Eric v. Lola: Where do we go now regarding common law property rights in Ontario?

By Ken Nathens[1]

Background

On January 25, 2013 the Supreme Court of Canada released its long awaited decision in the court case referred to commonly as *Eric v. Lola*[2]. Although this case originates in Quebec, it has far reaching implications for common law couples in Ontario and other provinces where there is no legislation enacted that regulates the division of property for common law couples on separation.

The facts of *Eric v. Lola* may be briefly summarized as follows: The parties met when the woman ("Lola") was 17 and the man ("Eric") was 32. They began to co-habit. Eric is an extremely wealthy Quebec entrepreneur. He supported Lola financially and together they travelled the world. Eventually they had two children. Lola did not work outside of the home and took care of the children and accompanied Eric on his travels. Eric financially supported the family. The parties broke up after a seven year relationship. They were never married, as Eric did not believe in the institution of marriage.

Lola filed a motion in Quebec Court seeking custody of the children and child support. She also brought notice to the Attorney General of Quebec that she will be seeking an order for spousal support and property division. Under the *Quebec Civil Code*, unmarried common law couples have no right to claim spousal support or division of family assets. Lola claimed that her constitutional right to equality pursuant to Section 15(1) of the *Canadian Charter of Rights and Freedom*s ("*Charter")* was violated by the *Quebec Civil Code* as the *Code* extends property and spousal support rights to married couples, but not to unmarried couples living together.

Over a period of ten years the case made its way through the courts. In January 2012 the case was argued before the Supreme Court of Canada. In a close decision, the majority of the Supreme Court of Canada held that the *Quebec Civil Code's* failure to extend spousal support and property division to common law couples was not in violation of the Charter. Alternatively, if it was in violation of equality rights under the *Charter*, such violation may be "saved" by Section 1 of the *Charter* that provides that an infringement of a *Charter* right may be permitted if such an infringement is proven to be "demonstrably justified in a free and democratic society."

The basis for the Supreme Court's decision that the provisions of the *Quebec Civil Code* are not unconstitutional lies in the concept of individual choice. According to the majority of the Supreme Court of Canada, couples are free to marry or not marry and those who do not marry can opt for a civil union that sets out rights of spousal support and property division. Alternatively common law couples have the option of entering into agreements that specify their legal rights on break up. The Supreme Court of Canada wished to protect individual autonomy and the right to choose the nature of one's relationship

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[2] Cited properly as *Quebec (Attorney General)* v. *A*, 2013 SCC 5. "Eric" and "Lola" are fictional names.

and the governing law in the event of the break- up of that relationship. On such grounds the distinction in treatment by the *Quebec Civil Code* between married and common law couples as applied to both spousal support and property division may be justified.

Eric v. Lola as applied in Ontario

The decision of the Supreme Court in *Eric v. Lola* as applied to spousal support in Ontario is of academic as opposed to practical interest. The *Ontario Family Law Act*, unlike the *Quebec Civil Code*, specifically provides that common law couples who reside in a relationship of three years or more, or have a child together and live in a relationship of some permanence, may claim spousal support.

Eric v. Lola does not create new law as applied to common law property division. It confirms the Supreme Court's prior 2002 decision in *Walsh v. Bona*[3] that the Court will not use the equality provisions of the *Charter* to force provincial legislatures, such as Ontario, to legislate property division for common law couples.

The fact that there is no legislation that deals with property division for Ontario's common law couples does not mean that common law couples are prohibited from applying for property division on separation. It means that in the absence of legislated rules as to how property is to be divided, common law couples in Ontario who wish to claim property division on separation must rely on the equitable doctrine of unjust enrichment to do so.

The application of unjust enrichment principles to common law relationships is highly subjective and relies on much judicial discretion. In order to claim unjust enrichment, the non-titled spouse must demonstrate that his or her efforts have enriched the other spouse with a corresponding deprivation to the non-titled spouse, and there is no legal basis for the enrichment. In a typical example, the non-titled common law spouse has dedicated his or her time, money and effort to renovate a home registered in the name of the other spouse, thus adding value. The non- titled spouse claims that the titled spouse would be unjustly enriched by his or her efforts if the non-titled spouse is not granted compensation or an ownership interest in the home resulting from his or her efforts. The law will not presume that the non-titled spouse performed the work as a gift to the other without clear evidence of the intent to bestow a gift. Once the unjust enrichment is established, courts must then decide the appropriate remedy, either a monetary compensation or a partial ownership ("constructive trust") interest in the property.

The difficulty with the unjust enrichment claim is that it requires an extensive accounting of which party did what and who paid for what during the common law relationship. The accounting exercise in some cases can go back as far as 10-20 years. Further, there is much difficulty in determining the intent of the parties regarding the acquisition and sharing of property many years after the commencement of the relationship.

Kerr v. Baranow

[3] *Walsh v. Bona*, 2002 SCC 83

In the 2011 Supreme Court of Canada's decision in *Kerr v. Baranow*[4], the Court set a number of principles to further define the law of unjust enrichment as applied to common law couples. Justice Cromwell uses the concept of "joint family venture" to determine whether an unjust enrichment claim should succeed. According to Justice Cromwell, if common law parties are engaged in a "joint family venture", and one party leaves the relationship with significant more assets and wealth than the other, it will be assumed that the titled spouse would be unjustly enriched if there was no obligation to share the wealth. The concept of "joint family venture" is intended by to reduce the need for extensive accounting in determining whether unjust enrichment exists.

In determining whether or not a "joint family venture" exists, the following factors should be considered, although not exhaustive:

(a) Mutual effort: Have the parties worked together towards a common goal? This may include consideration of the pooling of efforts and team work, decision to raise children together, and the length of the relationship.

(b) Economic Integration: The more extensive the integration of the couple's finances, economic interests, and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture.

(c) Actual Intent: Did the parties intend to form a joint family venture? These intentions may be stated or inferred by the parties' actions. Did the parties' hold themselves out as being "equivalent to married." Was the relationship long and stable so that engaging in the precise weighing of the benefits conferred within the relationship would be nearly impossible? Were the parties lax in such issues as accounting for contributions to properties, holding of titles, contributions to renovations, all which demonstrate an intent to create a joint family venture.

(d) Priority of the Family: A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. Did the parties plan for their financial future together? Did one party give up his or her employment for the common financial future of both of them or to raise children? Is one party left in a worse position than he or she otherwise would have been if he or she has not acted in a way to assist the family to his or her financial detriment.

(e) Mutual Benefit Conferral: According to Justice Cromwell, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits, each party in almost all cases confers benefits to the other. In determining whether or not there has been unjust enrichment given the

[4] *Kerr v. Baranow*, 2011 SCC 10

mutual exchange of benefits, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. This weighing of benefits is not an exact science. It calls for the reasoned exercise of judgment in light of all the circumstances. According to Cromwell J, mutual enrichments should mainly be considered at the defense and remedy stages, and also may be considered at the jurisdic reason stage to the extent that the provisions of reciprocal benefits constitute existence (or non-existence) of juristic reasons for the enrichment.

(f) Reasonable or Legitimate Expectations: In some cases, the fact that mutual benefits were conferred or that the benefits provided pursuant to the parties reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present, such as a contract for the provision of a benefit. The question is whether the parties' expectation show the retention of the benefit is just.

One the "joint family venture" is established, courts must then define the remedy, which may be monetary compensation or a percentage interest in the "joint family venture." Courts still have significant discretion in terms of the appropriate remedy. For instance, if a percentage interest in the "joint family venture" is awarded to a common law spouse such percentage may be anywhere from 1-100% depending on the evidence and the particular circumstances of the case.

<u>What does this all mean in practice for Ontario common law couples</u>?

The important point to remember is that the lack of legislation in Ontario governing property division for common law couples does not mean that there is no common law property division in Ontario. Individuals in common law relationships must understand that if they wish to clearly specify property rights, or spousal support rights, that will govern on separation, a properly drafted cohabitation agreement is absolutely essential. Without such a cohabitation agreement, common law couples who go through a separation may very well face lengthy and very expensive court proceedings to determine whether spousal support may be justified in the circumstances of the relationship and whether a "joint family venture" exists, and if so, what the appropriate remedy may be.

<u>Legislative Reform is Required for Ontario Common Law Couples</u>

Common law couples who do not have cohabitation agreements that specify rights and obligations on separation, cannot rely, as can married couples, on a legislated property regime that clearly sets out a formula for equalization payments and property division. Common law couples are forced to argue unjust enrichment claims in Court in the absence of such clear legislative guidelines. The unjust enrichment cases are usually bitterly fought and expensive, with both parties trying to diminish the relative contribution of the other during the relationship. The outcome of these cases are notoriously hard to predict.

Once all the evidence is in, trial judges then must then sort it all out, and determine which partner did what during the relationship, and whether a "joint family venture" may be said to exist. The trial judge

often has conflicting evidence from both spouses and less than a clear evidentiary record of intent and contributions. If a "joint family venture" is found to exist, the trial judge then must use his or her discretion to fashion an appropriate remedy. In the end, unsuspecting common law couples who did not have the foresight or will to have a cohabitation agreement drafted and signed are left with the potential of years of court proceedings and large legal bills that they cannot afford. In some cases, the potential cost of proceedings may be more than the disputed piece of property is worth.

Thus, the freedom to choose that is promoted by the Supreme Court in both *Eric v. Lola* and *Walsh v. Bona*, comes with a very high price for both common law spouses in Ontario and the Ontario court system that is already over-burdened.

The Supreme Court of Canada has now indicated on two occasions, both in *Walsh v. Bona*, and *Eric v. Lola*, that it will not force the province to legislate common law property division. Therefore, it is up to the Ontario legislature to meet this issue head on. The laws governing common law property division on separation in Ontario, as they stand now, are too vague. Uncertainty in law and application of law as a general rule leads to more litigation, not less. Manitoba, Saskatchewan, the Northwest Territories, and BC have all dealt with this issue by way of legislative reform. Ontario must too. Non suspecting common law couples should not be forced to go through years of litigation and thousands, if not hundreds of thousands of legal fees, in order to have the Court determine simple property rights.

In a follow up paper, I will provide idea regarding what future Ontario legislation that governs property division for common law couples should look like and how it may be applied.