

ABÉNAKIS OF ODANAK FAMILY REAL PROPERTY LAW

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Abénakis of Odanak Family Real Property Law

Preamble

WHEREAS the Abénakis of Odanak have from time immemorial used and occupied their Lands and possess the Seignurial rights;

WHEREAS the Abénakis of Odanak have the inherent right to govern themselves and their lands;

WHEREAS the Abénakis of Odanak desire to protect their members living on their reserve lands in accordance with their culture and traditions;

WHEREAS the Abénakis of Odanak do not wish to be bound by the default provisions of the Federal Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada);

WHEREAS provincial laws respecting real property do not apply to reserve lands;

WHEREAS the Abénakis of Odanak desire to provide a law appropriate to their culture and traditions respecting the use, enjoyment and occupation of family homes on their reserve lands and the division of real property rights or interests held by spouses or common-law partners on reserve lands;

WHEREAS spouses and common-law partners should be enabled to make agreements to deal with their rights and obligations upon separation or divorce and to resolve their disputes amicably;

WHEREAS the Abénakis of Odanak believe that the best interests and welfare of the children should be paramount when determining the rights and interests of spouses and common-law partners and that family homes should be a place of safety and comfort for children;

The Chief and Council of the Abénakis of Odanak enact as follows:**1. TITLE**

The title of this Law is the *Abénakis of Odanak Family Real Property Law*.

2. DÉFINITIONS

For the purposes of understanding this Law, the following definitions apply:

"Abénakis of Odanak land" means the land of the community.

"Act" means the Abénakis of Odanak Family Real Property Law.

"Child" means:

- (a) a child of the spouses, whether born in wedlock or not;
- (b) a child adopted by the spouses in accordance with the law of a province or territory or in accordance with Aboriginal custom;
- (c) a child of one spouse and adopted by the other spouse.

"Common-law partner" means an individual who, in respect of another person, is not married to the other person but has been living together with the other person in a marriage-like relationship continuously for a period of at least five (5) years or who has been living together with the other person in a marriage-like relationship continuously for a period of at least one (1) year and who concluded a domestic agreement explicitly providing that both spouses wish to be considered as common-law partner for the purposes of this present Act;

"Council" means the Council of the Abénakis of Odanak.

"Court" means the Superior Court of Québec or a tribal court of the Abénakis of Odanak

"Dispose" includes to give, to sell, to exchange and any other method of disposal or instrument, including by a will.

"Domestic agreement" means an agreement in which the parties agree on their respective rights and obligations

- (a) under their marriage or on separation;
- (b) on the annulment or dissolution of the marriage;
- (c) while living together or on ceasing to live together; or
- (d) on the death of one or both of them.

"Family home" means a structure

- (a) where the spouses habitually reside; or
- (b) if they separated or one of them died, where the spouses habitually resided on the day on which they separated or the death occurred.

"Family real property" means a right or interest held by at least one of the spouses that was

- (a) acquired during the marriage or marriage-like relationship; or
- (b) acquired before the marriage or marriage-like relationship, but in specific contemplation of the marriage or relationship.

"Interest of a child" means, for the Abenakis of Odanak, respecting the child's needs, while taking into account, the interest of the family, of the community and of the Nation, and particularly emphasizes the protection of identity, culture, traditional activities and language. The best interests of the Abenakis child are to be able to remain among their own people in their own community in order to protect their identity, their language and their culture.

"Member" means a person whose name appears on the membership list of the Abénakis of Odanak and also a person whose name appears on the list of the Abénakis of Odanak Membership Code.

"Ndakinna" means the ancestral territory of the Abénakis.

"Peace officer" means a person referred to in paragraph (c) of the definition of "peace officer" in Section 2 of the *Criminal Code* (Canada).

"Spouse" means an individual who, in respect of another person,

- (a) is married to the other person;
- (b) has in good faith entered into a marriage with the other person that is void or voidable; or
- (c) is a common-law partner of the other person.

3. RULES OF INTERPRETATION

For greater certainty, the following rules apply to the interpretation and application of this Law:

- 3.1 A person ceases to be considered a child upon reaching the age of 18 years of age, unless he or she is dependent upon one of the spouses for care or financial support because he or she is:
- (a) attending school and did not completed one Bachelor Degree; or
 - (b) suffering from an illness or disability.

A person also ceases to be considered a child upon reaching complete emancipation or getting married.

- 3.2 A marriage is valid if performed in accordance with the law of a province or territory.
- 3.3 The sex or gender of a person is not relevant to the interpretation of "spouse" or "common-law partner" or to the application of this Law.
- 3.4 Persons are deemed to have lived separate and apart for any period during which they:

- (a) lived apart and either of them had the intention to live separate and apart from the other, or
 - (b) continued to live together but their marriage or marriage-like relationship had ended.
- 3.5 A period during which persons have lived separate and apart shall not be considered to have been interrupted or terminated only because they resumed living together for the purpose of reconciliation during one or more periods totalling not more than 90 days.
- 3.6 Structures located on but not affixed to the Abénakis of Odanak land are subject to this Law.
- 3.7 If a family home is also normally used for more than just a residential purpose, the rules on family homes include only the portion of the structure that may reasonably be regarded as necessary for the residential purpose.
- 3.8 Family Real Property does not include any asset acquired by a spouse by way of inheritance, unless it can be shown that the inheritance was divided or made with the intention of benefiting both spouses.
- 3.9 This Law does limit or preclude any right or remedy available under any other law.

4. APPLICATION OF THIS LAW

- 4.1 This Law applies in respect of:
- (a) the use, enjoyment, occupation and possession of family homes on the Abénakis of Odanak land; and
 - (b) the rights and interests of spouses in or the Abénakis of Odanak land.
- 4.2 This Law applies to spouses only if at least one of them is
- (a) a member; or
 - (b) a person who, pursuant to the Indian Act (Canada), is registered as an Indian or is entitled to be registered as an Indian.

No title deed and no Certificate of possession can be awarded to a non-member by virtue of this present Law.

- 4.3 This Law applies in respect of rights and interests acquired both before and after this Law take effect.

5. DOMESTIC AGREEMENTS

- 5.1 Spouses and people entering into a marriage or marriage-like relationship are encouraged to enter into a domestic agreement.
- 5.2 A domestic agreement may divide the rights and interests of spouses differently than provided under this Law.

- 5.3 A domestic contract is only enforceable if it is made in writing, signed by the parties and the signatures of the parties are witnessed.

6. USE, ENJOYMENT AND OCCUPATION OF FAMILY HOME

- 6.1 A family home is for the use, enjoyment and occupation of the spouses and their children.

- 6.2 The right of a spouse or child to use, enjoy and occupy the family home is personal is inherent to each other.

- 6.3 The right of a child to use, enjoy and occupy the family home is:

- (a) paramount over the right of a spouse to use, enjoy and occupy the family home; and
- (b) continues until the Court makes an order, or other accommodation is arranged, in the best interests and welfare of the child.

- 6.4 A spouse who is occupying the family home when the other spouse dies is entitled to continue to occupy the family home for 180 days after the spouse's death; the period of 180 days can be prolonged until the succession concerning the rights relative to the occupation of the family home is settled.

- 6.5 To avoid uncertainty, spouses may designate a structure as their family home in a domestic agreement.

- 6.6 To avoid uncertainty, a spouse may, in a form approved by Council, designate a structure as the family home, if at least one spouse has a right or interest in it.

7. RESTRICTIONS ON DISPOSITION OF FAMILY HOME

- 7.1 A domestic agreement can provide that no spouse shall dispose of or encumber a right or interest in a family home without the consent of the other spouse.

8. APPLICATION FOR EXCLUSIVE OCCUPATION OF FAMILY HOME

- 8.1 The Court may, on application, order that:

- (a) one spouse or child be given exclusive rights to use, enjoy and occupy the family home or part of it for the period that the Court directs but not exceeding the period of 180 days if the conferred right is in favour of a non-member spouse having no children that are member and release other property that is a family home from the application of all or part of this Law;
- (b) a spouse or other person preserve and deliver up the family home and its contents to a spouse, a child, another person or to the Abénakis of Odanak Band Council;
- (c) a spouse or other person not disturb the occupants of the family home;

- (d) a spouse make periodic payments to the other spouse for exclusive use, enjoyment and occupation;
 - (e) all or part of the contents of the family home remain in the home or be removed from the home;
 - (f) a spouse pay for all or part of the repair and maintenance of the family home and other related liabilities, or to make periodic payments to the other spouse for these purposes; and
 - (g) exclusive occupation extends to the portion of any land that is contiguous to the family home and that is necessary for the use and enjoyment of the family home.
- 8.2 When making an order under Section 8.1, the Court shall consider all the circumstances of the parties, including:
- (a) the best interests and welfare of any affected children and their paramount right to use, enjoy and occupy the family home;
 - (b) any existing orders under this Law and any existing support orders;
 - (c) the financial position and medical condition of the spouses;
 - (d) the provisions of any domestic agreement;
 - (e) the availability of other suitable and affordable accommodation;
 - (f) any risk of violence or harm to a spouse or child or another person occupying the family home;
 - (g) the length of time each spouse has resided in the family home;
 - (h) whether any third party holds a right or interest in the family home;
 - (i) the interests of any elderly person, or person with a disability, who habitually resides in the family home, if one of the spouses is that person's caregiver;
 - (j) any other exceptional circumstances related to a person, other than the spouses or children, who is occupying the family home;
 - (k) the collective rights of the Abénakis of Odanak and any financial interest of the Abénakis of Odanak in the family home.
- 8.3 If the family home was occupied under a lease, the terms of the lease apply to the persons granted exclusive occupancy during the period of the order.
- 8.4 For greater certainty, an order under Section 8.1 may be made on an emergency basis pursuant to Sections 13.3 and 13.4.
- 8.5 For greater certainty, an order made under Section 8.1 does not:
- (a) change who holds a right or interest in or to the family home; and
 - (b) prevent an executor of a will or an administrator of an estate from transferring such an interest or right to a named beneficiary under the will or to a beneficiary on intestacy.

9. SHARING FAMILY REAL PROPERTY

- 9.1 On the breakdown of the marriage or marriage-like relationship, each spouse is entitled to an equal share of the value of their family Real Property. For the purposes of this Act, the breakdown of the marriage or marriage-like relationship includes the death of a spouse.
- 9.2 A spouse may apply to the Court to divide the value of their family Real Property.
- 9.3 For greater certainty, when dividing or sharing the value family real property, the following rights and interests cannot be transferred to or held by a person who is not a member:
- (a) a Certificate of Possession; or
 - (b) any other right to possession allotted in accordance with Section 20 of the Indian Act (Canada).

10. COMPENSATION FOR OTHER REAL PROPERTY

- 10.1 If one spouse has a right or interest that is not family real property, the other spouse, is entitled on division of the family real property to compensation for that right or interest in accordance to Sections 10.2 and 10.3.
- 10.2 If the spouse is a member, he or she is entitled to be paid to the greater of the following amounts calculated for each right or interest:
- (a) one half of the amount by which the right or interest appreciated in value from the beginning of the marriage or marriage-like relationship to the valuation date; and
 - (b) the difference between any amounts made by the spouse for improvements to the structure and any liability incurred to make those payments.
- 10.3 If the spouse is not a member, he or she is entitled to be paid:
- (a) in the case of a structure, the greater of the following amounts:
 - (i) one half of the amount by which the structure appreciated in value from the beginning of the marriage or marriage-like relationship to the valuation date, and
 - (ii) the difference between any amounts made by the spouse for improvements to the land and any liability incurred to make those payments; and
 - (b) in the case of any other rights and interests, the difference between any amounts made by the spouse for improvements to the land and any liability incurred to make those payments.

11. VALUATION OF REAL PROPERTY

- 11.1 Rights and interests must be valued at the amount that a buyer would reasonably be expected to pay for comparable rights or interests minus the amount of any outstanding debts or other liabilities assumed for acquiring the rights or interests or for improving or maintaining the structures and lands that are the object of the rights or interests, unless the Court determines that another value is more appropriate in the circumstances.
- 11.2 For greater certainty, the value of a right or interest does not necessarily mean its insured value or the value of equivalent property off reserve.
- 11.3 The date for determining the value of rights and interests is the earliest of the following dates:
- (a) the date a divorce is granted;
 - (b) the date the marriage is declared a nullity;
 - (c) the date the spouses began to live separate and apart;
 - (d) the date on which a spouse manifested the intention not to continue the marriage or marriage-like relationship;
 - (e) the date one spouse dies;
 - (f) the date an application is made to the Court for
 - (i) exclusive occupation of the family home,
 - (ii) division of family real property, or
 - (iii) irresponsible depletion.

12. POWERS OF THE COURT

- 12.1 The Court may, on application, determine whether or not a structure is a family home and if so, its extent.
- 12.2 The Court may, on application,
- (a) determine what the family real property is and its value;
 - (b) determine the date for fixing the value of the family real property under Section 11.3;
 - (c) determine the amount payable by one spouse to the other;
 - (d) provide for the method by which the amount payable be settled, including
 - (i) payment of the amount in a lump sum,
 - (ii) payment of the amount by instalments,
 - (iii) the transfer of a right or interest, subject to Section 9.3,
 - (iv) the set-off or compensation of any amounts owed by one spouse to the other, or

- (v) any combination of the methods referred to in subparagraphs (i) to (iv).

12.3 Despite Sections 9.2 and 10.1, the Court may divide the family real property in unequal shares or adjust the payments under Sections 10.2 or 10.3, if the Court considers that it would be unfair and inequitable after considering the following:

- (a) the best interests and welfare of any affected child, including the need to provide accommodation or to properly support any affected child;
- (b) any payments payable for the support of a child and any financial responsibility related to the care and upbringing of the child;
- (c) any domestic agreement;
- (d) any agreement between one or both spouses and a third party;
- (e) the length of time that the spouses have lived together;
- (f) the length of time, if any, that the spouses have lived separate and apart;
- (g) the date when the property was acquired;
- (h) any significant change in the value of the interests or rights in question between the day for fixing the value date and the day on which the order is made;
- (i) whether one spouse has exclusive occupation of the family home by agreement or order;
- (j) any contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the property;
- (k) any direct or indirect contribution made by one spouse to the career or career potential of the other spouse;
- (l) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage or marriage-like relationship;
- (m) any substantial gift of property by a spouse to a third party or any transfer of property by a spouse to a third party other than a bonafide purchaser for value;
- (n) any previous distribution of property between the spouses by gift or agreement or pursuant to an order of any Court;
- (o) any tax liability that may be incurred by a spouse as a result of any transfer or sale of property or any order made by a Court;
- (p) any dissipation or reduction in value of the property caused by a spouse;
- (q) any benefit received or receivable by the surviving spouse as a result of the death of his or her spouse;
- (r) any financial or other interests of the First Nation or third parties in the family real property;

- (s) any debts or liabilities of a spouse, including debts paid during the course of the marriage or marriage-like relationship;
- (t) the value of other property that is subject to division or has been divided under the applicable family law of a province or territory;
- (u) any other relevant fact or circumstance.

13. GENERAL PROVISIONS FOR ORDERS

- 13.1 In the case of domestic violence, the Court may attach any conditions it considers appropriate to its decision or order under this Law and give such directions as are necessary for those purposes.
- 13.2 The Court may, on application to make a decision or order under one section of this Law, make a decision or order under another section, or combine them.
- 13.3 The Court may make a decision or order on an emergency or temporary basis.
- 13.4 The Court may make a decision or order without prior notice to another party, if the Court believes that it is justified in the circumstances.
- 13.5 The Abénakis of Odanak Council is entitled to
- (a) receive a copy of every application to the Court;
 - (b) to make representations to the Court on the application; and
 - (c) to receive a copy of any order made under this Law.
- 13.6 In determining the best interests and welfare of a child, the Court shall also consider
- (a) the possible disruptive effects on the child of a move to another accommodation; and
 - (b) the child's views and preferences, if we can establish them with enough certainty.
- 13.7 No application may be made under Section 12.3 more than two (2) years after the day the spouses lived separate and apart, unless the Court grants leave on the grounds that exceptional circumstances justify the late application.
- 13.8 The Court may, on application, confirm, vary or revoke any order or decision made under this Law.
- 13.9 For greater certainty, the applicable rules of the Court apply to orders and decisions made by the Court under this Law.

14. ADMINISTRATION

- 14.1 A copy of this Law appearing to be certified as a true copy by an officer of the Abénakis of Odanak is proof of the original without proof of the officer's signature or official character.

- 14.2 The Council shall ensure that a copy of this Law, as amended from time to time, is available for public inspection at locations designated by the Council and may make it public by any other means of communication that the Council considers appropriate.

15. MEDIATION

- 15.1 Spouses who have a dispute about matters under this Law should make a reasonable attempt to resolve it through the efforts of a mutually agreed upon mediator in a process that accords with the traditions, customs and practices of the Abénakis of Odanak.
- 15.2 Mediation does not prevent a party from seeking a remedy from the Court, especially in urgent circumstances.

16. APPEALS

- 16.1 An appeal from an order of the Court does not operate as a stay or suspend the operation of the order unless the judge hearing the matter decides otherwise.

17. ENFORCEMENT

- 17.1 A peace officer may arrest without warrant any person the officer believes on reasonable and probable grounds to have contravened an order for exclusive occupation.
- 17.2 A peace officer may assist in making an application on behalf of a spouse or child with that person's consent, or if that person does not consent, with the permission of the Court.
- 17.3 A peace officer shall, on the request of an applicant or if directed by the Court, assist in the enforcement of any order made under this Law, including:
- (a) serving notice of an order or decision upon any person; and
 - (b) accompanying the applicant or any specified person to the family home or other location in order to supervise compliance with the order or decision.
- 17.4 Any person who contravenes the provisions of an order or decision made under this Law is guilty of an offence and is liable upon summary conviction to:
- (a) in the case of a first offence, a fine not exceeding \$2,000 or to imprisonment for a term not exceeding three months, or both; or
 - (b) in the case of a subsequent offence, a fine not exceeding \$5,000 or to imprisonment for a term not exceeding one year, or both.

18. AMENDMENT OR REPEAL

- 18.1 This Law may be amended or repealed only by a subsequent law made by the Chief and Council.

- 18.2 The Council must hold at least three meetings that are open to all members to consider and discuss any amendment or repeal of this Law.
- 18.3 The Council must, at least 30 days in advance of the first meeting, take reasonable measures that are in accordance with the traditions, customs and practices of the Abénakis of Odanak to inform its members of:
- (a) the time and place of all the meetings;
 - (b) their right to attend and participate in these meetings;
 - (c) a summary of the proposed amendments or repeal.

19. COMING INTO FORCE

- 19.1 This Law comes into force on January 31st, 2015.