

# Proposed Changes to Legislation

## What is the Matrimonial Property Act?

The Matrimonial Property Act (MPA) sets out the rules for how married couples and registered domestic partnerships will divide property at the end of the relationship.

### We want to hear from you

Do you have personal experience with the MPA? Are you interested in how a proposed new law would affect the division of family property? We want to hear from you so we can. Please read this background paper then complete our [survey](#). Your responses will help us to improve the law.

## Why do we need a new law now?

*Nova Scotia's Law Reform Commission suggested a new law in 2017*

In September 2017, Nova Scotia's former Law Reform Commission released its Final Report on the Division of Family Property ([Final Report](#)). The report said we should create a new Family Property Act to replace the MPA. The new law should be

- clear
- up to date
- fair

The commissioners made over 100 suggestions for law reform after years of researching family law and consulting with family law experts, lawyers, and the public.

Read the [full report](#).

## **Laws need to keep pace with changes in society**

Society has changed in the 40 years since the MPA was created. Canadian courts are already deciding family law cases based on changing points of view and expectations. The laws that courts apply must reflect current realities. These are some examples of how family life has changed in 40 years:

- Couples are having fewer children. A greater number of couples don't have any children.
- Fewer couples get married. Many who do are older than couples who married in 1980.
- More people bring their own property and debt into their marriages – fewer couples are “starting from scratch”.
- The number of common-law families is increasing.
- Second and third marriages are more common. This means more people may have to divide their property with an ex-spouse more than once in their lifetimes.

## **Gender roles are changing**

Marriage is no longer exclusively between a man and a woman. Same-sex marriage has been legal for 15 years. There are more same-sex marriages in Canada and Nova Scotia every year.

In opposite-sex marriages, the roles for men and women have changed as they have in society in general. But some things have not improved as much as we would like. For example:

- Women are generally paid less than men for the work they do outside the home.
- Most women continue to do more work inside the home than men do.
- Women are still more likely than men to end up in poverty, particularly after divorce.

Nova Scotians expect to see changing gender roles reflected in the laws that determine who gets what when a relationship breaks down. This can improve the chances that a couple will agree on how to divide their property, rather than going to court. Divorcing or separating couples are more likely to settle their differences out of court when laws are clear and consistent with their expectations.

## **How is family property divided in Nova Scotia today?**

Every family situation is different. The courts apply the law to each family's unique circumstances to make their decisions. But there are some general rules that apply under the MPA.

When a married couple or registered domestic partnership separates, they divide what they own between them. If they disagree on how to divide their property, either person can apply to the Nova Scotia Supreme Court or Nova Scotia Supreme Court (Family Division). The court will decide how the property will be divided. To do this, the court will consider the facts of the case and the law (including the MPA and past court decisions).

As we said earlier, the MPA sets out how property is divided when a couple cannot agree. Generally, a couple's property is divided equally between them, 50-50.

There are exceptions to the 50-50 rule. The court may decide to give one person more than the other, but this can only happen when:

- both people agree to divide the property this way  
OR
- the court finds that it would be unfair to divide the property equally.

In addition to dividing property, the court also takes into account any debts that one or both spouses have.

## **What is the property we are talking about?**

Under the MPA, a couple's property is called matrimonial property. It includes these things:

- the home where the couple lived during the relationship (the matrimonial home)
- the contents of the couple's home such as furniture and appliances
- land
- vehicles that the couple owned when they were together
- pensions that either person may have
- money in bank accounts
- other investments

All of the above items and more are generally included in the pool of property to be divided. This is the case whether the property is owned by one spouse or both of them.

In Nova Scotia, it does not matter whether the property was owned by one spouse before entering the marriage or registered domestic partnership – it is all generally required to be divided. This is different from most provinces and territories in Canada.

Some property is not required to be divided. The spouse who owns these items gets to keep them:

- gifts, inheritances, and trusts received by one spouse from someone outside the relationship unless it was used to benefit the family
- money awarded by a court to one spouse as damages (for example, a personal injury claim) or an out-of-court settlement
- money paid or owed to one spouse as part of an insurance policy
- personal effects
- business assets
- anything that the couple agreed not to share under a marriage contract or separation agreement
- anything one of the spouses obtained after separation

## **Who is covered under the MPA and who is not?**

Right now, the MPA only applies to married spouses and registered domestic partnerships. This means that when a common-law couple separates, the rules in the MPA do not apply. Common-law couples may choose to register their relationship as a registered domestic partnership to ensure that the MPA will apply to them if the relationship ends.

## How do common-law couples divide their property?

If a common-law couple has not registered as a registered domestic partnership, the rules for dividing property are much less clear. If they cannot agree, they can go to court where either person may claim an interest in property held in the other's name. They can ask for money or another kind of compensation. They would need to show the court that their former partner benefited unfairly from their contribution to the relationship. They may use other legal principles.

## Questions?

Visit [nsfamilylaw.ca](http://nsfamilylaw.ca) and [legalinfo.org](http://legalinfo.org)

If you need information about a specific case involving the division of family property, talk to a lawyer who practises family law.

## New Family Property Legislation

We are considering a new law to replace the MPA. We want to know what you think of these possible changes:

- Including common-law couples
- Excluding property that one spouse or partner brought into the relationship
- Including business assets in the pool of assets to be divided
- Limiting how long one can stay in the family home without a court order
- Dealing with family debt
- Dividing pensions

### Including common-law couples

#### *How common-law couples are treated under the current MPA*

The MPA only applies to married couples and registered domestic partnerships. Most common-law couples do not register their relationships as domestic partnerships. This means that when they separate, it is not clear how they should divide their property. If they disagree on how to divide their property, they must go to court and argue about concepts like “joint family venture”, “unjust enrichment” or “constructive trust.” These are complicated arguments. They have less certain outcomes and the process can be expensive.

#### *Many common-law couples behave like married couples*

Many common-law couples don't know that the law treats them differently from married couples when it comes to dividing their property. After all, many common-law couples behave exactly like married couples. For example:

- They have joint bank accounts and shared credit card accounts.
- Both partners' names are on the mortgage or lease.
- They share responsibility for childcare, household management, and finances.
- They make sacrifices for one another like giving up a career move for the benefit of the family.

When common-law couples separate, they risk losing their economic stability just like married couples do. They need a way to divide the property they share fairly. This is particularly true if they have children. If one partner took on the role of primary caregiver, they will likely have earned less income. When they leave the relationship, they may find it more difficult to earn a living. They may have little in the way of savings or other property. Child support and spousal support do not replace a share of the property the couple gained together during the relationship.

On the other hand, some couples prefer to be in common-law relationships because they want to maintain their economic independence. They don't want to join finances and don't expect to share property if the relationship ends.

### *Common-law couples' rights elsewhere in Canada*

In other provinces and territories in Canada, common-law couples who have lived together for 1 to 3 years have the same legal rights as married couples when it comes to dividing family property upon separation. These are the provinces and territories where common-law couples and married couples have the same legal property rights:

- British Columbia
- Manitoba
- Saskatchewan
- Northwest Territories
- Nunavut
- Alberta

The **Final Report** recommends that common-law partners live together continuously for at least 2 years before the new family property law would apply to their common-law relationship.

### *Include common-law couples in the new family property law*

We agree with the **Final Report's** recommendation that "[common-law] partners should be entitled to make a claim for the division of family property on ... the same basis as married spouses" (p. 11). This means that like married couples, common-law partners would generally be entitled to divide family property equally when they separate. See *How is family property divided in Nova Scotia today?*

### *Do not call common-law and registered domestic partners "spouses"*

We do not think the definition of the word "spouse" should include common-law partners and registered domestic partners. We feel they should have their own definitions in the law. While we do see the term "common-law spouse" used, the rights and obligations for common-law couples will be addressed slightly differently under this new law than they will for either married couples or registered domestic partnerships. Separate definitions will be clearer.

### *Allow common-law partners to live together for 2 years before the new law applies*

We are considering the **Final report's** recommendation that "[common-law] partners should be eligible to make a claim after [2] years cohabitation" (p. 11). This means that couples who are together for less than two years would not have the law apply to them. This would give common-law couples the first 2 years of living together to decide if they want to

- accept the legal obligations under the new law
- OR
- opt out of the new law by making a cohabitation agreement

### *Setting a time limit for applying to the court for property division*

We are also considering placing a time limit on common-law couples and registered domestic partners as to when they can start a property division court proceeding. The time limit being considered is 2 years from the date they separated. Currently, married couples must divide their property before their divorce is finalized. We are considering continuing that approach or having the 2-year time limit also apply to married couples. We propose that the court would be able to extend the time limit as well. For all couples, this time limit would apply unless one of the following states differently:

- a court order
- a domestic contract
- written agreement

## Dividing property

### *Excluding property that one spouse or partner brought into the relationship*

In Nova Scotia and New Brunswick, if one person owned property before the relationship, it is generally included in the property to be divided at the end of the relationship. These are the only provinces where this happens.

Once people are in a relationship and living together, they may use what they brought to the relationship for the benefit of the family. For example, one person may have owned a car before the relationship began. The car then becomes the couple's car or the family car. This often happens with such things as

- land
- a home
- furniture
- investments

We agree with this recommendation from the **Final Report**: "*The net value of assets acquired prior to cohabitation should be presumptively excluded from division*" (p. 11). We also agree with the **Final Report's** recommendation that "*only the increase in the value of pre-cohabitation family assets will be presumptively shared*" (p. 15). This means that if one person owned property before the couple began living together, the starting position in the new law would be that it should not be shared at separation. However, any increase in value of that property during the relationship would generally be divided when the relationship ended. For example, if one person owned a home before the couple began living together, what the home was worth at the time the couple began living together would be deducted from what is going to be divided between them when they separate. The couple would divide the amount the home was worth at the end of the relationship minus what it was worth at the beginning.

### *Proving the value of property that was owned before living together*

A partner or spouse who wants to exclude the value of property owned before the relationship will need to prove the amount that should be excluded. These are some of the things that will be needed as proof:

- bank statements
- retirement savings account statements
- pension plan statements
- investment account statements
- loan statements including mortgages, lines of credit, and credit card statements
- assessment statements for land

Banks may not keep records older than seven years. Spouses and partners should keep their own records.

### *Business assets*

Business assets include property related to these things:

- a commercial business
- an investment
- other income-producing purpose

Nova Scotia is one of the only Canadian provinces to exclude business assets from the property that is divided equally when a relationship ends. The other provinces are New Brunswick and Newfoundland. This means that the spouse who owns the business assets does not normally have to share them with the other when the relationship ends.

In some cases, a spouse or partner may ask the court to divide the value of the other spouse or partner's business asset based on family contribution. For example, it may be unfair to leave the non-owning spouse without a share of the business assets, if they did more work inside the home, such as housekeeping, childcare, or other domestic responsibilities.

Another way to make a claim for business assets is to show that the non-owning spouse contributed to the business asset (e.g. obtaining, managing, operating or improving the asset).

We agree with the **Final Report's** recommendation that *"Family property legislation should not exclude business assets from a presumptive equal division of property"* (p. 138). This means that the new law would generally require the person who owns the business asset to divide it equally with the other when the relationship ends, unless that equal sharing was proved to be unfair.

There are 2 main ways to divide business assets:

- The asset itself could be split and half transferred from the person who owns the asset to the other  
OR
- The person who owns the asset can pay the other the value of half of the asset.

## **Limiting how long one can stay in the family home**

Right now, the MPA gives either person in a marriage or registered domestic partnership equal rights to stay living in the matrimonial home no matter who owns the home. Neither person can sell or mortgage the home unless the other person agrees. Neither person can force the other to move out without a court order. The matrimonial home is treated this way because it provides important stability and security to those who live there.

Under the MPA, equal rights to live in the matrimonial home end when one of these things happens:

- the couple divorces
- a court order states that only one of the two people stays in the home
- court order or agreement divides the property
- one person in the couple dies

The new law would give equal rights to live in the family home to common-law partners. Therefore, it must also set a reasonable limit for how long non-married partners who do not own the family home may be entitled to live there after the relationship ends, before the other spouse can require them to move out.

The **Final Report** recommends that the limit should be no longer than 2 years while they look for somewhere else to live.



Even so, as with married spouses currently, the other partner will be able to ask the court for sole possession of the family home in certain circumstances; for example, where leaving or sharing the home would put the safety of family members at risk.

## Dealing with family debt

Today, many people bring debt into relationships and take on debt during relationships. The MPA does not address dividing family debt. The courts have had to decide how to do this. To help solve disagreements over family property, the new law must be clear, fair, and predictable.

Nova Scotia courts have decided that reasonable matrimonial debts should generally be divided equally unless that would be unfair. Matrimonial debt is debt taken on for these reasons:

- to finance ordinary household matters. This kind of debt is taken on during the relationship.
- to meet basic living expenses or to keep matrimonial assets. This kind of debt may be taken on after the relationship ends

We agree with the **Final Report's** recommendation that "Family property legislation should provide that family debt be divided on a presumptively equal basis" (p. 194). This means that debt taken on during a relationship will generally be divided equally when that relationship ends, unless proven to be unfair. We agree with the Final Report's recommendation on how to define family debt:

1. debt that was taken on during the relationship and remained at the time of separation.  
AND this debt was
  - a) in both people's names
  - OR
  - b) in one person's name but taken on for a family purpose
2. debt that was taken on after separation to keep or maintain family assets

This means that any debt taken on by a spouse or partner for a family purpose will be divided between them at the end of the relationship. Also, any debt taken on by both people should generally be divided between them, no matter what it was for.

If one person takes on debt for their own purposes, it should not be considered family debt. Therefore, the couple need not share it when they separate. If one person thinks they should not take an equal share of the debt, they will have to prove to the court that it is not a family debt.

With this new definition, no one would have to argue whether a debt was reasonable or not. They need only prove that both people took on the debt, or that one person took it on for a family purpose.

## Dividing Pensions

There are specific laws that govern pension plans and they deal with what happens to a spouse or partner's pension when the couple separates. Under Nova Scotia pension law, a spouse or partner who is not the pension plan member is entitled to a maximum of 50% of the part of the pension that was earned during the relationship.

Courts have, on occasion, ordered that a spouse or partner get more than 50% of the pension earned during the relationship. However, it is unclear if the pension plan administrator can do this. Instead, the pension plan member may have to use other assets to pay what the remaining part of the pension is worth.

We would like to create a pension law that would solve these problems. The usual rule would continue to be that pension benefits earned during the relationship would be divided 50-50. But if a court ordered one person to get more than 50%, the pension plan would be able to pay this amount. Further, in certain circumstances the court could order that the spouse who is not the pension plan member should get part of the pension that was earned before the relationship.

For example, the spouse who is a member of the pension plan may have gotten rid of assets that should have been divided, depriving the other spouse of what they should have received in an equal division. In that case, the pension might be the only asset available to compensate the other spouse. We think, in that sort of case, the court should be able to order the pension plan to pay the appropriate amount and it should be clear that the pension plan administrators could pay the funds if so ordered. It would also lead to better outcomes where one spouse's pension is the couple's only significant asset.

## Property law and First Nations communities

In Nova Scotia, a number of First Nations have their own Matrimonial Real Property law and those that do not are governed by the Family Homes on Reserves and Matrimonial Interests or Rights Act. Whether and how a new family property law will impact them will be different for each First Nation as a result.

## Questions?

For more information and to complete our survey, please go to:

<https://novascotia.ca/family-property-law-survey>

If you have any questions, please contact Narrative Research at 1-888-414-1336 (toll free).

## We want to hear from you

Please complete this **survey** so that we can take your comments into account as we consider developing new legislation.