

Legal strangers

[Robert Leckey](#). [National Post](#). Feb 11, 2009. pg. A.17

For weeks, the media have salivated over a trial in which a Brazilian woman in her mid-30s is challenging federal and Quebec law in order to claim more than \$50-million in assets and \$56,000 monthly alimony from her ex-partner, a billionaire businessman. Beyond the human drama, the case may trigger a political firestorm in Quebec. It sets three key elements on a collision course.

One is the social practice of family life in Quebec. In 2006, more than one-third of Quebec couples were unmarried. In the other provinces and territories, it was 13%. Three-fifths of children in Quebec are born to unmarried parents. Sociologists connect the low marriage rate to the Quiet Revolution and rejection of Roman Catholicism.

The second element is Quebec's distinct approach to family law. As in other provinces, social programs typically treat unmarried couples like married couples. And as in most provinces, Quebec law does not require cohabitants to share their individual assets when they separate, as must married spouses. But unlike every other province, Quebec does not require partners to support one another. Its civil code recognizes no duties on the part of unmarried partners as such. In legal jargon, unmarried cohabitants are *legal strangers*.

Crucially, Quebec's lack of rules for unmarried couples is not an oversight. It's deliberate policy. While overhauling family law in 1980, the legislature rejected a proposal to create a support obligation for unmarried couples. It concluded that preserving an unregulated space outside marriage best protected everybody's equality and freedom. People could then choose to marry or not.

The third element is the Canadian Charter of Rights and Freedoms, which protects against discrimination and underpins the woman's claim. The Supreme Court of Canada has held that it protects from discrimination on the basis of marital status. A couple of precedents support the woman's claim, emphasizing need and dependence. A more recent judgment, relying on choice, points the other way.

Recall that Quebec has never endorsed the 1982 constitutional package of which the Charter is part. Many Quebecers -- at least of those who follow law and politics -- view it as illegitimate. Quebecers may like their interventionist state. But they like their interventions from Quebec City, not imposed by a federally appointed judge wielding Pierre Trudeau's Charter.

Suppose the trial judge rejects the woman's Charter claim, as she might do. Upholding the status quo will trigger a collision between provincial family law and the widespread social reality. Quebecers may reject a church wedding, but it's far from clear that all those living outside marriage know the rules that will (or won't) apply should they break up. The lawsuit brings this to the forefront. And, despite its talk of freedom, the Quebec legislature cannot have foreseen that so many of its citizens would fall entirely outside the protections of family law. This social policy problem will outlive the lawsuit.

The other collision occurs if the court allows part of the woman's claim. If the judge orders spousal support on the basis of the Charter, cries will arise that the federal instrument has destroyed the integrity of a distinctively Quebecois approach to families. A judge's view of equality will have replaced the legislature's view, or so some will argue.

Yet whether the billionaire or his ex wins, there are broader lessons. At debates of this kind, about what we owe one another, legislatures are likely better than judges. Designing family policy calls for trade-offs between individuals' autonomy and protection. The cutoff date on parents' duty to support their children is one example. But Charter claims give judges only blunt tools, such as declaring a law invalid or extending it as is to another group.

The woman's discrimination claim shows, more specifically, the problems of Charter claims for family law. Unmarried cohabitation is so common in Quebec that unmarried couples aren't a stigmatized minority. Moreover, the group of unmarried couples is diverse. Women who left jobs to raise their kids may require attention from policymakers. Divorced mothers who start a new relationship at mid-life but wish to protect assets for their kids are rather different. The old markers of discrimination-- race, sex, religion, age, disability --don't point precisely enough to the economic vulnerabilities of different kinds of families.

The challenge is to press our elected leaders to confront the policy issues raised by the diverse lives of today's families.

- Robert Leckey teaches family law and constitutional law at McGill University.