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**WESTBANK FIRST NATION**

**LAW No. 2006-02**

**FAMILY PROPERTY LAW**

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**FEBRUARY 20, 2006**

## WESTBANK FIRST NATION FAMILY PROPERTY LAW NO. 2006-02

WHEREAS Westbank has jurisdiction and authority over Westbank Lands, resources and Interests in Westbank Lands pursuant to the Westbank Self-Government Agreement effective April 1, 2005;

AND WHEREAS Westbank wishes to enact and respect the following rules and procedures applicable on the breakdown of a marriage with respect to the use, occupancy and possession of Westbank Lands and the division of Interests in Westbank Lands;

AND WHEREAS Westbank intends to provide rights and remedies without discrimination on the basis of sex to spouses who have or claimed an Interest in Westbank Lands upon the breakdown of their marriage.

NOW THEREFORE this Westbank First Nation Family Property Law is hereby enacted as a Law of the Westbank First Nation.

### PART I DEFINITIONS AND INTERPRETATION

#### 1. TITLE

- 1.1 This Law may be cited as the "*Westbank First Nation Family Property Law No. 2006-02*".

#### 2. DEFINITIONS

- 2.1 For the purposes of this Law, the following definitions shall apply:

"child" means a child of the spouses whether born in or out of wedlock or a child legally adopted by the spouses or adopted by the spouses in accordance with Syilx tradition who is under the age of nineteen;

"court" means the Supreme Court of British Columbia;

"domestic contract" means;

- (a) a "spousal agreement" entered into between spouses, or between two people in contemplation of their marriage to each other, made in writing, signed by the parties and witnessed, in which they agree on their respective rights and obligations while residing together as spouses or on separation, with respect to the possession or division of an Interest in

Westbank Lands and may be a separate agreement or part of an agreement dealing with the rights and obligations of the spouses; or

- (b) a "separation agreement" entered into between the spouses who are living separate and apart, made in writing, 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 an Interest in Westbank Lands and may be a separate agreement or part of an agreement dealing with the rights and obligations of spouses; or
- (c) a "co-habitation agreement" entered into between two persons living together in a marriage-like relationship, or in contemplation of living together in a marriage-like relationship, made in writing, signed by the parties and witnessed, in which they agree on their rights and obligations while living together or on separation, with respect to the possession or division of an Interest in Westbank Lands.

"family property" means an Interest in Westbank Land that is:

- a) owned by or registered in the name of one or both spouses;
- b) acquired after the date of the marriage; and
- c) ordinarily used by a spouse or a child of the spouses for a family purpose.

"Interest in Westbank Lands" means an allotment, leasehold, easement, permit or licence held by either spouse or both spouses in Westbank Lands;

"matrimonial home" means an Interest in Westbank Lands that is or if the spouses have separated, was at the time of separation:

- a) occupied by one or both spouses as their family home, or
- b) mutually intended by the spouses to be occupied by one or both of them as the family home whether the home was acquired before or after the date of the marriage.

"mediator" means a mediator listed with the BC Mediator Roster Society;

"separate and apart" means circumstances where two spouses are living separate and apart where the marriage relationship has broken down and they do not intend to reconcile and for the purposes of this law may include living separate and apart under the same roof if the above conditions exist;

“spouse” means a person who is married to another person, whether by a religious or civil ceremony, or a Syilx traditional ceremony;

“Syilx” means people of the Okanagan Territory;

“Westbank Law” includes a law enacted pursuant to the Westbank Constitution or the Westbank Self-Government Agreement.

2.2 For greater certainty, the definitions of spouse and references to marriage in this law include:

- (a) relationships between persons of the same gender who are married to each other;
- (b) in the case of a person asserting a right under this law a void or voidable marriage(s) entered into by that person in good faith;
- (c) relationships entered into before this Law takes effect; and
- (d) former spouses:
  - (i) for the purposes of enforcing rights or obligations under a court order or domestic contract as defined in this Law; or
  - (ii) for asserting rights or obligations under this Law, so long as an application by a former spouse is commenced within one year of the divorce of the spouses.

2.3 Unless the context otherwise requires, words and expressions used in this Law and not otherwise defined have the same meaning as in the Westbank Constitution.

### **3. APPLICATION**

3.1 This Law applies only to Interests in Westbank Lands.

3.2 For greater certainty:

- (a) rights of a spouse in family property include a right to possession of the matrimonial home determined in accordance with this Law; and
- (b) family property does not include Interests in Westbank Lands that are used for business or commercial purposes; and

- (c) family property does not include the interests of a Member in Community Lands.
- 3.3 Nothing in this Law limits the application of valid laws of British Columbia or Canada in respect of matrimonial causes, except to the extent that such laws deal expressly or implicitly with Interests in Westbank Lands, and to that extent this Law shall apply.
- 3.4 This Law does not apply to an Interest in Westbank Lands held by either spouse, or both spouses where neither spouse is a Member.
- 3.5 For greater certainty, a spouse cannot commence an action after the death of the other spouse to claim, take or pursue an Interest in Westbank 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.
- 3.6 The interest of a spouse in Westbank Lands arises on the earliest of the following dates:
- (a) the date agreed upon in writing by the spouses when they commenced living separate and apart with no reasonable prospect of reconciliation;
  - (b) the date the court makes a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other;
  - (c) the date the spouses enter into a separation agreement;
  - (d) the date a divorce is granted;
  - (e) the date the marriage is declared a nullity; or
  - (f) such other time as a court determines.
- 3.7 The interest of a spouse including any right of possession of the matrimonial home or other family property shall be determined in accordance with this Law.
- 3.8 This Law applies in respect of interests in Westbank Lands whether or not they were acquired before or after this Law takes effect.

## PART II DOMESTIC CONTRACTS

### 4. DOMESTIC CONTRACTS

- 4.1 Except with respect to determination of possession of the matrimonial home where there is a child involved, subject to this Part, a domestic contract made in compliance with this Part dealing with an Interest in Westbank Lands, including an interest or right of possession in the matrimonial home, is valid, binding and enforceable whether or not there is valuable consideration for the domestic contract.
- 4.2 A domestic contract or an amendment to or rescission of a domestic contract is enforceable under this Law if it is in writing, signed by both parties and witnessed by at least one other person.
- 4.3 Notwithstanding sections 4.1 and 4.2, a provision in a domestic contract that would give, award, acknowledge or create an allotment Interest in Westbank Lands in favour of a spouse or child who is not a Member, is void.
- 4.4 Subject to this Law, a court may, on application under Part V, set aside a provision of a domestic contract with respect to an Interest in Westbank Lands:
- (g) If a party failed to disclose to the other all of that party's interests in Westbank Lands, or any material information in respect of those Interests;
  - (h) If a party did not understand the nature or consequences of the provision;  
or
  - (i) If otherwise in accordance with the law of contract.
- 4.5 This Part applies whether the parties entered into a domestic contract on, before, or after the date that this Law comes into force and effect.
- 4.6 A provision of a domestic contract that is void or voidable is severable from the other provisions of the domestic contract.

**PART III  
DISPOSITION OR ENCUMBRANCE OF MATRIMONIAL HOME**

**5. REGISTRATION OF NOTICE**

- 5.1 A spouse may apply to the Director of Lands to register notice that a registered Interest in Westbank Lands is a matrimonial home.
- 5.2 If the application is in the prescribed form accompanied by an affidavit in the prescribed form signed by the spouse attesting to the fact the Interest in Westbank Lands is a matrimonial home, the notice shall be registered in the Westbank Lands Register.
- 5.3 Where a notice has been registered in the Westbank Lands Register in accordance with section 5.1 no spouse shall dispose of or encumber an Interest in Westbank Lands that is a matrimonial home unless:
- (a) the other spouse consents;
  - (b) the other spouse joins in the instrument of disposal or encumbrance;
  - (c) the other spouse has released all rights in respect of that interest by domestic contract;
  - (d) a court order has authorized the transaction; or
  - (e) a court has released the Interest in Westbank Lands from the application of this section.
- 5.4 If a spouse disposes of or encumbers an Interest in Westbank Lands that is a matrimonial home in contravention of section 5.3, the disposal or encumbrance may, on application to a court, be set aside.
- 5.5 Section 5.3 does not apply where the person holding the disposition or encumbrance at the time of the application to the court acquired the disposition or encumbrance for value, in good faith and without notice at the time of acquiring, or making an agreement to acquire the disposition or encumbrance, that the property was a matrimonial home.
- 5.6 Where a person proceeds to realize upon an encumbrance or execution against an Interest in Westbank Lands that is a matrimonial home, the spouse who has a right of possession under this Law 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.

## **PART IV MEDIATION**

### **6. MEDIATION**

- 6.1 Either spouse may commence mediation with respect to their rights and interests in family property by providing to the BC Mediator Roster Society and the other spouse a written request for mediation setting forth the general subject of the dispute.
- 6.2 The spouses shall cooperate with the BC Mediator Roster Society and with one another in selecting a mediator from the BC Mediator Society panel of neutrals and in scheduling mediation proceedings.
- 6.3 If the spouses have not agreed upon a mediator within fourteen (14) days of the initial request to the BC Mediator Roster Society, either spouse may, in writing, request that the BC Mediator Roster Society appoint a mediator and the BC Mediator Roster Society shall appoint a mediator within fourteen (14) days of receipt of the request.
- 6.4 As soon as possible after their appointment, the mediator shall meet or communicate directly with the spouses, either together or individually, to explain the mediation process and to provide an initial assessment of the parties' suitability for mediation.
- 6.5 Within fourteen (14) days of the completion of the process described in section 6.3, each spouse shall provide a brief written summary to the mediator of the relevant facts and the issues to be resolved. Upon receipt of both summaries the mediator shall deliver copies of the summaries to the other spouse as soon as reasonably possible.
- 6.6 A mediator shall provide both initial screening and on-going screening with the spouses for suitability for mediation, and will not mediate if, in the opinion of the mediator, it is not possible to provide a safe mediation forum for both spouses.
- 6.7 A mediator may conduct a mediation in joint meetings or private caucus convened at locations the mediator designates after consulting each spouse and determine his/her own rules and procedures applicable to the conduct of the mediation in accordance with the BC Mediation Roster Society standards.
- 6.8 A spouse may attend mediation with or without legal counsel.



- 6.9 A spouse who receives a notice of appointment with a mediator has a duty to attend the mediation.
- 6.10 The mediator shall proceed expeditiously with the mediation and use best efforts to assist the spouses in resolving any issues with respect to Interests in Westbank Lands and possession of the matrimonial home.
- 6.11 Subject to sections 6.12 and 6.13 all offers, promises, conduct and statements, whether written or oral, made in the course of mediation by either spouse or their lawyer or agent and by the mediator are confidential, privileged and inadmissible for any purpose, including litigation between the spouses, provided that evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in the mediation.
- 6.12 For greater certainty, section 6.11 does not preclude a mediator from complying with a statutory duty to report if the mediator obtains information that a child is in need of protection.
- 6.13 Where a mediation results in a negotiated agreement on all or some of the issues, the mediator shall advise the spouses to seek independent legal advice. A separation agreement shall be drafted by the mediator or by legal counsel for either spouse setting out the agreed terms with respect to those issues and setting out that each spouse waives all rights to challenge the provisions as set out in the separation agreement. Once the agreement is signed each spouse shall receive a signed copy of the separation agreement.
- 6.14 A mediator shall prepare a report if:
- (a) one of the spouses refuses to attend the mediation;
  - (b) the mediator decided that mediation was not suitable for the spouses; or
  - (c) if no issues were resolved by negotiated agreement;
- which report shall set out:
- (i) whether both spouses were willing to proceed with the mediation,
  - (ii) whether the mediator decided that the mediation should not proceed, and
  - (iii) that the mediation did not result in a negotiated agreement.
- 6.15 If a mediation does not proceed because one of the spouses refuses to attend or if no issues are resolved by negotiated agreement, the mediator shall prepare a

report confirming that the mediation did not proceed or did not result in a negotiated agreement. The report shall only address whether both spouses were willing to, and did participate in the mediation and confirm that the mediation did not result in a negotiated agreement.

- 6.16 The mediator's report described in section 6.14 shall be in writing and shall be sent to both spouses and may be submitted to the court in proceedings under Part V to assist the court in making a determination whether there has been a mediation.
- 6.17 Unless otherwise agreed, each spouse shall be responsible for an equal share of the costs of mediation.
- 6.18 For greater certainty, nothing in this Part is intended to deprive or limit the right of a spouse to seek any or further alternate dispute resolution on the breakdown of the relationship in relation to any matter other than an Interest in Westbank Lands or to restrict the spouses from otherwise reaching agreement with respect to an Interest in Westbank Lands, provided that such agreement results in a separation agreement that meets the requirements set out in this Law.

## **PART V ACCESS TO A COURT OF COMPETENT JURISDICTION**

### **7 GENERAL**

- 7.1 On application by two spouses married to each other or by one of the spouses the court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation.
- 7.2 In the event of the breakdown of the relationship, a spouse or former spouse may apply to a court to determine a dispute in relation to an Interest in Westbank Lands provided that the spouse has first complied with Part IV or has been specifically relieved of such compliance by a provision of this Part.
- 7.3 No court shall take or exercise jurisdiction under this Part without first enquiring whether or not the spouses have pursued and participated in mediation pursuant to Part IV and, if there has been no mediation, the court may:
- (j) direct that there be mediation pursuant to the rules of the court or under Part IV; or
  - (k) where a requirement for mediation may result in an injustice, proceed to deal with an application under this Part.

- 7.4 Subject to this Law, a court may make any order in relation to an Interest in Westbank Lands held by a spouse, or by both spouses, that the court could make in respect of real property situated in the province of British Columbia, but not on Westbank Lands, including:
- (a) a declaration as to the ownership or right of possession of family property;
  - (b) an order that an Interest in Westbank Lands be transferred to a spouse absolutely, where permitted under the Westbank Constitution;
  - (c) an order that an Interest in Westbank Lands be subject to a lease by one spouse to the other spouse for a term of years, subject to such terms and conditions as the court deems just in all the circumstances;
  - (d) order a spouse to pay compensation to the other spouse if the Interest in Westbank Lands has been disposed of, or for the purpose of adjusting the division of family property;
  - (e) an order that the share of either or both spouses in the family property be transferred to, or in trust for, a child;
  - (f) an order that an Interest in Westbank Lands held by both spouses be partitioned or sold and if sold payment made to either or both spouses in specified proportions or amounts; or
  - (g) any appropriate and equitable order where a spouse has intentionally, recklessly or fraudulently depleted family property that is an Interest in Westbank Lands.
- 7.5 No order shall be made under section 7.4 that results in a transfer of a certificate of possession or creation of an allotment Interest in Westbank Lands in favour of a spouse or child who is not a Member.
- 7.6 Where a spouse's Interest in Westbank Lands is held through a corporation, the court may order
- (a) that spouse to transfer shares in the corporation to the other spouse; or
  - (b) the corporation to issue shares in the corporation to the other spouse where the corporation is a party to the action.
- 7.7 Where a proceeding has been commenced under this Part, and either spouse dies before all issues relating to Interests in Westbank Lands have been disposed of by a court, the surviving spouse may continue the proceeding against the estate of the deceased spouse.

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

## **8 FAMILY PROPERTY**

8.1 A spouse's interest in family property shall be determined by considering the following factors:

- (a) the extent to which the family property was acquired by one spouse through inheritance or gift;
- (b) the date when the family property was acquired or disposed of;
- (c) the duration of the spousal relationship;
- (d) the duration of the period during which the spouses have lived separate and apart;
- (e) the needs of each spouse to become or remain economically independent;
- (f) direct financial contributions of each of the spouses to the acquisition or improvement of the family property;
- (g) the contribution of a spouse, who does not hold the registered Interest in Westbank Lands of the family property, directly or indirectly to the acquisition, improvement or increased value of the family property by effective household management or child rearing responsibilities;
- (h) any order or award made under the *Family Relations Act* of British Columbia in favour of a spouse concerning custody, child support, spousal support or division of family assets; and
- (i) any other circumstances or factors in relation to the Interest in Westbank Lands a court may wish to consider.

8.2 An Interest in Westbank Lands 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 given additional weight by the court in considering the factors in section 8.1.

8.3 Where an Interest in Westbank Lands for purposes of this Law includes a matrimonial home that is normally used for a purpose other than residential

purposes, the matrimonial home includes only that part of the Interest in Westbank Lands that may reasonably be regarded as necessary for use and enjoyment as the family residence.

## **9 POSSESSION OF MATRIMONIAL HOME**

- 9.1 Subject to this Law, both spouses have an equal right to possession of the matrimonial home.
- 9.2 When only one spouse holds an Interest in Westbank Lands that is a matrimonial home, the other spouse's right of possession is:
- (a) personal against the spouse who holds the Interest; and
  - (b) unless a domestic contract or court order provides otherwise, ends, subject to section 2.2 (d) when the parties cease to be spouses.
- 9.3 The court may make an order for possession of the matrimonial home.
- 9.4 Subject to section 9.5 a court in hearing an application under section 9.3 shall consider:
- (a) any existing orders under this Law and any existing support orders;
  - (b) the financial position of both spouses;
  - (c) any domestic contract between the spouses;
  - (d) the duration of spousal residence in the matrimonial home;
  - (e) the availability of other suitable and affordable accommodation;
  - (f) any violence committed by a spouse against the other spouse or the children of the marriage; and
  - (g) any other relevant factors.
- 9.5 A court, in considering whether to direct that one spouse have exclusive possession of an Interest in Westbank Lands that is a matrimonial home, shall consider the factors set out in section 9.4 provided that the most important factor in determining exclusive possession shall be which parent has custody of the child, the possible disruptive effects on the child of a move to other

accommodation, the child's views and preferences if they can reasonably be ascertained.

- 9.6 Where an order is made based on principles in section 9.5 the custodial parent of a child of the marriage should have exclusive 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 and has the opportunity to complete their education, provided that observance of this principle is consistent with the best interests of the child.
- 9.7 Where both spouses share joint custody of a child or children, the principles set out in sections 9.3 to 9.6 shall be adapted to favour the spouse with whom the child or children principally reside, but if the child or children reside substantially equal periods of time with both spouses, then the principle shall be neutral as between the spouses.
- 9.8 In applying the principles set out in section 9.3 to 9.6, a court may have regard to the fact that one or more of the children are not members of Westbank First Nation.
- 9.9 The possession of a matrimonial home under this Law is not assignable and shall be deemed to terminate when that person, or a child entitled to possession of the matrimonial home, ceases to use or occupy the matrimonial home.

## **10 COURT ORDERS**

- 10.1 A court may, on the application of a spouse or a person claiming an Interest in Westbank Lands that is a matrimonial home:
- (a) make a declaration whether or not the Interest in Westbank Lands is a matrimonial home;
  - (b) where a court finds that the spouse whose consent is required under section 5.3 cannot be found, is not available, is declared incompetent due to mental incapacity, is otherwise incapable of giving or withholding consent, or is unreasonably withholding consent, authorize a disposition or encumbrance of the Interest in Westbank Lands, provided that such disposition or encumbrance is otherwise authorized under Westbank Law, and the court may prescribe such conditions including the provision of or payment for other comparable accommodation, that the court considers appropriate; or
  - (c) make an order under section 5.3(d) or 5.3(e), subject to such terms and conditions as the court determines to be equitable and just in all the circumstances.

- 10.2 Regardless of which spouse holds an Interest in Westbank Lands that is a matrimonial home, a court may on application:
- (a) order the delivering up, safekeeping and preservation of the Interest in Westbank Lands that is a matrimonial home;
  - (b) direct that one spouse be given exclusive possession, consistent with this Law, of the Interest in Westbank Lands that is a matrimonial home, or part of that interest, for such period as the court may direct, and release any other Interest in Westbank Lands that is a matrimonial home from the application of this Part;
  - (c) authorize a disposition or encumbrance consistent with Westbank Law of a spouse's Interest in Westbank Lands that is a matrimonial home, subject to the other spouse's right of exclusive possession as ordered;
  - (d) where it is shown that a spouse has disposed of or encumbered an Interest in Westbank Lands that is a matrimonial home in a 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 Westbank Lands is not a matrimonial home, direct the other spouse to substitute any other interest the other spouse may hold in Westbank Lands 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; and
  - (f) make any ancillary order, including an order as to costs, that the court deems necessary to give effect to this Law.

## **11 REGISTRATION OF SPOUSAL INTEREST**

- 11.1 Any order granted under this Law or a notice made under this section may be registered in the Westbank Lands Register in accordance with the Westbank Constitution.
- 11.2 A spouse who is a party to a domestic contract may sign and register in Westbank Lands Register a notice in the prescribed form setting out:
- (a) the full name and last known address of each spouse who is a party to the domestic contract;

- (b) a description of the matrimonial home or Interest in Westbank Lands to which the domestic contract relates; and
- (c) the provisions of the domestic contract that relates to the matrimonial home or Interest in Westbank Lands described in the notice.

## **PART VI GENERAL PROVISIONS**

### **12 GENERAL PROVISIONS**

- 12.1 Where any federal Act or regulation or provincial Act or regulation or any other Westbank Law may apply to any matter covered by this Law, compliance with this Law will not relieve the person from also complying with the provisions of the other applicable Act, regulation or law.
- 12.2 If any section of this Law is for any reason held invalid by a decision of a court of competent jurisdiction, the invalid section or subsection will be severed from and not affect the remaining provisions of this Law.
- 12.3 The headings given to the sections and paragraphs in this Law are for convenience of reference only. They do not form part of this Law and will not be used in the interpretation of this Law.

## **PART VII ENFORCEMENT AND OFFENCES**

### **13 ENFORCEMENT**

- 13.1 A peace officer may arrest without warrant a person the officer believes on reasonable and probable grounds to have contravened an order for exclusive possession of the matrimonial home.
- 13.2 Where a person has exclusive possession of the matrimonial home pursuant to an order made by a court and alleges that a spouse, or former spouse, is interfering with that possession or behaving in a manner calculated to disrupt or interfere with the quiet possession of the matrimonial home by the person or any children residing there, the court may make an order directing that spouse, or former spouse, not enter the matrimonial home or approach within a prescribed distance of the matrimonial home.



13.3 A person who contravenes an order made by a court under 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.

BE IT KNOWN that this Law entitled, "WFN Family Property Law No. 2006-02" is hereby:

Read a first time by the Council of Westbank First Nation at a duly convened meeting held on the 12<sup>th</sup> day of December, 2005;

Read a second time at a Special Membership Meeting held on the 17th day of January, 2006;

Read a third time by the Council of Westbank First Nation at a duly convened meeting held on the 20<sup>th</sup> day of February, 2006.


Signed by the following members of Council:

  
\_\_\_\_\_  
Chief Robert Louie

\_\_\_\_\_  
Councillor Brian Eli

  
\_\_\_\_\_  
Councillor Loretta Swite

\_\_\_\_\_  
Councillor Michael Werstuik

  
\_\_\_\_\_  
Councillor Miguel DeGuevara