

**ANISHINABEK OF AUNDECK OMNI KANING
FIRST NATION MATRIMONIAL REAL
PROPERTY LAW**



Aundeck Omni Kaning First Nation
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This version of the proposed Law has explanatory notes (in brackets) which do not form part of the Law.

**ANISHINABEK OF AUNDECK OMNI KANING FIRST NATION
MATRIMONIAL REAL PROPERTY LAW**

WHEREAS the Anishinabek of Aundeck Omni Kaning First Nation intends to ensure rights and remedies, without discrimination on the basis of sex, with respect to spouses who have, or claim, interests in First Nation land upon the breakdown of their marriage or common-law relationship, which also includes the death of a spouse;

AND WHEREAS the Anishinabek of Aundeck Omni Kaning First Nation intends to apply the following principles and steps with respect to the use, occupancy or possession of matrimonial real property on First Nation land, and the division of interests in that land on the breakdown of a marriage or common-law relationship;

Firstly, the right of the parties to a marriage or common-law relationship to make their own agreement as to the disposition of interests in First Nation land in the event that their marriage or cohabitation does, or has, broken down;

Secondly, the value and necessity for mediation where the parties have not or are unable to reach their own agreement as described above; and

Thirdly, the right of the parties to have access to a court of competent jurisdiction to deal with all of their property rights, entitlements and obligations on the breakdown of their marriage, or death of a spouse subject to First Nation law where their property includes an interest in First Nation land.

IT IS THEREFORE ENACTED AS A LAW OF THE AUNDECK OMNIKANING FIRST NATION:

1. This Law may be cited as the *Anishinabek of Aundeck Omni Kaning First Nation Matrimonial Real Property Law* ("Law").

(Provides the title of the law).

2. This Law applies only to interests in, or claimed in, Anishinabek of Aundeck Omni Kaning First Nation "reserve" land as defined in the *Indian Act*.

(States that the law applies on reserve only).

3. Subject to its terms, this Law shall not be construed as limiting or precluding any right or remedy otherwise available to persons who are or may be affected by it pursuant to any other Law applicable on the breakdown of a marriage or common-

law relationship, or the death of a spouse with respect to any property other than interests in First Nation land, or other entitlements or obligations of spouses.

(States that this Law does not take away the right of a spouse to use a court of competent jurisdiction to pursue personal property rights).

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

"child" includes a child born either in or out of wedlock, a legally adopted child or a child adopted in accordance with Anishinabek custom.

"Court of Competent Jurisdiction" refers to the Ontario Court of Justice, the Family Court of the Superior Court of Justice, the Superior Court of Justice and a court approved in accordance with Anishinabek custom.

"domestic contract" includes:

"cohabitation agreement" entered into between two people who are living together, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the cohabitation or on separation, with respect to the possession or division of interests in First Nation land;

"marriage contract" entered into between spouses who are married to each other, or intend to marry, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in First Nation land; and

"separation agreement" entered into between spouses who are married to each other and are living separate and apart, made in writing and signed by the parties and witnessed, in which they agree on their respective rights and obligations under the marriage or on separation, with respect to the possession or division of interests in First Nation land.

"interest in First Nation land" includes any legal or equitable interest held in possession by either spouse, or both spouses, in First Nation land.

"matrimonial home" means an interest in First Nation land that is or, if the spouses have separated, was at the time of separation, ordinarily occupied by the person and his or her spouse as their family residence, and, where a parcel of First Nation land that is an interest in First Nation land for purposes of this Law includes a matrimonial home and is normally used for a purpose other than residential, the matrimonial home is only the part of the interest in First Nation land that may reasonably be regarded as necessary to the use and enjoyment of the family residence.

"member" means a person who is a member of the Anishinabek of Aundeck Omni Kaning First Nation pursuant to the *Aundeck Omni Kaning First Nation Membership Code*.

"personal property" means property other than matrimonial home and may include household items, vehicles, boats, bank accounts, etc.

"real property" means the matrimonial home.

"spouse" means a person who is married to another, whether by a traditional customary, religious or civil ceremony, and includes a common-law partner.

"common-law partner" means the relationship between two (2) persons who are cohabitating together in a conjugal relationship for a continuous twelve (12) month period, and includes same-sex relationships, and "common-law relationship" shall have a corresponding meaning.

(These words and phrases are important and it needs to be clearly understood that there is a specific definition applied to them).

DOMESTIC CONTRACTS

5. It is the purpose and intention of this Law to respect the agreement of the parties to a marriage as to the use, possession, occupancy, disposition or partition of an interest in First Nation land, including an interest that is a matrimonial home.

(Individuals are encouraged to enter into domestic contracts to resolve their property issues).

6. A provision in a domestic contract that reflects the agreement of the parties with respect to an interest in First Nation land, including an interest that is a matrimonial home, is valid, binding and enforceable.

(Domestic contracts dealing with property division will be enforceable on reserve).

7. (1) Notwithstanding section 6, a provision in a domestic contract that would give, award, acknowledge or create an interest in First Nation land greater than a life estate to occupy or possess an interest in First Nation land, in favour of a spouse who is not a member, is void.

2) In applying this section, a valid life estate to possess or occupy an interest in First Nation must be delimited by the life of the person intended to enjoy it.

(Non-member spouses can only get possession of real property for their lifetime).

8. Subject to this Law, a court of competent jurisdiction may set aside a provision of a domestic contract with respect to an interest in First Nation land:

- (a) if a party failed to disclose to the other all of his or her interests in First Nation land, or any material information in respect of those interests;
- (b) if a party did not understand the nature or consequences of the provision; or
- (c) otherwise in accordance with the law of contract.

(A domestic contract can be voided if one of the parties did not provide all relevant information about his/her property, or one party did not understand the agreement or the agreement violates contract law).

9. This Law applies whether the domestic contract was entered into by the parties on, before or after the date that this Law comes into force and effect.

(This Law can be retroactive).

MEDIATION

10. Spouses who, on the breakdown of their marriage or common-law relationship, do not have and are unable to conclude a domestic contract with respect to interests in First Nation land, shall submit to mediation, at their cost, in respect of interests in First Nation land under the direction of the Council of Aundeck Omni Kaning First Nation.

(If the parties do not have an agreement or cannot come to an agreement on their own, then the parties will try to get their agreement through a mediation process that they have to pay for themselves).

11. Council may, by way of written resolution, provide for:

- (a) rules and procedures applicable to the conduct of compulsory mediation pursuant to section 10;
- (b) the qualifications of mediators and the establishment of a roster of qualified mediators for the purposes of section 10;
- (c) an option for the parties to select their own mediator, and in default of such selection, the selection of a mediator by the Council of the Aundeck Omni Kaning First Nation;
- (d) setting an appointment with the mediator and giving notice to the spouses of an appointment with the mediator;
- (e) forms, certificates, and other documents or instruments deemed necessary or advisable for the purposes of section 10; and
- (f) waiver of compliance where it appears that a party is avoiding service, refusing to comply with the requirements of section 10, or taking or failing to

take action in a manner calculated to frustrate the intention of section 10 that the parties have a reasonable opportunity to resolve any dispute with respect to interests in First Nation land.

(The Band Council can make rules about the mediation process, but the Band Council itself is not involved in the mediation).

12. A spouse may, within a reasonable period, upon the breakdown of a marriage, give notice of a request for compulsory mediation to the Council of Aundeck Omni Kaning First Nation, setting out in writing that:

- (a) his or her marriage or common-law relationship has resulted in a breakdown;
- (b) that he or she and the other spouse are living, or intend to live, separate and apart with no reasonable prospect for the resumption of cohabitation;
- (c) that either spouse has, or both spouses have, an interest in First Nation land; and
- (d) (i) the spouses do not have a domestic contract including provisions in respect of an interest in First Nation land;

(ii) there is no reasonable prospect that the spouses will conclude a domestic contract including provisions in respect of an interest in First Nation land within a reasonable period of time; or

(iii) the parties have concluded a domestic contract, but one of the parties intends to seek relief pursuant to section 8.

(One of the parties will start the mediation process by preparing a written request).

13. It is the responsibility of the spouse requesting compulsory mediation to ensure that the notice referred to in section 12 is served on the other spouse before it is delivered to Council. For greater certainty, service may be effected by personal service, by delivery to a solicitor representing the other spouse in the matter of the breakdown of the marriage, as provided in a domestic contract, or by registered mail to the address where the other spouse is known or believed to be residing. Service by registered mail shall be deemed to be effected four (4) days after the day the notice is mailed.

(The spouse starting the mediation process has to make sure the other spouse gets a copy of the written request for mediation).

14. Proof of service on the other spouse shall be delivered to the Council of Aundeck Omni Kaning First Nation at the same time the notice referred to in section 12 is delivered to Council.

(Proof has to be provided that the other spouse did get a copy of the written request for mediation).

15. Council shall arrange for a qualified mediator to be available to the parties within thirty (30) days after the notice referred to in section 12 is received. That period may be extended by Council:

(a) at the joint request of the parties; or

(b) where Council is unable to secure the services of a qualified mediator to be available to the parties within the 30 day period.

(The mediation should start within 30 days unless the spouses ask for more time or a mediator cannot be found within that time).

16. The mediator shall proceed expeditiously with the mediation and use best efforts to assist the parties in resolving any and all issues with respect to interests in First Nations land.

(The mediator must do the best he/she can to help the spouses come to an agreement).

17. Where the mediation is successful, the agreement of the parties with respect to interests in First Nation land shall be reduced to writing in a separation agreement, and that agreement shall expressly provide that each party waives all rights to challenge its provisions pursuant to section 8.

(Written agreements have to be prepared that sets out an agreement reached by the spouses through the mediation process).

18. A separation agreement for the purposes of section 17 shall include provision for all interests in First Nation land held by either spouse, or both spouses, and shall be a sufficient domestic contract for purposes of this Law if it deals only with those interests.

(A separation agreement that only deals with an agreement about the division of real property will be adequate to comply with this Law).

19. Where the mediation is unsuccessful, the mediator shall deliver a confidential report to the parties and to Council upon the mediation and the points remaining in dispute between the parties with respect to interests in First Nation land.

(The mediator has to prepare a report to Band Council if the mediation fails).

20. At the conclusion of compulsory mediation under section 10, Council shall provide a certificate to the parties attesting to their compliance thereto.

(Band Council will provide a letter to the spouses confirming that the mediation took place).

21. No party shall proceed with any application in respect of an interest in First Nation land, or seek any remedy pursuant to section 23, unless the certificate referred to in section 20 has been obtained and is filed with a court of competent jurisdiction.

(The spouses have to have the letter use it as proof that mediation has been attempted before moving on to court processes).

22. For greater certainty, nothing in section 10 is intended to deprive or limit the right of a spouse to seek any other or further alternate dispute resolution on the breakdown of his or her marriage in relation to any matter other than interests in First Nation land, or to restrict the parties from otherwise reaching agreement with respect to interests in First Nation land provided that such agreement results in a separation agreement that meets the requirements set out in this Law.

(The spouse can try other mediation if the first attempt failed).

COURT OF COMPETENT JURISDICTION

23. In the event of the breakdown of their marriage or common-law relationship, which includes the death of a spouse, a spouse may apply to a court of competent jurisdiction to determine disputes in relation to interests in First Nation land provided that he or she has first complied with the requirements of section 10 or is specifically relieved of such compliance by another provision in this Law.

(If negotiations or mediation fail to produce an agreement between the spouses then they may use a court to have the property division issues to be decided).

24. Subject to this Law, a court of competent jurisdiction may deal with interests in First Nation land held by either spouse, or both spouses, in a manner consistent with the laws of general application relevant to the disposition of real property in proceedings relating to matrimonial causes.

(The court can apply the usual law to resolve the issues).

25. Notwithstanding section 24, the fact that an interest in First Nation land does not include future or contingent interests in First Nation land shall not be taken to confer jurisdiction upon a court over such interests under this Law.

(The court only has the power to make an offer affecting the land and home for the lifetime of the spouses not beyond).

26. An interest in First Nation land received by way of 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, and subject to the intention that the interest, the income from the interest and the value of the interest are to be excluded from the transferee spouse's net family property.

(Family land should be kept in the family as much as possible).

27. Section 26 does not apply with respect to an interest in First Nation land that is a matrimonial home.

(The matrimonial home and lot that it sits on will not be treated as family land).

28. Notwithstanding section 26, the court may make any appropriate and equitable order on the ground of unconscionability where a spouse has intentionally, recklessly or fraudulently depleted his or her net family property that is an interest in First Nation land and that would otherwise be subject to the presumption set out in section 26.

(The rule about keeping family land in the family as much as possible will not be maintained if one of the spouses has acted unfairly).

29. Subject to this Law, the court may make any order in relation to interests in First Nation land held by a spouse or by both spouses, that the court could make in respect of real property situated in the province of Ontario, but not on First Nation land, including in appropriate circumstances:

- (a) an order that an interest in First Nation land be transferred to a spouse absolutely, where permitted under this Law;
- (b) an order that an interest in First Nation land be subject to a lease by one spouse to the other for a term of years subject to such conditions as the court deems just in all the circumstances;
- (c) an order that an interest in First Nation land held by both spouses be partitioned or partitioned and sold.

(The court has the power to order exclusive possession, or that one spouse will lease the home to the other, or that the land should be divided or the home and land be sold and the proceeds be divided between the spouses).

30. An order shall not be made under paragraph 29 (a) in favour of a spouse who is not a member.

(A non-band member cannot get exclusive possession beyond his/her lifetime or that he/she cannot sell or transfer the home and land).

31. Where an order is made under paragraph 29 (c) for the partition of an interest in First Nation land, the Council of Aundeck Omni Kaning First Nation shall direct the transaction, and may by resolution make provision for a survey and for the allocation of the costs of the transaction unless the court has already made an order to that effect.

(The Band Council would have to oversee a sale [including ensuring a survey] if the court orders a sale).

32. Where an order is made under paragraph 29 (c) for the sale of an interest in First Nation land, that sale shall be by auction directed by the Council of Aundeck Omni Kaning First Nation, which shall by resolution make provision for a Band Member bid, representing a fair sale price for the interest and for the allocation of costs of the transaction, unless the court has already made an order to that effect.

(The sale would have to be restricted to band members).

33. Where the interest of a spouse in First Nation land is held through a corporation, the court may order that he or she transfers shares in the corporation to the other spouse; or have the corporation issue shares in the corporation to the other spouse.

(A spouse who has a corporation [that holds land interests of some kind on-reserve] can be ordered to transfer the corporation or part of the corporation to the other spouse).

34. An order shall not be made under section 29 so as to require the sale of an operating business or farm on First Nation land, or so as to impair seriously its operation, unless there is no reasonable alternative method of achieving an equitable result between the parties.

(Reserve lands have to be avoided if it involves some kind of business or farming).

35. Where a proceeding has been commenced in accordance with this Law and either spouse dies before all issues relating to interests in First Nation land have been disposed of by the court, the surviving spouse may continue the proceeding against the estate of the deceased spouse.

(Property division proceedings can continue even if one of spouses dies during the process).

36. For greater certainty, a "spouse" for the purposes of applying for relief from a court includes a former spouse after the marriage has been dissolved by decree absolute of divorce or by judgment of nullity.

(The definition of "spouse" can continue to include former spouses that have already divorced).

37. Nothing in this Law relieves a party of the requirement to observe the rules and procedures of a court of competent jurisdiction in relation to matrimonial causes.

(Court rules have to be complied if the parties are in the court process).

38. Nothing in this Law limits the application of valid laws of general application in respect of matrimonial causes, except to the extent that such laws deal expressly or implicitly with interests in First Nation land and to that extent this Law applies.

(Ontario law can apply relating to the division of personal property but not real property).

39. It is the intention of this Law that all rights, entitlements and obligations of spouses be dealt with equitably on the basis of the totality of their circumstances, including rights, entitlements and obligations in respect of interests in First Nation land, but subject to the special provisions set out in this Law.

(The division of property has to take into account all matters and interests not such an examination of real property issues).

40. Whether or not an interest in First Nation land is a matrimonial home is a question of fact and, for greater certainty, the provisions of the *Family Law Act (Ontario)* dealing with the designation of a matrimonial home do not apply in respect of interests in First Nation land.

(Facts and evidence will determine ownership issues).

41. Subject to the limitations inherent in the nature of First Nation land, both spouses have an equal right to possession of a matrimonial home.

(The general rule is that both spouses have an equal right and interest in the matrimonial home).

42. When only one spouse holds an interest in First Nation land that is a matrimonial home, the other spouse's right of possession:

(a) is personal against the spouse who holds the interest; and

(b) ends when they cease to be spouses, unless a domestic contract or court order provides otherwise.

(The Law acknowledges that the marriage or cohabitation could have started on the basis that only one of the spouses had the matrimonial home already and the other spouse may not have an equal interest in the matrimonial home in the event that there is a separation).

43. No spouse shall dispose of or encumber an interest in First Nation land that is a matrimonial home unless:

(a) the other spouse joins in the instrument or consents to the transaction;

(b) the other spouse has released all rights in respect of that interest by domestic contract; or

(c) a court order has authorized the transaction or has released the interest in First Nation land from the application of this section.

(A matrimonial home is joint property and both spouses have to be involved in transactions that affect it).

44. If a spouse disposes of or encumbers an interest in First Nation land that is a matrimonial home in contravention of section 43, the transaction may be set aside on an application to the court, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home.

(A transaction can be set aside if both spouses were not involved in a transaction concerning the matrimonial home, however, if an innocent third party is involved then the transaction may not be set aside).

45. Regardless of which spouse holds an interest in First Nation land that is a matrimonial home, the court may, on application:

- (a) order the delivering up, safekeeping and preservation of the interest in First Nation land that is a matrimonial home;
- (b) direct that one spouse be given exclusive possession of the interest in First Nation land that is a matrimonial home, or part of it for such period as the court may direct consistent with this Law, and release any other interests in First Nation land that is a matrimonial home;
- (c) authorize a disposition or encumbrance consistent with First Nation Law of a spouse's interest in First Nation land that is a matrimonial home, subject to the other spouse's right of exclusive possession as ordered;
- (d) where it appears that a spouse has disposed of or encumbered an interest in First Nation land that is a matrimonial home in a fraudulent manner calculated to defeat the rights of the other spouse under this Law, or has falsely and knowingly represented in connection with a disposition or encumbrance that the interest in First Nation land is not a matrimonial home, direct the other spouse to substitute other interests he or she holds in First Nation land for the matrimonial home subject to such conditions as the court considers appropriate;
- (e) make any interim or temporary order to give effect to the purposes of this Law or to protect the rights of a spouse; or
- (f) make any ancillary order which the court deems necessary to give effect to this Law.

(The court has the power to ensure that all interests are properly looked after including the rights of the spouses and ensure that the matrimonial home is properly looked after).

46. A court, in considering whether to direct that one spouse have exclusive possession of an interest in First Nation land that is a matrimonial home, shall be guided by the principle that the custodial parent of a child should have exclusive possession of the family residence 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 and has the opportunity to complete his or her education, provided that observance of this principle is consistent with the best interests of the child.

(Exclusive possession of the matrimonial home should go to the spouse that has custody of the children).

47. Where both parents share joint custody of a child or children, the principle set out in section 45 shall be adapted to favour the spouse with whom the child or children principally reside, and if the child or children reside substantially equal periods of time with both spouses, then the principle shall be neutral as between them.

(If the spouses have joint custody the matrimonial home should go to the spouse that has the children living with him/her most of the time).

48. In applying the principle set out in section 46, the court may have regard to the fact that one or more of the children are not members.

(Non-band member children being involved is a factor one way or the other).

49. The requirement of compulsory First Nation mediation set out in this Law applies except that:

(a) the court may entertain an application where the court is satisfied that mediation is not feasible in the circumstances; and

(b) the court may entertain any application as a matter of urgency, but shall not make any order unless satisfied that the matter is an urgent one, having regard to the conduct of the party making the application, and shall limit the scope of any order to matters found to be urgent.

(The mediation step is necessary, but it can be by-passed if there is no chance that an agreement can be achieved or if there is some emergency to get the court involved).

50. (1) A person who contravenes an order made by a court of competent jurisdiction pursuant to this Law in relation to an interest in First Nation land is guilty of an offence and liable, on summary conviction, to a fine of not more than \$1,000 or to imprisonment for a term of not more than three months, or to both.

(2) A fine payable under this section shall be remitted to the Anishinabek of Aundeck Omni Kaning First Nation by the court, after reasonable court costs have been deducted.

(A person violating this Law can be charged and the penalty can be fine or jail).

51. This Law may only undergo major amendments by the consent of the majority of the members at a meeting convened by Council for the purpose of amending this Law:
- (i) The amendment shall be initiated by a petition signed by at least thirty (30) percent of the Members or by two thirds (2/3) majority of Council;
 - (ii) The Council shall provide Members a written notice containing the text of the amendment and the date for the members Meeting; and
 - (iii) If amendments are made to this Law, the Council, must without delay and in writing, notify the Minister, the organization designated by the Minister, if any, and the Attorney General of Ontario.
52. This Law may be subject to minor amendment (i.e. typographical errors, renumbering to harmonize with other laws, improvements in the language to clarify the intention of our First Nation, changes in our Law to reconcile inconsistencies with other laws and court decisions) by a unanimous decision of Council at a duly convened meeting called for that purpose.
53. The rules and regulations made under the *Aundeck Omni Kaning First Nation Matrimonial Real Property Law*, and the provisions of any other law or of any rule, regulation or other instrument made thereunder respecting any matter in relation to which rules may be made under this *Act* that are not inconsistent with this *Act* continue in force as though made or enacted by or under this *Act* until they are repealed or altered by rules or regulations made under this *Act* or are, by virtue of the making of rules or regulations under this *Act*, rendered inconsistent with those rules or regulations.
54. This Law shall come into force and have the force of Law on the day on which they are approved or on any later day that may be specified in or under this Law.