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SHARING FAMILY PROPERTY

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Until 1978, spouses had no right anywhere in Canada to claim, by virtue of their marital status, a share of any property accumulated during their marriage. It is a measure of the vast changes in the law of family property that there is now no place in Canada where a married person cannot claim a fair share of the family's assets.

There is no federal property law that applies across Canada; by constitutional law, property is a matter for provincial jurisdiction. All provinces and territories have laws that require spouses to share assets when a marriage breaks down, but the rules differ in every jurisdiction and can be complex to interpret. It is not possible to say simplistically that "everything is 50/50."

In fact, not all assets are shared in every jurisdiction; nor is every asset split equally. Sharing can mean getting title to a share of the assets, or it can mean a payment representing a share of the value. The treatment of the matrimonial home differs depending on where the spouses made their home. Legislation may mandate various exclusions and deductions from sharing. The authority of judges to exercise their discretion to vary legislated divisions also differs. However, the general direction of the law seems to be to share the family wealth, and the onus is usually on those who do not want to share equally to bring their situation within the exceptions permitted by a province's legislation.

Generally, title governs ownership throughout Canada during marriage, and rights to share in property in the other spouse's name do not arise until separation, when the provincial and territorial laws come into play. Some of these laws permit a judge to take individual factors into account, such as the length of the marriage, the duration of separation, a spouse's contribution to assets in the other spouse's name, the contribution of each spouse to the marriage and welfare of the family, including as homemaker or parent, and any dissipation of assets by one of the spouses.

If all the assets are in joint names, each spouse has the rights of any titled owner of property. However, since one of the spouses usually has title to a greater share of the assets, the other spouse must make a legal claim to have a chance at receiving a share of the titled spouse's assets or a share of their value on separation. Negotiations often resolve matters, and the parties sign a separation agreement. However, if agreement cannot be reached, the claim must proceed through litigation, relying on the matrimonial property law in the jurisdiction where the spouses reside.

The laws in most jurisdictions allow for extensive sharing of assets on separation. In general, the value of all assets, whether used for family or for business purposes, is shareable upon separation, subject to various deductions by each spouse: the value of property owned at the date of marriage, the value of property acquired by gift or inheritance, a damage award for personal injury and payments under a life insurance policy. Some jurisdictions limit sharing to family assets. However, what constitutes family assets in these jurisdictions varies. These jurisdictions begin with the premise that only those assets used and enjoyed by the family are shared, such as the family home, cottage, cars, and that the court has a discretion to also require that business and other assets also be shared, especially where the non-titled spouse made a direct or indirect contribution to its acquisition. Quebec for example, specifies pensions as family assets.

How these assets will be shared depends on the court, which means that entitlement is less certain and predictable. In 1994, for example, the B.C. Court of Appeal overturned a trial judge's decision that awarded a traditional wife and mother in her forties, after a 17-year marriage and three children, a standard 50 percent share of the couple's main asset—the matrimonial home. The husband, a letter carrier, lost his job, defaulted in his modest child support payments and then cashed in his pension and kept all the proceeds for himself. The Court of Appeal upheld the trial decision that the home could not be sold until the children had moved out (the youngest was then eight) and gave the wife a 75 percent interest in it. In doing so, the Court acknowledged that, without the wife's contribution of her inheritances during the marriage, totalling $97,000, the couple would not even have this asset.

Even in jurisdictions with the most restrictive sharing of assets on separation, where normally little discretion is allowed in defining the family assets to be shared, a court may exempt from sharing property owned at the date of marriage, or property acquired by one spouse as a gift from the other spouse or a third party, or damage awards from personal injuries, proceeds of life insurance and personal effects. It is best for spouses who are separating to get legal advice on how the law in their jurisdiction applies the sharing of assets and their value. What is certain is that there is no *automatic* "50/50 sharing" as some people assume so it is essential to get legal advice tailored to an individual's own situation.

Whether or not spouses have their name on title to the assets and depending on the jurisdiction, sharing is accomplished either by dividing the assets themselves or a share of the proceeds from their sale, or by sharing the value of the assets.