

June 5, 2013

## Roundtable on *Quebec v A*: Searching for Clarity on Equality

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### Decision Considered:

*Quebec (Attorney General) v. A*, 2013 SCC 5 (case summary available [here](#))

On May 13, 2013, we led the Faculty of Law's first roundtable discussion of the summer on the Supreme Court's most recent equality rights decision, *Quebec (Attorney General) v. A*. Participants included faculty members, researchers from the Alberta Civil Liberties Research Centre and Alberta Law Reform Institute, and a number of JD and graduate students. Coincidentally, a virtual roundtable on the case is also ongoing at the moment, moderated by Sonia Lawrence, Director of Osgoode Hall's [Institute for Feminist Legal Studies](#) (IFLS), with participation from law profs Robert Leckey, Hester Lessard, Bruce Ryder, and Margot Young. Many of the issues raised in the IFLS discussion were also debated in our roundtable.

*Quebec v A*, also known as the Eric and Lola case, involved an equality rights challenge to the *Civil Code of Québec*, SQ 1991, c 64 (CCQ), and its exclusion of *de facto* spouses from the property-sharing and spousal support provisions that apply upon the breakdown of marriage and civil union relationships. This exclusion was challenged by A (Lola), a woman who was in an on and off *de facto* relationship with B (Eric) for several years and had three children with him. The parties met in Brazil, A's home country, when she was a 17 year old student and he was a wealthy 32 year old business man. A moved to Quebec a few years later to reside with B. For the most part A did not work outside of the home, and B provided financially for her and the children's needs. Although A wanted to get married, B told her that he did not believe in marriage.

The parties separated in 2002 after living together for seven years. A and B agreed on A's claim to the use of the family residence, and a 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 other expenses. Although these matters were resolved, A challenged the constitutionality of the CCQ provisions that excluded her, as a *de facto* spouse, from the spousal support and property-sharing benefits available to married and civil union spouses.

A had mixed success in the Quebec courts. The Quebec Superior Court rejected her arguments and held that the impugned provisions of the CCQ did not violate her *Charter* equality rights. The Quebec Court of Appeal allowed her appeal in part, finding that the provision excluding A from spousal support benefits was of no force or effect but suspending that declaration for 12 months. The Court of Appeal upheld the Superior Court's decision that excluding *de facto* spouses from the CCQ's property-sharing provisions did not violate the *Charter*. B and the Attorney General of Quebec appealed the Court of Appeal's decision to strike down the spousal

support exclusion, and A appealed its decision that the property-sharing exclusions were constitutionally valid.

## Supreme Court Decision

The first issue for the Supreme Court was whether excluding *de facto* spouses from the CCQ provisions mandating property-sharing and spousal support on the breakdown of marriages and civil unions violated the equality guarantee in section 15(1) of the *Charter*. Justice Abella wrote the majority decision on this issue, with Deschamps (writing for herself, Cromwell and Karakatsanis JJ) and McLachlin CJ (writing only for herself) indicating they agreed with her that there was a violation of section 15(1). LeBel J, writing also for Fish, Rothstein, and Moldaver JJ, dissented on section 15(1) by holding that there was no discrimination.

The second issue was whether any violation of section 15(1) was justified under section 1 of the *Charter*. McLachlin CJ held that it was, thereby swinging the majority on the outcome to a 5:4 decision that there was no unjustified discrimination. To complicate matters further, Deschamps J agreed with McLachlin CJ that the discrimination was justified with respect to the property-sharing exclusions but was not justified for the spousal support-sharing exclusion. Abella J was the only justice who held that neither type of exclusion was justified under section 1.

We have provided a summary of the decision we circulated to workshop participants, written by Jonnette Watson Hamilton (and linked to this post at the top). It distills the 259 page, 450 paragraph decision into about 12 pages. This post will focus on the questions for discussion dealt with at the roundtable, assuming readers are familiar with the reasons for decision.

## Roundtable Discussion

*Question One: What is Quebec v A actually precedent for, and how much of an impact will it have on equality jurisprudence?*

The first topic of discussion was: What is *Quebec v A* actually precedent for, and how much of an impact will it have on equality jurisprudence? As noted in Jonnette's summary, the sheer length of the decision, the many differences among the four opinions, and the lack of clear and concise formulations of the section 15(1) test put the precedential value of this decision in jeopardy.

Prior to *Quebec v A*, the governing test for section 15 came from *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17 and *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 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?

In *Kapp* and *Withler*, Abella J and McLachlin CJ wrote joint reasons for decision, and they were both part of the section 15(1) majority in *Quebec v A*. Yet their approaches to section 15(1) are quite different in *Quebec v A*, particularly on the second question from the *Kapp/Withler* test. Justice Abella questioned the wisdom of relying too heavily on prejudice and stereotyping as the measures of discrimination, as opposed to disadvantage and substantive equality more broadly (see e.g. paras 325, 327). For her, prejudice and stereotyping reflect discriminatory attitudes, and

an exclusive focus on attitudes fails to recognize an effects-based approach to section 15 that captures discriminatory conduct (at para 328). In her application of section 15 to the CCQ's exclusion of *de facto* spouses, Abella J focused primarily on the historic disadvantage faced by *de facto* spouses (see e.g. para 349). McLachlin CJ stated that she agreed with Abella J's section 15 analysis (at para 416), and did seem to concur with a couple of Abella J's key findings: first, that prejudice and stereotyping were not crucial factors for finding discrimination, as opposed to being simply "useful guides" (at para 418), and, second, that choice is a matter to be considered under section 1 of the *Charter* rather than under section 15 (at paras 334-337 (Abella J) and 429-431 (McLachlin CJ). See also the reasons of Deschamps J at para 384)). However, in her application of section 15 to the CCQ, McLachlin CJ noted the historical prejudice and "false stereotypes" faced by *de facto* spouses (at para 423). Her application of the test suggests that she may not be willing to set aside prejudice and stereotyping as the key measures of discrimination as readily as Abella J. McLachlin CJ also differentiated her section 15 reasons from those of Abella J by discussing the continued relevance of the four contextual factors from *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (at para 418) and by invoking *Law* for the purpose of section 15 (at para 417) and for its focus on the reasonable section 15 claimant (at paras 419, 427).

While Deschamps J's section 15 reasons were quite brief, she agreed with Abella J's reliance on historic disadvantage (at para 385) and she did not discuss prejudice or stereotyping. For the dissent, LeBel J continued to see prejudice and stereotyping as (at least) crucial factors, if not the only factors, in proving discrimination under the second step of the *Kapp/Withler* test (see e.g. paras 169, 179). Thus there is no clear statement from a majority of the Court eschewing the focus on prejudice and stereotyping, particularly in light of McLachlin CJ's judgment.

Discussion at the roundtable focused on why the Court seems so intent on establishing a clear test for section 15, rather than on principles that should be applied in assessing equality rights claims (which was the approach in the Court's first section 15 decision, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143). It was noted that while a test provides clarity for litigants and lower courts (as well as law teachers and students), it sometimes ends up being applied by rote, as was the *Law* test, with a resulting inattention to underlying principles. Participants noted that this is not unlike the approach the Court has taken with respect to the standard of review in the administrative law context, where there is a desire to send a clear message to lower courts but the result when the test is applied is often fracturing or inattention to principles. On the other hand, the test for discrimination in the human rights context has not been clarified by the Court, in spite of pleas for it to do so (see e.g. *Moore v British Columbia (Education)*, 2012 SCC 61), leading to much uncertainty for litigants and lower courts. Perhaps the Court is reluctant to rely on principles, rather than a test, because principles can be applied in such disparate ways.

At the same time, in formulating the test for discrimination, members of the Court are not always careful in their choice of words. For example, Abella J referred to "arbitrary disadvantage" at one point in her reasons (see para 331), which could be seen to undercut her remarks about the need to stay away from section 1 considerations in the section 15 analysis. And LeBel J was not clear about whether he viewed prejudice and stereotyping as being the only ways of proving discrimination (see *Quebec v A* summary at pages 8-9). If the Court is intent on establishing a clear test for section 15, that clarity was not communicated even within particular sets of reasons for decision in *Quebec v A*.

It remains to be seen whether the case will be ignored, or will be considered as a tweak of the *Kapp/Withler* approach, and to what extent. It seems fairly safe to say that *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 is overruled and all discussions of choice should henceforth take place only under section 1. It is much more difficult to predict the effect of *Quebec v A* on the test for discrimination. If McLachlin CJ's reasons are ignored and LeBel J is taken for what he says and not what he does, *Quebec v A* might change the test for discrimination to allow a claimant to succeed by proving disadvantage as a result of any number of causes, including but not limited to prejudice or stereotyping.

*Question Two: 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?*

The second question for discussion was: 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? There were no participants in our roundtable discussion who favoured exclusive reliance on prejudice and stereotyping as the test for discrimination. Opinions differed somewhat on whether stereotyping and prejudice should be seen as requiring negative attitudes and assumptions. To do so would prove especially problematic for adverse effects cases. If these remain the main synonyms for discrimination, it was agreed that the terms should be interpreted as broadly as possible.

In terms of how the various members of the Court actually defined these terms, Abella J viewed prejudice as “the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member”, while stereotyping “is a disadvantaging attitude ... that attributes characteristics to members of a group regardless of their actual capacities” (at para 326). For her then, only prejudice seems to require negative or malevolent attitudes. McLachlin CJ did not explain the terms in her concurring reasons under section 15, although she relied on “false stereotyping” in her application of the test for section 15(1) (at paras 418, 423, 428), suggesting that her focus is on false rather than negative assumptions. Deschamps J did not define nor rely on prejudice and stereotyping in her judgment.

LeBel J defined prejudice with reference to the work of Denise Réaume, who argues that prejudice “denies a class of persons a benefit out of *animus* or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status” (see “Discrimination and Dignity” (2003), 63 La L Rev 645 at 679-80, cited in *Quebec v A* at para 195). Although prejudice thus seems to require negative attitudes, LeBel J noted that laws may be unintentionally prejudicial, i.e. prejudicial in their effects. For example, laws that “restrict access to a fundamental social institution or impede full membership in Canadian society” may “indicate that the government action expresses, or has the effect of perpetuating, prejudice against — i.e., a lower or demeaning opinion of — certain persons” (at para 200). As an example of unintentional prejudice, Justice LeBel used the case of *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, which involved the denial of equal access to health care to deaf persons based on a failure to accommodate their need for sign language interpretation (at paras 199, 200). This example suggests a fairly broad interpretation of prejudice that may seem at odds with the definition provided earlier. As for stereotyping, Justice LeBel referred to laws that are “premised upon personal traits or circumstances that do not relate to individual needs, capacities or merits” (at para 201). His focus seemed to be on the accuracy of the assumptions, although he did refer several times to “negative stereotypes” (see e.g. paras 202, 203).

Roundtable participants also discussed the role of stereotyping in cases such as *Withler* and *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429. Although the majority opinion in *Gosselin* suggested that stereotyping must be negative to be captured by section 15, *Withler* took a broader approach to stereotyping that captured both negative and false assumptions, a view which is arguably accepted in *Quebec v A*. It was agreed that a focus on intentional discrimination is a narrow approach that should be avoided.

*Question Three: 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 section 1?*

The third question for discussion was: 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 section 1? This was essentially a rhetorical question flowing from McLachlin CJ’s finding that assumptions about choice in *de facto* relationships are based on false stereotypes, yet discrimination faced by *de facto* spouses under the CCQ is justified on the basis of choice under section 1. This logic seemed perplexing if not outright contradictory to many participants. It was agreed that McLachlin CJ’s reasoning was at best utilitarian – discrimination against *de facto* spouses was seen as justifiable because it was in the overall public interest to continue to promote choice of relationships (see paras 435-448). Participants questioned the basis for Chief Justice McLachlin’s deference to the government’s justification for excluding *de facto* spouses, since this was a case of private rather than public benefits. It was noted that the Court may remain sensitive to accusations of judicial activism, so that may have been a factor in her deference. We also discussed the similarity of McLachlin CJ’s section 1 reasons in this case with her decision in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, which she herself cited for the proposition that only means that “actually achieve the government’s objective” are to be considered under section 1 (at para 442). For McLachlin CJ, a scheme which presumptively provided for spousal support and property division, subject to opt-out provisions, could not promote choice to the same extent as an opt-in scheme, and thus could not be seen as a viable alternative under section 1’s minimal impairment test (at para 443). Although this places women such as A in an “unfortunate dilemma,” this disadvantage was not seen as “disproportionate to the overall benefits of the legislation” by the Chief Justice (at para 448). Women such as A are thus treated as sacrificial lambs on the altar of choice and autonomy, just as the religious freedoms of Hutterite drivers in *Hutterian Brethren of Wilson Colony* were sacrificed for the sake of security.

*Question Four: What does Quebec v A suggest about the fundamental incompatibility between equality and freedom?*

McLachlin CJ’s section 1 reasons also helped frame the fourth question for discussion: What does *Quebec v A* suggest about the fundamental incompatibility between equality and freedom? Participants noted that this case really brings these values into stark contrast. For Abella J, equality trumped freedom of choice, and for LeBel J, it was *vice versa*. McLachlin CJ attempted to give each value prominence in section 15 and section 1 respectively, resulting in the incoherence noted earlier. As one participant said, McLachlin CJ’s swing vote in *Quebec v A* suggests that the case has no rational outcome as far as equality and freedom of choice are concerned.

*Question Five: 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?*

The fifth question was: 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? One participant noted that while the Alberta government intervened in *Quebec v A*, the decision may not apply in the same way here, given the Court's focus on the particular histories and current circumstances of *de facto*, civil union and married spouses under the CCQ. There is a core of matrimonial property under the CCQ that is subject to equal division that the parties cannot contract out of, again suggesting that the *Quebec v A* decision might be distinguished. In terms of whether it makes a difference that Quebec has a unique category protecting civil unions, this could be seen as a response to the same sex marriage litigation in the late 1990s, and probably does not support the argument that the availability of more "choices" of relationships in Quebec also distinguishes that province from others.

It is also important to note that in Alberta, spousal support is available to *de facto* spouses by virtue of the *Adult Interdependent Relationships Act*, SA 2002 c A-4.5, and it is only with respect to matrimonial property that married and unmarried spouses are treated differently. Because *Quebec v A* was 8:1 on the issue of property rights, with only Abella J finding that this exclusion was unjustifiably discriminatory, this decision may not provide strong support for a challenge to Alberta's *Matrimonial Property Act*. On the other hand, if the majority reasons on equality and choice are followed, and the particular circumstances of the CCQ that seemed to motivate the decision of Deschamps J are distinguished, perhaps the case will prove to be a strong precedent for such a challenge.

Participants also discussed BC's new *Family Law Act*, SBC 2011, c 25, which provides for an opt-out rather than opt-in scheme for unmarried spouses. It was noted that both this regime and the *Quebec v A* decision itself (and its surrounding publicity) may serve to notify members of the public that their relationship choices (or lack thereof) may have certain legal consequences. The point was also made that it would be useful to know whether schemes that presume equal division of property and availability of spousal support with opt-out provisions are actually being used, and how the gendered power dynamics of heterosexual relationships and some of the heteronormative assumptions inherent in such schemes may play out in this context.

*Question Six: Is the gender split in Quebec v A significant?*

A sixth question was suggested by a participant at the beginning of the roundtable and also builds on the point just made. Participants remarked upon the gender split in *Quebec v A*, with all of the female justices plus Cromwell J finding discrimination in the CCQ's exclusion of *de facto* spouses, and only male justices finding that there was no discrimination.

It is also interesting to consider the gender split in terms of who the various justices see as the paradigmatic *de facto* spouses. For Abella J, the paradigmatic *de facto* spouse appears to be someone — a woman — who is vulnerable to the economic harms that may flow from the breakdown of a relationship, and requires protection. For LeBel J, the relationship between *de facto* spouses is primarily characterized as involving freedom of contract rather than gendered power imbalances. One participant rather cynically suggested the male judges were protecting a man's right to a 17-year-old girlfriend. Participants also noted a link to the dispute between Abella J and LeBel J about whether, once recognized, an analogous ground is forever an analogous ground. For Abella J, marital status will always be an analogous ground, perhaps because of its basis in historical disadvantage (see paras 317, 334). It was suggested that, coupled with her paradigmatic *de facto* spouse, Abella J presents a picture of women as forever vulnerable and forever in need of protection. For LeBel J, however, analogous grounds are time sensitive and grounds of discrimination can disappear, especially if they are related to customs and social behaviour (see para 182).

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