

PROPERTY AND SUPPORT REGIMES ACROSS CANADA: AN OVERVIEW

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When a spousal relationship breaks down, the former spouses and the courts must grapple with the financial consequences of the end of the relationship. Inevitably, several key questions arise: How should property acquired before, during and after the relationship be apportioned between the parties? Is one spouse entitled to financial support, and if so, how much are they entitled to, and for how long? Are there children of the relationship to support?

Canada has comprehensive family law legislation, enacted at both the federal and provincial levels, which provides a framework under which individuals and the courts may apportion the financial consequences of relationship breakdown. This paper presents an overview of the property and support regimes in Canada's common law provinces.² This overview includes a review of matrimonial property legislation and the recent Supreme Court ruling addressing property in "joint family ventures," as well as the law of spousal and child support.

The term "spouses," may refer to both cohabiting and married couples. The paper makes note of areas where the law treats cohabiting and married couples differently.

This paper provides a simplified overview of property and support, and is not a substitute for legal advice. If you require legal assistance, you should consult a family law lawyer.

Property Rights

Marital property regimes have been enacted at the provincial level. As a result, there is much variation between provinces as to how property is apportioned upon relationship breakdown. Some provinces allow for a straightforward "50/50" division of assets, while others, such as Ontario, employ an equalization procedure that accounts for differences in the growth of the value of the assets of each partner during the marriage. The application of provincial legislation also varies, with some regimes being applicable to non-married spouses in addition to married individuals.

The following chart offers a comparison of the matrimonial property legislation across Canada's common law provinces.

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² All provinces, with the exception of Quebec, which has a civil law system.

SUMMARY OF PROVINCIAL MATRIMONIAL PROPERTY LEGISLATION	PROVINCE	ALBERTA	BC	MANITOBA
	STATUTE	Matrimonial Property Act	Family Law Act ³	Family Property Act
1. NATURE OF SCHEME		Property Distribution – “The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them” (distribution made according to a variety of factors, though presumption is equal division)	Property Division – “on separation, each spouse has a right to an undivided half interest in family property...and is equally responsible for family debt”	Equalization – “Each spouse and common-law partner has the right upon application to an accounting and ...an equalization of assets in accordance with this Part.”
2. APPLIES TO COHABITATING COUPLES?		N	Y	Y
3. TRIGGERING EVENTS				
A. Divorce		X		
B. Judicial Separation or Separation Agreement		X		
C. Living “Separate and Apart”		X	“Separation”	
D. Dissipation of Property		X		
E. Nullity		X		
F. Death of Spouse		X		
G. Upon Application				X
4. SPECIFIED VALUATION DATE?		NO	Date of agreement OR date of hearing	As agreed to OR date of last cohabitation OR date of application if still cohabiting
5. BASIS OF VALUATION?		Market Value	Fair Market Value	Fair Market Value
6. EXEMPT, EXCLUDED OR EXCEPTED PROPERTY		Exempted from distribution.	Excluded from ‘family property’	Act does not apply to these types of property.
H. All Pre-marriage Assets		X	X	Excluded unless acquired while cohabiting
I. Gifts or Inheritances		X	X	X
J. Personal Injury Awards		X	X	X
K. Personal Effects				
L. Business Assets				
M. Family Heirlooms				
N. Insurance Proceeds		X	X	X
O. Gifts from Spouse		Given special consideration		
P. Traceable Property		Given special consideration	X	X
Q. Exempt via Marriage Contract			X	X
R. Post-separation Assets		Given special consideration		X
7. UNEQUAL DIVISION AVAILABLE WHERE EQUALIZATION WOULD BE:		Not ‘just and equitable’	‘Significantly unfair’	‘Grossly unfair/unconscionable’ (re family assets) or ‘clearly inequitable’ (re commercial assets)
8. AUTOMATIC EQUAL RIGHT TO POSSESSION OF MATRIMONIAL HOME?		NO	Not specified	YES

³ The *Family Law Act* comes into force on March 18, 2013, replacing the *Family Relations Act*.

SUMMARY OF PROVINCIAL MATRIMONIAL PROPERTY LEGISLATION	PROVINCE	N.B.	NFLD.	N.S.
	STATUTE	Marital Property Act	Family Law Act	Matrimonial Property Act
1. NATURE OF SCHEME		Property Division – “each spouse, upon application to the Court, is entitled to have the marital property divided in equal shares.”	Property Division – “either spouse is entitled to apply to a court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets.”	Property Division – “either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets.”
2. APPLIES TO COHABITATING COUPLES?		N	N	If registered
3. TRIGGERING EVENTS				
A. Divorce		X	X	X
B. Judicial Separation or Separation Agreement		X		
C. Living “Separate and Apart”		X	X	X
D. Dissipation of Property				
E. Nullity		X	X	X
F. Death of Spouse		X	X	X
G. Upon Application				
4. SPECIFIED VALUATION DATE?		NO	NO	NO
5. BASIS OF VALUATION?		None Specified	None Specified	None Specified
6. EXEMPT, EXCLUDED OR EXCEPTED PROPERTY		Excepted from ‘matrimonial property’	Excepted from ‘matrimonial assets’	Excepted from the ‘matrimonial assets’
H. All Pre-marriage Assets				
I. Gifts or Inheritances		X	X	
J. Personal Injury Awards			X	
K. Personal Effects			X	
L. Business Assets		X	X	
M. Family Heirlooms			X	
N. Insurance Proceeds				
O. Gifts from Spouse		X		
P. Traceable Property		X		
Q. Exempt via Marriage Contract		X	X	
R. Post-separation Assets		X	X	
7. UNEQUAL DIVISION AVAILABLE WHERE EQUALIZATION WOULD BE:		‘Inequitable’	‘Grossly unjust’ or ‘Unconscionable’	‘Unfair’ or ‘Unconscionable’
8. AUTOMATIC EQUAL RIGHT TO POSSESSION OF MATRIMONIAL HOME?		YES	YES	YES

SUMMARY OF PROVINCIAL MATRIMONIAL PROPERTY LEGISLATION	PROVINCE	ONTARIO	P.E.I.	SASK.
	STATUTE	Family Law Act	Family Law Act	Family Property Act
1. NATURE OF SCHEME		Equalization – “the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them”	Equalization – “the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.”	Property Distribution – “the court shall, subject to any exceptions, exemptions and equitable considerations mentioned in this Act, order that the family property or its value be distributed equally between the spouses.”
2. APPLIES TO COHABITATING COUPLES?		N	N	Y
3. TRIGGERING EVENTS				
A. Divorce		X	X	
B. Judicial Separation or Separation Agreement				
C. Living “Separate and Apart”		X	X	
D. Dissipation of Property		X	X	
E. Nullity		X	X	
F. Death of Spouse		X		
G. Upon Application				X
4. SPECIFIED VALUATION DATE?		Earliest of triggering events	Earliest of triggering events	Date of application or adjudication
5. BASIS OF VALUATION?		Value	Value	Fair Market Value
6. EXEMPT, EXCLUDED OR EXCEPTED PROPERTY		Excluded from forming part of spouses’s NFP	Deducted from value of all property before equalization	Exempt from distribution
H. All Pre-marriage Assets		Deducted from NFP	X	X
I. Gifts or Inheritances		X	X	
J. Personal Injury Awards		X	X	X
K. Personal Effects				
L. Business Assets				
M. Family Heirlooms				
N. Insurance Proceeds		X	X	X
O. Gifts from Spouse				
P. Traceable Property		X	X	X
Q. Exempt via Marriage Contract		X	X	X
R. Post-separation Assets				X
7. UNEQUAL DIVISION AVAILABLE WHERE EQUALIZATION WOULD BE:		‘Unconscionable’	‘Unconscionable’	‘Unfair and inequitable’
8. AUTOMATIC EQUAL RIGHT TO POSSESSION OF MATRIMONIAL HOME?		YES	YES	YES

Property Rights in a ‘Joint Family Venture’: *Kerr v Baranow*

In 2011, the Supreme Court of Canada released a landmark decision in the case of *Kerr v Baranow* (2011 SCC 10).

Ms. Kerr and Mr. Baranow cohabited for over 25 years. When the relationship broke down, each party claimed a share in the other’s property, even though as cohabiting spouses they did not have any legislative basis under British Columbia’s *Family Relations Act* for such claims. Each claimed that the other spouse had been “unjustly enriched” by the claimant’s contributions during their relationship.⁴

The Court found that where a “joint family venture” is found, and one of the spouses can show that his or her contributions within the joint family venture can be linked to the other spouse’s accumulation of property (assets and/or wealth), the claimant spouse may be entitled to a share of that property. In determining whether a joint family venture exists, a court may consider the parties’ mutual efforts, the degree of economic integration of the parties, the parties’ actual intent, and the degree to which each spouse prioritized the family unit in his or her decision making.

Kerr v Baranow has an important implication for Canadian couples: non-married, cohabiting individuals may now be able to gain rights in their spouse’s property, even where the applicable provincial property legislation would not grant them property rights.

Spousal Support

In Ontario, both married and unmarried spouses may be entitled to spousal support. To be eligible for spousal support in Ontario, unmarried spouses must have cohabited for three years, or have been in a relationship of some permanence with a child. The length of cohabitation required for unmarried spouses to be eligible for support varies from province-to-province. In some provinces, most notably Quebec, unmarried spouses have no entitlement to spousal support.

Spousal support serves several purposes, including recognizing a spouse’s contributions to the relationship, sharing the financial costs of caring for a child, relieving financial hardship, helping a spouse to become self-sufficient, and correcting economic advantage or disadvantage arising from the relationship breakdown.

The parties may agree to spousal support in a private agreement, or a court may order spousal support.

In 2008, the federal government released the Spousal Support Advisory Guidelines (the “SSAGs”). The SSAGs use various inputs to provide a low, middle and high range for spousal support. Unlike child support, which is mandatory, the SSAGs do not impose a mandatory award of spousal support. The amount of spousal support awarded, as well as the duration of the award, may vary, depending on the length of the relationship, whether the couple had children and what the arrangements are for the children’s care, the roles of the parties during the relationship, the

⁴ The Court decided the appeal of *Vanase v Seguin* at the same time. The case, on appeal from the Ontario Court of Appeal, involved a similar claim based on principles of unjust enrichment.

age of the spouses, and the spouses' financial situation. While the SSAGs are not mandatory, they are a starting point for the parties or a court to decide on the quantum and duration of an award for spousal support; courts tend to award one of the amounts suggested by the SSAGs.

Spousal support may be paid in monthly installments, or may be paid in a lump sum. If the spousal support is paid in installments, it is taxable for the recipient and tax-deductible for the payor.

If spousal support is paid pursuant to an agreement, the parties may agree to vary the quantum or duration of spousal support. If the parties cannot agree, or if spousal support is being paid pursuant to a court order, a spouse may apply for variation. The court will only agree to change a court order where there is a material change in a spouse's circumstances (for example, a substantial change in income).

Child Support

Every parent has a legal duty to support their dependent children to the extent that they can. This includes birth parents, adoptive parents, and in some cases, step-parents, where the step-parent has demonstrated a "settled intention" to treat the child as a child of his or her own family. It is possible for several people to have a legal duty to support the child.

Child support, as ordered by a court, is based on federal and provincial legislation called the Child Support Guidelines. The Child Support Guidelines include a table for each province and territory that sets out the monthly amount a parent will owe, based on his or her gross income and the number of children he or she must support. Barring any claims for undue hardship, the 'table amount' is what almost all parents will pay under a court order.

For example, a payor parent in Ontario earning \$200,000 per year and supporting one child would have to pay \$1633 per month in child support, according to the Child Support Guidelines. If the payor had two children to support, he or she would owe \$2582 per month; for three children, he or she would owe \$3331. Although the Guidelines say that for income earned over \$150,000 per year the payor may ask for an adjustment to the amount owed, the courts have almost never done so.

Note that, subject to what is said below, the amount the payor parent must pay remains constant regardless of the payee parent's income. The payee's income is not a factor in determining the quantum of child support, and child support must be paid regardless of the payee's income, even if the payee parent earns more than the payor parent. In short, for the purpose of regular child support, the payee parent's income is irrelevant.

Parents may also reach their own agreement for child support, though a court may not uphold an agreement that includes a child support amount that substantially deviates from the table amount.

A court may deviate from the table amount where there is a shared custody situation. Shared custody occurs where one parent has the child for at least 40% of the time. In that case, each parent is assumed to pay for the ordinary expenses of the child, and any support awarded will likely be adjusted downwards from the table amount.

Separated parents may also have ‘split custody’ arrangement, where each parent has custody of at least one child. In this situation, generally a court will determine the child support owing by each parent for children living with the other parent, and set these amounts off against each other.

In addition to regular child support, parents may have to pay ‘extraordinary expenses’ (sometimes referred to as ‘section 7 expenses’) for their children. Such expenses include child care, medical-related expenses, school or educational expenses, post-secondary expenses, and extracurricular activities. In determining whether these expenses are required, a court will take into a consideration what is in the child’s best interests, whether the expenses are reasonable, and the spending pattern of the family before separation. If awarded, these expenses are shared in proportion to the parties’ gross incomes.

Child support lasts at least until the child is 18, unless the child marries before that age, or is over 16 and has ‘withdrawn from parental control.’ Child support may be owed for a child over the age of 18, where the child has a disability or illness, or is going to school full-time.

Child support may be varied by agreement, or by the court, where there is a significant change in at least one party’s circumstances.

Child support is not taxable in the hands of the recipient, nor is it deductible in the hands of the payor.

Conclusion

Canadian spouses have access to a comprehensive set of legislation to protect their financial interests following the breakdown of the spousal relationship, including provincial property regimes, the Spousal Support Advisory Guidelines, and the Child Support Guidelines. As this paper describes, the rights of spouses vary across the country, depending on the applicable provincial legislation. Most importantly, while comprehensive family law legislation provides a useful framework for reaching decisions about a couple’s financial outcomes, each case will ultimately be decided on its own, unique facts.