# *Quebec (Attorney General) v A*, 2013 SCC 5

## Introduction

There are four opinions and two issues in *Quebec v A*, a 259 page, 450 paragraph January 25, 2013 decision of the Supreme Court of Canada.

The first issue was the s 15(1) Charter issue: Did excluding *de facto* spouses from the Civil Code of Quebec (CCQ) provisions mandating property-sharing and spousal support on the breakdown of marriages and civil union relationships violate the equality guarantee in the Charter?

The second issue was whether any such violation of s 15(1) could be justified under s 1 of the Charter.

Abella wrote only for herself, but she wrote the majority decision on the first issue when Deschamps (writing for herself, Cromwell and Karakatsanis) and McLachlin (writing only for herself) indicated they agreed with her that there was a violation of s 15(1). LeBel (writing for himself, Fish, Rothstein, and Moldaver) wrote the dissent on s15(1), holding there was no discrimination.

On the second issue of whether the violation of s 15(1) was justified under s 1, McLachlin held that it was, thereby swinging the majority on the outcome — the decision that there was no (unjustified) discrimination was 5:4. To complicate matters further, Deschamps agreed with McLachlin that the discrimination was justified with respect to the property-sharing exclusions but was not justified for the spousal support-sharing exclusion. Abella held that neither type of exclusion was justified under s 1.

The split between Abella and LeBel on the s 15(1) issue is serious and reminiscent of the badly fractured Court exposed by the "equality trilogy" in the mid-1990s. LeBel wrote at length on the s 15(1) issue — 282 paragraphs of the 450 paragraph judgment — and with obvious passion. See especially his warning (at para 268) that Abella's approach deprived lower courts of guidance and potentially affected the legitimacy of their decisions because it would reduce any analysis of a s 15(1) claim of discrimination to the simple requirement that only an adverse distinction need be proved.

The sheer length of the decision, the many differences among the four opinions, and the lack of clear and concise formulations of the s 15(1) test put the precedential value of this decision in jeopardy.

## Facts and Procedural History

The parties, referred to as A and B by the courts (and as Lola and Eric by the press; see, e.g., Macleans' "A billionaire, the law, his Brazilian ex"), met in Brazil, A's home country, in 1992. A, who was 17 years old at the time, was living with her parents and attending school. B, who was 32, was a wealthy businessman. From 1992 to 1994, they travelled the world together several times a year, and B provided A with financial support so that she could continue her

schooling. In early 1995, the couple agreed that A would come to live in Quebec, where B lived. They broke up soon after A moved to Quebec, but continued to see each other. A became pregnant with their first child in 1996 and the couple began to live together. She gave birth to two other children with B, in 1999 and 2001. For the most part A did not work outside of the home and she often accompanied B on his travels. B provided for all of A's needs and for those of the children. A wanted to get married, but B told her that he did not believe in the institution of marriage. He said that he could possibly envision getting married someday, but only to make a long standing relationship official. The parties separated in 2002 after living together for seven years.

In February 2002, A sued for custody of the children. Her lawsuit also challenged the constitutionality of several provisions of the CCQ that excluded her, as a de facto spouse, from the spousal support and property-sharing benefits that existed in the CCQ for married and civil union spouses. A claimed support for herself and a share of B's property or compensation in lieu thereof. A and B had settled A's claim for use of the family residence and a 2006 court order awarded A and B joint custody of the children and ordered B to pay over $34,000/month to A for child support, plus the children's tuition fees, the cost of their extracurricular activities, the salaries of two nannies and one cook, and the taxes, insurance maintenance and renovation costs for the family residence she and the children were occupying.

The appeals deal solely with the constitutional challenges. The Quebec Superior Court rejected A's arguments and found that the impugned provisions did not violate her Charter equality rights. A appealed to the Quebec Court of Appeal, which allowed her appeal in part, declaring that the provision excluding A from the benefit of spousal support was of no force or effect but suspending that declaration for 12 months. The Court of Appeal upheld the Superior Court's decision on the exclusion of *de facto* spouses from the CCQ's property-sharing provisions. B and the Attorney General of Quebec appealed the Court of Appeal's decision to strike down the spousal support exclusion. A appealed the Court of Appeal's decision that the property-sharing exclusions were constitutionally valid.

**First Issue: Did excluding *de facto* spouses from the Civil Code of Quebec (CCQ) provisions mandating property-sharing and spousal support on the breakdown of marriages and civil union relationships violate the equality guarantee in the Charter?**

***Context***

Both LeBel and Abella discuss the treatment of *de facto* or common law unions in Canada as part of their introductory remarks. Deschamps undertakes a similar review as part of her s 1 analysis.

Abella's narrative (at paras 291-300) is focused on showing that a protective theory of spousal support based on mutual obligations, economic dependency and vulnerability, and need has supplanted a contractual theory of spousal support. She also argues (at paras. 301-311) that the division of family property has also come to be conceptualized on a protective basis, rather than a contractual one. She points to the goal of protecting economically vulnerable spouses as underlying each reform of family property law in Quebec and identifies how each reform

subordinated choices made by married persons to a government agenda of protection. Abella also comments (at para 318) on the historical disadvantage stemming from prejudice that unmarried spouses have faced, a disadvantage recognized in *Miron v. Trudel*, [1995] 2 SCR 418.

LeBel spends the most time looking at the historical prejudice against *de facto* spouses and the historical and present day legal treatment of married, civil union and common law spouses (at paras. 51 – 129, 246-248). He characterizes the relationship between *de facto* spouses as a regime of freedom of contract (at paras. 111-120).

Deschamps discusses three possible bases for support: compensatory, contractual, and non-compensatory. She notes that the non-compensatory basis is just as valid for *de facto* spouses as for married and civil union spouses, and that the basis of the CCQ spousal support provisions is non-compensatory — they are based on need (at paras 390). She differentiates the basis of spousal support from that of property-sharing, where she finds a diversity of sources and objectives (at para 392). This differentiation allows Deschamps to reach different conclusions about the justification of the discrimination in the spousal support provisions and the property-sharing provisions.

McLachlin briefly discusses the historic disadvantage suffered by *de facto* spouses (at para 423-427), but shifts to a focus on choice and autonomy in her s1 reasons (at paras 435-6, 442-446).

All of the judges treated the CCQ provisions with respect to spousal support and property-sharing in the same way, except Deschamps. LeBel is most explicit about why he did so, holding that the issue "was not whether the exclusion of *de facto* spouses from the *obligation of support* is discriminatory, but whether their exclusion from the entire *statutory framework* imposed on married and civil union spouses is discriminatory under s. 15(1) of the Charter" (at para 235, emphasis in original).

***Analytical Framework***

The most recent test for proving that a challenged law is discriminatory within the meaning of s 15(1) was set out in *R v Kapp*, 2008 SCC 41 at para 17 and *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para 30:

(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?

Whether that test survives *Quebec v A* is one of the questions that case raises.

*(1) Does the law create a distinction based on an enumerated or analogous ground?*

All members of the Supreme Court agreed that the first step in the test was met: the CCQ did draw a distinction between married and civil union spouses and *de facto* spouses, and marital status is a protected analogous ground (Abella at para 348, Deschamps at para 385, McLachlin at para 417, LeBel at para 241.)

Despite this unanimity, there is quite a bit of discussion of marital status as an analogous ground. Prior to *Quebec v A*, three Supreme Court cases had considered claims based on the ground of marital status: *Miron v Trudel*, [1995] 2 SCR 418, *M v H*, [1999] 2 SCR 3 (more specifically dealing with sexual orientation and spousal benefits), and *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 SCR 325. The outcomes in these three cases and the reasons for those outcomes figured prominently in the second step of the Court's analysis in *Quebec v A*, in part because of the court's discussion of the role and the reality of "choice" in those cases. The *Walsh* case was particularly relevant because it involved the exclusion of common law spouses from Nova Scotia's property-sharing statutory regime and the lower courts in *Quebec v A* had held *Walsh* was not distinguishable.

Abella repeatedly makes the point that marital status was recognized by the Court as an analogous ground for the very reason that marital status "may not in fact be a choice at all" (at para 317, see also McLachlin at paras 428-430). For example, Abella states (at para 334) that "[i]n *Miron*, the fact that marital status is not a real choice was the basis for designating marital status as an analogous ground under s. 15(1)." This discussion is aimed at countering LeBel's reliance on choice to find the challenged provisions not discriminatory in the second step of the s 15(1) analysis. Abella argues (at para 335) that "focusing on choice at the s 15(1) stage undermines the recognition of marital status as an analogous ground." Analogous grounds are not context-dependent as far as she is concerned.

LeBel, in disavowing the need for historical disadvantage to prove discrimination, makes the point that "historical prejudices can change; some disappear, while new ones may emerge" (at para 182), thereby paving the way for him to state that *de facto* spouses are no longer disadvantaged (which he does at paras 249-250) . But LeBel goes on to recognize analogous grounds as context-dependent, or at least time sensitive, when he states (at para 182) that "[t]he concept of immutability on which my colleagues Deschamps and Abella JJ. rely in their respective reasons, on the basis in particular of *Corbiere*, is not synonymous with eternity. . . . It does not mean that the factors of discrimination can never change or disappear, especially where they are related to customs or social behaviour that could change, as in the case of the attitudes of Quebec society with respect to de facto unions."

Unlike Abella and McLachlin, LeBel appears to think that the acceptance or rejection of a ground of discrimination as analogous in one case does not mean it cannot be rejected or accepted in a subsequent case. This would be a departure from the Court's previous treatment of analogous grounds in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, but it does seem to be what LeBel means when he states (at para 183): "Nor does recourse to these changeable contextual factors in analyzing a specific allegation of infringement of the right to equality mean that a ground of discrimination that is accepted or rejected in a specific case cannot be relied on in another situation."

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

Both LeBel and Abella provide lengthy overviews of the Court's s 15 jurisprudence, from *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 to *Withler*. Both appear to do so

in order to justify their own interpretations of the approach set out in *Kapp/Withler* and, in particular, their interpretation of the second step.

In her summary of the law (at paras. 319-337), Abella focuses on disadvantage as being at the heart of determining whether a distinction based on a protected ground is or is not discriminatory (at paras 322-323). Whether she changes the *Kapp/Withler* approach is difficult to determine, although LeBel certainly believes that she does.

Abella emphasizes that, despite the wording of the second step of the *Kapp/Withler* test, prejudice and stereotyping are merely two indicia of disadvantage that may help determine whether a distinction violates the norm of substantive equality — they are not discrete elements to be proved (at para 325, 327). She does not, however, reformulate the *Kapp/Withler* test. In fact, in her application of the law to the facts of the case (at paras 348-357) Abella does not use (or even mention) the *Kapp/Withler* test. She states as conclusions (at para 349) that the distinction in this case did impose a disadvantage and that the disadvantage the distinction perpetuates is an historic one. Has she reduced the test for a violation of s 15(1) to one of proving a disadvantageous distinction based on a protected ground (at para 349)? Certainly LeBel thinks she has as he states that her approach reduces any analysis of a s 15(1) claim to the simple requirement that only an adverse distinction need be proved (at para 268).

As a summary of her discussion about how claimants need not prove prejudicial or stereotypical attitudes, Abella does provide one clear and concise statement of what a claimant must prove:

> *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. (at para 331, emphasis added)

The use of the word "arbitrary" is particularly regrettable , as a focus on arbitrariness would bring rationality and reasonableness into the s 15(1) analysis and Abella explicitly said (at para 333) that reasonableness should not be considered in a s 15(1) analysis. Unfortunately, because it is the only clear and concise statement of what a claimant must prove in the majority judgment on s 15(1), Abella's statement on "arbitrary disadvantage" may come to haunt equality analysis over the next few years (as it has in the human rights context since her decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4).

Instead of dismissing her use of "arbitrary" as presumably unintentional, perhaps we should consider whether Abella meant it. In her application of the law to the facts, after stating her conclusion up front, she segues into a discussion (at paras 350-356) about the "functional similarity" between *de facto* and married spouses. She does not tell us expressly how this point is related to determining whether the distinction between *de facto* and married spouses is discriminatory? Is it to show a lack of correspondence to the needs of *de facto* spouses, a point consistent with *Law* and *Kapp/Withler*? Or is she saying that functional equivalents must be treated the same? If so, it seems that she is using the "similarly situated" test that was rejected in

*Andrews*. Or is she saying that the distinction between *de facto* and married spouses is an unreasonable one? If so, then perhaps her use of "arbitrary" was intended.

The only point that is clear about Abella's s 15(1) test is that a claimant is not required to prove prejudice or stereotyping. Indeed, she argues (at 327-330) that, because prejudice is "the holding of pejorative *attitudes* based on strongly held views about the appropriate capacities or limits of individuals or groups" and stereotyping is "a disadvantaging *attitude* . . . that attributes characteristics to members of a group regardless of their actual capacities" (at para 326), to require a claimant to prove prejudice or stereotyping would be to wrongly focus on the attitudes of those making the distinctions — their intent or purpose — and not on their conduct and the impact of that conduct on the claimants (at paras 326, 333).

That latter point allows Abella to reiterate (at paras 333-335) a point first made in *Andrews*, namely, that the distinction between the s 15 breach analysis and the s 1 justificatory stage is crucial. Looking at the government's intent or purpose in the s 15 analysis would leave no role for s 1, reducing the test for discrimination to "a prohibition on intentional discrimination based on irrational stereotyping" (at para 333).

The distinction between the work done under s 15 and the work done under s 1 then leads Abella (at para 334) to the question of the proper stage in the analysis in which to address the effect of the choice not to marry. She attacks LeBel's use of choice in the second step of the s 15 analysis in three ways. First she attacks choice in this context as an illusion, drawing on *Miron*. She then argues that focusing on choice in s 15 undermines the recognition of marital status as an analogous ground. Analogous grounds are by definition "personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity" (*Corbiere, supra* at para. 13). To find, as LeBel does, that *de facto* spouses do have a choice about their marital status and that those choices mean the government's line-drawing is not discriminatory is contradictory. Third, Abella argues (at paras 336-337) that choice has rarely in the Court's jurisprudence protected a distinction from being found discriminatory, relying on *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219 (rejecting an argument based on a woman's choice to get pregnant) and *Lavoie v. Canada*, [2002] 1 S.C.R. 769 (rejecting choice to obtain Canadian citizenship or not as a reason to discriminate on the basis of citizenship in public service jobs).

However, in *Walsh*, an 8:1 decision, the Court did uphold discrimination against unmarried spouses based on their choice not to marry. Abella thought it appropriate to conduct the s 15(1) analysis "untethered from *Walsh*" (at para 347). Why? Because the Court's equality analysis has "evolved substantially" (at para 338); because *Walsh* collapses a s 1 concern about the reasonableness of the distinction based on choice into s 15(1) (at para 340); because the Court in *Walsh* relied on human dignity, a s 15 requirement dropped by the Court in *Kapp* (at para 341); because a focus on choice rather than impact was a formal and not substantive equality approach (at para 342); and because *Walsh* emphasized the heterogeneity of unmarried spouses and the fact not all common law spouses were disadvantaged, making the group less than a perfect mirror of married spouses, but *Kapp/Withler* got rid of the requirement for mirror comparators (at para 346).

Abella also comments on the role of historical disadvantage, a tricky factor in this case because all seem to be agreed that although *de facto* spouses suffered prejudice in the past, they no longer do. Abella notes (at para 332) that historical disadvantage is at the root of s 15 and that "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." She does not suggest that historical disadvantage is required, but neither does she reject the idea.

Do either Deschamps or McLachlin offer any clarification or assistance to claimants when they endorse Abella's finding of a violation of s 15?

Deschamps only reiterates that *Walsh* does not survive the Court's decisions in *Kapp* and *Withler*, because freedom of choice should not have been a factor in the s 15(1) analysis. She appears to adopt a simple "perpetuation of a historical disadvantage" test for s 15(1) (at para 385), but the issue is treated in such a cursory fashion that it is difficult to rely on this as a test.

McLachlin states she agrees with Abella's analysis (at para 416), but she adds an additional 16 paragraphs about s 15(1) and its application in this case.

On the crucial second step of the *Kapp/Withler* approach, McLachlin first falls back on *Law* (at para 417) to state that a law is discriminatory if it has the purpose or effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration . In doing so, she seems to take issue with Abella's singular focus on effect (at para 420). McLachlin then quotes (at para 418) the two-step test from *Kapp* and *Withler*, but characterizes "the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, as useful guides", noting that what constitutes discrimination requires a contextual analysis in which one takes into account *Law*'s four contextual factors. McLachlin seems to suggest a claimant need not prove prejudice or stereotyping as discrete elements. This is reinforced by the fact that, when she applies the law to the facts, McLachlin states (at para 423) that "all elements of a s. 15 violation are present" when a distinction, made on analogous grounds, creates a disadvantage which is discriminatory from the point of view of a reasonable person placed in circumstances similar to those of A. Her test seems similar to the approach of Abella, a truncated *Kapp/Withler* test — (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage? — but, unlike Abella, McLachlin does analyze this claim in terms of historical prejudice and false stereotypes, her "useful guides".

Like Abella and Deschamps, on the question of *Walsh*, McLachlin states (at para 422) "it does not bind the Court in the present case." One of her reasons for so concluding is that freedom of choice and individual autonomy are better considered under s 1 and should not be used to negate a breach of s 15 as they were in *Walsh*.

LeBel's 282 paragraph opinion is focused on s 15(1) and, in particular, on the second step of the *Kapp/Withler* test. In his lengthy summary of the development of the jurisprudence on s 15 (at paras. 135-206), LeBel emphasizes the values of freedom and personal autonomy, which he sees as an integral part of human dignity and substantive equality, before focusing on the analytical

framework essential to identifying discrimination (at para 141). LeBel also emphasizes the need for an analytical framework, which he sees as missing from Abella's decision (at para 268).

LeBel's decision is contradictory on the role of prejudice and stereotyping in the second step of the *Kapp/Withler* test. In concluding his discussion of the application of that test in *Kapp* and *Withler*, he states that the Court "stressed the importance of the factors of perpetuation of prejudice and stereotyping. While *it did not make them the only factors*, it determined that they were crucial to the identification of discrimination and to the application of the analytical framework for s. 15" (at para 169, emphasis added). And at the beginning of his discussion about the meaning and scope of *Kapp* and *Withler*, LeBel states that "a discriminatory disadvantage is *as a general rule* one that perpetuates prejudice or that stereotypes" (at para 171, emphasis added) and notes that *Withler* stated that "there are *usually* two ways for a claimant to prove that a law containing an adverse distinction based on an enumerated or analogous ground 'discriminates in a substantive sense'(at para 173, emphasis added) . Finally, he begins his synthesis of the analytical framework for s 15(1) (at para 185, emphasis added) by stating that the test is the two-step tests as stated in *Kapp* and *Withler*, but "subject to my comments to the effect that prejudice or stereotyping *is a crucial, although not the only, factor* to be considered . . .". These statements all suggest that there are other ways to prove discrimination in addition to proving prejudice and stereotyping.

But LeBel admits to uncertainty introduced into the *Kapp/Withler* test by some passages in each case suggesting that a s 15(1) violation "can be established simply by proof of a disadvantage based on an enumerated or analogous ground, without having to establish that the disadvantage is discriminatory by showing that it results from the perpetuation of prejudice or from stereotyping" (at para 175) — and thus begins his insistence on proof of the perpetuation of prejudice or stereotyping as discrete elements:

> The central question is not whether one person receives less than another, but whether one person obtains less than another *as a result of prejudice or stereotyping*. This is the essence of the wrong or injustice that s. 15(1) is intended to prevent. (at para 179, emphasis added)

He goes on, in his synthesis of the analytical framework, to discuss "perpetuating prejudice" as "[t]he first way that substantive inequality — discrimination — may be established . . ." (at para 192). Then he moves on to "the second way that substantive inequality — discrimination — may be established is 'by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group'" (at para 201, quoting *Withler*, at para 36). No third or other way to prove discrimination is mentioned. Indeed, he takes pains to deny that there is only one way, stereotyping, to prove discrimination. He emphasizes (at para 205) that a distinction need not be based on a stereotype to be discriminatory because a "disadvantageous law can also be found to be discriminatory on the basis that it expresses or perpetuates prejudice." In his summary of his synthesis of the analytical framework, LeBel states quite unequivocally (at para 204) ". . . there are thus two ways for a claimant to show that a law that draws a distinction based on an enumerated or analogous ground is discriminatory. On the one hand, the claimant can show that the impugned disadvantageous law perpetuates prejudice against members of a group. On the

other hand, the claimant can prove that the disadvantage imposed by the law is based on a stereotype." He makes this same point when he applies the law to the facts, by insisting (at para 244) there are two ways for A to prove discrimination: "First, she can show that the disadvantageous law perpetuates prejudice against de facto spouses. Second, she can show that the disadvantage imposed by the law is based on a stereotype." All of these statements suggest that either prejudice or stereotyping must be proved.

Perhaps the contradictory statements crept into his opinion because his focus was elsewhere, on Abella's approach to s 15(1). LeBel insists that pre-existing disadvantage is not enough by itself to establish discrimination because it is only a contextual factor allowing the identification of prejudice (at paras 176-177). He also rejects the need for historical prejudice (at para 181), suggested by the *Kapp/Withler* formulation "perpetuating prejudice". Indeed, he begins to use the phrase "the expression and/or perpetuation of prejudice" (at para 198-199, 205).

LeBel does talk about attitudes as part of his analytical framework for s 15(1), a point that Abella calls him on. For example, he states (at para 193, emphasis added) that "[a]n adverse distinction . . . discriminates by perpetuating prejudice *if it denotes an attitude or view concerning a person that is at first glance negative* and that is based on one or more of the personal characteristics enumerated in s. 15(1) or on characteristics analogous to them." But he immediately goes on to add that "[a]n adverse distinction can also be inconsistent with s. 15, even if there is no discriminatory intent whatsoever, if it has a discriminatory effect." His point may merely be the same as McLachlin's (at para 420) that a distinction can be discriminatory either in purpose or in effect. His emphasis on attitude may also arise from the fact he characterizes the historical prejudice against *de facto* spouses as intentional (at para 246).

It is in LeBel's discussion of the precedential value of *Walsh* (at paras 207-226) that we see the crux of his disagreement with Abella and the reason he finds that the distinctions drawn between married and civil union spouses and *de facto* spouses are not discriminatory. Choice is at the heart of his opinion. He accorded no weight to the expert evidence introduced to show the limits on choice in *de facto* relationships (at para 127 and more obliquely at paras 237-240). In summarizing that case, LeBel states (at para 213) that a fundamental difference between married couples and unmarried couples was that the former had chosen to be bound by the matrimonial property legislation while the latter had not. It was not stereotyping to believe that common law couples had chosen to avoid the institution of marriage, in part because common law couples were such a heterogeneous group that it could not be argued they had impliedly consented to be bound by the legislation (at para 215). Instead, by excluding common law spouses, the matrimonial property statute "maintained the liberty of all spouses to make fundamental choices in their lives", even if the freedom to marry "can sometimes be illusory" (at para 216).

LeBel was of the opinion that the same conclusion of "no discrimination" would have been reached in *Walsh* if the analysis was based on the *Kapp/Withler* analytical framework. Although the matrimonial property statute did draw a distinction based on an analogous ground "that distinction did not create a disadvantage by perpetuating prejudice or stereotyping" (at para 217). The statute merely defined the legal content of a variety of relationships that couples could choose between. Or, as LeBel put it (at para 219), "the legislature had defined the content and consequences of various forms of relationship but had not favoured one form over another. . . .

By expressing a consensual choice or intention, spouses could opt in to the regime of their choice to which the rights and obligations established by the legislature applied."

In finding that A could not show that "the disadvantageous law perpetuates prejudice against *de facto* spouses," LeBel emphasizes consent as the source of obligations of support and property-sharing (at para 257). He attacks Abella's characterization of the choice of relationship as a mutual one (at para 260) and her preference for an "opt out" system over the current "opt in" system (at paras 259-265, 268). He seems particularly upset by her refusal to recognize the role of consent even while her "opt out" system would depend on consent (at para 268). Neither he nor Abella mention how "opt in" and "opt in" systems change who holds the veto and hence the bargaining power.

In finding that A could not show "that the disadvantage imposed by the law is based on a stereotype," LeBel states that the issue is "the validity of the basic premise of Quebec family law, namely the exercise of autonomy of the will" (at para 270). The purpose of the legislation is what counts for LeBel, illustrating the use of s 1 considerations within a s 15(1) analysis. How does the legislatures' purpose end up having such a large role in a s 15(1) analysis? It is *Law*'s correspondence factor at work, a factor often accused of importing s1 considerations into s 15. LeBel had earlier tied stereotyping tightly to *Law*'s correspondence factor — correspondence between the ground or grounds of discrimination on which the claim is based and the actual circumstances of the claimant or the affected group — by insisting that correspondence "can be used to determine whether the distinction creates a disadvantage by stereotyping" (at para 206). The purpose of Quebec's exclusion of *de facto* spouses was to recognize individual's autonomy of will and as long as there is autonomy of will in relationships the distinction by the legislature corresponds to the actual circumstances and characteristics of *de facto* spouses and therefore does not create a disadvantage based on false stereotyping (at para 271).

**Second Issue: Was the breach of s 15(1) justified under s 1?**

LeBel did not deal with the s 1 issue at all, having found that there was no violation of s 15(1).

McLachlin, who had found there was a violation of s 15(1), found that the discrimination was justified under s 1. She was the only judge to do so. Nevertheless, it is her decision on s 1 that results in the outcome of this case being "no (unjustified) discrimination".

At the pressing and substantive objective stage, McLachlin identified the objective as being "to promote choice and autonomy for all Quebec spouses with respect to property division and support" (at para 435). Unlike Abella and Deschamps, she found this to be an important objective that would justify an infringement of the right to equality (at para 437). This is interesting in light of her remarks on choice in the s15 context, where she notes (at para 428) that "people in A's situation have not in fact chosen to forego the protections of the mandatory regime", and calls choice in this context a "false stereotype".

Under the rational connection stage of s1, McLachlin found there was more than the tenuous connection Abella and Deschamps found between the objective and the means chosen to achieve it. She states that without the discriminatory distinction, "the clear choice between a regime of

division of property and support on the one hand, and a regime of full autonomy on the other hand, would be absent" (at para 438).

Her minimal impairment discussion is the longest, as it must be in the face of the total exclusion of *de facto* spouses in the CCQ provisions. The relevant question for her was "whether the impugned provisions fall within a range of reasonable alternatives", particularly because the impugned measures "attempt to strike a balance between the claims of legitimate but competing social values" (at para 439). She acknowledged (at para 442) that an "opt out" scheme and other provinces' spousal support and property-sharing regimes impair the equality right of *de facto* spouses to a lesser degree than the Quebec scheme, but found that "such approaches would be less effective in promoting the goals of the Quebec scheme of maximizing choice and autonomy for couples in Quebec" and "[l]ess drastic means which do not actually achieve the government's objective are not considered at this stage" (at para 442, citing *Hutterian Brethren*, at para. 54). The minimal impairment question is "whether the legislative goal could be achieved in a way that impacts the right less, not whether the legislative goal should be altered" (at para 445). An "opt out" property-sharing scheme would "offer a narrower conception of choice than does Quebec's current approach . . . [because it] would require agreement and positive action on the part of *de facto* spouses" and therefore an "opt out" scheme as proposed by Abella was not to be considered. As for support, which was intertwined with property in any event, "allowing judges to award support would undermine the legislative goal of maximizing choice and autonomy" (at para 446). McLachlin therefore concluded (at para 447) that the CCQ provisions fell "within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support."

As for proportionality, McLachlin found that benefits of enhancing freedom of choice and autonomy in times when there was no stigma attached to *de facto* spouses' relationships outweighed "the cost of infringing the equality right of people like A, who have not been able to make a meaningful choice" (at para 449). This conclusion was easier to reach because of deference, i.e., because McLachlin added (at para 449) "the need to allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of each province to legislate for its population" to the salutatory effects side of the proportionality ledger.

Abella was the only judge to find that the discrimination was not justified under s 1.She agreed (at para 358), reluctantly, that the objective of preserving freedom of choice was a pressing and substantial objective. She relied on the fact it was not vigorously argued. As for rational connection between the objective and the means used to achieve it, Abella characterized it as "tenuous" but accepted it existed because "the government does not face a heavy burden" at this stage of the s 1 test (at para 359).

For Abella, justification failed at the minimal impairment stage. She used a different test than McLachlin did, a test in which the government must show that the measures at issue impair the right as little as reasonably possible in order to achieve the legislative objective (at para 360). The discriminatory provisions were an outright exclusion of *de facto* spouses, an exclusion characterized as "total" (at para 361). Alternatives she identified included an "opt out" system which would protect vulnerable spouses without interfering with freedom of choice. Other

provinces had extended spousal support to unmarried couples in a variety of ways and a number of them had extended their matrimonial property regimes as well, indicating other alternative, less infringing options.

As for the final step of *Oakes*, Abella noted that the harm of excluding all *de facto* spouses from the protection of the spousal support and family property regimes "is clearly profound" because the exclusion "impact[s] over a third of Quebec couples" (at para 377) who would have to expend time, effort and money to try to obtain some financial assistance because it was not presumptively available to them. The salutary effect would be the preservation of *de facto* spouses' freedom to choose, something an "opt out" scheme would also preserve, so the salutary effects did not outweigh the harm she found.

Deschamps found that the discrimination was justified in the case of the property-sharing provisions of the CCQ, but not the spousal support provisions. Having found that the spousal support provisions of the CCQ are based on need and the property-sharing provisions are not, Deschamps deals with the provisions separately.

For the spousal support provisions, Deschamps agrees with Abella about pressing and substantive objective and the tenuous rational connection (at para 394). The provisions fail the minimal impairment test because the interest affected is fundamental, the need-based reasons apply to *de facto* spouses as much as to married spouses, social assistance benefits are "minimalist", and the exclusion is total (at paras 395-399).

Deschamps breaks down the property-sharing provisions into compensatory allowance provisions, where the exclusion of *de facto* spouses is a minimal impairment; the partnership of acquests provisions, where the exclusion is justified because the provisions are not related to need and require spouses to "opt in"; and the family patrimony provisions, for similar reasons, especially the positive and deliberate choices made to acquire such property (at paras 400-406).

**Summary of Doctrinal Differences**

Doctrinally, the fundamental splits on the Court occurred over some pretty basic issues:

- Whether a claimant must prove prejudice or stereotyping in order to prove a distinction based on a protected ground is discriminatory or whether proving disadvantage is enough (i.e., has the *Kapp/Withler* test been changed)
- Where to address choice, under s 1 or s 15
- How to approach minimal impairment under s 1
- The relevance of context in relation to analogous grounds
- How relevant is intent/attitude in the context of prejudice and stereotyping?
- Whether *Walsh* is a good precedent
- The purpose of s 15, i.e., the role of vulnerability and the role of freedom
- How many members of a group must be disadvantaged, i.e., the role of group heterogeneity
- The role of historical disadvantage
- The role of qualitative empirical evidence

**Themes**

- The tension between equality and liberty, the heart of the case
- The different perceptions of the typical *de facto* spouse relied upon by each judge, grounding their assumptions about how many or few *de facto* spouses were economically vulnerable versus how many or few were autonomous agents
    - Is the Court itself engaged in stereotyping?
- The public/private dichotomy, e.g., when LeBel discusses how the legislature could choose to make *de facto* spouses support each other and relieve the fiscal burden currently on the state; e.g., where the CCQ provisions are seen to confer private benefits and are therefore separable from the many other statutory provisions which treat *de facto* spouses to the same benefits from the public purse
- Lumpers versus splitters: are the spousal support and property provisions lumped together or split apart?

**Questions for Discussion**

1. What is *Quebec v A* actually precedent for? How much of an impact will it have on equality jurisprudence?

2. What should be the role of prejudice and stereotyping in section 15 cases? Should stereotyping and prejudice both be seen to require negative attitudes / assumptions?

3. How can assumptions about "choice" lead to a finding of stereotyping and thus discrimination under section 15(1), yet still justify the exclusion of *de facto* spouses under s1? Does McLachlin CJ's reasoning amount to anything more than pure utilitarianism?

4. What does *Quebec v A* suggest about the fundamental incompatibility between equality and freedom?

5. What might be the impact of *Quebec v A* in Alberta, where the *Matrimonial Property Act* continues to exclude common law spouses from the legislative assumption of equal property division?