

YAKWEAKWIOOSE FIRST NATION
SPOUSAL PROPERTY LAW
JANUARY 2015



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SYUWÁ:LELH - Stó:lō Laws

“S’ólh Téméxw te ikw’elo. Xolhmet te mekw’stam it kwelat”

This is Our Land, we have to take care of everything that belongs to us

“Xaxastexw te mekw’stam”

Respect all Things

“Lílheqi”

Importance of women-to the people, the fish and the river; territory identification; roles & responsibilities of women

“T’xwelátse”

Do things in a good way; respect each other

PREAMBLE

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

AND WHEREAS the Yakweakwioose First Nation has taken control of Reserve lands and resources pursuant to the *Framework Agreement on First Nation Land Management* and has enacted the *Yakweakwioose Land Code* effective the 1ST day of May, 2014;

AND WHEREAS pursuant to the *Yakweakwioose Land Code*, Yakweakwioose agreed to enact rules and procedures applicable on the breakdown of a marriage to the use, occupancy and possession of Yakweakwioose Lands, and the division of interests in that land;

AND WHEREAS Yakweakwioose First Nation intends to provide rights and remedies, without discrimination on the basis of sex, to Spouses who have or claim interests in Yakweakwioose Lands upon the breakdown of their marriage;

AND WHEREAS it is the intent of Yakweakwioose in the interests of natural justice to respect the rights of the individual and treat all persons fairly;

NOW THEREFORE, THIS YAKWEAKWIOOSE SPOUSAL PROPERTY LAW IS HEREBY ENACTED A LAW OF YAKWEAKWIOOSE.

PART 1

1. Title

1.1. The title of this enactment is the *Yakweakwioose Spousal Property Law*.

2. Interpretation

2.1. For the purposes of this Law, terms have the same definitions as in the *Yakweakwioose Land Code* except as set out below;

2.2. The following definitions apply in this Law:

“Court” means any other federal or provincial court of competent jurisdiction;

“Land Code” means the *Yakweakwioose Land Code*;

“Life Estate” means a right of a Spouse or Child to occupy the Matrimonial Home for a period of time up to a maximum of the rest of their life;

“Matrimonial Home” means a family home affixed to Yakweakwioose Lands that is – or if the Spouses have separated, was at the time of separation – occupied by one or both Spouses as the family home or that is mutually intended by the Spouses to be occupied by one or both of them as the family home, but, despite the common law relating to real property, excludes and is separate from the land or CP or Allotment on which the home is situated;

“Mediator” means a mediator listed on the Roster of Mediate BC;

“Pre-nuptial, Marriage, or Separation Agreement” means an agreement in writing signed by the Parties and by a witness in which the parties agree on their respective rights and obligations under the marriage or on separation, with respect to the possession, use or division of an Interest in Yakweakwioose Lands, and includes:

- a) a pre-nuptial entered into between Spouses who intend to marry or live in a Common-law Marriage;
- b) a Marriage Agreement entered into between Spouses who are married to each other; and
- c) a Separation Agreement entered into between Spouses who are married to each other and are living separate and apart;

“Primary Care” means physical custody and day-to-day care of a Child to protect the well-being of the Child;

“Yakweakwioose Law” means a law enacted pursuant to the *Yakweakwioose Land Code* or any other law making authority Yakweakwioose has;

“Spouse”, means a person who is married to another person of the same or opposite sex in a civil or religious ceremony, and includes:

- a) a Spouse by Common-law Marriage; and
- b) also includes, for a period of up to two years from the date of separation and only for the purposes of section 4, sub-section 5.5 and section 6 of this Law, a former Spouse after a separation or a marriage has been dissolved by decree absolute of divorce or judgment of nullity;

3. Application of Law

Only to Reserve Land

3.1. This Law applies only to Yakweakwioose Lands which are Reserves and not to the rest of the Territory.

Only to Members and their Spouses

3.2. This Law applies only to Yakweakwioose Members and their Spouses in relation to a break-down of a Marriage or Common Law Marriage.

3.3. This Law does not apply to a Matrimonial Home held by either Spouse, or both Spouses, where neither Spouse is a Member.

Only to Matrimonial Homes

3.4. This Law applies only to Matrimonial Homes and, except where explicitly stated, not to other Interests in or on Yakweakwioose Lands as defined in the *Yakweakwioose Land Code* or in this Law.

Federal and Provincial Laws

3.5. The *British Columbia Family Law Act*, S.B.C. 2011 c. 25 and the *Canada Divorce Act*, 1985, c. 3 (2nd Supp.) apply as modified by this Law and to the extent possible subject to this Law, the Land Code, and the common law.

3.6. Despite paragraph 3.5, the fact that a Matrimonial Home does not include future or contingent Interests in Lands shall not be taken to confer jurisdiction upon a Court over those Interests under this Law.

3.7. Nothing in this Law limits the application of valid and applicable federal or provincial laws in respect of matrimonial causes or any rights or remedies available in those laws, except to the extent that such laws deal expressly or implicitly with Matrimonial Homes or Lands, and to that extent this Law shall apply.

3.8. Unless otherwise specified in this Law, nothing in this Law relieves either Spouse of the requirement to observe the rules and procedures of a Court in relation to matrimonial causes.

Does Not Apply to Wills and Estates

3.9. For greater certainty, a Spouse cannot commence an action after the death of the other Spouse to claim, take, or pursue an Interest in Yakweakwioose Lands held by the other Spouse under this Law, and his or her interest will be determined by the applicable law governing the estate of the deceased Spouse.

3.10. Despite paragraph 3.9, when a Spouse who owns a Matrimonial Home dies, a survivor who does not hold an interest or right in or to the Matrimonial Home may occupy that home for a period of up to 180 days after the day on which the death occurs or for such longer period which may be approved by Council Resolution, whether or not the survivor is a Yakweakwioose First Nation member.

Continuation Where Spouse Dies During Proceedings

3.11. Despite paragraph 3.9 where a proceeding has been commenced under Part 6 of this Law, and either Spouse dies before all issues relating to the Matrimonial Home have been determined by a Court, the surviving Spouse may continue the proceeding.

Subject to other Laws

3.12. The rights and remedies recognized in this Law are subject to any Laws passed under Part 3 of the Yakweakwioose Land Code in relation to:

- a) the removal and punishment of persons trespassing on Lands or frequenting Lands for prohibited purposes,
- b) prevention of nuisance, or
- c) protection of the community.

Yakweakwioose Mortgages and Housing Laws and Policies Prevail

3.13. Nothing in this Law affects the rights or priority of Yakweakwioose First Nation if the First Nation has guaranteed a mortgage or holds a mortgage or legal or financial interest in a Matrimonial Home, and, for greater certainty, Yakweakwioose First Nation Laws, policies and agreements relating to housing take priority and prevail over any provision of this Law or order made under it, to the extent of any conflict.

Applies Despite Restrictions on Mortgages and Seizure of Property on Reserve

3.14. This Law applies despite subsection 89(1) of the *Indian Act*.

4. Pre-nuptial, Marriage, and Separation Agreements

4.1. Despite the definition of Registry in the *Yakweakwioose Land Code*, registration under this section 4 may mean registration in the First Nations Land Registry or a separate registry maintained or coordinated by Yakweakwioose to retain private documents relating to agreements under this Part.

4.2. It is the purpose and intention of this Law to respect written agreements between Spouses or people intending to become Spouses as to the use, possession, occupancy, disposition or partition of an Interest in Yakweakwioose Lands, including a Matrimonial Home.

Registration of Agreements

4.3 All Spouses or persons intending to become Spouses are encouraged to register their Pre-Nuptial, Marriage or Separation Agreements.

4.4 A Spouse or persons intending to become a Spouse may submit an application to the Lands Manager to register a Pre-Nuptial, Marriage or Separation Agreement in the First Nations Land Registry or a separate registry.

4.5 A Pre-Nuptial or Marriage Agreement may contain a provision asserting that a structure is a Matrimonial Home.

4.6 The Lands Manager will register, in the requested registry any Pre-Nuptial, Marriage or Separation Agreement submitted under paragraph 4.2 provided that:

- a) The applicant provides an original agreement or a certified true copy;
- b) The agreement is submitted by a Spouse and signed and dated by both Spouses with their signatures notarized;
- c) The applicant provides proof of membership in the Yakweakwioose First Nation of at least one of the Spouses;
- d) The applicant pays the prescribed fee, if any;
- e) The agreement provides the legal description of any Interest referred to in the agreement and proof of title; and

- f) For each Interest referred to in the agreement:
- (i) the applicant provides proof that they or their Spouse are the sole owner of the Interest or,
 - (ii) if an Interest in the Agreement is shared with other parties, a signed and notarized statement from each other shared Interest-holders stating that they do not object to the Interest being included in the Agreement.

Agreements Valid and Binding

4.7 Subject to this Law and all applicable laws, a provision in a Pre-Nuptial, Marriage, or Separation Agreement that reflects the agreement of the Spouses with respect to an Interest in Yakweawkwoose Lands, including a Matrimonial Home, is valid, binding and enforceable.

Interests, Rights and Life Estates to non-Members

4.8 A Pre-Nuptial, Marriage or Separation Agreement may provide an Interest or grant rights to a Matrimonial Home to a Spouse or Child who is not a Member but such Interests and rights shall not in any case be greater than a Life Estate and any such Interest or right that is greater than a Life Estate in respect of a non-Member is void.

4.9 Despite paragraphs 4.6 and 4.7, any provision in a Pre-Nuptial, Marriage or Separation Agreement is void if it purports to give, transfer, award, acknowledge or create an Allotment or a CP in favour of a Spouse or any individual who is not a Member.

Court May Set Aside or Vary Agreements

4.10 Subject to this Law, a Court may, on application, set aside or vary a provision of a Pre-Nuptial, Marriage, or Separation Agreement with respect to a Matrimonial Home:

- a) if a Spouse failed to disclose to the other Spouse all of that Spouse's Interests in Yakweawkwoose Lands, or any material information in respect of those Interests;
- b) if a Spouse can demonstrate that they did not understand the nature or consequences of the provision;
- c) if there is evidence of abuse or coercion; or
- d) otherwise in accordance with the common law or the law of equity or contract.

Past and Future Agreements Valid

4.11 This Part applies whether the parties entered into the Pre-Nuptial, Marriage or Separation Agreement on, before or after the date that this Law comes into force and effect.

5. MATRIMONIAL HOME

How to Determine Matrimonial Home

- 5.1 Whether or not a structure or Interest is a Matrimonial Home is a question of fact.
- 5.2 Where part of a Matrimonial Home is normally used for a purpose other than residential purposes, the Matrimonial Home includes only that part of the structure or structures that may reasonably be regarded as necessary for use and enjoyment as the family residence.

Limits on Sales and Encumbrances

- 5.3 No Spouse shall sell, transfer or otherwise grant a mortgage or other interests in the Matrimonial Home unless:
- a) the other Spouse consents in writing;
 - b) the other Spouse joins in and signs the instrument;
 - c) the other Spouse has released all rights in respect of the Matrimonial Home by Pre-Nuptial, Marriage or Separation Agreement;
 - d) a Court order has authorized the transaction; or
 - e) a Court has released the Matrimonial Home from the application of this section.

6. ACCESS TO COURT

Cooperative Dispute Resolution Encouraged

- 6.1 Any Spouse may contact the Lands Manager for information and resources relating to mediation and dispute resolution.
- 6.2 Spouses are encouraged to resolve their differences regarding any matter addressed in this Law through Qwí:qwelstom, cooperative discussion, mediation or alternative dispute resolution.

General Access to Court

- 6.3 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.
- 6.4 In the event of the breakdown of a marriage or a relationship involving Common- law Spouses, a Spouse may apply to a Court to:
- a) enforce a Pre-Nuptial, Marriage or Separation Agreement,
 - b) determine a dispute in relation to a Matrimonial Home, or
 - c) deal with any matter provided for under this Law or any applicable law.

Time Limit

6.5 A Spouse seeking to apply for an order under this Part must make their initial application before their divorce or within one year after their divorce has been granted by a Court, or within two years after separation, unless otherwise ordered by the Court.

Types of Orders; Powers of Court

6.6 Subject to this Law, the *Yakwekwioose Land Code*, and the common law, a Court may, on application, make any order in relation to a Matrimonial Home held by a Spouse, or by both Spouses, that the Court could make in respect of a Matrimonial Home situated off of Yakwekwioose Lands in the province of British Columbia.

Emergency Orders

6.7 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.

6.8 An order under paragraph 6.7 must include a provision directing a peace officer to enforce any provision of the order if requested to do so by the applicant Spouse.

6.9 An order under paragraph 6.7 may include any or all 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 for the duration of the order;
- b) a provision directing a peace officer to remove the applicant's Spouse and any other person from the Matrimonial Home;
- c) a restraining order;
- d) a provision directing a peace officer to escort the person who is required to vacate back to the Matrimonial Home to supervise the removal of personal belongings; or
- e) any other provision that the Court considers necessary for the immediate protection of any person who is at risk.

6.10 Any person in whose favour or against whom an order is made under paragraph 6.7 may apply to the Court to have the order varied or revoked at any point while the order remains in force.

Court Orders

6.11 If a Spouse sells, transfers or otherwise grants a mortgage or other interest in a Matrimonial Home in contravention of paragraph 5.5, a Court may, on application:

- a) set aside the transaction or interest; or
- b) order the Spouse to pay compensation to the other Spouse.

6.12 Paragraph 6.11 a) does not apply where the person holding the interest at the time of the application to the Court acquired the interest for value, in good faith and without notice at the time of acquiring, or making an agreement to acquire the interest in the Matrimonial Home.

6.13 Regardless of which Spouse holds a Matrimonial Home, a Court may, on application and subject to this Law:

- a) order the delivering up, safekeeping and preservation of the Matrimonial Home;
- b) direct that one Spouse be given exclusive possession, consistent with this Law, of the Matrimonial Home, for such period as the Court may direct, and release any other aspect or interest relating to the Matrimonial Home from the application of this Part;
- c) authorize a sale, transfer, mortgage or other interest consistent with Yakwekwioose law of a Spouse's Interest in a Matrimonial Home, subject to the other Spouse's right of exclusive possession as ordered;
- d) make any interim or temporary order to give effect to the purposes of this Law or to protect the rights of a Spouse; and
- e) make any ancillary order, including an order as to costs that the Court deems necessary to give effect to this Law.

6.14 A Court, in considering whether to direct that one Spouse have exclusive possession of a Matrimonial Home, shall be guided by the principle that the parent with the Primary Care of a child should have possession of the Matrimonial Home for a period sufficient to ensure that the child, or the youngest child if there is more than one child, reaches the age of majority or, if they are dependent on the Spouse, for a reasonable time period after the age of majority, provided that this is consistent with the best interests of the child or children.

6.15 Where both Spouses share joint custody of a child or children, the principle set out in

paragraph 6.14 shall be adapted to favour the Spouse who has Primary Care if there is one.

6.16 In applying the principle set out in paragraph 6.14, a Court may have regard to the fact that one or more of the children are not Members and may also take into consideration any disabilities of any of the children and whether such disabilities support continuing possession or occupation of the Matrimonial Home past the time the child with disabilities reaches that age of majority.

6.17 Subject to this Law, a Court may make any determination about a Matrimonial Home and may make orders that are necessary, reasonable or related to give effect to the determination, including:

- a) a declaration as to whether a structure is in fact a Matrimonial Home;
- b) an order that a Matrimonial Home be transferred to one Spouse exclusively on an interim or permanent basis;
- c) an order that a Matrimonial Home be subject to a lease by one Spouse to the other Spouse, for a term not exceeding 5 years except for extensions for reasons set out in paragraphs 6.14 and 6.16, and subject to such terms and conditions as the Court deems just, taking into account the best interests of any children living in the Matrimonial Home;
- d) an order granting an easement or access for a specified period of time across a CP or Allotment held or shared by one Spouse for the purpose of enabling the other Spouse to access the Matrimonial Home;
- e) an order that restrains either Spouse from disposing of or transferring a Matrimonial Home or an Interest in it, either legally or beneficially, pending the granting of the divorce;
- f) an order directing one or both spouses to pay specified amounts of money in relation to rent, lease, mortgage, tax, utilities, repairs, legal fees, or other payments relating to the Matrimonial Home;

- g) an order that one Spouse make a compensation payment to the other Spouse to recognize the contribution which the other Spouse has made to the acquisition, rent, mortgage payments, upkeep and/or improvement of the Matrimonial Home, including:**

 - (i) determining the amount payable by one Spouse to the other; and**
 - (ii) providing that the amount payable be settled by**
 - (iii) payment of the amount in a lump sum,**
 - (iv) payment of the amount by installments,**
 - (v) the set-off or compensation of any amounts owed by one Spouse to the other, or**
 - (vi) any combination of the methods referred to in subparagraphs .**
- h) an order that one Spouse pay compensation to the other Spouse if the Matrimonial Home or an Interest has been granted, sold or transferred, or;**
- i) any appropriate equitable order where one Spouse has intentionally, recklessly, or fraudulently damaged, granted an interest, sold or transferred the Matrimonial Home or an Interest relating to it.**
- j) In making any order under paragraph 6.17, the Court shall determine the fair share of each Spouse in relation to the Matrimonial Home or the value of the Matrimonial Home, and then shall consider the following factors:**
- k) the date when the Matrimonial Home was acquired or disposed of;**

 - (i) the duration of the marriage or Common-law Marriage;**
 - (ii) the duration of the period during which the Spouses have lived separate and apart;**
 - (iii) the needs of each Spouse to become or remain economically independent;**
 - (iv) direct or indirect financial contributions of each Spouse toward the acquisition, rent, mortgage payments, upkeep, improvement, or increased value of the Matrimonial Home, including contributions through child rearing responsibilities;**

(v) any relevant order or award that the Court is making or has previously made for the Spouses pursuant to the provincial Family Law Act or the federal Divorce Act or their successors; and

(vi) any other factor which the Court considers relevant to an equitable division of the Matrimonial Home.

6.18 In making any compensation order under sub-paragraph 6.17g), the Court shall:

- a) not make any order until it has been provided with at least one valuation of the Matrimonial Home by a qualified appraiser, and which accounts for the limitations on the ownership rights associated with it and, in particular, the feasibility of selling or leasing the Matrimonial Home; and
- b) not make an order against a Member if that Member Spouse demonstrates that the order is likely to unreasonably force the Member Spouse to move out of the Matrimonial Home.

Over-ride of Paragraph 8.3[Pre-Marriage Gifts and Inheritances]

6.19 Despite paragraph 8.3 [certain pre-marriage gifts and inheritances exempted], the Court may make any appropriate and equitable order on the ground of unconscionability where a Spouse has intentionally, recklessly or fraudulently depleted net family property that is an Interest in Yakwekwioose Lands or a Matrimonial Home and that would otherwise be subject to the exemption in paragraph 8.3.

Certain Orders Prohibited

6.20 No order shall be made under this Part:

- a) in respect of a CP or Allotment in favour of a Spouse who is not a Member; or
- b) that results in a sale, partition or transfer of a CP or Allotment.

Court May Vary Orders

6.21 A Court may, on application, vary any declaration or order granted under this Part if:

- a) there is a material change in circumstance;
- b) there is evidence of fraud, abuse, or coercion; or
- c) the Court determines that fairness or equity justify a variance.

Copy and Registration of Orders

6.22 When a court makes any order under this Law, the Spouse in whose favour the order is made shall provide, without delay, a copy of the order to the Lands Manager who shall register it in the First Nations Land Registry.

7. AMENDMENTS

- 7.1 Substantive amendments to this Law can only be made in accordance with paragraph 3.14 of the *Yakweakwioose Land Code*.
- 7.2 Despite paragraph 7.1 of this Law, Council may authorize minor amendments to the Law including:
- a) amendments to correct typographical errors,
 - b) amendments required to reference any relevant new or amended Yakweakwioose laws;
 - c) amendments ordered by any Court; and
 - d) amendments which serve to clarify the Law, where there is no reasonable dispute about the intention underlying the original provision.

8. GENERAL PROVISIONS

Interpretation

- 8.1 Headings in this Law are for reference purposes only and do not form part of the Law.
- 8.2 All provisions of this Law are severable. If a Court determines that any provision of this Law is invalid or inapplicable, the provision shall be severed from the Law and the remainder of the Law shall remain in force with any necessary revisions.

Certain Pre-Marriage Gifts and Inheritances Exempt

- 8.3 An Interest and the value of the Interest in Yakweakwioose Land:
- a) received prior to the marriage or Common-law Marriage; and
 - b) received as a gift or inheritance by one Spouse only from a third person who is a family member, or by one Spouse only together with one or more members of that family; shall be deemed, subject to proof to the contrary, to have been transferred with the intention that the Interest should continue to be held within that family exempt from any claim of the other Spouse.

8.4 The exemption in paragraph 8.3:

- a) does not apply with respect to an Interest in Yakweakwioose Lands that is a Matrimonial Home; and
- b) only applies to the value of the gift or inheritance prior to the marriage or Common-law Marriage.

Rights of Non-Members Non-Transferable

8.5 A non-Member who is granted interim occupation or possession rights on Yakweakwioose Lands under this Law cannot dispose of, transfer or assign these rights or pass them to their heirs in a will. As soon as the non-Member ceases use or occupation personally or the term of the order or arrangement expires, all rights are deemed to be terminated.

Penalties

8.6 A person who contravenes an order made by a Court pursuant to this Law is guilty of an offence and liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than three months, or to both.

8.7 A fine payable under paragraph 8.6 shall be remitted to the Yakweakwioose First Nation by the Court, after reasonable Court costs have been deducted.


Date Law Comes into Force

8.8 This Law shall come into force and effect on the date it is passed by Council Resolution after complying with the requirements of Part 3 of the Land Code.

BE IT KNOWN that this Law entitled *Yakweakwioose Spousal Property Law* is hereby enacted by a quorum of Council at a duly convened Council of the Yakweakwioose First Nation held on the 17 day of February, 2015.


(Chief Frank Malloway Sr.)


.....
(Councilor - Terry Horne)


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(Councilor- Jennifer Malloway)

.....
(Councilor - Jason Malloway)

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(Councilor- Frank Malloway Jr.)