



## Family Law News

Lauren Bale & Kanata Cowan

### “Unsupportive” in Quebec

On January 25, 2013 the Supreme Court of Canada released judgment in the case of *Attorney General of Quebec, et al. v. A, et al.*, upholding the constitutionality of property and support laws which distinguish between married and unmarried spouses in Quebec. The *Civil Code of Quebec* may not always be of interest to family law practitioners in Ontario, but because this is the first significant family law decision to be released by

the Supreme Court of Canada since December 2011, and the case was heard by the full 9 member panel, we thought we should give this thorough 128 page decision due attention.

The story begins in 1992 between the beautiful A (we’ll call her “Ashley”), a 17 year old model, and B (we’ll call him “Bill”), the 32 year old owner of a lucrative business. Ashley resided with her parents in a foreign country. Bill was a Canadian citizen, residing in Quebec. From 1992 to 1994 Ashley and Bill travelled the

world together several times a year. Bill provided Ashley with financial support, paying for her schooling, and eventually Ashley moved to Quebec in 1995. In 1996 Ashley became pregnant with their first child and they began living together. Two more children followed in 1999 and 2001. Ashley did little work outside of the home, had a short modelling career, and often accompanied Bill on his international travels. Bill provided for the financial support of Ashley and the three children. Ashley wanted to get married; Bill did not. They separated in 2002 after living together for approximately seven years. Ashley was 27 years of age at separation.

Ashley immediately commenced court proceedings. Her action was accompanied by a notice to the Attorney General of Quebec challenging the constitutionality of several provisions of the *Civil Code of Quebec*, and seeking application of the same legal

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regimes (property and support) for *de facto* (unmarried) spouses that exists for married spouses.

Book Two of the *Civil Code of Quebec* is entitled “The Family”. The provisions pertaining to the family residence, division of property, compensatory allowances, and spousal support apply only to married spouses. There are large differences between the substance and application of family law in Quebec and Ontario, but the most glaring distinction for purposes of this case, is the lack of spousal support relief for unmarried spouses in Quebec. In fact, Quebec is the only province that does not extend spousal support rights and obligations to *de facto* spouses.

The Quebec Superior Court rejected Ashley’s constitutional arguments and held that the provisions did not violate the right to equality under s. 15 of the *Charter*. The Quebec Court of Appeal

allowed the appeal in part, declaring the provisions that limit the rights and obligations of spousal support to married spouses to be of no force or effect, but upholding the restrictions pertaining to property. The Supreme Court of Canada ruled as follows:

**Constitutional Question #1:** Do the relevant articles of the *Civil Code of Quebec* infringe s. 15(1) of the *Charter*?

“YES”: Abella, Deschamps, McLachlin, Cromwell, Karakatsanis (the majority on this issue): Married spouses are guaranteed certain legal protections including support and equal division of property. The mandatory nature of support and property rights for married spouses highlights the significance placed on concern for the protection of vulnerable persons. While in theory an individual is free to choose whether

to marry, in reality a number of factors may place the decision beyond an individual’s control. The purpose of s. 15 is to eliminate the exclusionary barriers faced by individuals in enumerated groups from gaining meaningful access to legal protection. Marital status has been recognized as an analogous ground. To exclude *de facto* spouses from the economic protections available to formal spousal relationships imposes a disadvantage upon vulnerable and economically dependent *de facto* spouses, resulting in discriminatory treatment. A reasonable person in Ashley’s position would conclude that the law shows less concern for people in her situation than those in a married union, resulting therefore in unequal rights and benefits under the law.

“NO”: LeBel, Fish, Rothstein and Moldaver (the minority on this issue): *De facto* spouses chose a particular form of conjugality upon which to base their relationships. In short, parties must consent to entering into a marriage union. By not entering into such a union, legislature has preserved Ashley and Bill’s freedom to organize their relationships outside of a mandatory framework. Legislature does not express a preference for married unions over their *de facto* relationship, and does not create a disadvantage by expressing or perpetuating prejudice or stereotyping. No distinction should be made between property and support.

**Constitutional Question #2:** Is the infringement a reasonable limit that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

“YES”: McLachlin: The law falls within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets

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and support. The unfortunate dilemma faced by persons such as Ashley is not disproportionate to the benefits of the scheme to an extent that warrants a finding of unconstitutionality.

“NO”: Abella: An outright exclusion of *de facto* spouses cannot be said to minimally impair equality rights. The ‘opt in’ provisions may adequately protect *de facto* spouses who enter their unions with sufficient financial security, legal information, and the intent to avoid the consequences of a more formal union, but an ‘opt out’ provision can equally protect their freedom to choose.

“YES re: property division/NO re: spousal support”: Deschamps, Crowell, and Karakatsanis: Support and property should be considered separately; the measures which protect property rights are not, like support, focused on the basic needs of vulnerable persons. Property is acquired by conscious actions whereas vulnerability and dependence often evolve with little or no conscious control. Exclusion of *de facto* spouses from spousal support relief is not justified under s. 1 of the *Charter*.

“No Comment”: LeBel, Fish, Rothstein, and Muldaver: Exclusion of *de facto* spouses is not discriminatory therefore it is not necessary to proceed to the s.1 saving analysis.

As a result, the exclusion of *de facto* spouses from property and support rights under the *Civil Code of Quebec* was upheld by the court, and Quebec continues to be the only Canadian province which excludes unmarried spouses from spousal support relief.

The differing opinions above clearly outline the difficulty of this issue. Perhaps if Ashley had been a more sympathetic figure, she would have

been more successful in her challenge. The lack of spousal support after a 7 year relationship certainly did not leave this apparently beautiful 27 year old woman destitute; she received a child support award of \$34,260.24 per month (yes, not a typo) and Bill was ordered to pay all of the children’s tuition fees, extracurricular expenses, the salaries of two nannies and a cook working for Ashley, in addition to all costs, school and municipal taxes, home insurance premiums and general maintenance and renovation costs required for the residence of Ashley and the children in a residence owned by Bill. One can’t help but think that Edna, the childless and destitute sixty-something *de facto* spouse of 30+ years might have tipped the scales of justice in the other direction, bringing Quebec into conformity with the rest of the country.

Of specific interest are the statistics that were relied upon at the trial level of this decision. In Quebec, at the time of trial in 2006, the proportion of couples living in *de facto* unions in Quebec was 34.6%, as opposed to the average of 18.4% throughout the balance of Canada. In 2012, 3,002,058 Canadians resided in *de facto* unions, almost half of which were residing in the province of Quebec.<sup>1</sup> The issue before the court was clearly one of significant family law importance

in Quebec. Of the three Quebecois Judges (Fish, LeBel, and Deschamps), two of the three were in the camp that declared that the provisions did not violate s. 15 at all, and the third (who had practiced family law) was critical of the exclusion from spousal support relief. For the rest of Canada however, whose *de facto* spouses already have the benefit (or burden depending on who is holding the wallet) of spousal support, it is noteworthy that an overwhelming majority of the panel was not inclined to again open the doors to a universal property division scheme.

<sup>1</sup> Statistics Canada, population by marital status and sex, 2012. ■

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