an oral or written record given by Qwi:qwelstóm on the conclusion of a traditional mediation proceeding;

“Skawahlook Land” means Skawahlook IR #1, Ruby Creek IR #2, any future additions to the Skawahlook Nation’s reserves, and any lands held by the Skawahlook First Nation under a modern treaty or reconciliation agreement with British Columbia and/or Canada;

“Spousal Property” means

- a) an Interest in Skawahlook Land that is held by one or both Spouses and that was acquired during the Relationship;
- b) any increased value during the course of the Relationship of an Interest in Skawahlook Land that is held by one or both Spouses and that was acquired prior to the Relationship; and
- c) Matrimonial Homes

but it does not include an Interest in Skawahlook Land that was received by way of gift or inheritance to only one Spouse from a third person or to only one Spouse, together with one or more family members, unless the Interest in Skawahlook Land includes a Matrimonial Home;

“Spouse” means a person who:

- a) is married to another person, including through an Aboriginal customary marriage and including a marriage between persons of the same gender;
- b) has been living with another person in a marriage-like relationship for at least two years, including in a marriage-like relationship between persons of the same gender (i.e. Common Law Spouse); or
- c) is a former Spouse, subject to the restrictions set out in this Law.

“Qwi:qwelstóm” means the Sto:lo Qwi:qwelstóm Justice group which can be used to conduct traditional mediation with regard to Interests in Skawahlook Land on the breakdown of a Relationship.

C. Application

3. This Law applies only to Skawahlook Land and not the remainder of Skawahlook territory.
4. This Law does not apply to an Interest in Skawahlook Land held by one or both Spouses where neither Spouse is a Member.
5.
 - a) A Spouse cannot commence legal proceedings under this Law, after the death of the other Spouse, and his or her rights in relation to an Interest in Skawahlook Land or a Matrimonial Home will instead be determined by the applicable law governing the estate of the deceased Spouse.
 - b) Where a Spouse dies, the other Spouse may continue any legal proceedings under this Law which were commenced before the death of that Spouse.

PART 2 - DOMESTIC CONTRACTS

6. Subject to sections 8-10, a provision in a Domestic Contract that reflects the agreement of the Spouses with respect to an Interest in Skawahlook Land or a Matrimonial Home is valid, binding, and enforceable by the Court, whether the Spouses entered into the Domestic Contract before or after this Law came into force.
7. If the Domestic Contract transfers an Interest in Skawahlook Land or a partial Interest in Skawahlook Land, the Domestic Contract must be registered in the First Nation Land Register in order to be enforceable.
8. A Domestic Contract may provide an Interest in Skawahlook Land or grant rights to a Matrimonial Home to a Spouse or Child who is not a Member, but such Interest and such rights shall not in any case be greater than a life estate measured by the life of the individual intended to enjoy it. Any life estate granted to a Child shall be held in trust for the benefit of that Child until the Child reaches the age of majority. For greater certainty, a provision creating, or intended to create, any greater interest than a life estate in respect of a non-Member is void.
9. Subject to this Law, the Court may, on application by a Spouse, set aside a Domestic Contract or any provision therein concerning an Interest in Skawahlook Land or a Matrimonial Home upon making a determination that:
 - a) a Spouse failed to disclose to the other Spouse any material information in respect of his or her Interests in Skawahlook Land or a Matrimonial Home;

- b) a Spouse did not understand the nature or consequences of the Domestic Contract or provision;
 - c) the Domestic Contract or provision is unconscionable, was entered into under duress, or on the basis of undue influence or fraud; or
 - d) any other common law requirement for a legal and binding contract has been breached or has not been met.
10. Section 9 only applies to formerly married Spouses who have been divorced for less than two years and to common law Spouses who have been living separate and apart for less than two years.

Part 3 - Qwi:qwelstóm JUSTICE ASSISTANCE

Qwi:qwelstóm is the Halq'emeylem word used to describe "justice" according to the Stó:lō worldview. It is based upon traditional Stó:lō forms of mediation and dispute resolution whereby affected family and community members are called together to discuss what has happened and to reach an agreement on how best to repair harm and restore balance and harmony.

11. It is the intention of this Part that Spouses who, on the breakdown of their marriage, do not have and are unable to conclude a Domestic Contract with respect to Interests in Skawahlook Land, can choose to submit to Qwi:qwelstóm for help with mediation with respect to such Interests.
12. Qwi:qwelstóm may obtain the services of advisors and professionals to assist it in fulfilling its functions under this Part.
13. Where Qwi:qwelstóm is successful, the agreement of the Spouses with respect to Interests in Skawahlook Land shall be reduced to writing in a Domestic Contract, and that Domestic Contract shall expressly provide that each Spouse waives all rights to challenge its provisions under section 9.
14. Where a Domestic Contract is achieved in the traditional mediation conducted by Qwi:qwelstóm, the chair of Qwi:qwelstóm shall report to and provide a copy of that Domestic Contract to the Lands Manager and the Lands Manager shall notify the Lands Advisory Committee.
15. Where the traditional mediation is unsuccessful and no Domestic Contract is reached, the chair of Qwi:qwelstóm shall deliver to each of the Spouses and to the Lands Manager a confidential Report on the mediation and the points remaining in dispute between the Spouses with respect to Interests in

Skawahlook Land.

16. Where the Report has been given orally, the Lands Manager shall produce a written record of the Report and have that written report initialled by the chair of Qwi:qwelstóm.
17. For greater certainty, nothing in this Part is intended to limit the right of a Spouse to seek other or further alternative dispute resolution on the breakdown of a marriage in relation to any matter other than an Interest in Skawahlook Land, or to restrict the Spouses from otherwise reaching agreement with respect to an Interest in Skawahlook Land, provided that such agreement results in a Domestic Contract that meets the requirements of this Act.

PART 4 - ACCESS TO A COURT OF COMPETENT JURISDICTION

A. General Rules

18. Where Spouses are unable to resolve their differences regarding any matter addressed in this Law, they may apply to the Court for a resolution of their dispute.
19. (1) Any Spouse who seeks a Court order based on any provision in this Law, other than s. 34 (emergency protection orders), must serve the Council with a copy of the documents filed with the court, within seven days of the filing of the documents.

(2) At the request of Council, the Court shall, 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 whether or not the order sought should be made.
20. When a Court makes any order under this Law, the Spouse in whose favour the order is made shall provide a copy of the order to the Council, within three days of the date the order is made.

B. Ownership and Division of Spousal Property

21. Sections 22 to 24 only apply to formerly married Spouses who have been divorced for less than two years and to former common law Spouses who have been living separate and apart for less than two years.
22. (1) Subject to this Law, the Court may make any determination concerning interests in and the division of Spousal Property and may make orders that

are necessary, reasonable or ancillary to give effect to the determination, including, in appropriate circumstances:

- a) a declaration as to whether the property at issue is in fact Spousal Property;
- b) a declaration as to the ownership of any Interest in Skawahlook Land or an interest in a Matrimonial Home;
- c) if a Spouse is a Member, an order that Spousal Property be transferred to that Spouse exclusively;
- d) an order that one Spouse lease an Interest in Skawahlook Land or a Matrimonial Home to the other Spouse for a fixed period of time, subject to such conditions as the Court deems just in all the circumstances;
- e) an order that a Member Spouse make a compensatory payment to the non-Member Spouse to recognize the contribution which the non-Member Spouse has made to the acquisition, upkeep and/or improvement of the Spousal Property;
- f) an order that restrains either Spouse from disposing of or transferring their Interest in the Spousal Property, either legally or beneficially, pending the trial of the action;
- g) an order that one Spouse pay compensation to the other Spouse if an Interest in Skawahlook Land or a Matrimonial Home has been disposed of for the purpose of dividing the Spousal Property; and
- h) any appropriate equitable order where one Spouse has intentionally, recklessly, or fraudulently depleted Spousal Property.

(2) For greater certainty, the Court may not make any declaration or order that provides a non-Member with any permanent Interest in Skawahlook Land or any permanent interest in a Matrimonial Home.

(3) In making any order under subsection (1)(a)-(h), the Court shall begin with the presumption that each Spouse is entitled to an equal share of the Spousal Property, or in the case of a non-Member Spouse, an equal share of the value of the Spousal Property, and then consider whether this presumption should be varied in light of any of the following factors:

- a) the date when the Spousal Property was acquired or disposed of;
- b) the duration of the Relationship;

- c) the duration of the period during which the Spouses have lived separate and apart;
 - d) the needs of each Spouse to become or remain economically independent;
 - e) direct financial contributions of each Spouse toward the acquisition, upkeep, or improvement of the Spousal Property;
 - f) the direct or indirect contribution of each Spouse to the acquisition, upkeep, improvement or increased value of the Spousal Property, including through child rearing responsibilities;
 - g) any relevant order or award that the Court is making or has previously made for the Spouses pursuant to the *Family Relations Act* or the *Divorce Act*; and
 - h) any other factor which the Court considers relevant to an equitable division of the Spousal Property.
- (4) In making any compensation order under subsection (1)(e), the Court shall:
- a) not make any order until it has been provided with at least one valuation of the Spousal Property that has been prepared by a qualified appraiser, and which accounts for the limitations on the ownership rights associated with the Spousal Property and, in particular, the feasibility of selling or leasing the Spousal Property or replacing it with a new Interest in Skawahlook Land; and
 - b) not make an order if a Member Spouse demonstrates that the order is likely to force the Member Spouse to move out of the Matrimonial Home, unless the Court concludes that the order is unlikely to cause the Member Spouse undue hardship.
23. Where the interest of a Spouse in Spousal Property is held through a corporation, the Court may order that he or she transfer shares in the corporation to the other Spouse.
24. An order shall not be made under this Part so as to require the sale of an operating business or farm on Skawahlook Land, or so as to seriously impair its operation, unless there is no reasonable alternative method of achieving an equitable result between the Spouses.
25. Nothing in this Law relieves a party of the requirement to observe the rules and procedures of the Court.

26. Where any order is made under subsection 22(1) which transfers the ownership of an Interest in Skawahlook Land, the Spouse who benefits from that order shall promptly register the order with the First Nation Land Register.

C. Matrimonial Home

27. Subject to the provisions below, both Spouses have an equal right to occupy the Matrimonial Home.

28. No Spouse shall dispose of or encumber a Matrimonial Home unless:

- a) the other Spouse joins in the instrument or consents in writing to the transaction;
- b) the other Spouse has released all rights to the Matrimonial Home by Domestic Contract; or
- c) a Court order has authorized the transaction or has released the Matrimonial Home from the application of this section.

29. Sections 27 and 28 only apply to formerly married Spouses if they have been divorced for less than two years and to former common law Spouses if they have been living separate and apart for less than two years.

30. If a Spouse disposes of or encumbers a Matrimonial Home in contravention of section 28, the transaction may be set aside on an application to the Court.

31. When a person proceeds to realize upon an encumbrance or execution against a Matrimonial Home, the Spouse who has a right of occupation under section 27 has the same right of redemption or relief against forfeiture as the other Spouse and is entitled to the same notice respecting the claim and its enforcement or realization.

32. The Court may, on the application of a Spouse or a person claiming an interest in a Matrimonial Home:

- a) make a declaration as to whether or not the dwelling at issue is a Matrimonial Home; and
- b) authorize a disposition or encumbrance of the Matrimonial Home, provided that such disposition or encumbrance is otherwise authorized under this Law, if the Court finds that the Spouse whose consent is required cannot be found or is not available, is not capable of giving or withholding consent, or is unreasonably withholding consent, and the Court may prescribe conditions including the provision of other

comparable accommodation, or payment in place of it, that the Court considers appropriate.

33. (1) The Court may, on application, make an exclusive occupation order for the Matrimonial Home and its contents in favour of one Spouse for a specified period of time:

- a) if that Spouse is a Member, whether or not that Spouse owns the Matrimonial Home; or
- b) if that Spouse is not a Member, but is the primary caregiver of a Child, if such an order is in the best interests of the Child.

(2) Any person in whose favour or against whom an order is made under subsection (1) may apply to the Court to have the order varied or revoked within the time determined by the Court or, if no time limit is stipulated, at any point while the order remains in force.

34. (1) The Court may, on ex parte application by a Spouse, make an emergency exclusive occupation order for the Matrimonial Home in favour of that Spouse for a period of up to 90 days, whether or not the Spouse is a Member and whether or not a Child is involved, if the Court concludes that:

- a) family violence has occurred; and
- b) the order should be made to help ensure the immediate protection of the Spouse or a Child who resides in the Matrimonial Home.

(2) The order described in subsection (1) must include a provision directing a peace officer to enforce any provision of the order if requested to do so by the applicant Spouse or the Council.

(3) The order described in subsection (1) may include any of the following additional provisions:

- a) a provision requiring the Spouse of the applicant Spouse and any other person to vacate the Matrimonial Home and prohibiting them from returning to the Matrimonial Home;
- b) a provision directing a peace officer to remove the applicant's Spouse and any other person from the Matrimonial Home;
- c) a provision prohibiting any person who is required to vacate the Matrimonial Home from attending near the Matrimonial Home;

- d) a provision directing a peace officer to accompany the person who is required to vacate the Matrimonial Home to the Matrimonial Home in order to supervise the removal of personal belongings; or
- e) any other provision that the Court considers necessary for the immediate protection of the person who is at risk.

(4) Any person in whose favour or against whom an order is made under subsection (1) may apply to the Court to have the order varied or revoked within the time determined by the Court or, if no time limit is stipulated, at any point while the order remains in force.

PART 5 – Amending Procedures

35. (1) Any proposed substantive amendment to this Law shall be initiated by a petition signed by at least ten percent of Skawahlook eligible voters or by a two-thirds majority of Council.

(2) This Law may only undergo substantive amendments with the consent of the majority of Skawahlook eligible voters at a meeting convened by Council for the purpose of amending this Law provided that ten percent of Skawahlook eligible voters are present.

(3) The Council shall provide to Members, in writing, the wording of the proposed amendment and the date for the Members' meeting at least 14 days before the meeting.

36. (1) The Council may adopt minor amendments to the Law by unanimous decision at a duly convened meeting of Council.

(2) For the purpose of subsection (1), minor amendments include:

- a) amendments to correct typographical errors,
- b) amendments required to reference any relevant new or amended Skawahlook Nation laws,
- c) amendments ordered by any court of competent jurisdiction; and
- d) amendments which serve to clarify the Law, where there is no reasonable dispute about the intention underlying the original provision.

PART 6 – General Provisions

37. If any provision or set of provisions in this Law is for any reason held invalid by a decision of a court of competent jurisdiction, the invalid provision(s) will, wherever possible, be severed from and not affect the remaining provisions of this Law.
38. (1) A person commits an offence by refusing or neglecting, without reasonable excuse, to comply with any Court order made against that person under the provisions of this Law.
- (2) A Court order, certified by a proper officer of the Court that made the order, is proof of the order in a prosecution under this section.
- (3) A person is liable, on summary conviction under subsection (1), to a fine of not more than \$5,000 or to imprisonment for a term of not more than three months, or to both.
- (4) A fine payable under this section shall be remitted to Skawahlook First Nation by the Court, after reasonable Court costs have been deducted.