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### Quebec, "Lola" and living common-law

*Should common-law couples be treated the same by the law as married spouses? The Supreme Court of Canada will decide in January 2012.*

By Nelson Peters

On January 18, 2012, the Supreme Court of Canada will hear an appeal for what has come to be known as the "Lola affair," a case involving the break-up of a fabulously wealthy Quebec businessman, "Eric," and his common-law partner, "Lola." [1] According to Quebec's Civil Code, only married partners or persons in a civil union may claim spousal support or a division of familial property, including the family home and other assets. "Lola" aims to change that.

Lola's lawyers argued successfully that Quebec's rules on family law are discriminatory against common-law couples because they don't allow the right to a division of property or the right to claim spousal support outside of marriage or civil unions.

It comes down to this: should common-law couples be treated the same by the law as married spouses? If so, then denying the benefits of marriage is discriminatory. If not, then Quebec's law can stand.

This case is heading to the Supreme Court of Canada because the Quebec Court of Appeal held recently in the Lola case that although denying a division of family property could be justified, withholding spousal support could not.

Article 585 of the Quebec Civil Code addresses withholding spousal support in common-law relationships and the Quebec Court of Appeal found this to be discriminatory and contrary to the Charter of Rights and Freedoms.

How did they come to this conclusion? They asked whether there was discrimination against Lola. Secondly, they asked, if so, whether that discrimination could be reasonably justified.

The Court of Appeal held that common-law cohabitation no longer bears the social stigma it once did, although in historical terms unmarried couples have been a "disadvantaged group." [2] The Court went on to add that the notion that common-law cohabitations were less stable than marriages was a harmful stereotype.

This reasoning fails to address the documented benefits of marriage and the real distinctions that exist between married and unmarried couples. The Court noted that cohabiting couples often emerge into stable, enduring relationships. While this is sometimes true, research actually shows that common-law relationships are more likely to break up than marriage.[3]

Research further shows there are serious consequences for children born in unmarried unions, including a greater likelihood of using drugs, engaging in sexual intercourse at a younger age, and having poorer relationships with their parents.[4]

The Court of Appeal ignored this research. Then, having determined that there are grounds for identifying unmarried, cohabiting couples as a disadvantaged group, they went on to note that there are negative effects from denying support to unmarried couples, including poverty (especially for women). Thus, the Court concluded that the provisions of article 585 were in fact discriminatory.

After concluding that discrimination was in effect, the Court turned to the second stage of its analysis: can the difference in treatment be reasonably justified?

To answer this, the Court of Appeal based its interpretation on a global reading of the goals of the Book of Family in the Quebec Civil Code. It ruled that the failure to provide spousal support even between common-law partners ran contrary to the inherent principles of family law as a whole.

Finally, they decided, given how difficult family upkeep can be, that the effects were neither minimal nor proportional. Accordingly, they came to the conclusion that article 585 could not be justified, and as such violated the Charter, rendering it unconstitutional.

Much of the Court's reasoning was justified by the social objectives of spousal support, namely to avoid allowing a partner to fall into financial ruin as a result of a break-up, as well as collateral damage inflicted on innocent parties, such as children.

The Court found that in broad social terms, they could not justify the exclusion of unmarried couples from this form of legal protection. Again, however, this rationale does not take into account the substantial social benefits that result from families founded on traditional marriage structures and the substantial grounds any government has for maintaining a strong, stable institution of marriage. [5]

### **Significance of the case**

This case is of particular significance due to its constitutional nature. According to the hierarchy of Canadian legal norms, any law that violates the Charter is deemed to be invalid. If the Supreme Court agrees with Lola's lawyers, future legislation that establishes punitive consequences for unmarried couples might be struck down on the grounds that it is discriminatory. Governments might then be hesitant to propose laws that incentivize marriage, perhaps by tax credits or other financial rewards, if they risk having to fight lengthy court battles with uncertain results.

In a sense, the Quebec Court of Appeal's decision aims to render the concept of marriage useless. It disregards the parameters established within the Quebec Civil Code for spousal support, and seeks to address a historical disadvantage it admits no longer exists. Furthermore, it ignores the body of research showing distinct and beneficial aspects of marriage, advantages that simply aren't present in living common-law. If its decision stands there would be even less incentive to get married, since marriage will be in law precisely the same thing as living common law.

In order for supporters of traditional marriage to strengthen their arguments at the Supreme Court, they need to reiterate the legal foundation in favour of traditional marriage present in the Quebec Civil Code Book of Family, as well as to convince the court of the many positive consequences from marriage for Canadian society as a whole that reasonably justify drawing a distinction between married and unmarried couples in law, both now and in the future.

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## Endnotes

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[1] Since children are involved in the proceedings a publication ban has been issued, with the court using pseudonyms for the respective parties.

[2] Author's translation: "Historiquement, les conjoints vivant en union de fait ont constitué un groupe désavantagé." para. 86, Droit de la famille — 102866, 2010 QCCA 1978 (CanLII)

[3] "Starting conjugal life in a common-law relationship, as opposed to a marriage, sharply increases the probability of this first union ending in separation. And whether the common-law partners eventually marry or not makes little difference: the risk of separation is just as high." Le Bourdais, C., Neill, G., and Turcotte, P. (2000). The changing face of conjugal relationships. Canadian Social Trends, no. 56. p. 15. Retrieved August 16 from <http://www.statcan.gc.ca/pub/11-008-x/11-008-x1999004-eng.pdf>

[4] Mitchell, P.J. (2009). Connecting parental marital status with teen attitudes and behaviours. Ottawa: Institute of Marriage and Family Canada. Retrieved July 28, 2011 from: [http://www.imfcanada.org/article\\_files/Frank%20Jones\\_FINAL.pdf](http://www.imfcanada.org/article_files/Frank%20Jones_FINAL.pdf)

[5] Walberg, R. and Mrozek, A. (2009). Private choices, public costs: How failing families cost us all. Ottawa: Institute of Marriage and Family Canada. Retrieved August 15, 2011 from [http://www.imfcanada.org/article\\_files/Cost%20of%20Family%20Breakdown%20final.pdf](http://www.imfcanada.org/article_files/Cost%20of%20Family%20Breakdown%20final.pdf)