Sameness and Change Respecting Unmarried Couples

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In a high-profile decision, the Supreme Court of Canada has rejected a challenge to family law's differential treatment of married and unmarried couples. Although it affirmed the status quo, the judgment has implications for practitioners of trusts and estates.

A Loss for Lola in a Sharply Divided Decision

In *Quebec (Attorney General) v. A*, 2013 SCC 5, the Supreme Court upheld the constitutional validity of Quebec's distinct approach to unmarried cohabitants. In every other province, the law of spousal support extends to cohabitants; in several provinces, so do presumptions for sharing family property on relationship breakdown or death. By contrast, Quebec's law does not subject unmarried cohabitants to any of the rights and duties of married spouses. A majority of the court has now rejected the claim that Quebec's restrictive approach discriminates unjustifiably against cohabitants on the basis of marital status and thus violates the *Canadian Charter of Rights and Freedoms*.

Subject to a publication ban on the parties' names, the case became known as *Eric v. Lola*. It owes its profile to the high stakes. For one thing, the former cohabitant opposing the Charter claim was a Quebec billionaire. For another, more than one-third of couples in Quebec are unmarried. A finding of unconstitutionality would thus have had far-reaching effects. Finally, such an outcome might have undermined the restrictive application of matrimonial property regimes in several common-law provinces.

In a decision spanning more than 400 paragraphs, the judges divided on several issues. Abella J and four colleagues held that Quebec's exclusion of unmarried cohabitants from the protections of family law discriminated against them. This group of judges overruled the discrimination analysis in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 SCR 325, a judgment that had upheld the exclusion of cohabitants from Nova Scotia's matrimonial property regime on the basis that it affirmed their choice and autonomy. Of the five judges who made up a majority in finding discrimination, only Abella J viewed the limit on cohabitants' equality rights as wholly unjustifiable under section 1 of the Charter. Deschamps J and two other judges distinguished the division of property from the law of support. In their view, only the

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exclusion from spousal support was unjustifiable and thereby unconstitutional. The fifth judge, McLachlin CJ, exercised the swing vote. She accepted the entire legislative policy as reasonably justifiable and in conformity with the Charter, and she aligned her views with those of LeBel J and three other judges. The latter group upheld the law on the basis that excluding cohabitants entirely from the rights and obligations of formal spouses conformed with the Charter's right to equality. These judges approved the government's stated aim of respecting cohabitants' autonomy and freedom of choice.

The renewed focus on claims of unjust enrichment among cohabitants signals the importance of advance planning on the part of clients. In all jurisdictions, an enforceable domestic contract may count as a legal reason to reject an unjust enrichment claim. That being said, a contract that is unconscionable or otherwise unenforceable will not.

Practical Implications

The court's recent judgment sheds light on three avenues by which the law relating to cohabitants may continue to develop.

First, concerning constitutional litigation, the decision suggests that further legal change via a Charter challenge is unlikely. The comfort of a majority of judges with Quebec's total exclusion of cohabitants from the rights and duties of married spouses hints that the more piecemeal effects of cohabitation in other provinces are unlikelier still to run afoul the Charter.

Second, practitioners should keep an eye on legislative reform. Some commentators had understood the court's decision in *Walsh* as removing the impetus for legislative enlargement of cohabitants' rights and duties. But British Columbia's recent *Family Law Act* assimilates cohabitants into the class of married spouses for the purposes of property division. And it does so in the absence of any obligation under the Charter. Moreover, in the wake of the court's recent decision, Quebec's minister of justice acknowledged the possibility of legislative reform. Further legislative action cannot be ruled out.

Third, the judgment's greatest practical impact may be to intensify the focus on private-law litigation. It confirms the abiding significance of the Supreme Court's leading decision on unjust enrichment in the context of cohabitation, *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 SCR 269, and its elaboration by lower courts. Some commentators predict that, in ordinary cases, *Kerr* will call for an equal sharing of the parties' gains during cohabitation.

In particular, the failure of reform via the Charter may increase the pressure on Quebec judges to adapt their austere approach to former cohabitants' claims. Quebec civil law provides that unjust enrichment generates a debt under the law of obligations. But there is no proprietary remedy such as a constructive trust. Moreover, judges insist that unjust enrichment is not a device for sharing profits among cohabitants. Will the judges find a way to integrate *Kerr*, a common-law decision, into Quebec civil law?

Furthermore, the Supreme Court's recent decision on the Charter question is unlikely to hamper claims under the private law. Indeed, it may ease them. The reason is that the majority of the judges who found discrimination highlighted the functional similarity of cohabitants to married spouses. By contrast, the earlier judgment in *Walsh* had figured in some unjust enrichment cases as a basis for restraint. The majority in that decision had highlighted cohabitants' differences from married spouses and the significance of the choice not to marry.

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More speculatively, might judges be especially open to claims made against an estate following cohabitation? Such claims may be framed in unjust enrichment or brought under legislation providing for the variation of wills. The autonomy-based concerns that extending rights and obligations to cohabitants would impose an unchosen status might seem less applicable where the respondent spouse is deceased.

Changes to the law applicable to clients who live in unmarried cohabitation remain foreseeable. What the Supreme Court of Canada has told us is that they won't arise from Charter litigation. ■