MDW LAW

LIANS SOLO AND SMALL FIRM CONFERENCE

Family Law: Practical Pitfalls in Property Division and Cohabitation Agreements

50/50
…unless it isn't.

A Nova Scotia practitioner's guide to avoiding costly mistakes

Roadmap for the Next 45 Minutes

Timings are approximate.

1 — 8 min
NS property framework

2 — 6 min
Pension division

3 — 4 min
Valuation dates

4 — 6 min
Business assets

5 — 5 min
Tax and netting

6 — 9 min
Marriage contracts and cohabitation agreements

7 — 3 min
Takeaways and checklist

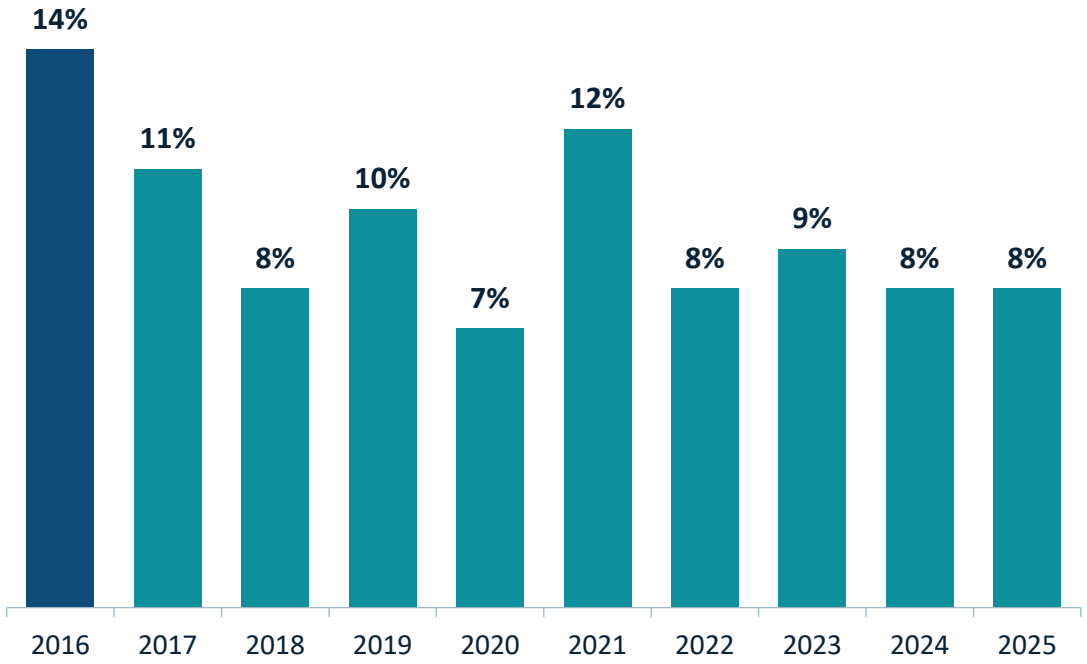
? — 4 min
Questions

WHY THIS MATTERS

Family Law Claims Against LIANS

Matrimonial and family share of all claims, 2016 to 2025

About 1 in 10 claims comes from a family file. Real estate is still #1 (41% in 2025).



Source: LIANS Annual Report 2025, Program Report, "Percentage of Claims by Area of Law: 2016-2025"

BOTTOM LINE

family files are a steady 7% to 14% of claims.

SECTION 01

Nova Scotia's Property Division Framework

01

Equal sharing, unless it isn't.

Matrimonial Property Act: The Essentials

The rules behind every NS property file

s. 12 says 'equal'. s. 13 says 'unless'. Your client hears only the part they like.

- s. 12: Split matrimonial assets equally, no matter whose name is on title
- s. 4: Includes property owned before the marriage, subject to listed exceptions (next slides)
- s. 13: Court can divide unequally, and can even divide property that is not a matrimonial asset, such as business assets
- s. 18: A spouse who helped the other's business can be compensated
- No automatic credit for what a spouse brought in (unlike Ontario)

BOTTOM LINE

Start from 50/50. No credit for what you brought in.

Section 4(1): What Is a Matrimonial Asset?

All property acquired before or during the marriage, except:

- (a) Gifts, inheritances, or trusts from third parties, unless used for both spouses or the children
- (b) Court damages awards or settlements to one spouse
- (c) Insurance money paid to one spouse
- (d) Reasonable personal effects
- (e) Business assets
- (f) Property exempted by a marriage contract or separation agreement
- (g) Property acquired after separation, unless the spouses resume cohabitation

Inheritance spent on the family home? To that extent it is no longer excluded (s. 4(1)(a)).

BOTTOM LINE

everything is in, unless it fits an exception.

Sections 4(2) to 4(4): The Fine Print

Three rules that pull assets back in

Ask: what does the company own, and who actually uses it?

- s. 4(2): Damages or insurance paid for a matrimonial asset (e.g., fire insurance on the home) is still a matrimonial asset
- s. 4(3): Living together again for up to 90 days in total, mainly to reconcile, does not count as resuming cohabitation
- s. 4(4): If a company owns property that would be a matrimonial asset if the spouse owned it personally, the spouse's shares are a matrimonial asset, up to the value of the spouse's benefit in that property
- Example: A holdco owns the family cottage. The spouse's shares are divisible to the extent of the cottage benefit

BOTTOM LINE

Putting the cottage in a company doesn't take it off the table.

Married Spouses vs. Cohabiting Partners in NS

Same house, same dog, very different legal regimes

Issue	Married spouses	Unmarried cohabitants
Property regime	Matrimonial Property Act: equal division of matrimonial assets	No MPA rights (Walsh v. Bona, 2002 SCC 83)
Opt-in route	Automatic on marriage	Registered domestic partnership (Vital Statistics Act) brings in MPA rights
Remedies if no opt-in	N/A	Unjust enrichment, joint family venture, resulting/constructive trust (Kerr v. Baranow, 2011 SCC 10)
Spousal support	Divorce Act or Parenting and Support Act	Parenting and Support Act (common-law partner definition)
Domestic contract	Marriage contract (MPA s. 23)	Cohabitation agreement (contract law, plus the court's discretion)

Section 13: Asking for an Unequal Division

Often argued, rarely proven

"It just feels unfair, Justice" is not evidence.

- s. 13: the court "may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset" where an equal division would be "unfair or unconscionable"
- So business assets and other excluded property can be divided too
- The spouse asking must prove it; the bar is high (Wolfson, 2023 NSCA 57: award cut from $4.48M to $1.5M)
- Common uses: short relationships, pre-owned assets, pre-relationship pensions, kept-separate inheritances (Whitman, 2023 NSSC 234: 75/25)

BOTTOM LINE

Plead it early and prove it with numbers.

Debts: Who Has to Prove What

Debt fights are lost on evidence, not law

'Mom lent us $50,000.' Eight years, no note, no payments. Gift or loan?

- Debts reduce a spouse's share and are a s. 13 factor
- The spouse relying on a debt must prove: it exists, its amount, and that it was for the family
- Red flag: undocumented “loans” from parents (S.M. v. Y.M., 2024 NSSC 410: $68,000 held a gift)
- Also watch: post-separation debts, business guarantees, tax arrears

BOTTOM LINE
no documents, no debt.

Conflict of Laws: Which Province's Rules Apply?

MPA s. 22: where did the couple last live together?

Moved from Ontario? Ontario's regime may govern their movables. Land abroad: use an equalizing payment (S.M. v. Y.M., 2024 NSSC 410).

- s. 22(1): Division of matrimonial assets and ownership of movables, wherever located, follow the law of the spouses' last common habitual residence; if none, NS law
  - Habitual residence: where the couple actually lived together as their settled, ordinary home. A question of fact, not citizenship or future plans
  - Last common: the last place they both lived that way. If one spouse moved to NS first, look back to where they last lived together
- s. 22(2): Ownership of land follows the law of where the land is
- s. 22(3): If NS law governs, the value of land anywhere can still be counted
- Do you need evidence of law in jurisdiction – Proof of Foreign Law Rules 54.03 (provincial) 54.04 (international)

BOTTOM LINE
ask “where was their last shared home?” before you calculate.



SECTION 02

Pension Division

02

Pre-relationship pension service is still on the table.

PENSIONS

NS Rule: Pre-Cohabitation Pension Counts

Clarke v. Clarke, [1990] 2 SCR 795 (on appeal from Nova Scotia)

- The whole pension is a matrimonial asset, including service before the relationship
- Often one of the largest assets at play
- To exclude the earlier portion, argue unequal division under s. 13 (Cox, 2024 NSCA 34)
- The plan's own rules control how the division is carried out
- Often have to crystallize value of pre-cohab portion and offset against other assets
- Can be a strong negotiating point

BOTTOM LINE

Don't prorate by habit. Value the whole pension.

PENSIONS

Valuing Pensions

Instruct the actuary in writing to split the value, or you may get only the relationship-period figure.

- Typically need to value pensions if there is a pre-cohab portion
- Also value the pension if not dividing at source
- HIRE AN EXPERT
- Write down the key dates: service start, cohabitation, marriage, separation
- Ask the actuary, in writing, for a split value: total, pre-relationship, and relationship portions
- Use the split figures to set your s. 13 position and settlement range
- Confirm early that the plan can actually do the division you draft (Hartlen, 2021 NSSC 223; Todd, 2025 NSCA 30)
- Get actual language to include in an agreement or court order from the plan provider

BOTTOM LINE

no separate number, no s. 13 argument.



SECTION 03

Valuation Dates

03

The date you choose can move the number.

VALUATION DATES

Simmons v. Simmons: The Six Principles

[2001] N.S.J. No. 276. The MPA sets no valuation date; Simmons fills the gap

Some assets are valued at separation, some at division. Simmons tells you which.

- 1. Assets acquired after separation are typically exempt (unless pre-separation funds used)
- 2. The asset or debt must have existed at separation (exception: changes made to separate finances, e.g., a consolidation loan)
- 3. If the asset no longer exists, use its separation-date value (exception: it was liquidated for a mutually beneficial purpose)
- 4. Both spouses should be equally affected by inevitable post-separation delay
- 5. Both accept that delay and its consequences, unless one spouse impoverished the assets
- 6. Valuation is an imprecise science; it will not be exact

VALUATION DATES

Simmons in Practice: Which Date Applies?

DOS = date of separation; DOD = date of division

Agree the date for each asset in writing early, or plead your position clearly.

- Real property and mortgages: DOD
- RRSPs: DOD, with post-separation contributions backed out
- Pensions: DOS, because later growth comes from post-separation contributions or service
- Vehicles: DOS, because one spouse has generally “consumed” the asset since separation
- See also Kadaner, 2024 NSSC 350: real property generally valued at trial

BOTTOM LINE

the house at division; the pension and the car at separation.

VALUATION DATES

When Values Move Between Separation and Trial

- At separation: portfolio $400k; cottage $300k
- At trial: portfolio $300k; cottage $420k
- Pat kept the portfolio; Lee had the cottage
- Simmons: both share the effect of delay, unless one spouse impoverished the asset
- Ask: was the change market-driven, or caused by one spouse?

Update your Statement of Property

BOTTOM LINE

the date you pick decides who gets the gain or loss.

Valuation Dates: Protecting Your Client

- Get separation-date values for every asset now
- Take care in preparing your client's Statement of Property
  - Include date of separation balances
  - Identify assets to be excluded – use footnotes if needed
  - Include air miles, accounts receivable, double check insurance policies for CSV
  - Advise clients to open new accounts post-separation for RESPs, RRSPs, investments, etc.
  - Value vehicles immediately – get quick appraisals (saves time)
  - Consider if real property needs to be appraised or agreed value
- Update real property appraisals and mortgage balances before settlement and trial
- Track post-separation RRSP contributions so they can be backed out
- Document any post-separation loss caused by the other spouse (Simmons exception)
- If you are making an unequal division claim, also get value at date of cohab

SECTION 04

Business Assets

04

Family savings or business capital?

What Counts as a Business Asset?

- MPA s. 2(a): property “primarily used or held” for a commercial, business, investment, or other income- or profit-producing purpose
- Case law narrows it: the asset must generate income “in an entrepreneurial sense” (Clarke; Tibbetts, 1992 NSCA 17)
- Entrepreneur: in effective control of a commercial undertaking, with a chance of profit or loss (Tibbetts)
- One primary purpose only: business or matrimonial, never a hybrid (Wolfson, 2023 NSCA 57)

Earning income is not enough. Is the spouse actually taking entrepreneurial risk?

BOTTOM LINE

truly entrepreneurial, or it's in the pot.

BUSINESS ASSETS

Usually Excluded vs. Often Divided

Look at what the asset does, not what it is called

A holdco full of retained earnings looks a lot like a savings account.

- Usually excluded: an operating business the spouse controls and runs at risk (Calder, 2022 NSSC 146: shares bought before marriage, owner alone took the risk, no matrimonial funds)
- Often excluded: property genuinely run as a rental (Wintrup v. Adams, 2023 NSCA 19)
- Often divided: stocks, bonds, or mutual funds bought from employment earnings; holding a portfolio is not running a business (Tibbetts)
- Often divided: professional corporations and holdcos where retained earnings are really the family's savings or retirement fund

BOTTOM LINE

retirement savings in a corporate wrapper are still savings.

Valuing the Business: Get a CBV

You may need a formal business valuation

Ask your valuator to explain each assumption; judges tend to prefer the expert who does.

- Retain a Chartered Business Valuator for any business or holdco of real value
- Consider valuation date – can have a huge impact
- Avoid double dipping – if you divide retained earnings as property, don't also include as income for that time period
- If the business asset is likely to be excluded, consider whether there is a claim under section 13, section 18
- If heading to trial or discovery, your expert can be the quarterback around developing effective cross-examination

BOTTOM LINE

no valuation, no number; no number, no negotiation.

BUSINESS ASSETS

Excluded Isn't the End: Sections 13 and 18

Two routes to a share of a business asset

- s. 13: the court can divide a business asset where an equal division of matrimonial assets would be unfair or unconscionable
- s. 13 is not wealth redistribution: it moves the division only into the fair range (Wolfson: $1.5M)
- No unequal division where matrimonial assets were double the business assets and nothing was impoverished (Calder)
- s. 18: compensation or a share for a spouse who contributed work or money (F.C. v. S.C., [2025] N.S.J. No. 671: 15%) – evidence to quantify
- s. 18 fails if the spouse was already paid, e.g., through dividends (Wolfson); the contribution must be significant (Archibald, 1981)
- If cannot access the business assets through section 13, or 18 – focus on spousal support and guideline income determination

BOTTOM LINE

excluded is not the same as untouchable.

SECTION 05

Tax Calculations and Netting of Assets

A dollar in an RRSP is not a dollar in your pocket.

Tax-Affecting: After-Tax Apples to Apples

Illustrative only: assumed 30% marginal rate on withdrawal

Asset	Face value	Tax on realization	After-tax value
RRSP (Spouse A keeps)	$200,000	About $60,000 on withdrawal	About $140,000
Principal residence (Spouse B keeps)	$200,000	Generally nil (principal residence exemption)	About $200,000 (less selling costs if sale is likely)
Non-registered stocks	$200,000	Capital gains tax on accrued gain	Depends on adjusted cost base –consult with accountant
Holdco shares	$200,000	Tax on extracting corporate surplus	Consult with accountant - expert evidence needed

KEY POINT **The 'equal' split that gives one spouse the RRSP and the other the house can be a $60,000 mistake.**

TAX & NETTING

Netting Assets After Tax in NS

- Courts deduct tax and selling costs on real estate
  - Don’t’ forget mortgage penalties
  - Don’t forget capital gains on cottages, rentals (only primary residence is exempt)
- Only deduct real or likely costs (Brunt, 2025 NSCA 19: no commission on a private sale)
- RRSPs can roll over between spouses tax-free (ITA ss. 146(16), 73)
- Often disagreement on appropriate tax rate to apply on corporate assets – get advice
- If dividing business assets get advice EARLY from an accountant and lawyer on best strategy to employ – butterfly transactions, other options
- Account for tax implications on pension division if off-setting

SECTION 06

Marriage Contracts and Cohabitation Agreements

Getting the paper right.



"I told them they should have started talking about it earlier than this."

The NS Statutory Framework

The formalities are minimal, so challenges usually turn on the fairness of the process.

- s. 23: Sign before marriage, or during marriage while living together
- s. 24: Must be in writing, signed, and witnessed (MacDougall, 2026 NSSC 241: handwritten contract upheld)
- s. 29: Court can vary terms that are unconscionable, unduly harsh, or fraudulent
- The MPA is silent on whether a cohabitation agreement becomes a marriage contract on marriage, so say so in the agreement
- Pendulum has swung towards enforcement of agreements so make sure be mindful of concessions made

BOTTOM LINE

written, signed, witnessed, and fair.

Key Drafting Considerations Under NS Law

A fair process is your best defence

The best time to negotiate a marriage contract is not the night before the wedding.

- Complete full financial disclosure
  - Ideally sworn statements of property and income
  - If not, attach detailed schedules and have clients swear they are accurate on the schedules themselves
- Independent legal advice for both, with signed certificates
- Start well before the wedding; if time is short, use a standstill agreement
- Address any credit for premarital assets expressly; NS gives none automatically
- Add review triggers, such as the birth of a child, passage of time
- Consider that spousal support may not be enforceable – sometimes better to address a regime of what will be paid then to simply waive
- Parenting always subject to review/change as is child support

BOTTOM LINE
a fair process protects the agreement.

NS Pitfalls: Will the Agreement Hold?

'We're not married, so we don't need a contract.' Famous last words before an unjust enrichment claim.

- Cohabitation agreement silent on marriage? Say expressly whether it survives (Turner, 2026 NSSC 104)
- Signed after separation? It is a separation agreement, not a marriage contract
- Full property and support waivers invite s. 29 and Miglin (2003 SCC 24) challenges
- Skipping disclosure or ILA because the MPA doesn't require them
- Unmarried clients: draft for unjust enrichment, joint family venture, and trust claims
- Address existing property but also future acquired property – trace the asset
- Consider how the marriage contract interacts with an estate plan

BOTTOM LINE

say what happens if the couple marries.

SECTION 07

Practical Tips and Takeaways

07

A checklist for your next file.

PRACTICAL TIPS

Checklist: Key Pitfalls and Best Practices

NUMBERS

- ✓ Value the pre-cohabitation pension portion; never prorate by reflex
- ✓ Take separation-date snapshots; agree valuation dates asset by asset
- ✓ Consider appropriate valuation dates
- ✓ get expert evidence where needed (appraisals on real property, pensions, businesses, vehicles)
- ✓ Tax-effect every asset before comparing; use rollovers

CHARACTERIZATION

- ✓ Married, registered domestic partners, or neither? Pick the right regime
- ✓ Business vs. matrimonial asset: build the use evidence
- ✓ Plead s. 13 (unequal division) and s. 18 (business contribution) early, with numbers
- ✓ Prove debts with documents
- ✓ Check which province's law governs all assets

CONTRACTS

- ✓ Written, signed, witnessed (s. 24)
- ✓ Full disclosure with values; real ILA
- ✓ Start early; standstill if needed
- ✓ Address marriage, date-of-marriage deductions, and changing circumstances
- ✓ Refer clients for independent estate advice

PRACTICAL TIPS

The CYA Letter: Put Your Advice in Writing

Your file is your defence when the client later says, "No one told me."

- Send it when: disclosure is not provided or is waived; the client agrees to a value (e.g., the house) without an appraisal; or the client settles against your advice
- Say what was missing: the disclosure, appraisal, or valuation you recommended
- Explain the risk: the value may be wrong, and the client may be bound by a bad deal
- Record the client's instructions to proceed anyway, despite your recommendation
- Ask the client to sign and return a copy, and keep it on file
- There are many reasons client's may be willing to accept less – including the emotional cost of litigation and the desire for closure and certainty
- Remain curious about concessions and consider whether coercion is present
- Screen for power imbalance
- Keep good notes, use AI tools
- Time entries are also evidence of work done

PRACTICAL TIPS

AI in a Family Law Practice: Where It Helps

- Notetakers: AI notes or transcripts of client meetings, with the client's consent, reviewed before they go on file
- Vetting agreements: check a draft against your checklist (s. 24 formalities, disclosure schedules, ILA certificates, a marriage clause, valuation dates)
- Disclosure: summarize statements, build a first-draft asset and debt chart, and flag missing documents
- Issue spotting: business vs. matrimonial assets, pre-cohabitation pensions, holdco property under s. 4(4)
- First drafts: CYA letters, disclosure requests, and actuary or CBV instructions

Try it: ask AI to list every asset in a disclosure package with its date and value, then check it.

BOTTOM LINE

AI drafts and flags; you decide and sign.

PRACTICAL TIPS

AI: Practical Guardrails

- Confidentiality: use firm-approved tools; never paste client financials into a free public tool
- Verify every case and citation; AI can invent authorities, so check against the source
- Check the numbers: redo tax-effecting and equalization math yourself
- Notetakers: get consent to record, check accuracy, and decide what goes in the file
- Know the current rules: check NSBS guidance and court practice directions on AI; you stay responsible for the work

If you wouldn't email it to opposing counsel, don't paste it into a public chatbot.

BOTTOM LINE

trust, but verify, every time.

Questions?

No question is too small.

Thank you | MDW Law | LIANS Conference



This presentation is general information for practitioners, not legal advice. Verify statutory and case references against current sources.

PRACTICAL TIPS

Cases Referenced, by Topic

Every decision cited on the slides, grouped by presentation section

Topic	Cases
NS property framework	Walsh v. Bona, 2002 SCC 83 · Kerr v. Baranow, 2011 SCC 10 · Wolfson v. Wolfson, 2023 NSCA 57 · Whitman v. Hammond, 2023 NSSC 234 · S.M. v. Y.M., 2024 NSSC 410
Pension division	Clarke v. Clarke, [1990] 2 SCR 795 · Cox v. Cox, 2024 NSCA 34 · Hartlen v. McNeil, 2021 NSSC 223 · Todd v. Todd, 2025 NSCA 30
Valuation dates	Simmons v. Simmons, [2001] N.S.J. No. 276 · Kadaner v. Kadaner, 2024 NSSC 350
Business assets	Tibbetts v. Tibbetts, 1992 NSCA 17 · Wolfson v. Wolfson, 2023 NSCA 57 · Calder v. Calder, 2022 NSSC 146 · Wintrup v. Adams, 2023 NSCA 19 · F.C. v. S.C., [2025] N.S.J. No. 671 · Archibald v. Archibald, 1981 CanLII 4859 (NS SC)
Tax and netting	Brunt v. O'Brien, 2025 NSCA 19
Marriage contracts and cohabitation agreements	MacDougall v. MacDougall, 2026 NSSC 241 · Miglin v. Miglin, 2003 SCC 24 · Turner v. Turner, 2026 NSSC 104