Few recent Supreme Court of Canada decisions have attracted as much attention – or generated as much divisive debate around the water cooler – as the judgment in *Quebec (Attorney General) v. A.*, better known as “*Eric v. Lola*.” In Quebec, unlike the rest of Canada, *de facto* spouses have no right to claim spousal support or to apply for a division of family property upon separation. The loaded question at the root of *Eric v. Lola* was whether this violates the equality rights of *de facto* spouses under s. 15 of the *Canadian Charter of Rights and Freedoms*.

After separating from her long-term partner, Ms. A – dubbed “Lola” by the Quebec press – decided to challenge her inability to claim support or division of property. The case became a media circus in Quebec, partly because of the sensitivity of the issue and partly because the facts sound like they were cribbed from a soap opera script.

Lola was 17 when she met 32-year-old Mr. B (“Eric”) in her native Brazil. The two began a relationship that would continue for ten years and produce three children. Lola moved to Canada. Eric became a billionaire, “a pillar of Quebec’s business community,” and Lola attempted to start a modelling career but otherwise did not work outside the home. Lola wanted to get married; Eric did not. When the relationship ended, Lola applied for a division of property, $56,000 a month in spousal support and a lump-sum payment of $50 million, despite the fact that the union was *de facto*. She asked the courts to find that the Quebec legislature’s decision to distinguish between married and *de facto* spouses was a discriminatory distinction on grounds of marital status and thus a violation of her equality rights under s. 15 of the *Charter*.

The legal analysis: Limiting equality rights in s. 15

The Supreme Court split four ways in deciding *Eric v. Lola*, resulting in a complex decision that spans 450 paragraphs.

LeBel J., accompanied by Fish, Rothstein and Moldaver JJ., found no infringement of s. 15. The remaining five judges found that s. 15 had been infringed but parted ways on the determinative issue of whether the infringement could be justified under s. 1 of the *Charter*, delivering three separate sets of reasons. Abella J. held that the distinction between married and *de facto* spouses violated s. 15 and could not be justified under s. 1. Deschamps J. (with Cromwell and Karakatsanis JJ.) adopted Abella J.’s s. 15 analysis, but held that the exclusion of *de facto* spouses property-sharing could be saved by s. 1, though not their exclusion from spousal support obligations. The Chief Justice, casting the deciding vote, more or less agreed with Abella J.’s approach to s. 15, but ultimately upheld the entirety of the legislative regime under s. 1.

Although *Eric v. Lola* is ostensibly a case about Quebec family law, it’s importance extends well beyond those borders. Our aim in this article is to analyze what we see as the most important themes of the decision as a matter of constitutional and public law, for the benefit of the Ontario reader.

Legally, *Eric v. Lola* represents the latest installment in the Supreme Court of Canada's continuing quest to formulate a workable test for s. 15 equality rights and addresses the interplay between s. 15 and the limitation clause in s. 1 of the *Charter*. Philosophically, the decision reveals how the current bench approaches the tension between the competing values of individual autonomy and protecting the vulnerable in the context of equality rights. Politically, *Eric v. Lola* reminds us that in the context of a *Charter* challenge to provincial legislation – particularly Quebec legislation – the Supreme Court’s interest in federal-provincial conflict avoidance may be the most important consideration of all.

The right to equality is not absolute. First, it is subject to the general limitation clause in s. 1 of the *Charter*, which allows the government to justify or “save” infringing measures if those measures constitute reasonable limits that can be demonstrably justified in a free and democratic society. Second, it contains an inherent limitation in the form of the phrase “without discrimination.”

Although the Supreme Court’s equality rights jurisprudence has largely centred on trying to find a workable definition of discrimination, it is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*… The right[s] … are granted with the direction contained in s. 15 itself that they be *without discrimination.* [emphasis added]

Thus, a claimant seeking to prove an infringement must demonstrate two things: first, that the impugned law creates a *distinction* based on an enumerated or analogous ground; and second, that the distinction amounts to *discrimination*.

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Underlying this is the fundamental question of the respective roles of s. 15 and s. 1: which section should do the heavy lifting in limiting equality rights? This is no mere academic debate: it determines who will bear the burden of proof in the majority of equality rights claims. Under s. 15, the claimant has the burden of proving that the distinction is discriminatory; under s. 1, the government has the burden of proving that the distinction is justified. Defining discrimination too narrowly could place an unreasonable burden on rights claimants; defining it too broadly could place an undue burden on the government to justify any law that draws a distinction between groups. The convoluted history of equality rights under the Charter reflects the court’s attempt to strike a balance between these extremes.

The definition of “discrimination”: A short history

Over the years, the definition of “discrimination” has gone from general to specific and back again. In the first Supreme Court decision interpreting s. 15, Andrews v. Law Society of British Columbia, McIntyre J. defined discrimination simply as “distinctions … which involve prejudice or disadvantage.”

In a subsequent decision, Law v. Canada (Minister of Employment and Immigration), the court created a more detailed framework. Law held that discrimination should be defined in terms of the impugned law’s impact on the claimant group’s “human dignity,” having regard to four contextual factors: (1) pre-existing disadvantage; (2) correspondence between the differential treatment and the claimant group’s reality; (3) the law or program’s ameliorative purpose or effect, if any; and (4) the nature of the interest affected.

In the decade that followed, the Test case came under heavy fire for overcomplicating the analysis and making it too difficult for claimants to establish infringement of s. 15. The notion of human dignity, originally intended to articulate the underlying aim of equality rights, instead became an additional barrier for rights claimants to surmount. As McLachlin C.J. and Abella J. stated in R. v. Kapp:

[H]uman dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply, it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. [emphasis added]

Thus, in Kapp, the court retreated to a more general understanding of discrimination, similar to the Andrews analysis and with no mention of “human dignity” as a defining factor. However, Kapp also generated some confusion, as it appeared to employ two different definitions of discrimination:

- the perpetuation of prejudice or stereotyping which creates a disadvantage;
- the perpetuation of prejudice or disadvantage, or stereotyping.

Though these definitions sound similar, the first is considerably more restrictive than the second. Under the first definition, the claimant must demonstrate both a disadvantage and an existing prejudice or stereotype against her group. Under the second definition, disadvantage alone will suffice: prejudice, stereotype and disadvantage are treated as alternative forms of discrimination. Thus if the claimant can demonstrate that the law perpetuates a disadvantage for her group, there is no need to establish that this disadvantage is caused by prejudice or stereotyping.

Eric v. Lola: Does a s.15 claimant have to prove existing prejudice or stereotyping?

These two definitions of discrimination came to a head in Eric v. Lola. LeBel and Abella J.J.s contrasting decisions stem in part from how they view the respective roles of s. 15 and s. 1 in limiting equality rights. LeBel J. places greater importance on the internal limitation in s. 15; Abella J. prefers to rely on s. 1.

LeBel J. opts for the first definition: a law will only be discriminatory when (1) it perpetuates prejudice against members of a group or (2) it is based on a stereotype. The perpetuation of disadvantage cannot in itself constitute discrimination. In LeBel J.’s view, s. 15 should contain a strong internal limitation to prevent the floodgates from opening. He worries for the legitimacy of the courts’ decisions on equality if the government is required to justify every law that draws a distinction between groups. Requiring the claimant to prove existing prejudice or stereotyping provides a “coherent analytical framework” under s. 15.

LeBel J. acknowledges that the Quebec law’s distinction on the ground of marital status may result in disadvantage to economically vulnerable de facto spouses. He also acknowledges that de facto spouses have historically experienced disadvantageous treatment based on prejudice. He concludes, however, that the law is not discriminatory because there is no current prejudicing or stereotyping of de facto relationships in Quebec. De facto unions are “a respected type of conjugality” in Quebec. In the absence of present prejudice or stereotyping, there can be no violation of equality rights.

Abella J. opts for the second, broader definition of discrimination, holding that a s. 15 claimant need only demonstrate that the distinction created by the impugned law perpetuates disadvantage. Abella J.’s primary concern is removing additional requirements on the claimant at the s. 15 stage. In her view, “prejudice and stereotyping are neither separate elements of the Andrews test, nor categories into which a claim of discrimination must fit.” Once a claimant proves that the impugned law creates a distinction that perpetuates disadvantage, the s. 15 test is met and the burden shifts to the government to justify the reasonableness of the distinction under s. 1. Demanding proof of existing prejudice or stereotyping would require claimants to prove that the law promotes negative attitudes or bias. This is difficult to prove, especially where the impugned law shows no signs of a discriminatory or prejudicial intention, but nevertheless has a discriminatory effect. Substantive equality requires protection from laws that discriminate in either intent or effect.

Abella J. finds that the Quebec law infringes s. 15 because it imposes and perpetuates historical disadvantage by excluding economically vulnerable de facto spouses from the protections available to married spouses. The absence of current societal prejudice or stereotyping against de facto spouses is irrelevant.

The Chief Justice plays tiebreaker between LeBel and Abella J.J.’s positions. She agrees with Abella J. that the Quebec law infringes s. 15, but on a slightly different analytical basis. For her, the key question is whether a reasonable person in the claimant’s position would consider the law discriminatory. In this assessment, perpetuation of prejudice and false stereotyping are “useful guides,” but not prerequisites. The Chief Justice finds that the Quebec regime ticks every box. It puts de facto spouses at a disadvantage and the disadvantage is discriminatory from the point of view of a reasonable person because it shows less concern for de facto
spouses than other spouses; it perpetuates the effects of historical disadvantage rooted in prejudice; and it is based on a false stereotype that all couples are free to choose the form of their relationship. The Chief joins Abella J. in holding that the public policy goals of the legislation should be considered under s. 1, not s. 15.23

What, then, is the proper approach to s. 15 after Eric v. Lola? Is it still necessary to prove that a disadvantage results from prejudice or stereotyping, or is perpetuation of disadvantage sufficient in itself? Read together, the decisions of Abella J. and the Chief Justice suggest that the perpetuation of prejudice or stereotyping is not strictly necessary, but that the court will remain lukewarm to claims that do not involve prejudice or stereotyping. Plus ça change...

The philosophical analysis: The competing values of autonomy and protection of the vulnerable in equality rights
LeBel and Abella J.J.’s competing views on the s. 15 test are influenced by what they perceive to be the critical value at play in Quebec’s regime for conjugal relationships. For LeBel J., the critical value is the claimant’s choice of conjugal relationship, marriage or de facto union. For Abella J., the critical value is the protection of vulnerable people in conjugal relationships.

LeBel J. sees marriage and de facto unions as separate but equal regimes. In his view, the Quebec legislature does not favour one form of relationship over another.24 Couples can enter into marriage, civil union or de facto union, each with its own legal content.25 They are free to create, by “consent,” the patrimonial rights and obligations that best suit them. The choice of different relationship frameworks “connotes respect for the various conceptions of conjugality.”26 By allowing couples to remain outside the mandatory statutory framework, the Quebec regime promotes the values of personal autonomy and freedom, which are central to the s. 15 equality guarantee.27

LeBel J. recognizes that de facto unions will disadvantage certain spouses as compared with marriage. However, he notes that each form of conjugal relationship “is likely to have its share of disadvantages for one or the other of the spouses.”28 If freedom of choice is the predominant value, then each couple should be free to choose the arrangement that best suits them.

Abella J. disagrees with LeBel J.’s characterization of autonomy as the paramount value, arguing that this would undermine the notion of substantive equality: unlike formal equality, which “assumes an ‘autonomous, self-interested and self-determined’ individual, substantive equality looks not only at the choices that are available to individuals, but at ‘the social and economic environments in which [they] pla[y] out.”29

Abella J. notes that, in reality, many couples do not actually “choose” de facto unions. Instead, they adopt de facto unions because of “the reluctance of one’s partner to marry” or because of “financial, religious or social constraints.”30

If autonomy is not the central value at play, what is? Abella J. argues that it is the protection of economically vulnerable spouses. In her view, Quebec conceptualized the mandatory regime applicable to married spouses along a “protective basis rather than a contractual one.” The regime was meant to protect economically vulnerable spouses – usually women – following the dissolution of marriage.31 In adopting this regime, Quebec expressly rejected a theory of support whereby spouses are only entitled to what they have “contracted for.”32 For Abella J., the same reasoning ought to extend to spouses in de facto unions; it would be discriminatory to permit otherwise. Abella J. thus strongly disagrees with LeBel J. that marriage and de facto unions are separate but equal regimes. Marriage protects the economically vulnerable spouse; de facto unions do not.

For Abella J., the importance of choice is better evaluated at the s. 1 stage, where the government bears the burden of persuading a court that individual autonomy justifies the existence of different legislative regimes, than as part of the discrimination analysis under s. 15.33

The “realpolitik” analysis: Tie goes to the province
Ironically, the question that ultimately determined the outcome of Eric v. Lola was not whether individual autonomy should trump protection of the vulnerable, but whether provincial autonomy – specifically, Quebec’s autonomy – should trump all else. En fin de compte, it did.

Quebec essentially had two alternative regimes to choose from: (1) the current “opt-in” regime, where de facto couples can choose to adopt a protective regime, either by getting married or contracting into a cohabitation agreement,34 or (2) an “opt-out” regime, where mandatory protections apply by default across the board unless the de facto spouses agree to opt out of them.35

The Chief Justice ultimately saves Quebec’s current “opt-in” regime under s. 1. Unlike Abella J., the Chief concludes that the Quebec law passes the minimal impairment branch of the s. 1 test because the alternative “opt-out” regime would “require agreement and positive action on the part of de facto spouses” and therefore would not achieve the Quebec government’s goal of maximizing choice and autonomy for couples.36

The key to the Chief Justice’s decision lies in her assessment of the law’s proportionality. She acknowledges the impact of the law on economically vulnerable de facto spouses, but also considers the impact of the court’s decision on institutional and federal–provincial peace. In the end, peacekeeping prevails:

Critics can say and have said that the situation of women like A suggests that the legislation achieves only a formalistic autonomy and an illusory freedom. However, the question for this Court is whether the unfortunate dilemma faced by women such as A is disproportionate to the overall benefits of the legislation, so as to make it unconstitutional. Having regard to 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, the answer to this question is no.37 [emphasis added]

Eric v. Lola was an extraordinarily high-profile case in Quebec, and opinion on it was hotly divided. The Chief Justice concluded that the wisest course of action for the court would be to maintain
the status quo, leaving the debate on changing the *de facto* spouse regime to the population and the legislature of Quebec.

This was in all probability an astute decision. When it comes to conjugal relationships, Quebec is undoubtedly distinct from the rest of Canada. In Quebec, 37.8 percent of couples live in *de facto* relationships, compared with 20 percent across Canada. In the under-35 age bracket, this climbs to 51 percent in Quebec, versus 29 percent in Canada. It is clear that, for one reason or another, a significant number of Quebecers are avoiding the institution of marriage. The prevalence of *de facto* unions has become a cultural feature of modern Quebec society, and Quebecers are fiercely protective of their culture. Although opinion on the outcome of *Eric v. Lola* was evidently not unanimous, press pundit reaction suggests that response among Quebecers was overwhelmingly positive. A few examples (with apologies for dodgy translations):

Good decision. One doesn't join a million people in marriage without asking them first. It is neither polite nor judicious. 40

– Yves Boisvert, columnist, *La Presse*

The Supreme Court’s decision in *Eric v. Lola* should have us throwing confetti. It is a triple victory. It confirms freedom of choice and the freedom of Quebecers to choose their desired type of union. It leaves the distinctness of Quebec intact and, moreover, leaves the responsibility of updating family and matrimonial law to the political arena. This is a task to which the elected leaders of Quebec should now turn. 41

– Brigitte Breton, columnist, *Le Soleil*

Was it cowardly of the highest court of the land to pass off a hot potato that no one wants to touch? I don’t believe so. Rather, the Supreme Court declared that it does not wish to intervene in the decisions of the legislature, which established the current rules in response to social change and to affirm individual values. 42

– Me Mélanie Dugré, lawyer and contributor to *La Presse*

The Supreme Court, overturning a decision of the Quebec Court of Appeal, brought everyone back to their senses. In declining to allow *de facto* spouses to benefit from the same advantages as married spouses upon separation, it brought meaning back to marriage. It recognized a couple’s right to choose freely their matrimonial regime. It shed away from the idea of forcing Quebec, master of its civil code, to grant the same personal protection to common law spouses as other provinces do. And above all, it rejected the pessimistic and paternalistic philosophy that overprotects women, viewing them as minors incapable of taking responsibility for themselves and distinguishing between marriage and *de facto* union. 43

– Lysiane Gagnon, columnist, *La Presse*

Of course, whether Quebecers are justified in their faith that the prevalence of *de facto* unions results from informed choice is a different question entirely. 44 A CROP poll taken in March 2013 paints a rather different and more troubling picture. 45 Apparently, a significant number of Quebecers are simply unaware that *de facto* spouses do not have the same rights and obligations as married spouses upon separation. The following statistics are a jarring reality check:

• 46 percent of respondents believe that *de facto* spouses obtain the legal status of a married or civil union spouse;

• 62 percent of respondents believe that all property acquired during the couple’s relationship will be equally divided;

• 58 percent of respondents are unaware that the economically weaker *de facto* spouse has no right to spousal support upon separation.

If the exercise of autonomy requires “informed choice,” this widespread lack of awareness weakens the argument that the Quebec regime promotes autonomy.

The jurisprudential legacy of *Eric v. Lola* will lie in its affirmation of the analytical distinction between s. 15 and s. 1 and its effective elimination of prejudice and/or stereotype as necessary elements of an equality rights claim. But it can be hoped that the decision will eventually prompt a larger legislative and societal debate on an issue that affects so many – whether they know it or not.

**Notes**

1. Quebec (Attorney General) v A, 2013 SCC 5 [*Quebec v A*].

2. “*De facto* spouses” are the civil law equivalent of “common law” spouses, that is, neither married nor in a formal civil union. A “civil union” is a legal relationship particular to Quebec, created before the legalization of same-sex marriage in order to allow same-sex couples to access the same benefits as married couples (see articles 521.1–19 of the *Civil Code of Quebec*). This article uses “married” as shorthand for “married or in a civil union.”


4. For this reason, we will not address Deschamps J.’s reasons for justifying the property-sharing regime but not the spousal support regime under s 1. Though an interesting question, this is a matter of Quebec family law and therefore beyond the scope of this article.

5. Section 15(1): “Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

6. The Supreme Court articulated the justification test under s 1 of the Charter in *R v Oakes*, [1986] 1 SCR 103 at paras 69–71: the government must demonstrate (1) a sufficiently important objective to justify an infringement, (2) a rational connection between the objective and the means chosen by the state, (3) that the means are minimally impairing of the right at issue and (4) that the measure’s effects on the Charter-protected right are proportionate to the state objective.


10. Ibid at para 88.


13. This is understandable, as the live issue in *Kapp* was s 15(2): the “affirmative action” provision of s 15, not s 15(1) – the “anti-discrimination” provision.


15. Ibid at paras 18, 23, 37.

16. These two different articulations were reiterated by the court in *Withlaker v Canada (Attorney General)*, 2011 SCC 12 at paras 3, 15, 30, 32, 35–36.

17. Quebec v A, supra note 1 at paras 141–142, 177–178, 204, 268.

18. Ibid at para 141.

19. Ibid at paras 242, 246, 248–249.

20. Ibid at paras 323, 327–329.

21. Ibid at para 323.

22. Ibid at para 349.

23. Ibid at paras 412–413.

24. Ibid at para 250.