Her Majesty the Queen v. Hall

[Indexed as: R. v. Hall]

114 O.R. (3d) 393

2013 ONSC 834

Ontario Superior Court of Justice,
Lofchik J.
February 7, 2013

Criminal law -- Evidence -- Witnesses -- Competency -- Section 4 of Canada Evidence Act and common law application of spousal competency rule discriminating against unmarried couples living in common law relationships -- Violation of s. 15(1) of Charter not justified under s. 1 of Charter -- Appropriate remedy being to read common law spouses into s. 4 of Act and to apply common law provisions as including common law spouses -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Canada Evidence Act, R.S.C. 1985, c. C-5, s. 4.

The accused attacked the constitutionality of the exclusion of common law spouses from the spousal incompetence provisions of s. 4 of the Canada Evidence Act and the common law.

Held, the application should be granted.

The common law relating to the spousal competence rule and s. 4 of the Canada Evidence Act discriminates against common law partners on the ground of marital status, contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms. The law denies

2013 ONSC 834 (CanLII)

common law spouses protections available to married and civil union spouses. That distinction creates a disadvantage: common law spouses do not automatically benefit from the protection of the law vis--vis the competence of their spouse/partner to testify for the Crown. A reasonable person in the accused's position would conclude that the law perpetuates pre-existing disadvantage. The exclusion of common law spouses is not justified under s. 1 of the Charter. The pressing and substantial objective of the spousal incompetence rule and s. 4 of the Act is to promote conjugal confidences, protect marital harmony and prevent the indignity of conscripting an accused's spouse to participate in the accused's own prosecution. There is no rational connection between that objective and the exclusion of common law spouses from the benefit. Even if there is a rational connection, the law does not minimally impair the accused's right to equality. There is no proportionality between the effects of s. 4 and the common law spousal incompetence rules on accused persons in common law relationships and the objective of protecting marital harmony. The appropriate remedy is to read s. 4 of the Act to include common law spouses where there is reference to "husband" and "wife" and to apply the common law provisions as including common law partners in any definition of "husband and wife" or "husband" and "wife" or "spouse".

Cases referred to

Miron v. Trudel (1995), 23 O.R. (3d) 160, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44, 124 D.L.R. (4th) 693, 181 N.R. 253, J.E. 95-1089, 81 O.A.C. 253, 29 C.R.R. (2d) 189, [1995] I.L.R. 1-3185, 10 M.V.R. (2d) 151, 13 R.F.L. (4th) 1, 55 A.C.W.S. (3d) 630; Quebec (Attorney General) v. A., [2013] S.C.J. No. 5, 2013 SCC 5, 2013EXP-288, J.E. 2013-141, EYB 2013-216977, 439 N.R. 1, [2013] W.D.F.L. 746, [2013] W.D.F.L. 814, [2013] W.D.F.L. 776, 21 R.F.L. (7th) 1, 354 D.L.R. (4th) 191, apld

R. v. Nguyen, [2010] O.J. No. 6148, 2010 ONSC 5843, 278 C.C.C. (3d) 490, 98 W.C.B. (2d) 708 (S.C.J.), not folld [page394]

Other cases referred to

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, J.E. 89-259, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 36 C.R.R. 193, 13 A.C.W.S. (3d) 347; Nova

2013 ONSC 834 (CanLII)

Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325, [2002] S.C.J. No. 84, 2002 SCC 83, 221 D.L.R. (4th) 1, 297 N.R. 203, J.E. 2003-102, 210 N.S.R. (2d) 273, 102 C.R.R. (2d) 1, 32 R.F.L. (5th) 81, 119 A.C.W.S. (3d) 42; R. v. Hawkins (1996), 30 O.R. (3d) 641, [1996] 3 S.C.R. 1043, [1996] S.C.J. No. 117, 141 D.L.R. (4th) 193, 204 N.R. 241, 96 O.A.C. 81, 111 C.C.C. (3d) 129, 2 C.R. (5th) 245, 32 W.C.B. (2d) 388, EYB 1996-67709, J.E. 96-2285; R. v. Kapp, [2008] 2 S.C.R. 483, [2008] S.C.J. No. 42, 2008 SCC 41, 175 C.R.R. (2d) 185, EYB 2008-135098, J.E. 2008-1323, [2008] 8 W.W.R. 1, 294 D.L.R. (4th) 1, 232 C.C.C. (3d) 349, [2008] 3 C.N.L.R. 347, 376 N.R. 1, 256 B.C.A.C. 75, 78 W.C.B. (2d) 343, 37 C.E.L.R. (3d) 1, 58 C.R. (6th) 1; R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73; R. v. Salituro, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, 131 N.R. 161, J.E. 92-16, 50 O.A.C. 125, 68 C.C.C. (3d) 289, 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 14 W.C.B. (2d) 407; Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12, 2011 SCC 12, 229 C.R.R. (2d) 329, 412 N.R. 149, 2011EXP-867, 2011EXPT-511, 87 C.C.P.B. 161, J.E. 2011-461, D.T.E. 2011T-181, EYB 2011-187170, [2011] 4 W.W.R. 383, 15 B.C.L.R. (5th) 1, 329 D.L.R. (4th) 193, 300 B.C.A.C. 120

Statutes referred to

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 4 [as am.], (1), (3)

Canadian Charter of Rights and Freedoms, ss. 1, 15, (1)

APPLICATION attacking the constitutionality of the exclusion of common law spouses from the spousal incompetency provisions of s. 4 of the Canada Evidence Act and the common law.

S. O'Brien and C. Fraser, for applicant.

D. Derstine and S. DiGiuseppe, for respondent.

[1] LOFCHIK J.: -- Following my ruling of December 14, 2012

2013 ONSC 834 (CanLII)

on the accused's spousal incompetency application, the Supreme Court of Canada issued its decision in Quebec (Attorney General) v. A., [2013] S.C.J. No. 5, 2013 SCC 5, just before the commencement of the trial of this action. In light of the judgment of that court, I find it advisable to issue an addendum to my original reasons. I have heard additional submissions of counsel as to the effect of that case on the spousal incompetency issue.

[2] Lebel J., writing for the minority, in deciding whether or not s. 15 of the Canadian Charter of Rights and Freedoms was violated by the legislation being considered applied the test originally set out in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, as restated in R. v. Kapp, [2008] 2 S.C.R. 483, [2008] S.C.J. No. 42 and [page395] Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12 and applied in Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325, [2002] S.C.J. No. 84. Namely,

(1) does the law create a distinction based on an enumerated or analogous ground;

(2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[3] He concluded that the legislation before the court drew a distinction between common-law couples and married or civil union couples but did not create a disadvantage by expressing or perpetuating prejudice or stereotyping and therefore did not infringe s. 15(1) of the Charter (paras. 281 and 282).

[4] This is the same as the approach taken by the court in Walsh and followed by me in my original reasons.

[5] Abella J. whose reasons were adopted by the majority stated that in referring to prejudice and stereotyping in the second step of the Kapp reformulation of the Andrews test, the court was not purporting to create a new s. 15 test and that the test was as stated in Withler, namely, that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?" She stated that prejudice and stereotyping are two of

2013 ONSC 834 (CanLII)

the indicia that help answer the question but they are not discreet elements of the test which the complainant is obliged to demonstrate (paras. 323-25). Her test, as stated above, is essentially the same as the first question in Kapp. She summarized by saying Kapp and Withler guide us as a result to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.

[6] She pointed out that the root of the s. 15 inquiry is our awareness that certain groups have been historically discriminated against and that the perpetuation of such discrimination should be curtailed. If the complained of law or conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[7] She goes on to say that an emphasis at this stage on whether the claimant group's exclusion was well motivated or reasonable is inconsistent with the substantive equality approach to s. 15(1) since it redirects the analysis from the impact of the decision on the affected individual or group to the legislature's intent or purpose. Assessment of legislative purpose is an important part of Charter analysis but it is conducted under s. 1 once the burden has shifted to the state to justify the [page396] reasonableness of the infringement. She held that the proper stage in the analysis to address the effect of the choice not to marry is in the s. 1 analysis. She points out that the court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination.

[8] She stated in her reasons that because the equality analysis under s. 15(1) of the Charter has evolved substantially in the decade since Walsh was decided, she would decline to follow Walsh and pointed out that two aspects of the majority decision in Walsh, are, in fact, manifestly contrary to the substantive equality analysis developed in Kapp and Withler, namely, its approach to the issue of choice and its reliance on the heterogeneity of common-law relationships. She

2013 ONSC 834 (CanLII)

stated that the majority in Walsh accepted that marital status is an analogous ground, but justified distinctions within this group by pointing to an individual's "choice" to marry. This contradicts the approach to substantive equality under s. 15(1) where any argument concerning the reasonableness of legislation is considered under s. 1. Contrary to this approach, the majority of the court in Walsh collapsed the justification into the s. 15 analysis leaving the claimants to justify what should analytically have been part of the government's burden.

[9] Deschamps J. agrees with Abella J.'s analysis that the justification of differential treatment of unmarried couples has no place in the s. 15 analysis and that their exclusion from social protection perpetuates a historical disadvantage which violates s. 15 Charter values. He also found that Walsh was no longer applicable as a test.

[10] The chief justice also agreed with the s. 15 analysis in Abella J.'s reasons to make up the majority decision with respect to the s. 15 issue.

[11] So far as the test for discrimination is concerned, she also agreed that while the promotion or perpetuation of prejudice, on one hand and false stereotyping, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of a claiming group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interest affected. She was also of the view that the decision in Walsh did not bind the court and that freedom of choice and individual autonomy, which were held in Walsh to negate a breach of s. 15 are better considered at the s. 1 stage of the analysis.

[12] Having reviewed the decision of the Supreme Court in Quebec v. A., I must conclude that the foundations upon which [page397] Tulloch J.'s decision in R. v. Nguyen [[2010] O.J. No. 6148, 2010 ONSC 5843 (S.C.J.)] and my earlier reasons for decision in this application have been undermined by the approach of the court in that case.

2013 ONSC 834 (CanLII)

[13] In my view, the common law relating to the spousal competence rule and s. 4 of the Canada Evidence Act, R.S.C. 1985, c. C-5 make discriminatory distinctions that limit the s. 15 equality rights of common-law partners. All the elements of a s. 15 violation are present. The law denies common-law spouses protections available to married and civil union spouses. These distinctions are made on the basis of an analogous ground of marital status: Miron v. Trudel (1995), 23 O.R. (3d) 160, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44. The distinctions create a disadvantage: common-law spouses do not automatically benefit from the protection of the law vis--vis the competence of their spouse/ partner to testify for the Crown. Finally, the disadvantage is discriminatory from the point of view of a reasonable person placed in the circumstances similar to those of Jeremy Hall.

[14] Legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. In Miron v. Trudel, supra, the court held [at para. 152] that "[p]ersons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted upon the unmarried partner range from social ostracism through denial of status and benefits. In recent years the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historic disadvantage associated with this group cannot be denied."

[15] Section 4 of the Canada Evidence Act provides a certain legal benefit, namely, an evidentiary block to the Crown. To those living in relationships with all the characteristics of marriage, save for the formal bond, this statute perpetuates the historic view that these persons are considered less worthy and less morally upright. These views no longer accord with

2013 ONSC 834 (CanLII)

current social values or realities. I agree with and am bound by the finding in Miron v. Trudel, supra, that the denial of equality between married and common-law partners constitutes discrimination. [page398]

[16] In the case at bar, there is no doubt that the relationship between Ms. Eaton and Mr. Hall has all the hallmarks of traditional marriage. Ms. Eaton and Mr. Hall live in a long-term committed conjugal relationship to the exclusion of others raising children of the union and living openly in the community as a couple. But for the formal bond of marriage, this couple appears to live in the very type of relationship that the common law and statutory spousal testimonial incompetence rule was designed to protect.

[17] However, as a result of the lack of a formal martial bond, the accused is not afforded the protection of the Act, vis--vis the competence of his spouse/partner to testify before the court. This is differential treatment of the accused as a person living in common-law relationship as compared to those who are married. While we recognize the nobility of a public commitment of two people to each to the exclusion of all others, we cannot ignore that certain couples chose for a variety reasons to make this commitment through their actions rather than by scripted words. Common-law couples must also be accorded respect, dignity and the benefit of the law.

[18] A reasonable person in Mr. Hall's situation would conclude that the law perpetuates a pre-existing disadvantage. On the s. 15(1) analysis, I conclude that ss. 4(1) and 4(3) of the Canada Evidence Act and the common-law spousal incompetence rule as they relate only to married couples violate the accused's s. 15 Charter right to equality.

[19] Having found that s. 4 of the Canada Evidence Act and the common-law application of the spousal competency rule discriminate against unmarried accused persons living in common-law relationships, the question becomes whether the Crown can prove that the law is a reasonable limit on the accused's equality right and that it is demonstrably justified in a free and democratic society.

2013 ONSC 834 (CanLII)

[20] It is the defence position that the legislation cannot be justified under s. 1 of the Charter as there is no rational connection between the infringement of the constitutional right to equality and the purposes of s. 4 of the Canada Evidence Act and the common-law spousal competence rule.

[21] The state bears the burden of establishing justification on a balance of probabilities. The four criteria for the s. 1 analysis were set out in R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, at paras. 69-70:

(1) the objective of the limit must be pressing and substantial in order to be sufficiently important to warrant overriding a constitutionally protected right or freedom; [page399]
(2) the measures adopted must be rationally connected to the objective, i.e., they must not be arbitrary, unfair or based on a irrational considerations;
(3) the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question; and
(4) there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.

Pressing and Substantive Objective

[22] The pressing and substantial objective of the spousal incompetence rule and s. 4 of the Canada Evidence Act as recognized by the Supreme Court in R. v. Hawkins (1996), 30 O.R. (3d) 641, [1996] 3 S.C.R. 1043, [1996] S.C.J. No. 117, at para. 38, is to promote conjugal confidences, protect marital harmony and prevent the indignity of conscripting an accused's spouse to participate in the accused's own prosecution. There is no evidentiary or logical reason to believe the proponents of this rule and the statutory scheme which followed had any intention of considering the autonomy and freedom of choice of unmarried persons and excluding them from the purview of this rule, as suggested by the Crown. I cannot agree that any objective of the spousal incompetence rules, or the Canada Evidence Act, was to protect autonomy and freedom of choice of unmarried couples.

2013 ONSC 834 (CanLII)

Proportionality Test

[23] If the goal of the spousal incompetence rules and s. 4 of the Canada Evidence Act is promote marital harmony, there is no rationale connection between such a purpose and the exclusion of common-law spouses from the benefit. The exclusion of common-law spouses will not help protect marital harmony or avoid the indignity of having one spouse being the means by which the other is condemned. In fact, one could argue that to exclude common-law spouses from the protection of s. 4 of the Canada Evidence Act and the common-law spousal incompetence rules would be to undermine the very policy reasons that informed the creation of the spousal testimonial incompetence rule in the first place.

[24] Having concluded that the s. 4 of the Canada Evidence Act and the common-law spousal incompetence rules do not satisfy the first component of the proportionality test, it is technically unnecessary for me to consider [the] two other components. However, I do note that even if there is a rational connection the [page400] law does not minimally impair the accused's right to equality as little as possible. By fixing on individuals who are in formal marital unions, only the rule impairs the equality rights more than reasonable necessary to achieve the articulated goals.

[25] There is no proportionality between the effects of s. 4 and the common-law spousal incompetence rules on accused's in common-law relationships and the objective of protecting marital harmony.

Remedy

[26] The remedy sought is for the court to "read in" the extension of the spousal privilege protection to common-law spouses into s. 4 and the common-law spousal incompetence rule. A common-law partner is consistently defined in federal legislation as "a person who is cohabiting with the individual in a conjugal relationship having so cohabited for a period of at least one year or having a child together, or entering into a cohabitation agreement".

2013 ONSC 834 (CanLII)

[27] The Crown argues that in cases such as R. v. Salituro, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, the Supreme Court held that the judiciary should confine itself only to those incremental changes which are necessary to keep the law in step with the dynamic and evolving fabric of our society and that extending the spousal incompetence rule to common-law couples would involve a major change in the law.

[28] In my view, to include common-law partners in the evidentiary protection granted by s. 4 of the Canada Evidence Act and the common-law spousal incompetence rules harmonizes the law in this area with other legislation which for most intents and purposes has abolished the distinction between married and common-law spouses. To include common-law spouses in the evidentiary protection provided by this area of the law does no more than to keep the law in step with the changed and changing social and moral fabric of Canada.

[29] The appropriate remedy is [to] read s. 4 of the Canada Evidence Act to include common-law spouses where there is reference to "husband" and "wife" and to apply the common-law provisions as including common-law partners in any definition of "husband and wife" or "husband" and "wife" or "spouse".

[30] Accordingly, in the present case Carol Ann Eaton is neither a competent nor compellable witness for the prosecution and all communications between Ms. Eaton and the accused, including intercepted communications, are subject to spousal privilege.

Application granted.

2013 ONSC 834 (CanLII)