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MARRIAGE IN CANADA:
THE MARITAL DEDUCTION AND OTHER TAX RELIEF
AND PROPERTY RIGHTS ON
MARITAL BREAKDOWN AND DEATH

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PART I: GENERAL CANADIAN TAXATION PRINCIPLES AND SPOUSAL PLANNING
Capital Gains Tax Regime: History

- Capital gains tax since 1972; federal gift and estate tax discontinued 1971.
- Royal Commission on Taxation (“Carter Commission”) recommended “comprehensive tax base”.
- Initial inclusion rate of 50% of capital gains.
- Tax applies to capital gains and losses accrued after a valuation date.
- No provincial wealth transfer taxes since 1985.

- A majority of the Carter Commission advocated a “comprehensive tax base”, as “[t]he first and most essential purpose of taxation is to share the burden of the state fairly among all individuals and families.” (Report of the Royal Commission on Taxation, as cited in Duff, infra, at 91).
- With regard to capital gains the Carter Commission recommended the recognition of capital gains and losses on a realization basis (and upon gifting or death) rather than an accrual basis, for administrative reasons. It also recommended that the value of gifts and inheritances be included in income, which was not implemented, and that wealth taxes be repealed accordingly. The inclusion rate of 50% was a political concession upon reactions to a government White Paper.
- Valuation date: December 31, 1971.
- The federal government’s reasons for the repeal of federal gift and estate tax included concerns about the substantial cumulative impact in certain cases of both estate taxes and capital gains taxes.
- After 1972, provincial estate and/or gift taxes were not uniform across the provinces. Many provinces ceased levying wealth transfer taxes during the 1970s, and by 1985 no province levied such taxes.
- Generally, Canada includes in income for taxation purposes a portion of capital gains, being the growth in the value of non-inventory capital property on the disposition of that property. The Income Tax Act (Canada) defines a capital gain as the difference between the proceeds of disposition of an asset (for example, its sale price) and its adjusted cost base, less outlays and expenses of disposition.
- A taxable capital gain is 50% of a capital gain. Allowable capital losses may be deducted from taxable capital gains for a taxation year.
- A disposition is broadly defined as “any transaction or event entitling a taxpayer to proceeds of disposition of the property” (s. 248(1)), and includes a sale and any transfer where there is a change of beneficial ownership, including gifts, resulting in a disposition of capital property. There is a deemed disposition of capital property at fair market value immediately before a taxpayer’s death. Generally, there is a deemed disposition of capital property held in a personal trust every 21 years (21 years after the creation of the trust or 21 years after January 1, 1972, whichever is later).
- “Rollovers” permit deferral of recognition of capital gains or losses, typically by allowing another taxpayer to receive capital property at the original taxpayer’s adjusted cost base – for example, for a transfer of capital property to a Canadian resident surviving spouse or common-law partner or qualified spousal trust during lifetime and on a spouse’s or partner’s death.
- A lifetime capital gains exemption can shelter $800,000.00 of capital gains from limited sources, including qualified small business corporation shares, qualified farm property and qualified fishing property.
Tax Filings

For the purposes of Canadian federal income tax, married spouses (whether they are of the same-sex or opposite sex) are required to indicate their marital status as of December 31 of the tax year for which a filing is being made, as well as report the name, social insurance number and net income of their spouse. Each spouse files a separate return—Canada does not have a spousal joint-filing system as in the U.S. Note that all of the following comments also apply to common-law spouses who meet the following statutory requirements for a “common law partner” under s. 248(1) of the Income Tax Act:

“common-law partner”, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(a) has so cohabited throughout the 12-month period that ends at that time, or
(b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraphs 252(2)(a)(iii),

and, for the purpose of this definition, where at any time the taxpayer
and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

As the thrust of this presentation is “marriage” in Canada, however, all references will be to legally married spouses. Personal tax returns are due to be filed with Canada Revenue Agency on or before April 30 of the year immediately following the taxation year.

**Tax Credits**

For married spouses, there are a variety of tax credits that may be claimed. For example, there are credits available to be claimed with respect to supporting a financially dependent spouse at any time during the tax year whose net income was below the threshold amount. Other credits and amounts, such as age and tuition amounts, may be transferred between spouses in order to minimize the total tax payable as between spouses. Married spouses may also combine certain other credits such as medical expenses and charitable donations by claiming such amounts on one spouse’s return in order to obtain the maximum credit available. Other credits or benefits, however, such as the Canada Child Tax Benefit, may be reduced or lost entirely when using a combined net family income to calculate the income threshold for such benefits.

**Income Splitting**

There are a variety of income splitting strategies available to married spouses in Canada. With respect to retirement savings plans (RSPs), the higher income spouse is permitted to use his or her contribution room to make contributions to a spousal RSP held by the lower income spouse. Contributions to the lower income spouse’s RSP would be deducted from the income of the higher income spouse. Further, when funds are ultimately withdrawn by the lower income spouse during his or her retirement, any such withdrawals are fully taxable in his or her hands. With respect to retirement income funds (RIFs), income paid from the RIF is eligible to be split between the spouses if both are 65 years of age or older.

In terms of further income splitting opportunities, if both spouses are over the age of 60 years and receive monthly Canada Pension Plan payments, they may share up to 50% of the benefits earned during the period of their relationship. Pension income splitting allows spouses receiving income that qualifies for the pension income credit to allocate up to 50% of that income to their spouse. In addition, pension income from a defined
benefit or defined contribution pension plan may be split with a spouse at any age.

**Tax-Deferred Spousal Rollovers**

**Transfer during lifetime:**

A spouse may, during his or her lifetime, transfer non-registered assets to his or her spouse outright without triggering tax on capital gains. The income attribution rules (discussed in greater detail below) will, however, apply to such assets so transferred.

A spouse, if he or she is 65 years of age or older, may also transfer assets into a joint partner *inter vivos* trust, which would permit a spousal rollover of the assets held in the trust to the surviving joint partner (i.e., his or her spouse) on a tax-deferred basis. To qualify as a joint partner trust, income must be paid to the settlor and his or her spouse, and tax on such income is paid by the settlor and his or her spouse at his, her or their respective graduated tax rates unless a special tax election is made to tax the income in the trust. Further, there is a deemed realization of the assets of a joint partner trust on the date of death of the survivor of the partners, as well as every 21 years thereafter unless an election is made to trigger an earlier disposition. Due to the deemed realization, tax is payable on any taxable capital gains.

**Upon death:**

Upon death of one spouse, RSPs and RIFs can be transferred to the surviving spouse on a tax-deferred, rollover basis.

Moreover, other capital property may be transferred on death to a surviving spouse through a deceased spouse’s will without triggering tax on capital gains. Such rollovers on death may be accomplished through either an outright distribution in the deceased spouse’s will, or by way of transfer to a qualifying spouse trust. A qualifying spouse trust is a trust whereby the surviving spouse is entitled to receive all of the income that may arise during the lifetime of the spouse. The surviving spouse is the only person who can receive, use or have the benefit of, any income or capital of the trust during his or her lifetime. The spousal rollover will usually apply to a transfer of property to a spousal trust if all of the following requirements are satisfied: (a) the deceased spouse was resident in Canada prior to his or her death; (b) the trust is resident in Canada immediately after the property is transferred to it; and (c) the property so transferred vests indefeasibly in the spousal trust within 36 months after the death of the deceased spouse. This vesting period may be extended at the discretion of the Minister of National Revenue within the 36-month period.

A Tax Free Savings Account (TFSA), which offers tax-free growth of amounts held in the
account, can also be transferred on a tax-free basis to a surviving spouse.

**Attribution Rules**

As noted above, non-registered assets can be transferred from one spouse to another during their lifetimes outright on a tax-deferred basis without triggering tax on accrued capital gains. In this instance, however, the attribution rules will attribute any subsequent income or gain earned on the asset back to the transferring spouse. There are certain strategies though that can be used to avoid attribution in certain situations.

**Reduced Availability of Principal Residence Exemption**

If prior to marriage both spouses own a home and they continue to each own a home upon moving in together in one of the homes, there may be reduced availability of the exemption on both properties and taxable capital gains may potentially arise when the one property is eventually sold. The principal residence exemption is available only to one family unit if the taxpayer is designating a property as his or her principal residence for 1982 or any subsequent year, which includes, in addition to the taxpayer, the following persons (if any):

- The taxpayer’s spouse or common law partner throughout the year, unless the spouse or common-law partner was throughout the year living apart from, and was separated under a judicial separation or written separation agreement from, the taxpayer; and
- The taxpayer’s children, except those who were married, in a common-law partnership or 18 years of age or older during the year; and
- Where the taxpayer was not married, in a common-law partnership or 18 years of age or older during the year:
  - The taxpayer’s mother and father; and
  - The taxpayer’s brothers and sisters who were not married, in a common-law partnership or 18 years of age or older during the year.
CROSS-BORDER PLANNING FOR SPOUSES ON DEATH
Planning for Two U.S. Citizen Spouses resident in Canada: Outright Distribution

- U.S. marital deduction.
- Canadian spousal rollover:

Subsection 70(5) of the Income Tax Act (Canada) “Income Tax Act” provides in part:

(5) Where in a taxation year a taxpayer dies,
(a) the taxpayer shall be deemed to have, immediately before the taxpayer’s death, disposed of each capital property of the taxpayer and received proceeds of disposition therefor equal to the fair market value of the property immediately before the death;
(b) any person who as a consequence of the taxpayer’s death acquires any property that is deemed by paragraph 70(5)(a) to have been disposed of by the taxpayer shall be deemed to have acquired it at the time of the death at a cost equal to its fair market value immediately before the death;

Subsection 70(6) of the Income Tax Act states in part:

(6) Where any property of a taxpayer who was resident in Canada immediately before the taxpayer’s death that is a property to which subsection 70(5) would otherwise apply is, as a consequence of the death, transferred or distributed to
(a) the taxpayer’s spouse or common-law partner who was resident in Canada immediately before the taxpayer’s death, or
(b) a trust, created by the taxpayer’s will, that was resident in Canada immediately after the time the property vested indefeasibly in the trust and under which
(i) the taxpayer’s spouse or common-law partner is entitled to receive all of the income of the trust that arises before the spouse’s or common-law partner’s death, and
(ii) no person except the spouse or common-law partner may, before the spouse’s or common-law partner’s death, receive or otherwise obtain the use of any of the income or capital of the trust,
if it can be shown, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by
the taxpayer’s legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, that the property has become vested indefeasibly in the spouse or common-law partner or trust, as the case may be, the following rules apply:

(c) paragraphs 70(5)(a) and 70(5)(b) do not apply in respect of the property.
- U.S. marital deduction if marital trust.
- Canadian spousal rollover.
Credit Shelter Trust:
- Possible Canadian spousal rollover depending on terms:
  - Surviving spouse is entitled to receive all of the income of the trust that arises before his or her death, and no other person may receive or obtain the use of any income or capital of the trust before the death of the surviving spouse.
  - Alternatively, if children, remoter issue or other beneficiaries— income-splitting opportunities may be possible. No rollover available.

Canadian Resident Qualified Spouse Trust:
- U.S. marital deduction if QTIP Trust.
- Canadian spousal rollover if qualified spouse trust or outright distribution to spouse.
Canadian Resident U.S. Citizen Spouse with a non-U.S. Citizen Canadian Resident Spouse

- Canadian spousal rollover if outright distribution or transfer to a qualified spouse trust.
- Income splitting may be possible if trust used.
- Spouse credit under Canada / U.S. Treaty which approximately doubles U.S. citizen spouse’s U.S. excluded amount if outright distribution to spouse or if spouse trust qualifies for marital deduction.

3. In determining the estate tax imposed by the United States on an individual's estate with respect to property that passes to the surviving spouse of the individual (within the meaning of the law of the United States) and that would qualify for the estate tax marital deduction under the law of the United States if the surviving spouse were a citizen of the United States and all applicable elections were properly made (in this paragraph and in paragraph 4 referred to as "qualifying property"), a non-refundable credit computed in accordance with the provisions of paragraph 4 shall be allowed in addition to the unified credit allowed to the estate under paragraph 2 or under the law of the United States, provided that

(a) the individual was at the time of death a citizen of the United States.
States or a resident of either Contracting State;
(b) the surviving spouse was at the time of the individual's death a resident of either Contracting State;
(c) if both the individual and the surviving spouse were residents of the United States at the time of the individual's death, one or both was a citizen of Canada; and
(d) the executor of the decedent's estate elects the benefits of this paragraph and waives irrevocably the benefits of any estate tax marital deduction that would be allowed under the law of the United States on a United States Federal estate tax return filed for the individual's estate by the date on which a qualified domestic trust election could be made under the law of the United States.

4. The amount of the credit allowed under paragraph 3 shall equal the lesser of
   (a) the unified credit allowed under paragraph 2 or under the law of the United States (determined without regard to any credit allowed previously with respect to any gift made by the individual), and
   (b) the amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property.

The amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property shall equal the amount by which the estate tax (before allowable credits) that would be imposed by the United States if the qualifying property were included in computing the taxable estate exceeds the estate tax (before allowable credits) that would be so imposed if the qualifying property were not so included. Solely for purposes of determining other credits allowed under the law of the United States, the credit provided under paragraph 3 shall be allowed after such other credits.

- Deferral of U.S. estate tax if U.S. Qualified Domestic Trust ("QDOT") used but no spouse credit under Canada / U.S. Tax Treaty. Can be used where U.S. Citizen spouse’s estate exceeds the excluded amount plus the spouse credit to defer U.S. estate tax, including in addition to an outright distribution / qualified spouse trust.
- Outright or qualified spouse trust: spousal rollover and possible income splitting.
- Non-qualifying trust such as a family trust for spouse and issue: no rollover but income splitting.
- Spouse trust: need Canadian competent authority approval to treat trust as Canadian resident for spousal rollover purposes.
- U.S.: marital deduction.
Planning for Canadian Vacation Home and Spousal Rollover on Death

- A U.S. citizen, U.S. resident spouse on death can transfer Canadian vacation home outright to his/her U.S. resident spouse or to qualifying spouse trust by will and receive rollover treatment under Treaty to defer Canadian capital gains tax.

- A spouse trust must meet requirements for a qualifying spouse trust under subsection 70(6) of *Income Tax Act* (Canada) and must request Canadian competent authority to agree to treat it as if it were a Canadian resident spouse trust if it has U.S. trustees.
Cross-Border Issues for U.S. Spouses with Revocable Trusts

- Example: U.S. revocable living trusts for U.S. spouses moving to Canada or who own Canadian taxable property such as Canadian vacation homes, Canadian private company shares - problems occur
  - Canadian tax law treats trust as a separate taxpayer distinct from settlor unless a “bare trust”.
  - Potential accelerated and double taxation:
    - On transfer of Canadian taxable property to the trust.
    - During lifetime, pursuant to the 21-year rule.
    - On and after death (U.S. estate tax on death vs. Canadian capital gains tax on disposition from trust. “mix/match” issues re credits on death under Treaty).

- Revocable living trusts are popular in the U.S. as will substitutes, for reasons of privacy and to minimize probate fees on death.
- If central management and control of the trust is exercised from Canada, or if the settlor/trustee becomes a tax resident of Canada, the trust can acquire Canadian residency or deemed residency for tax purposes.
- For the purposes of Canadian tax law, a trust (including an *inter vivos* trust established during the settlor’s lifetime, such as a revocable living trust) is taxed separately from the settlor unless it is a “bare” trust. Various tax consequences can arise:
  - Generally, there is a deemed disposition of assets transferred from a Canadian resident settlor to a trust or by a non-resident of Canadian taxable property to a trust if there is any change in beneficial ownership.
  - Income, taxable capital gains and allowable capital losses from a revocable trust are attributed to a resident settlor: Income Tax Act, s. 75(2).
  - Generally, there is a deemed disposition of capital property and land inventory in a personal trust 21 years after the trust is created, and every 21 years thereafter.
- With regard to Treaty issues:
  - During the settlor’s lifetime, there can be various issues with a revocable living trust; for example, double taxation of assets sold after 21 years of the trust, without Treaty relief.
  - On and after death, if the settlor remains a Canadian resident, double
taxation occurs (U.S. estate tax on death and Canadian capital gains tax on disposition or deemed disposition of the assets from trust), for which there is no Treaty relief. The two tax amounts are paid by or on behalf of different taxable entities (the deceased vs. the trust) and possibly in different years. Article XXIX-B, “Taxes Imposed by Reason of Death”, does not apply.

- Moreover, the trust may not function effectively as a valid will substitute in Canada if it does not meet certain formal execution requirements for execution of a will since a “self-settled” trust depending on its terms may be invalid to dispose of property on death as an invalid testamentary disposition.
PART II:
PROPERTY RIGHTS ON
MARRIAGE BREAKDOWN AND
DEATH IN CANADA
Canada is comprised of ten provinces and three territories—all of which are common law jurisdictions except for Quebec, which is a civil law jurisdiction.

Generally, under the various Canadian family property statutes, two different models are used for dividing family property, being:

- the proprietary model; and
- the compensation model (see British Columbia Ministry of Attorney General “Division of Family Property” in Family Relations Act Review – Discussion Paper, February 2007.)

The proprietary model generally focuses on the specific property. It is stated to be more flexible, but does not offer as much certainty as the compensation model as to how a judge will divide family property in each case. For example, in some cases certain types of property may be excluded from division between the spouses under the statute even if the property was used for a family purpose, but a judge may be authorized to divide this property if it would be unfair not to do so. A judge may also order an unequal division of the family property if upon taking certain factors into account, it would be unfair to divide the property equally.

Canadian provinces and territories whose legislation adopt some form of a proprietary model include Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Saskatchewan and Yukon (see Appendix I).
Columbia, however, has recently moved more towards an “excluded property” model that involves less judicial discretion—in particular, at the initial stage when assets subject to division are identified.

- The compensation model, on the other hand, is stated to offer a more predictable outcome on a regular basis as judges are given less discretion and flexibility. Upon a marital breakdown under this model, it is the value of the property that has built up during the qualifying spousal relationship (and not the property itself) that is subject to division. Generally, the value of the property that the respective spouses brought into the relationship, as well as other statutorily circumscribed types of property received by either of them during the relationship (for example, gifts and inheritances) may be expressly excluded. This model seeks to compensate spouses equally for the wealth accumulated during the relationship. Provincial and territorial statutes using this model may permit a judge to order an unequal division in limited circumstances only.

- Canadian provinces and territories whose legislation adopt a form of compensation model for marital property division include Manitoba, Northwest Territories, Nunavut, Ontario and Prince Edward Island (see Appendix I).

- Quebec’s matrimonial property regimes are contained in the Civil Code of Quebec (the Code). Under the Code, matrimonial property is regulated either pursuant to the legal regime set out in the legislation or under a contractual regime which the spouses tailor to their own needs and wishes. Under the legislation, the matrimonial property regime is called a “partnership of acquests”, which categorizes assets as either private property or acquests. Upon marital breakdown, the net value of the accumulated acquests is calculated and divided equally between the spouses, subject to certain adjustments—resembling a form of compensation model as is used in the above noted common law provinces and territories. In addition to the partnership of acquests property, the Code also contains mandatory provisions relating to the division of a special category of assets known as “family patrimony”, the net value of which accumulated during the marriage is subject to an equal division on divorce, legal separation, annulment or death of one spouse regardless of the matrimonial regime chosen. (see J. Talpis. “Equitable Distribution of Matrimonial Property in Private International Law”. 26 Estates, Trusts & Pensions Journal, 332 (2006) at pp. 71-72).
Ontario Family Law Act sets out formula for equalizing family property between married spouses on marriage breakdown or death
Value of assets owned at date of marriage (net of liabilities) subtracted from value of assets (net of liabilities) on termination of marriage for each spouse
“Net family properties” equalized by way of an equalization payment
Special treatment for gifts, inheritances and matrimonial home and certain other assets

- Applicable legislation is the Ontario Family Law Act, R.S.O. 1990, C. F.3, the primary objective of which is to recognize marriage as an equal economic partnership, and where a marriage is terminated, whether on marriage breakdown or death, to provide for an equal division of property acquired during the marriage.

- The Act sets out a formula for equalizing family property between married persons on marriage breakdown or death for the first spouse to die, as well as other matters.

- To equalize family property, each spouse’s assets are valued, net of liabilities, on termination of the marriage. From this amount, the value of all assets owned at the date of the marriage, net of liabilities, is subtracted (except a matrimonial home if it is owned by one or both spouses at the date of the marriage and is also owned on the termination of the marriage) in order to arrive at each spouse’s “net family property”.

- The spouse with the smaller “net family property” is entitled to make a claim against the other spouse with the larger “net family property” value, or on death of the first spouse to die, against the deceased spouse’s estate, for one-half of the difference between the two values.

- Certain assets do not have to be included in calculating each spouse’s property for equalization purposes, most significantly, gifts and inheritances received from any person (other than his or her spouse) after the date of the marriage; income from such gifts and inheritances if the person who has made the gift or bequest has stated...
in writing that the income is to be excluded; life insurance proceeds; any property
(other than the matrimonial home) whose acquisition can be traced as originating
from these assets; and any property excluded by the spouses’ domestic contract.

- The post-marriage increase in value of gifts and inheritances and income arising from
gifts or inheritances which have been received prior to the date of the marriage is
included in the calculation of the value of each spouse’s assets for equalization
purposes, unless a domestic contract excludes it. Under the Act, the capital value of
gifts and inheritances received during marriage is excluded in the equalization
calculation (unless this exclusion is lost), and as well the increase in value of gifts or
inheritances received during marriage and the income arising from such gifts or
inheritances, if the person who has made the gift has stipulated that the gains and
income is to be excluded in a deed of gift or in his or her will, is excluded. For this
reason, it is common practice in Ontario for wills to include a special clause for this
purpose.

- A matrimonial home receives special treatment under the Act. There can be more
than one matrimonial home and may include a primary residence as well as cottages
and other properties if occupied by the spouses or by a spouse and their children as
a family residence and at least one of the spouses has an “interest” in the property.
The value of the interest in a matrimonial home (not the property itself), net of
liabilities, is subject to equalization.

- If a gift or inheritance received during marriage is used to purchase a matrimonial
home, or make improvements to, or pay down a mortgage on, a matrimonial home,
the gift or inheritance loses its exclusion and must be included in equalizing family
property.
**Statutory Property Division on Marital Breakdown in Canada**

- Property law falls under provincial and territorial jurisdiction
- All provinces and territories have some scheme of statutory property division for legally married spouses
- Some provinces extend the claim to non-married cohabiting spouses, but the statutory requirements to fit within the definition of “spouse” will vary between Canadian jurisdictions

- Property law in Canada falls under the jurisdiction of the provinces and the territories. As a result, the availability and scheme of statutory claims by spouses upon marital breakdown varies throughout Canada. Generally, some form of property division regime is available to married spouses upon marital breakdown in all Canadian jurisdictions (see Appendix I). Alberta, New Brunswick, Ontario, Prince Edward Island and the Yukon all limit statutory property division claims on marital breakdown to married spouses only.

- In some cases—as is the situation in British Columbia, Northwest Territories, Nunavut and Saskatchewan—this statutory claim has been extended to non-married cohabiting partners who meet the specific requirements of the legislation. For example, in Saskatchewan, non-married cohabiting couples must have been cohabiting with one another as spouses continuously for a period of not less than two years in order to fit within the definition of spouse under the statute. In Quebec, on the other hand, the statutory claims are only extended to non-married partners who have entered into a civil union.

- Manitoba legislation, by comparison, permits legally married spouses as well as non-married cohabiting spouses who have (a) registered a common-law relationship under s. 13(1) of the *Vital Statistics Act*, or (b) who have cohabited in a conjugal relationship for a period of at least three years, to bring an application for property division on marital breakdown.

- In Nova Scotia, only legally married spouses and non-married cohabiting spouses
who have filed a domestic partner declaration under that province’s *Vital Statistics Act* may apply for a statutory division of property on marital breakdown. Despite the definition of “spouse” in s. 2 of Nova Scotia’s *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 still referring to “either of a man and woman who...are married to each other...”, Nova Scotia counsel advises that lawyers in the province proceed on the assumptions that all legally married persons are treated the same under the Act and that a judge would interpret the wording broadly so as to include same-sex married spouses.

- The only way non-married cohabiting partners can access statutory property division rights in Newfoundland and Labrador is through entering into a cohabitation agreement which expressly adopts the statutory provisions. While this could be done in any of the provinces and territories that limit such claims to married spouses only through a domestic contract, Newfoundland and Labrador is the only Canadian jurisdiction to expressly contemplate adopting the statutory provisions in its statute.
As noted earlier, property law falls under the authority of the Canadian provinces and territories. Again, the availability and scheme of statutory property division claims by surviving spouses upon the death of a spouse vary throughout Canada (see Appendix I). In contrast to the situation on divorce in which all Canadian jurisdictions extend statutory property division rights to legally married spouses upon marital breakdown, such a claim does not exist on death in some provinces and territories. Currently, in British Columbia, Prince Edward Island and the Yukon, death does not trigger a statutory property claim for the surviving spouse. For the time being, it is also the case in Alberta that death is generally not a triggering event for a statutory property division claim by a surviving spouse—a surviving spouse may only commence a claim on the death of a spouse if it could have been commenced immediately prior to the other spouse’s death. Under pending amendments to the Matrimonial Property Act, R.S.A. 2000, c. M-8 which are contained in the Wills and Succession Act, S.A. 2010, c. W-12.2, death will be a triggering event for a marital property claim, but for legally married spouses. There is currently no indication as to when these amendments may be proclaimed into force as the Government of Alberta deferred its proclamation to review feedback from the technical discussion held with wills, estate and family law practitioners in the province and the results of an online questionnaire. The government is currently conducting additional research to explore some of the issues raised in the consultation process.

In New Brunswick, Newfoundland and Labrador and Ontario, statutory property division claims on the death of a spouse are available to legally married surviving spouses only. Somewhat similarly in Quebec, statutory division of property claims on the death of the first spouse are only available to legally married surviving spouses and the survivor of those
couples who have entered into a civil union.

- In other provinces and territories consisting of Northwest Territories, Nunavut and Saskatchewan, the statutory claim to property division on death has been extended to non-married cohabiting partners who meet the specific requirements of the legislation. For example, in Nunavut, non-married cohabiting spouses must have lived together in a conjugal relationship outside marriage (a) for a period of at least two years or (b) the relationship is one of some permanence and they are together the natural or adoptive parents of a child (Family Law Act, S.N.W.T. (Nunavut) 1997, c. 18, s. 1(1)).

- In Nova Scotia, legally married spouses and non-married cohabiting spouses who have filed a domestic partner declaration under that province’s Vital Statistics Act may apply for a statutory division of property on death of the other spouse (see the discussion in the previous section regarding the definition of “spouse” in the Nova Scotia legislation).

- In Manitoba, legally married spouses as well as non-married, cohabiting spouses who have (a) registered a common-law relationship under s. 13(1) of The Vital Statistics Act of Manitoba, or (b) who have cohabited in a conjugal relationship for a period of at least three years, may bring an application for property division on the death of the other spouse.

- As is the case on marital breakdown, in Newfoundland and Labrador the only way non-married cohabiting partners can access statutory property division rights on death is through entering into a cohabitation agreement which expressly adopts the statutory provisions. Again, while this could be done in any of the provinces and territories that limit such claims to married spouses only through a domestic contract, Newfoundland and Labrador is the only Canadian jurisdiction to expressly contemplate adopting the statutory provisions in its statute.
Equitable Claims to Family Property on Marital Breakdown or Death

- Equitable claims may be available to both married spouses and common-law spouses with respect to family property division on marital breakdown or death, such as claims under the doctrine of unjust enrichment.

- Remedies may include:
  - Proprietary remedies (e.g., constructive trusts)
  - Monetary awards (e.g., quantum meruit)

- In addition to the various provincial statutory claims reviewed above, both married spouses and unmarried common-law spouses may have possible common law claims on marital breakdown against each other’s property or on death against the deceased spouse’s property under other legal principles to ensure fairness, such as under the legal doctrine of unjust enrichment, which may result in common law remedies including a monetary claim or requesting a court grant relief by imposing a “constructive trust” over property in their favour.

- In Walsh v. Bona, [2002] S.C.J. No. 84, the Supreme Court of Canada held that Nova Scotia’s Matrimonial Property Act was not unconstitutional because it created special family property rights for married spouses while excluding such rights from unmarried opposite sex couples. The Court appeared to focus on the “choice” made by unmarried couples to remain unmarried.


- According to recent commentary analyzing the case law in the Annual Review of Family Law (Carswell, 2012) at p. 725, Alfred A. Mamo writes:

  “Judges purport to apply the same legal principles to married and unmarried couples to decide if one person has been unjustly enriched by the efforts of another. However, it seems to be clear that they apply different standards to married and unmarried couples to decide whether a person has provided sufficient benefits and services to his or her partner that there would be an unjust enrichment if the recipient did not account in some way for the benefits received. Although judges routinely find an
unjust enrichment arising out of home and childcare contributions between unmarried couples, they are reluctant to do so between married couples.”