

What Is a Cohabitation Agreement and Do you Need It?

A Cohabitation Agreement is a contract made between a married or unmarried couple who live or want to live together and want to protect their individual interests while determining each person's rights and responsibilities, should the relationship end in the future. This article explains the types and features of Cohabitation Agreements and provides considerations to determine if you need one.

The information given here is general in nature. Due to provincial differences and on-going changes, it is advisable that you seek professional legal advice to assist you in preparing your Cohabitation Agreement.

Types of Agreements

In Canada, there are two main types of Cohabitation Agreements:

1. **Separation Agreements** which arise from the breakdown of a relationship; and
2. **Cohabitation Agreements** prepared in contemplation of cohabitation and specifies the rights and responsibilities that the spouse or common-law partners have to one another while in the relationship. Importantly, the Cohabitation Agreement also addresses the rights and responsibilities the spouses have to one another where the relationship ends due to separation, annulment, dissolution of the marriage, or death. Depending on the jurisdiction, these may be called Marriage Contracts, Marriage Agreements, Spousal Agreements, Domestic Contracts, Domestic Partnerships, or Cohabitation Agreements. In this article, the term "Cohabitation Agreement" will be used.

While many Cohabitation Agreements are signed before spouses move in together or marry, it is not technically a requirement at law.

Cohabitation Agreements can be signed at any time:

- **Pre (or ante) Nuptial Agreements** are created in advance of the marriage or cohabitation. Some only take effect in the event of marriage while other agreements are entered into prior to marriage and continue in effect whether the parties are common-law or married.
- **Post-Nuptial Agreements** are created after the spouses have already begun to cohabit or are already married.

Classification of your relationship

When determining whether or not you need a Cohabitation Agreement, it is first important to understand how to classify your relationship; or, whether some type of agreement will be necessary to accurately define your relationship. There are five types of legally defined relationships in Canada.

- **Married spouses:** Marriage is available to all Canadians who voluntarily enter into it (and have capacity to do so). It is defined, in the Civil Marriage Act as, "the lawful union of two persons to the exclusion of all others." Marriage creates certain rights and obligations. In many, but not all provinces, the rights of those who formally marry are greater than those who live in a common-law relationship.
- **Common-law spouse:** Many provinces recognize common-law couples as spouses following some prescribed duration of cohabitation or the birth of a child. In Quebec, this is called a "de-facto union" and no property rights arise.¹

- **Civil union and domestic partnerships:** In Quebec, where there is no formal recognition of a common-law relationship, a couple can enter a legislated form of civil union. In Nova Scotia, a Domestic Partnership can be registered such that the spouses gain some of the provincial rights otherwise reserved for married couples (including pension benefits or property divisions rights at separation or death).
- **Adult interdependent relationship:** Alberta allows for an “adult interdependent relationship” where friends, relatives or a couple who live together in mutual financial dependency may create financial and property obligations.
- **Spouses for the purpose of the Income Tax Act:** Spouses can simply be identified as spouse for the purpose of filing under the Income Tax Act. This status can be achieved through marriage, through one year of living in a conjugal relationship, or a shorter period if the spouses have a baby or adopt a child.

In preparing a Cohabitation Agreement, it is important to understand which definition(s) of spouse apply to your relationship.

In law for example, you may cohabit with a common-law spouse while being separated from your previous spouse from marriage, without being formally divorced.

Is a Cohabitation Agreement right for you?

Cohabitation Agreements are recommended in a number of scenarios where one or more of the spouses or common-law partners wishes to mitigate risk due to the following:

- Unequal present and/or future income earning potential;
 - Unequal present or future net worth or debt levels;
 - Protection of a gift or loan from parents/family to facilitate a house purchase that is going to be held jointly by the spouses;
 - Protection of inheritance, lawsuit proceeds, or an interest in a discretionary trust and/or the growth on those assets;
 - Caution arising from a prior divorce or relationship breakdown; and/or
- Intention to limit estate claims so that assets are preserved for specific beneficiaries. This is common in blended families where assets are not in joint name and the intention is for each spouse to benefit their own biological children at death.

Contents of the Cohabitation Agreement

Property division and spousal support

The contents of a Cohabitation Agreement will typically focus on property division and spousal support obligations if the relationship is terminated for any reason, including death. In most provinces, property and debt acquired during the course of the relationship is divided equally between married spouses. In British Columbia, common-law spouses who have cohabited for two years have the same property rights as married spouses, but this level of protection does not exist for common-law spouses in Ontario. Certain types of property may be excluded from division, although that protection can be lost when assets are made joint. Equally, the value of the assets on the date of cohabitation may be excluded but the growth on that asset may be divisible between both spouses. Generally, spousal support is available to married and common-law spouses after a specified period of cohabitation. It is important to note that Quebec is subject to civil law and property rights only apply to spouses who have married or entered into a civil union. A marriage contract must be signed before a notary and can be entered before or after the solemnization of the marriage.

Property rights and spousal support obligations vary by province and by country. If a couple moves to a different province or country, they should not assume that the legal obligations around property rights, spousal support or child support will remain the same. If a couple moves to a different jurisdiction, it is likely that an existing Agreement should be reviewed. Alternately, an Agreement may not be required in one jurisdiction but may become necessary in a new jurisdiction. Meeting with a qualified legal professional in the province or jurisdiction in which you reside to obtain advice on your unique situation is highly recommended.

Cohabitation Agreements might also discuss:

- The equity and/or growth in a family home (also called a matrimonial home in some provinces).

- The equity and/or growth of a family cottage or a share in the family cottage or recreational property.
- The equity or growth in an RRSP, RRIF, Pension or other account; and/or obligations to name a specific beneficiary.
- The equity and/or growth of business interests; and/or acquisition of a future business interest.
- The equity and/or growth in property acquired prior to the start of the relationship.
- Early inheritance, gifts from family members, or proceeds from a lawsuit both prior to and after cohabitation.
- Interests in a Family trust or other Inter-Vivos trust, whether or not such trust was settled prior to or during the relationship.
- Treatment of the growth on any assets for which an exemption is sought.
- Pre-determined spousal support obligations, including quantum and duration, particularly where one party has significantly higher earnings or where one spouse is going to exit the workforce to provide care-giving duties to children or aging parents.
- Obligations or limitations on obligations to financially support a spouse during incapacity (more common in second relationships).
- Education and moral training of children of the marriage.

It should be noted that missing from the list are obligations of child support and parenting time. For children of the relationship, child support will be governed by the legislation in place at the time of the relationship demise. Some Agreements will address or seek to indemnify someone who stands in the place of a parent to step children.

The grey area: couples who live together and apart

In some circumstances, a couple may also wish to agree that they are not spouses and no assets will be divided in the event of dissolution of the relationship or death. This is most common when a couple maintains separate residences but spend weekends together or take vacations together. Living separately while in a relationship is not determinative of whether the couple will be considered spouses under applicable provincial Family Law or Estate Law, such that property rights, spousal support or child support might arise.

This couple may wish for an Agreement confirming they are not spouses and intend to keep their finances separate during life and after death. It may also confirm that if they are subsequently found to be spouses, they also intend to keep their finances separate.

Fairness

If challenged, a Cohabitation Agreement is more likely to withstand Court scrutiny where both spouses provide full disclosure of their finances, have the benefit of independent legal counsel and the terms of the Agreement represent a true negotiation. However, a Cohabitation Agreement might be found to be unfair or set aside by a Court where:

- Assets were hidden or values were misrepresented;
- Bargaining power was unequal due to economic standing, education levels or sophistication;
- One spouse was unrepresented or did not have access to an independent lawyer; or
- Coercion was exerted to get the Agreement signed – for example, a parent who threatens to disinherit one of the spouses unless a Cohabitation Agreement is signed or there is a threat of calling off the wedding.

As a general rule, the more a Cohabitation Agreement deviates from the objectives or anticipated outcomes of the provincial Family Law legislation and/or the Divorce Act, the less fair it may be seen in the eyes of the Courts, if subsequently challenged. The Court must balance this against the rights of private parties (spouses) to manage their financial risks and obligations towards one another in the event a relationship dissolves or one spouse dies.

Conclusion

Spouses are able to arrange their affairs as they see fit. The Court is unlikely to interfere if the process by which the Agreement was negotiated was fair and if the substantive result for both spouses was fair. Cohabitation Agreements should be revisited from time to time to ensure that life events like changes of employment, the birth of a child, time away from the workplace, inheritance, Inter-Vivos gifts, or proceeds of a court action are appropriately reflected in the Cohabitation Agreement.

Many couples incorrectly assume that by maintaining a separate residence, they are not considered to be in a

common-law relationship. Recent decisions made by the Court open the door to claims by partners who do not live in a shared residence but maintain a committed long-term and conjugal relationship.² This may result in additional claims during life or against an estate by a spouse.

In all such circumstances, it is prudent to seek independent legal advice from a Family Law lawyer.

For more information regarding Cohabitation Agreements, please speak with your BMO financial professional.



¹That is, common-law couples in Quebec do not have legal obligations towards one another or the right to each other's property unless they own the property jointly.

²Climans v. Latner, (2020) ONCA, 152 OR (3d) 369

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