

LAW REFORM COMMISSION OF BRITISH COLUMBIA

Minor (Interim) Report on the Land (Wife Protection) Act

**LRC71
January 1984**

January 27, 1984

The Honourable Brian R.D. Smith, Q.C.
Attorney General of the Province of British Columbia
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

Re: *Minor (Interim) Report on the Land (Wife Protection) Act*

As you are aware, the Commission has recently added to its program a number of topics which fall under the general description of "Family Law." Although the terms of reference for these studies are not yet fully settled, we expect them to include an examination of the operation of those sections of the *Family Relations Act* relating to family property. While we plan to proceed as expeditiously as our resources permit, we are not in a position to say when our final recommendations will emerge. Our preliminary work has, however, identified one area in which early action is called for and we thought it appropriate to bring forward an interim recommendation at this stage.

A statute which predates the present *Family Relations Act*, but nonetheless complements it, is the *Land (Wife Protection) Act*. The aim of the Act is to place limitations on the right of the registered owner of a matrimonial home to sell or encumber it without the consent of the owner's spouse. More specifically, the Act permits the wife to cause a filing to be made in the Land Title office against her husband's

interest in the matrimonial home (referred to in the Act as a "homestead"). So long as that filing subsists the husband is limited in the way in which he can deal with his interest in the property. The Act also provides machinery whereby the filing may be cancelled in particular circumstances.

The particular difficulty presented by the Act is that it does not treat husband and wife in an even-handed fashion. The wife is permitted to make a filing against her husband's interest in the matrimonial home, but the husband has no corresponding privilege with respect to the wife's interest. That apparent inequality may not have been a matter of concern at the time the Act was first enacted, but the introduction of the Canadian Charter of Rights and Freedoms as part 1 of *The Constitution Act, 1982* adds a new dimension. Section 15(1) of the Charter provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

That provision comes into force three years after the date the Charter itself came into force [section 32(2)]. That date will be April 17, 1985. Thus, in just over a year, the *Land (Wife Protection) Act* will be liable to be tested under the Charter.

We see a very real danger that the Act, in its present form, would not survive a constitutional challenge under the Charter. None of the "saving" provisions seem applicable (reasonable limits demonstrably justified etc. [section 1] or affirmative action [section 15(2)]). Moreover, the "wife only" approach permeates the drafting of the entire Act. There is no one provision which could be identified and severed by a court to make the statute operate in an evenhanded fashion.

Any constitutional challenge to the Act would, therefore, likely result in the Act being struck down in its entirety. In that event, all subsisting filings would cease to have effect and there would be, at best, an unfortunate hiatus while repairs were being made. We therefore believe that immediate action should be taken to amend the Act to preserve it from constitutional challenge. These amendments should take the form of redrafting the Act to the extent necessary to give husbands the same filing privileges which the Act now confers on wives. The redrafted Act might then be enacted as a separate part of the *Family Relations Act*.

We believe these amendments should be regarded as "interim" only. No other changes in principle should be introduced at this time except for the deletion of sections 4 and 5 as recommended in our Report on Statutory Succession Rights (LRC 70). There are a number of modifications to the Act which might be made and require further consideration. The utility of the Act itself calls for scrutiny. The Commission's final recommendations concerning the Act must wait the outcome of its broader examination of family property law.

This letter is to be taken as a minor Report (No. 71) of the Law Reform Commission recommending changes in the law as herein set out. This recommendation was approved by the Commission at a meeting on January 26, 1984.

Yours sincerely,

Arthur L. Close
ViceChairman

ALC/ss