Eric and Lola : The Supreme Court rules on the rights of de facto spouses in Quebec

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Author

Caroline Harnois

Partner, Lawyer

It is not surprising that there has been so much discussion and debate surrounding the saga of Eric and Lola in the past few years. Indeed, this litigation raises issues that directly affect a large number of Quebec couples who live in de *facto* unions. The legal issues raised pit two competing interests: the freedom of choice of individuals versus the need to protect the *de facto* spouse suffering from the economic consequences of the breakdown of the relationship.

On January 25, 2013, the Supreme Court of Canada issued a ruling which ended the litigation between Eric and Lola as regards the rights of *de facto* spouses. In a decision with a strong dissent,[1] the Supreme Court upheld the constitutional validity of the articles of the *Civil Code of Québec* which provide that the support obligation and the division of the family property apply exclusively to couples who are married or who have entered into a civil union and not to *de facto* spouses, thereby leaving Quebec civil law unchanged on the matter.

As such, in the absence of an agreement to the contrary, *de facto* spouses in Quebec cannot, upon the breakdown of their relationship, claim spousal support or the division of property that is owned by one of the *de facto* spouses only, regardless of the length of the relationship or whether they had children.

It should however be noted that child support is determined on the basis of the type of custody and the parents' incomes in accordance with the applicable guidelines, without regard to whether the parents are married, in a civil union or a *de facto* union.

While the Supreme Court's judgment does not change the law applicable to *de facto* spouses, the broad media coverage of the litigation between Eric and Lola contributed to informing Quebecers about the fundamental differences that exist between the rights of couples who are married or in a civil union versus those living in a *de facto* union.

FACTUAL AND PROCEDURAL HISTORY

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The following is a brief summary of the relevant facts and proceedings concerning the relationship between Eric and Lola and its breakdown.

Eric and Lola met in 1992 when Lola was 17 years of age, living with her parents in her country of origin, and pursuing her studies. Eric was 32 years of age and at the head of a prosperous international business.

After traveling several times around the world together, Lola became pregnant in 1996 with their first child and moved to Quebec where Eric lived. They subsequently had two more children in 1999 and 2001.

During the time they lived together, Lola did not work outside the home and frequently accompanied Eric in his travels abroad. Eric provided for all the needs of Lola and the children. Lola expressed her desire to marry Eric, but he indicated that he did not believe in the institution of marriage. Eric and Lola separated in 2002 after living together for seven years.

In February 2002, Lola filed a motion in the Superior Court of Québec, district of Montreal, seeking sole custody of the children as well as child support. To this motion was annexed a notice to the Attorney General of Quebec of Lola's intention to contest the constitutionality of several articles of the *Civil Code of Québec* so that she could obtain the same legal regime that applied to married spouses, namely, spousal support, a lump sum, the division of the family patrimony and the partnership of acquests, and the reserve of her rights to claim a compensatory allowance. The use of the family residence was dealt with during the proceedings in an agreement between the parties on child custody.

The Honourable Carole Hallée, judge of the Superior Court, in her judgment rendered on July 9, 2009,[2] dismissed Lola's constitutional arguments and concluded that the provisions of the *Civil Code of Québec* did not infringe upon the right to equality. Indeed, Justice Hallée found that Lola had not succeeded in showing that the distinction made in the *Civil Code of Québec* between *de facto* spouses and married spouses had any substantively discriminatory effects, and that the lack of evidence in this regard was fatal to her action.

Lola sought leave to appeal to the Court of Appeal of Québec. The appeal was allowed in part,[3] and the article relating to spousal support (article 585 C.C.Q.) was declared to be of no force or effect and unconstitutional. However, the Court of Appeal confirmed Justice Hallée's decision to the effect that the provisions dealing with the family residence, family patrimony, compensatory allowance and partnership of acquests were constitutional. The Court of Appeal suspended the declaration of invalidity of article 585 C.C.Q. for a period of twelve months in order to allow the Quebec legislature time to determine a constitutional solution.

Eric and the Attorney General of Quebec appealed the Court of Appeal's decision on the invalidity of article 585 C.C.Q. before this country's highest court, while Lola appealed the ruling upholding the constitutional validity of the provisions relating to the division of property.

THE SUPREME COURT'S DECISION

On January 25, 2013, the Supreme Court of Canada rendered a divided judgment on the constitutional issues, which can be summarized as follows:

1. Do the articles in the *Civil Code of Québec* which provide for the obligation of support and the division of property between married spouses and those who have entered into a civil union only infringe section 15(1) of the *Canadian Charter of Rights and Freedoms?*

2. If so, does the infringement constitute a reasonable limit prescribed by law which can be

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demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms?*

The reasons for the judgment were rendered by Justice LeBel with Justices Fish, Rothstein and Moldaver concurring. Justice Abella dissented as to the result and Justices Deschamps, Cromwell and Karakatsanis dissented in part in the result. In the end, Chief Justice McLachlin's concurring opinion with that of Justice LeBel as to the result only determined the outcome of the Supreme Court's decisions with regard to the rights of de facto spouses to claim support for their needs.

According to Justices LeBel, Fish, Rothstein and Moldaver, support obligations form an integral and indissociable part of the measures that constitute Quebec's mandatory primary regime.

To establish discrimination within the meaning of section 15(1) of the *Charter*, Lola had to show, on a balance of probabilities, that the relevant articles of the Civil Code create a disadvantageous distinction based on an enumerated or analogous ground, and that this disadvantage is discriminatory because it perpetuates a prejudice or stereotype.

It was found that those articles of the Civil Code do in fact create a distinction based on an analogous ground, namely one's marital status. However, this distinction was not determined to be discriminatory as it does not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. Rather, Justices LeBel, Fish, Rothstein and Moldaver were of the view that *de facto* unions have become a respected type of relationship and are not judged unfavourably by Quebec society. The legislature has not created any hierarchy between the different types of conjugal relationships, but has merely defined the legal framework which governs each form thereof.

In their view, the Quebec legislature has determined that consent is the key to changing the legal framework that governs couples. Thus, express, and not deemed consent is essential to the creation of support obligations and the right to the division of the family property.

Far from being unconstitutional, the disputed articles of the *Civil Code of Québec* rather respect the autonomy of individuals and *de facto* spouses' freedom to organize their relationship based on their needs.

Finally, while *de facto* unions fall outside the legislative framework which applies to marriages and civil unions, *de facto* spouses are still free to enter into agreements in order to organize their financial relationships during cohabitation, and to provide for the consequences of a potential breakdown of the union.

Given the above, Justices LeBel, Fish, Rothstein and Moldaver held that it was not necessary to answer the second question as to whether the discrimination is a reasonable limit.

Justice Abella, in dissent, was of the opinion that the outright exclusion of de facto spouses from the articles of the *Civil Code of Québec* on spousal support and the division of family property constitutes a violation of section 15(1) of the *Canadian Charter of Rights and Freedoms*. The distinction based on marital status is an analogous ground as regards the application of this section, and perpetuates an arbitrary disadvantage for spouses living in a de facto union. The fact that *de facto* spouses can decide to marry does not exclude them from the protection of section 15(1).

In her view, the provisions of the *Civil Code of Québec* on support and the division of property between spouses who are married or who have entered into a civil union are, in a sense, a recognition of the roles assumed by each member of a couple during their life together, and aim to compensate for any situation of dependency or vulnerability arising from it. Moreover, the "*functional characteristics*" of a relationship and the disadvantages resulting from its dissolution are often the

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same for spouses who are married, who have entered in a civil union, or who live in a *de facto* union.

According to Justice Abella, both the provisions dealing with support and those dealing with the division of property are protective measures which go beyond their contractual nature. In addition, it should be recognized that the decision to marry or to live in a *de facto* union is mutual, and is often influenced by a myriad of factors which are not necessarily within a sole individual's control.

Furthermore, the fact that *de facto* spouses are completely precluded from claiming support and the division of family property in the event of the breakdown of their relationship is not a reasonable limit and is not justified under section 1 of the *Charter*. In Justice Abella's view, the infringement of the equality right of the more vulnerable spouse is neither minimal nor proportional.

Moreover, one's right to autonomy and freedom of choice could still be respected by creating a mechanism that would allow individuals living in a *de facto* union to opt out of the application of a legal regime which would, by default, grant the right to support and to the division of family property in the case of a breakdown of the relationship.

Justices Deschamps, Cromwell and Karatsanis agreed with Justice Abella's analysis under section 15(1) of the *Charter* and with her conclusion to the effect that the exclusion of *de facto* spouses from the provisions dealing with support and division of property in the *Civil Code of Québec* infringes the right to equality.

However, in their view, the right to support should be distinguished from the right to the division of the family property. While the right to support is the result of the creation of a relationship of interdependence between spouses which is often not solely dependent on the will of the parties, the same is not true for the acquisition of property and the rights which result therefrom.

For them, the exclusion of *de facto* spouses from the right to the division of property is justified under section 1 of the *Charter*, while the exclusion of the right to claim support is not. While the current Law's objective which aims to favour the freedom
of choice of Quebecers is important, the exclusion of the right of more vulnerable spouses to claim support for their needs in the event of the breakdown of the relationship infringes their right to equality in a disproportionate way. Certain individuals living in a *de facto* union suffer from the economic consequences of the breakup in the same way as those who were married or in a civil union do.

Justice McLachlin also agreed with Justice Abella's analysis and conclusion under section 15(1) of the *Charter*. However, her finding that the infringement of the equality right of *de facto* spouses is justified under section 1 of the *Charter* determined the final outcome of the Supreme Court's decision. According to Justice McLachlin, the Law as it currently stands achieves the Quebec legislature's primary objective of promoting individuals' freedom of deciding whether to subject themselves to the provisions on the right to spousal support and the division of family property. Since it is necessary to take into account that it is each province's responsibility to enact laws and, in so doing, to decide on certain difficult social issues, the infringement of the right to equality of *de facto* spouses is not disproportionate when considering the benefits of the Law, which enables Quebec couples to decide on the nature of the legal framework which will govern their relationship.

CONCLUSION

In the end, the result of this lengthy judicial saga is to the effect that the *status quo* is maintained for *de facto* spouses in Quebec. The situation is clear: in the event of separation, there exists no right to spousal support or to the division of property of which one *de facto* spouse is not the owner.

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The division within the Supreme Court perhaps reflects the division of opinion among Quebecers on these issues, particularly with regard to the right to claim support for *de facto* spouses. This will likely lead the Quebec legislature to examine the issue in greater depth.

It is currently the responsibility of *de facto* spouses to determine the legal framework which will govern their relationship in accordance with their objectives. A cohabitation agreement that is properly drafted and suited to their needs can allow *de facto* spouses to decide in advance on the consequences of the breakdown of their relationship and on the contributions each is required to make to the couple's expenses. This also applies to the ways in which individuals who live in a *de facto* union will choose to acquire property during the course of their relationship.

Regardless of their respective economic situation, both individuals living in a *de facto* union may benefit from consulting a professional on these issues at the very beginning of the cohabitation. This may avoid, or at least minimize, the economic consequences of the breakdown of the relationship, which can sometimes be disastrous when individuals are misinformed. The importance of consulting a professional and understanding the consequences which may flow from an individual's decision to marry, enter into a civil union, or a *de facto* union, should not be minimized. This will allow one to make decisions in a clear and informed manner.

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[1] Quebec (Attorney General) v. A, 2013 SCC 5.

[2] Droit de la famille-091768, 2009 QCCS 3210.

[3] Droit de la famille-102866, 2010 QCCA 1978.

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