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# Dividing Matrimonial Property

## *Common-Law Partners Still Excluded from Property Laws*

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Not much changed for common-law couples, in Quebec or anywhere else in Canada, when the Supreme Court of Canada handed down its decision in the *Eric v. Lola* case on January 25, 2013. In a split decision, the Court ruled that the Quebec government had not violated the Charter's right to equality by excluding all common-law couples from laws dividing matrimonial property. In that ruling, they upheld their 2002 decision in a Nova Scotia common-law property case, *Walsh v. Bona*.

Many common-law partners would be shocked to discover they don't have the same property rights as married spouses. They would be further shocked to hear that the Supreme Court thought this was okay.

According to the 2011 Census, 20% of Canadian couples now live in common-law relationships. In Quebec, the proportion is much higher, accounting for 38% of all couples. Some of those couples consciously choose common-law over marriage to avoid legal obligations, but most



of them simply make assumptions about their legal rights.

As a practising family law lawyer in Nova Scotia, both in a private firm and then at legal aid, I spent a lot of time explaining to female clients who weren't married:

Yes, in almost every way, the law treats your relationship as if you were married. For government benefits, CPP, workers compensation, income tax, child custody, even spousal support. But - and this is a big "but" - not when it comes to the property that you and your partner have. When you split up, the law says what's in your name is yours and what's in his name is his. Almost like you were strangers.

Each time I explained this law, my clients would not believe me at first. They believed they had the same rights as married people, that they were entitled to "half of everything" if their relationship ended.

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In most provinces and territories in Canada, common-law partners do *not* have the same property rights of married spouses. Some jurisdictions have extended marital property rights to common-law couples who have lived together for at least two or three years (NWT, Nunavut, Saskatchewan, Manitoba and British Columbia, as of March 2013). Partners there have rights to the division of property upon the breakdown of their relationship, with the presumption of a 50/50 split and clear procedures to work out the details. With such laws and procedures, most property cases settle at the 50/50 split, without need of court.

If they *don't* live in one of those places, then what can common-law partners do to protect themselves and each other?

First, they can enter into a "cohabitation agreement" when they start living together, an agreement that sets out their rights and obligations during cohabitation and upon separation if that should happen, including the ownership and division of property. But most couples don't.

Second, partners can be very careful to acquire and hold property in joint names, like when they buy a house or invest money. But when a couple is together and happy, they often don't think about such eventualities.

Third, if there is no cohabitation agreement and most of the property is in the name of one of the partners, then the common-law partner without property can make a claim of "unjust enrichment" against the partner with the property. This claim will require a lawyer, it will take time and expense to sort out, it will often have to go to court and there is no presumption in law that common-law couples should share equally. The partner without property will have to prove a contribution to the property (e.g. part of a down payment on the house or work renovating the home), and the extent of that contribution, in order to get an award.

In 2011, the Supreme Court of Canada did give some guidance to lower courts for these common-law cases, in the *Kerr v. Baranow* decision. In some unjust enrichment cases, said the Court, the couple could be proved to have a "joint family venture," and then there could be greater sharing of property at the end of the relationship – but not necessarily 50%. However, proving a "joint family venture" turns out to be an expensive and complicated process. In order to do so, one must prove four things through detailed evidence of their coupled life: mutual effort and

teamwork, economic integration of finances, an actual intent to share and priority to the family over individual interests.

So, back to the Supreme Court's decision regarding the *Eric v. Lola* case: in Quebec, common-law partners (or *conjoints de fait*) have no claim to marital-like property rights at the end of their relationship. Even more surprising, in Quebec, these partners have no claim to spousal support either, unlike any other province in Canada. Any changes in the legal situation of *conjoints de fait* in Quebec, or common-law couples in other provinces, will require legislative change.

Children are present in 50% of common-law relationships. When the relationship ends, the parent with custody of the children may not be able to stay in the family home. Without fair property division, that parent (and the children) may also experience a lower standard of living as a result. All of the abstract discussions about "choice" and adult decisions lose sight of the needs of children after relationships break down, no matter whether their parents are married or common-law.

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