Date:20000419
C.A. No. 159139

NOVA SCOTIA COURT OF APPEAL

[Cite as: Walsh v. Bona, 2000 NSCA 53]

Glube, C.J.N.S.; Roscoe and Flinn, JJ.A.

BETWEEN:

SUSAN WALSH Appellant - and - WAYNE BONA Respondent - and - THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF NOVA SCOTIA Third Parties	)	Katherine A. Briand for the appellant Respondent in person Edward A. Gores for the Third Party (AG of NS) Appeal heard: February 7, 2000 Judgment delivered: April 19, 2000

THE COURT: Appeal allowed; s. 2(g) of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 declared to be unconstitutional and of no force or effect — declaration suspended for twelve (12) months per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.

FLINN, J.A.:

[1] The appellant, Susan Walsh and the respondent, Wayne Bona, while not married, lived together in "a "common law relationship" (as they both described the relationship in their respective affidavits) for approximately ten years. Two children were born out of this relationship, in 1988 and 1990 respectively. The appellant and the respondent separated in 1995.

[2] In January, 1999, the appellant commenced an application under the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 (**MPA**), seeking an equal division of the parties' assets. In conjunction with that application, the appellant sought a declaration that the **Canadian Charter of Rights and Freedoms** is infringed by the definition of "spouse" in s. 2(g) of the **MPA**. The **MPA** does not apply to the appellant and the respondent because they do not come within the definition of "spouse" in s. 2(g):

> 2 In this Act
> .....
> (g) "spouse" means either of a man and woman who
> (i) are married to each other,
> (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity, or
> (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year,
> and for the purposes of an application under this Act includes a widow or widower.

[3] In her application, the appellant claims that s. 2(g) discriminates against her as a common law spouse in violation of s. 15(1) of the **Charter**; and that such discrimination cannot be justified under s. 1 of the **Charter**. The relief which the

appellant seeks is “an order reading into the definition of spouse s. 2(g) of the **MPA**, the definition of common law spouse contained in the **Family Maintenance Act**, R.S.N.S. 1989, c. 160". The definition of “common law spouse” is contained in s. 2(m) of the **Family Maintenance Act** and provides as follows:

> **2** In this Act,
> .....
> (m) “spouse” means a person married to another person and, for the purpose of this Act, includes a man and woman who, not being married to each other, live together as husband and wife for one year.

[4] Section 15(1) of the **Charter** provides as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the 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.

[5] With respect to her claim for a division of the assets, including real estate, of the respondent, the appellant deposes in her affidavit, inter alia, as follows:

> 12. THAT I am advised by my solicitor, and do verily believe, that the matrimonial property legislation in Nova Scotia does not apply to common-law relationships and as a result I have the legal obligation in any claim against the property of establishing not only that I have a claim, but the extent of that claim.
>
> 13. THAT I am advised by my solicitor, and do verily believe, that if I were married to the Defendant the Matrimonial Property Act would require the Defendant to establish that I was not entitled to an equal division of all assets accumulated prior to and during the marriage.
>
> 14. THAT I verily believe the Matrimonial Property Act is unconstitutional in that it discriminates against me on the basis of marital status and deprives me of rights that I would otherwise be entitled to in regards to the distribution of property once a spousal relationship has failed. This is even more so where the pre-existing spousal relationship was in all ways a traditional and fairly long term relationship.

[6] The matter came on for hearing before Justice Haliburton of the Supreme

Court on May 14th, 1999. In addition to the respondent, the appellant gave notice of the application to both the federal and the provincial Crown. The federal Crown did not appear on the application. The provincial Crown appeared and made representations. The respondent was not represented by counsel at the hearing.

[7] There was dispute between the appellant and the respondent on certain factual matters set out in their respective affidavits. There was dispute as to the length of the relationship (10 years versus 7 years). There was dispute as to the actual contribution which the appellant made by way of employment (or otherwise), to the household; and there was dispute with respect to the purchase and use of certain assets. These factual disputes were not resolved. For the purpose of the constitutional challenge, the Chambers judge assumed the facts to be as follows (and these assumptions are not challenged on this appeal):

> Ms. Walsh and Mr. Bona established a common law relationship which extended over a period of some ten years, ending in 1995.
> The relationship began when both were resident in the Halifax/Dartmouth region.
> Two children have been born of the relationship: Edwin Frederick Bona, born December 27th, 1988, and Patrick Arthur Bona, born September 11th, 1990.
> During or about the month of December, 1988, Mr. Bona gained employment in Richmond County. The parties moved to River Bourgeois where they took up occupancy in a residence owned by the two of them as joint tenants. After the separation of the parties in 1995, Mr. Bona continued to live in this home, assuming the debts and expenses connected therewith.
> Mr. Bona received in 1983 by way of gift from his father approximately 20 acres of land with a cottage. The cottage itself was sold for a price of $20,000 after the separation with $10,000 in proceeds being used to pay off matrimonial debts.

> The remaining recreational/woodland of approximately 13 acres remains property registered in the name of Mr. Bona alone.
>
> Based on the Affidavits of the two parties, the assets and liabilities at the time of separation may be:

Residence	$45,000	
Cottage	20,000	
Woodlot	6,500	
Jeep	4,500	
Household goods & furnishings (nominal)		
Husband's pension and RRSP	40,000	
	$116,000	$116,000
Less matrimonial debts of approximately $50,000		- 50,000
		$66,000

> By way of other proceedings, the Applicant has claimed payments for maintenance support for herself and the children from the Respondent.

[8] On July 20th, 1999, Justice Haliburton filed a written decision in which he concluded:

1. that marital status is not an analogous ground upon which to base a claim of discrimination under s. 15(1) of the **Charter**;
2. alternatively, the exclusion of a definition of common law spouse from the provisions of s. 2(g) of the **MPA** does not constitute discrimination under s. 15(1) of the **Charter**; and
3. alternatively, that if s. 2(g) of the **MPA** is found to be discriminatory, then it is saved by s. 1 of the **Charter**.

[9] The appellant appeals Justice Haliburton's decision.

[10] The respondent was present during the hearing of this appeal but made no representations. Representations were made by counsel for the appellant and counsel for the provincial Crown.

[11] The appellant's position on this appeal is that the Chambers judge erred in law in each of his three conclusions. The Crown concedes, on this appeal, that since the **MPA** applies only to married persons and not to cohabitees living in a conjugal relationship, that there is differential treatment for the purpose of s. 15(1) of the **Charter**. The Crown also concedes that marital status is an analogous ground of discrimination. The Crown submits, however, that the differential treatment which arises, here, is not discrimination under the **Charter**; and, if it is discrimination, then it is saved by s. 1 of the **Charter**.

SECTION 15(1) - ANALYSIS:

[12] In the recent decision of the Supreme Court of Canada in **Law v. Minister of Human Resources**, [1999] 1 S.C.R. 497, Justice Iacobucci, for the Court, summarizes the Court's approach to the interpretation of s. 15(1) **Charter** issues, and provides a set of guidelines for courts that are called upon to analyze a discrimination claim under the **Charter**. In **Law** the Court was dealing with the constitutionality of certain provisions of the Canada Pension Plan which draw distinctions - on the basis of age - with regard to entitlement to survivors' pensions. Justice Iacobucci reviewed the approach to s. 15(1) analysis in the Court's seminal case of **Andrews v. Law Society of B.C.**, [1989] 1 S.C.R. 143, following which he analyzed the Court's development of the Andrews

approach in subsequent decisions of **Miron v. Trudel**, [1995] 2 S.C.R 418 and **Egan v. Canada**, [1995] 2 S.C.R. 513. Justice Iacobucci then provides the following summary at pp. 548-549:

> Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the 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?

An Overview of the MPA:

[13] In the *Final Report* on *Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: Law Reform Commission of Nova Scotia, March 1997) at p. 5, the Commission said the following concerning the adoption, in Nova Scotia, of the **MPA** in 1980:

> The *Matrimonial Property Act* was adopted in Nova Scotia in 1980 as part of a general law reform movement in all the common law provinces which attempted to address dissatisfaction with the existing law regarding division of property on the ending of marriage. Prior to these reforms the law had been based on a concept known as "separate property". This was a concept developed in the late nineteenth century which provided that upon marriage termination, whether by death or divorce, each spouse could retain only that property to which they could show legal title. In other words, there was no such thing as "family property" or "matrimonial assets". This meant that in Nova Scotia until 1980, all property owned by a married couple was considered to belong either to the wife exclusively or to the husband exclusively, unless they had *expressly* obtained legal title together as co-owners of the property. While the concept of separate property may seem unfair or archaic from a contemporary perspective, it was originally adopted in 1884

in response to discontent with the common law's approach to matrimonial property. Prior to 1884 a husband was given full control over any property which his wife brought to the marriage or acquired during the marriage by any means. Separate property responded to the need of married women to be recognized as full legal persons distinct from their husbands. Changes in the law of matrimonial *property* did not, however, affect the right of a wife to seek *maintenance* (also called support, or alimony) from her husband after divorce or separation. Both before and after the adoption of the *Married Women's Property Act*, R.S.N.S. 1884, c. 94; now R.S.N.S. 1989, c. 272 in Nova Scotia in 1884, a husband remained under an obligation to support his wife, an obligation which was in principle lifelong.

For several decades after its adoption, separate property worked reasonably well in a large majority of cases. Questions of title to property between husband and wife are usually irrelevant while the parties are living in harmony. It is only when death, separation or divorce intervenes that questions of title become important. Even death of a spouse will not usually give rise to questions about title to property, as long as adequate provision has been made for the surviving spouse by will or by the law of intestate succession. In cases of separation or divorce, however, wives in particular were disadvantaged by the system of separate property. They had a claim to *maintenance* from their husbands (or ex-husbands), but no claim to any *property* to which he had sole title, even if that property had been acquired over the course of a long marriage and by their joint efforts. However, the low divorce rates which existed in Canada before the adoption of the federal *Divorce Act*, S.C. 1967-68, c. 24 in 1968, meant that the potential unfairness of the separate property system for divorced women did not come to public attention until the 1970s. Even then, judges were sometimes able to alleviate the harshness of separate property by ordering the ex-husband to pay a larger amount for lump-sum maintenance, as provided for under the *Divorce Act*.

Rising divorce rates, increasing economic prosperity, and growing dissatisfaction with the traditional roles assigned to married women all led to intense scrutiny in the 1960s and 1970s of family law in general and of the law of matrimonial property in particular. This scrutiny was given particular momentum by the decision of the Supreme Court of Canada in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. In that case, an Alberta rancher sought during the course of a divorce proceeding to have her interest in land legally recognized. Although the land had been effectively acquired through the joint efforts of both her and her husband during a 25-year marriage, title to the land was held solely in her husband's name. The Supreme Court of Canada concluded that she had no legal right to any share of it on marriage breakdown. The injustice of this state of affairs led provincial and territorial governments to consider legislative reform of matrimonial property law.

Murdoch was important in that it pointed to the need to rethink not just the law of matrimonial property, but also the law regarding support obligations within the family (family maintenance), and the law dealing with the rights of surviving spouses against the estates of their deceased spouses (the law of succession). There was also a need to ensure that the family law of the various provinces and territories was in harmony with the federal *Divorce Act* of 1968. This *Act*, in addition to making divorce somewhat easier to obtain, also made it available on the same basis across Canada for the first time. The dramatic increase in the divorce rate after 1968 was undoubtedly the principal factor motivating the need to find "orderly and equitable" ways to settle ex-spouses' financial affairs. The concept of separate property, which assumed each spouse to be equally

> positioned to earn an income and acquire property, had been revealed as inadequate at both a practical and a psychological level. Practically speaking, the prevalence of the male-provider/female-dependent model in the postwar period meant that the assumption of an equal opportunity to earn income was meaningless. The separate property model also seemed to be based on a model of emotionless and rational calculation which was psychologically at odds with the acceptance of romantic love as the basis of marriage. Some provinces responded to the need for change by enacting omnibus family law reform legislation which covered both matrimonial property and family maintenance. Nova Scotia passed two acts, the *Family Maintenance Act,* R.S.N.S. 1989, c. 160 and the *Matrimonial Property Act* on the same date, June 5, 1980, and they came into effect on the same day, October 1, 1980.
>
> The Nova Scotia *Matrimonial Property Act* changed the existing law in two main ways:
>
> (1) by creating a "pool" of assets owned by either spouse, known as "matrimonial assets", which could be divided, regardless of legal title, in equal shares between the spouses upon marriage breakdown, divorce or the death of a spouse; and
>
> (2) by giving each spouse an equal right of possession in the matrimonial home, without regard to which spouse has the title in law; and providing that no sale or mortgage of the matrimonial home can occur without the consent of both spouses.
>
> The right to equal division is a *presumption* only, in that the *Act* also allows judges to make an unequal division in some cases, for example where the length of the marriage might indicate that an equal division would result in unfairness. The right to equal division arises only at the *end* of a marriage. Before then, each spouse retains title to whatever property is in their name, and they may freely dispose of it without the consent of the other spouse. The only exceptions to this are the right to equal possession of the matrimonial home, and to veto any sale or mortgage of it. These rights arise at the moment of marriage and continue *during* the marriage.

Does the MPA draw a formal distinction between the appellant and others on the basis of one or more personal characteristics?

[14] As to the first of the three broad inquiries which the Court must make in analyzing a claim for discrimination under s. 15(1) of the **Charter** (see **Law**), the **MPA** denies a person in a common law relationship benefits which are granted to a similar person in a marriage relationship. This denial of equal benefit, on the basis of marital status, a

personal characteristic, is therefore established. Counsel for the Crown agrees that there is differential treatment for the purpose of s. 15(1) of the **Charter**.

Is the appellant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

[15] As to the second broad inquiry, marital status is not one of the enumerated grounds upon which a claim for discrimination under s. 15(1) can be made. Is it an analogous ground? The Crown concedes that it is an analogous ground on the basis of the majority decision in **Miron v. Trudel**, [1995] 2 S.C.R. 418.

[16] In **Miron**, Justice McLachlin (as she then was), said the following at p. 497:

> What then of the analogous ground proposed in this case — marital status? The question is whether the characteristic of being unmarried — of not having contracted a marriage in a manner recognized by the state — constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.

[17] Justice McLachlin set out her reasons for coming to this conclusion as follows at p. 497-499:

> First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.
>
> Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the Charter. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married

partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

A third characteristic sometimes associated with analogous grounds -- distinctions founded on personal, immutable characteristics -- is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints -- these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in *Andrews*: the individual exercises limited but not exclusive control over the designation.

Comparing discrimination on the basis of marital status with the grounds enumerated in s. 15(1), discrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the amicus curiae has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship. For example, the right to spousal maintenance is not conditioned on marriage: see Part III, *Family Law Act*, R.S.O. 1990, c. F.3, which establishes a right to spousal support for those who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence and who have a child. Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.

These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the *Charter*. If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground. .....

[18] It is clear, therefore, that marital status is an analogous ground upon which a

claim for discrimination may be made under s. 15(1) of the **Charter**, and the Chambers judge erred in concluding otherwise.

Does the differential treatment of the appellant by the provisions of the MPA discriminate in the substantive sense intended by s. 15(1) of the Charter? Does it violate the purpose of s. 15(1)?

[19] Shortly after the Supreme Court's decision in **Law**, the Court dealt with another equality rights issue in the case of **M. v. H.**, [1999] 2 S.C.R. 3. The issue in **M. v. H.** concerned the definition of "spouse" in the Ontario **Family Law Act**. That definition excluded a person in a same sex relationship. As a result, the claimant could not obtain a support order against her former partner on the breakdown of their same sex relationship. Eight judges, of the nine member Court, concluded that the applicant's s. 15(1) **Charter** rights were infringed, and that the infringement was not saved by s. 1. Justice Cory and Justice Iacobucci, jointly, wrote the majority decision for themselves and four other members of the Court.

[20] Referring to the Court's decision in **Law**, Justice Cory said the following concerning the analysis to be made at this stage of the inquiry into the discrimination claim at pp. 53-54:

> 5. The Existence of Discrimination in a Purposive Sense
>
> The determination of whether differential treatment imposed by legislation on an enumerated or analogous ground is discriminatory within the meaning of s. 15(1) of the *Charter* is to be undertaken in a purposive and contextual manner. The relevant inquiry is whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the 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: *Law, supra*, at para. 88.
>
> .....The question is whether this denial of a benefit violates the purpose of s. 15(1).

[21] As to the purpose of s. 15(1), Justice Iacobucci said the following in **Law** at p. 529:

> ..... It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

[22] How does the Supreme Court interpret the phrase “human dignity” when considering that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom? Again, in **Law**, Justice Iacobucci said the following at p. 530:

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the

> manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[23] Further, whether the **MPA** (the legislation which imposes differential treatment) has the effect of demeaning the appellant's human dignity, involves an inquiry which is both objective and subjective. It involves the evaluation of a reasonable person in circumstances similar to those of the appellant. Justice Iacobucci said the following concerning this perspective, in **Law**, at p. 532 - 33:

> ..... As applied in practice in several of this Court's equality decisions, and as neatly discussed by L'Heureux-Dubé J. in *Egan, supra*, at para. 56, the focus of the discrimination inquiry is both subjective and objective: subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances. The objective component means that it is not sufficient, in order to ground a s. 15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law.
>
> As stated by L'Heureux-Dubé J. in *Egan, supra*, at para. 56, the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant and from no other perspective, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation. <u>All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.</u> (emphasis added)

[24] In order to demonstrate that the impugned legislation violates his or her human dignity, there are various factors which may be referred to by a claimant. In **Law**, Justice Iacobucci referred to four such "contextual factors":

1. Pre-existing disadvantage - the existence of a pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or

group at issue;

2. Relationship between grounds and the claimant's characteristics or circumstances - the correspondence, or lack of it, between the ground on which the discrimination claim is based, and the actual need, capacity or circumstances of the claimant or others;

3. Ameliorative purpose or effects - the existence of an ameliorative purpose or effect may help to establish that human dignity is not violated where the person or group that is excluded is more advantaged with respect to the circumstances addressed by the legislation. Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination; and

4. Nature of the interest affected - the discriminatory character of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.

[25] It is important to note, here, that these contextual factors are only guidelines to assist the Court in the ultimate determination which has to be made; namely, whether the impugned legislation violates the purpose of s. 15(1). Justice Iacobucci made it quite clear, in **Law**, that this ultimate determination should not be made by way of a "fixed and limited formula". He said at p. 547, in **Law**:

> .....As I stated above, these guidelines should not be seen as a strict test, but rather should be understood as points of reference for a court that is called upon to decide whether a claimant's right to equality without discrimination under the *Charter* has been infringed. .....

[26] Justice Iacobucci also made it clear that the four contextual factors to which he made reference were only four of a variety of factors to which a claimant may refer:

> ..... there are undoubtedly others, and not all four factors will necessarily be relevant in each case.

He said further at p. 545:

> ..... it should be clear that in some cases it will be relatively easy for a claimant to establish a s. 15(1) infringement, while in other cases it will be more difficult to locate a violation of the purpose of the equality guarantee. In more straightforward cases, it will be clear to the court on the basis of judicial notice and logical reasoning that an impugned law interferes with human dignity and thus constitutes discrimination within the meaning of the *Charter*. Often, but not always, this will be the case where a law draws a formal distinction in treatment on the basis of enumerated or analogous grounds, because the use of these grounds frequently does not correlate with the need, capacity, or merit. It may be sufficient for the court simply to take judicial notice of pre-existing disadvantage experienced by the claimant or by the group of which the claimant is a member in order for such a s. 15(1) claim to be made out. In other cases, it will be necessary to refer to one or more other contextual factors. <u>In every case, though, a court's central concern will be with whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim</u>. (emphasis added)

[27] This analysis of Justice Iacobucci's decision in **Law**, clearly demonstrates the error of one of the positions which the Crown has taken on this appeal. In its factum, dealing with the third step in a s. 15(1) analysis, and after referring to the four contextual factors mentioned by Justice Iacobucci in **Law**, as "four key areas that should be considered under this third step", the Crown then states:

> This framework is significant as it restricts the instances in which a law may be found discriminatory. No section 1 analysis is required if the impugned law operates in accordance with the above contextual factors.

[28] This is not a correct reading of the decision of the Supreme Court in **Law**. The

Court's main concern, according to **Law**, is whether a violation of human dignity has been established in light of the historical, social, political and legal context of the discrimination claim. The contextual factors, as I have mentioned, which are not all necessarily relevant in every case, are only guidelines to assist the Court in making the ultimate determination.

[29] Justice Iacobucci confirmed, for example, in **Law**, as was enunciated initially in **Andrews**,**(supra)** that it would be a rare case where differential treatment on one of the enumerated or analogous grounds in s. 15(1) is <u>not</u> discriminatory.

[30] In finding no violation of s. 15(1) of the **Charter**, in **Law**, Justice Iacobucci said the following at p. 562:

> In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize young persons, nor can they be said to perpetuate the view that surviving spouses under age 45 are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member. I must conclude that, when considered in the social, political, and legal context of the claim, the age distinctions in s. 44(1)(d) and 58 of the CPP are not discriminatory.

And further:

> I conclude, then, that this is one of the rare cases contemplated in *Andrews*, *supra*, in which differential treatment based on one or more of the enumerated or analogous grounds in s. 15(1) is not discriminatory. ....

[31] The decision in **Law** was followed by the majority judgment in **M. v. H.**, **(supra)**. The conclusion of the majority in **M. v. H.**, on this third step of the s. 15(1) analysis, was in the words of Justice Cory at p. 58:

> ..... the human dignity of individuals in same sex relationships is violated by the impugned legislation. In light of this, I conclude that the definition of "spouse" in s. 29 of the *F.L.A.* violates s. 15(1).

The appellant's claim of discrimination:

[32] I will now deal with the claim of discrimination which the appellant advances in this case.

[33] The appellant has had a long standing relationship with the respondent. They have lived together for approximately 10 years. Two children have been born of this relationship. The appellant and the respondent own their own home. Other assets have been acquired during their relationship. This relationship has all the hallmarks of a marriage, with the exception that the appellant and the respondent have not gone through a formal marriage ceremony.

[34] Upon separation, the appellant has the right, under the provisions of the **Family Maintenance Act**, R.S.N.S. 1989, c. 160 to make application for:

1. custody of the children;
2. spousal and child support; and
3. limited rights to "occupation" of the family home. I note that when the jurisdiction under the **Family Maintenance Act** was vested in the Family Court of Nova Scotia, this provision was held to be *ultra vires* of the Family Court (see **Rudderham v. Rudderham** (1988), 85 N.S.R. (2d) 267 (C.A.)). I assume, without deciding, that to the extent that the jurisdiction

> over the **Family Maintenance Act** is now exercised by the Supreme Court of Nova Scotia (Family Division), such a provision is enforceable by that Court.

[35] The appellant is denied, however, the benefits of the **MPA**. Those benefits include the presumption that the married spouse is entitled to an equal division of the assets accumulated during the marriage. The other married spouse has the onus of rebutting that presumption. The appellant, on the other hand, as an unmarried cohabitee, has only available to her the common law remedies of resulting trust and unjust enrichment, about which I will say more later in these reasons. The benefits under the **MPA** also include the ability of the married spouse to apply for exclusive possession of the matrimonial home. The appellant's rights, on the other hand, are, at best, restricted to a limited right of "occupation" of the family home.

[36] The only reason the appellant is denied the benefits of the **MPA** is because she is not married.

[37] I recognize that the appellant and the respondent could have entered into a cohabitation agreement under which the appellant, on the termination of the relationship, would receive the same, or similar, benefits as are provided for in the **MPA**. However, a married couple has the ability to do that as well. The problem is that, in each case, it requires the agreement of two persons. Such an agreement is not

something over which the appellant, or the married spouse, has sole control. The legislature obviously recognized that fact, in enacting the **MPA**, but only to the extent of making provision for the married spouse.

[38] As an unmarried spouse, the appellant loses the benefit of the presumptions contained in the **MPA** in the event that no cohabitation agreement is reached. If a married couple either does not think about an agreement or thinks an agreement is unnecessary, or is unable to reach a consensus in a pre-nuptial agreement, the **MPA**, as the default position, will apply in the event of a separation. The common law couple on the other hand is denied the benefit of the **Act** as the default position, if they for whatever reason do not enter into an agreement.

[39] The existence of a marriage contract between married spouses is however not necessarily determinative of the final division of their property. It is among the numerous factors the court must consider on an application pursuant to the **Act** for a division of matrimonial assets.

[40] In **Clarke v. Clarke**, [1990] 2 S.C.R. 795 the Supreme Court of Canada dealt with the question of whether certain pension benefits were matrimonial property under the provisions of the **MPA**. Justice Wilson, writing for the court, said the following about the purpose of the **MPA** at p. 807:

> Thus the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. The Act goes further and asserts that, due to this joint contribution, both parties are entitled to share

> equally in the benefits that flow from the union -the assets of the marriage. **The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized.** In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose. (My emphasis)

[41] Essentially, the appellant contends that the **MPA** does not recognize the contribution which she has made to the economic survival and growth of her family. That, she claims, is discrimination under s. 15(1) of the **Charter**.

[42] The appellant's claim must be looked at objectively, and from her perspective. Does the denial of the benefit of the provisions of the **MPA** to the appellant violate the purpose of s. 15(1)? In light of the historical, social, political and legal context of the appellant's claim, does the **MPA** have the effect of demeaning the appellant's human dignity, and does it thereby constitute discrimination within the meaning of s. 15(1) of the **Charter**?

[43] Of the contextual factors referred to in **Law** (as points of reference for the Court in determining whether the **MPA** violates the purpose of s. 15(1)), the most relevant factors in this case are pre-existing disadvantage, and the nature of the interest which is affected.

[44] Justice Iacobucci explained the significance of pre-existing disadvantage, in **Law**, as follows at p. 534:

> As has been consistently recognized throughout this Court's jurisprudence, probably the

> most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group: see, e.g., *Andrews, supra*, at pp. 151-53, *per* Wilson J., p. 183, *per* McIntyre J., pp. 195-97, *per* La Forest J.; *Turpin, supra*, at pp. 1331-33; *Swain, supra*, at pp. 992, *per* Lamer C.J.; *Miron, supra*, at paras. 147-48, *per* McLachlin J.; *Eaton, supra*, at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[45] And further at p. 535:

> ..... I emphasize, then, that <u>any demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society (whether or not it involves a demonstration that the provision or other state action corroborates or exacerbates an existing prejudicial stereotype), will suffice to establish an infringement of s. 15(1)</u>. (emphasis added)

[46] In paragraph 17 of these reasons I have quoted at length from the decision of Justice McLachlin in **Miron**, the substance of which I will highlight here. Persons involved in an unmarried relationship constitute a historically disadvantaged group. Justice McLachlin says that there is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically, in our society, the unmarried partner has been regarded as less worthy than the married partner. Disadvantages have ranged from social ostracism through denial of status and benefits. In theory, Justice McLachlin says, the individual is free to choose whether to marry or not; however, the reality may be otherwise. She compares discrimination, on the basis of marital status, to discrimination on the ground of religion - to the extent that it finds its roots in moral disapproval of all sexual unions except those sanctioned by the church and state. Justice McLachlin then notes that there is some recognition that

distinguishing between cohabiting couples, on the basis of whether they are married or not, fails to accord with current social values or reality. Some benefits have been accorded to unmarried partners who have cohabited in a conjugal relationship (child and spousal support - the right to claim on the basis of unjust enrichment and resulting trust). This, she suggests, is recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married. I will refer, later in these reasons, to some of the Nova Scotia Statutes which make such provision.

[47] The Crown submits, in this case:

1. the marital spouse is not “entitled” to 50% of the matrimonial assets under the **MPA**. The marital spouse has only a presumption of entitlement. It cannot be said to be the denial of an equal benefit under the law simply because the appellant cannot avail herself of a presumption that she is entitled to 50% of the assets on the break-up of her relationship with the respondent; and
2. unlike **Miron**, where there was no other avenue open to the unmarried spouse to obtain the insurance benefits which were the subject of that action, the appellant has available to her the common law rights to claim benefits using the concepts of unjust enrichment and constructive trust. Also, unlike **Miron**, the appellant has the ability to contract into a joint property regime (with respect to this latter point, I have already dealt with that issue previously in these reasons); and

3. the presumption of entitlement in the **MPA** does not deal with the merit or worth of the relationship itself (i.e., whether it was long, short, loving or abusive), but with respect to the disposition of property acquired by married persons. That, counsel submits, does not go to human dignity.

[48] With respect to the Crown's first point, as Justice Cory noted in **M. v. H.**, the Crown's analysis takes too narrow a view of "benefit" under the law, and it is a view that the Court should not adopt. Justice Cory said at p. 53:

> ..... The type of benefit salient to the s. 15(1) analysis cannot encompass only the conferral of an economic benefit. It must also include access to a process that could confer an economic or other benefit: *Egan, supra*, at paras. 158-59; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 87. .....

[49] With respect to the second point, the fact that the appellant might be able to avail herself of the equitable remedies of unjust enrichment and resulting trust, can hardly be equated with the presumptive rights that a married person enjoys under the **MPA**. Pursuing such equitable remedies is difficult, time consuming, costly and uncertain (see, for example, **Peter v. Beblow**, [1993] 1 S.C.R. 980). If the appellant must resort to these equitable remedies, she has the burden of proof on several issues. She must prove that she made a contribution related to the acquisition of property, the value of that contribution, and that there was a reasonable expectation of receiving compensation. Another difficulty, associated with such equitable remedies, is that it may not be easy to marshal the necessary evidence in the context of a spousal relationship.

[50] As to the third point, as the Nova Scotia Law Reform Commission noted in its Report (supra), the **MPA**, and similar statutes in other parts of this country, were enacted following the decision of the Supreme Court of Canada in **Murdoch v. Murdoch**, [1975] 1 S.C.R. 423. The Supreme Court decided that, although certain land had been effectively acquired through the joint efforts of both the wife and her husband during their 25 year marriage, because title to the land was held solely in the husband's name, the wife had no legal right to any share of it on the marriage breakdown. The affront to the appellant's human dignity which is caused by the **MPA** is the fact that the **MPA** recognizes that a legally married spouse contributes to the marriage relationship, financially, and in other ways (e.g., raising a family). The **MPA** also recognizes that these contributions allow a married couple to accumulate matrimonial assets (see **Clarke v. Clarke, supra**). The appellant enjoys no such recognition. She must resort to the equitable principles of resulting trust and unjust enrichment, and I have already referred to the difficulties associated with those remedies. Further, in a constructive trust action, the factors which are considered by the Court under s. 13 of the **MPA** (in determining whether to make an unequal division of assets) are not, generally, applicable. Further, on this third point, the appellant may have, at best, limited rights to occupation of her family home; whereas the married spouse may apply for exclusive possession of the matrimonial home under the **MPA**. A further benefit to the married spouse, under the **MPA** - which an unmarried spouse does not enjoy - is protection from disposition of the matrimonial home. The appellant's dignity is violated because her relationship with the respondent is considered less worthy of recognition than the

relationship of a married couple; and, as a result, she is denied access to the benefits of the **MPA**.

[51] The **MPA** perpetuates the view that unmarried partners are less worthy of recognition, or value, as human beings or as members of Canadian society, equally deserving of concern, respect and consideration. That is sufficient to establish an infringement of s. 15(1) (see **Law**).

[52] This is not one of the rare cases contemplated in **Andrews**, in which differential treatment based on an analogous ground in s. 15(1) of the **Charter**, is not discriminatory (see **Miron**, per McLachlin, J. at p. 752).

[53] In my opinion, a reasonable person in circumstances similar to those of the appellant would find that the **MPA**, which imposes differential treatment, has the effect of demeaning the appellant's human dignity. As a result, there is a violation of s. 15(1) of the **Charter.**

SECTION 1 ANALYSIS:

[54] It is now necessary to consider, notwithstanding that the **MPA** is discriminatory, whether the **Charter** infringement is "demonstrably justified in a free and democratic society", and thereby saved by s. 1 of the **Charter**.

[55] In **Vriend v. Alberta**, [1998] 1 S.C.R. 493 at p. 554, Justice Iacobucci said the following concerning the framework of a s. 1 analysis:

> ..... The analytical framework for determining whether a statutory provision is a reasonable limit on a *Charter* right or freedom has been set out many times since it was first established in *R. v. Oakes*, [1986] 1 S.C.R. 103. It was recently restated in *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182, which was quoted with approval in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 84:
>
> > A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

Pressing and Substantial Objective:

[56] Where, as here, a law has been found to violate the **Charter** owing to under inclusion, the legislation as a whole, the impugned provisions, and the omission itself, are all properly considered in determining whether the objective is pressing and substantial (see **Vriend** per Iacobucci, J. at p. 555; and **M. v. H.** per Iacobucci and Cory, JJ. at p. 62-63).

[57] The preamble to the **MPA** is as follows:

> WHEREAS it is desirable to encourage and strengthen the role of the family in society;
>
> AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;
>
> AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

> AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;
>
> AND WHEREAS it is desirable to recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets.

[58] The Crown tendered no evidence to discharge its onus under s. 1; and, as a result, the Court is left with only the Crown's submissions in its factum and during the course of oral argument in support of justification. Before dealing with the Crown's submissions there are two points which should be noted, with respect to this case on the general subject of justification under s. 1:

a. this is not a case where including those in a common law relationship within the provisions of the **MPA** would have a financial impact on government; and

b. there is no suggestion that including those in a common law relationship within the provisions of the **MPA** would have any negative impact on married persons.

[59] The Crown submits that the purpose of the **MPA** is to strengthen the role of the family in society; and that the "promotion of marriage" is also a purpose of the legislation.

[60] In considering the objective of the **MPA** as a whole, the preamble is somewhat misleading. The functional objective of the legislation is, clearly, to provide for an orderly

and equitable settlement of the economic affairs of married persons on the breakdown of the marriage relationship. As the Law Reform Commission of Nova Scotia, in its *Final Report* at p. 15, suggests:

> . . . it creates a mechanism which provides for the equal sharing of matrimonial assets on the termination of marriage. With the exception of the provisions relating to the home, the *Act* applies only at the end of a marriage, whether by death, divorce, annulment or final separation. It does not purport to tell people how they should arrange their affairs during their marriage, only what will happen to their property at the end.

[61] In the sense that the legislation recognizes that the contribution of spouses to a marriage, regardless of their form, are equal - and should be shared equally - it could be said to be an objective of the legislation to strengthen the role of the family in society. However, since the functional purpose of the legislation is to make provision for the resolution of property disputes upon termination of the marriage, it can hardly be said to be an objective of this legislation to promote marriage. However, even if it could be said that the objective of the legislation was to support the institution of marriage over, for example, common law relationships, such an objective has been called into question as a discriminatory objective which could not be justified under s. 1, in light of the decision of the Supreme Court of Canada in **Miron** (see: *Constitution Law of Canada*, Peter W. Hogg, looseleaf edition, vol. 2, s. 52.17).

[62] Nevertheless, as the Law Reform Commission of Nova Scotia noted in its *Final Report*, by deeming contributions to a marriage relationship to be equal, regardless of their form, the legislation effected an important change in the law which had traditionally ignored, or undervalued, unpaid work in the home. Or, as Justice

Wilson said in **Clarke**, the legislation recognized “the contribution made by women to the economic survival and growth of the family”. To that extent, the objective of the legislation is pressing and substantial.

[63] In determining whether the objective of the legislation is pressing and substantial I must also consider the impugned provision and the omission itself; that is, the omission, of those in a common law relationship, from the definition of “spouse”. Is there any clear objective of this legislation for which the exclusion of those in a common law relationship is pressing and substantial? What objective of this legislation makes it pressing and substantial that it is to apply for the benefit of those in a marriage relationship (no matter how short the duration of the marriage); and yet it does not apply for the benefit of those in a long standing common law relationship such as that of the appellant and the respondent?

[64] The Crown submits that the two forms of relationship (i.e., marriage on the one hand, and the common law relationship of the appellant and the respondent on the other hand) are clearly different and deserve different treatment. In support of that proposition, the Crown cites C. Davies, “Cohabitation Outside of Marriage: The Path to Reform” in M.E. Hughes, E.D. Pask, eds., *National Themes in Family Law* (Toronto: Carswell, 1988) 195; and C. Davies, “Matrimonial Property Legislation: Justifiably Restrictive or Offensively Narrow?” (National Judicial Institute, Family Law Seminar, February 9-11, 2000) [unpublished]. The thesis of the author is that the distribution

provisions of statutes like the **MPA**, should not be extended to people who cohabit outside of marriage. There are, of course, others who take the opposite position (see W.H. Holland, “Intimate relationships in the new millennium: the assimilation of marriage and cohabitation?” Can. J. Fam. L. [forthcoming in 2000] and W. Holland, “Marriage and Cohabitation - Has the Time Come to Bridge the Gap?” (L.S.U.C. Special Lectures in Family Law, 1993). The Ontario Law Reform Commission’s *Report on The Rights and Responsibilities of Cohabitants Under the Family Law Act* (Toronto: 1993) strongly recommends the inclusion of those in a common law relationship within the provisions of the Ontario **Family Law Act**. That Commission recommends that the definition of “spouse” in s. 1(1) of the Ontario **Family Law Act** should be amended to include either a man and woman who are not married to each other and have cohabited,

> (a) continuously for a period of not less than three years (or some other period of time prescribed by statute), or
>
> (b) in a relationship of some permanence if they are parents of a child.

[65] Similarly, the Law Reform Commission of Nova Scotia recommends such changes. It proposes a new Domestic Property Division Act which defines a “domestic relationship” as meaning a relationship where two adults have cohabited for at least one year in a personal relationship in which one provides personal or financial commitment and support of a domestic nature for the benefit of the other.

[66] Further, in response to the Crown’s submission that marriage and common

law relationships are different, and, therefore, deserve to be treated differently, there is strong *dicta* from the Supreme Court of Canada on the subject of whether these two relationships are different when considering the division of property and assets. In **Pettkus v. Becker**, [1980] 2 S.C.R. 834, the Court considered the applicability of constructive and resulting trusts to a common law relationship. Dickson, J. (as he then was) noted that courts in other jurisdictions have not regarded the absence of a marital bond as any problem in applying the doctrine of unjust enrichment to common law relationships. He said the following at p. 850:

> I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated.

[67] More recently, in **Peter v. Beblow**, **(supra)**, one of the issues was whether the provision of domestic services during 12 years of cohabitation in a common law relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the parties in the relationship.

[68] In the course of referring to the submission of counsel that the British Columbia Legislature had chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets under the **Family Law Act** of British Columbia, McLachlin, J. (as she then was), referred to that exclusion as an “injustice”.

[69] She said the following at p. 994:

> Finally, I come to the argument that, because the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship, the court should not use the equitable doctrine of unjust enrichment to remedy the situation. Again, the argument seems flawed. It is precisely where an injustice arises without a legal remedy that equity finds a role.

[70] The Crown also suggests that marital relationships are more stable than common law relationships, providing another basis which justifies making a distinction between the two relationships. The Crown provides no evidence in support of that submission. However, even assuming marriage relationships to be more stable, stability is hardly justification for providing that only married persons should have the benefits of legislation the functional purpose of which is to provide for an orderly and equitable settlement of the economic affairs of married persons on the breakdown of their marriage. Further, Statistics Canada indicates that substantial changes are taking place in both marriage relationships and common law relationships, and there is a narrowing of the gap between the two.

[71] On October 14, 1997, Statistics Canada released its data, from the 1996 Census, on the subject of *Marital status, common-law unions and families.* Included in that Report is the following:

> **Marriage a fragile bond for more people**
>
> Marriage appears to be a fragile bond for more and more individuals. One result was the continuation of the upward trend over the last 25 years in the number of one-parent families.
>
> At the time of the 1996 Census, there were over 1.6 million people who reported that they were divorced, a 28% increase from 1991. Women accounted for more than half of divorced individuals in 1996, since women do not remarry as often as

men.

In 1996, 695,675 individuals reported that they were separated, up 15% from 1991. Again, more than half were women.

And also:

Families: growth strongest among common-law couple families

Of all family structures, growth was strongest among common-law couple families. In 1996, 920,635 such families were counted, up 28% from 1991. (The Census defines common-law partners as two persons of opposite sex who are not legally married to each other, but live together as husband and wife in the same dwelling.)

In 1996, one couple in seven in Canada was living common-law, compared to about one in nine in 1991. The marital status of individuals in common-law unions remained almost the same between 1991 and 1996: nearly two-thirds of them were single, while over a quarter were divorced.

Almost half of the common-law couple families included children, whether born to the current union or brought to the family from previous unions.

Common-law families were by far most frequent in Quebec, which had 400,265, or 43% of all such families in Canada. One couple in four (24%) in Quebec lived common law.

Between 1991 and 1996, the number of common-law families grew fastest in New Brunswick and the Northwest Territories. Increases were also above the national average of 28% in Newfoundland, Prince Edward Island and Quebec, and in the Yukon.

And further:

Substantially more children in common-law couple families

In 1996, 735,565 children were living in common-law couple families, a substantial 52% increase from 1991.

Nationally, 14% of all children under the age of six were living in common-law couple families. In Quebec, by comparison, 31% of all children in this age group were in common-law couple families.

Every province and territory recorded substantial increases among children living with common-law couples. In Quebec, 343,050 children lived in families of common-law couples in 1996, up 69% from 1991, the biggest increase among the provinces.

In Ontario, there were 164,550 children living in common-law couple families, up 45% from five years earlier.

[72] With specific reference to Nova Scotia, Statistics Canada's report indicates that, as a proportion to all families in Nova Scotia in 1996, approximately 10% were common law families.

[73] The Crown also submits that any interference with the present distinction which is made between married couples and those in a common law relationship, would interfere with the right to individual autonomy of those who do not wish to marry. In my view, providing those in a common law relationship with the ability to contract out of the **MPA** is of far less consequence than denying all others in a common law relationship the benefits of the **MPA**.

[74] The Legislature of Nova Scotia has seen fit, in some of its legislation, to treat common law relationships in the same way as marriages. Common law spouses under these statutes are allowed to make the same claims, or seek the same benefits, as those who are (or were) married. In some of these statutes common law spouses are included within an expanded definition of spouse (see: **Family Maintenance Act**, R.S.N.S. 1989 as am. by S.N.S. 1997, c. 3, s. 1, and **Pension Benefits Act**, R.S.N.S. 1989, c. 340 as am. by S.N.S. 1992, c. 27; 1993, c. 35). In others there is a separate definition setting out who is a spouse (including a common law spouse), (see: **Workers' Compensation Act**, S.N.S. 1994-95 and **Compensation for Victims of Crime Act**, R.S.N.S. 1989, c. 83). As well, there are statutes that have separate provisions

pertaining to those in common law relationships (see: **Fatal Injuries Act**, R.S.N.S. 1989, c. 163).

[75] The Legislature has also provided, in the **Human Rights Act**, R.S. 1989, c. 214, that it is unlawful to discriminate against an individual or class of individuals on account of marital status, in respect of the provision of or access to services or facilities; accommodation; purchase or sale of property; employment; volunteer public service; a publication broadcast or advertisement; and membership in a professional association, business or trade association, employer's organization or employees' organization.

[76] The Crown has not provided any satisfactory explanation as to why it is pressing and substantial to exclude persons in a common law relationship from the provisions of the **MPA** while, at the same time, including them, on the same basis as married persons, in other provincial legislation.

[77] Finally, the Crown submits in its factum:

> ..... an extension of property rights in the face of uncertainty in relationships between persons gives rise to a great deal of uncertainty in the law, particularly with respect to conveyancing and estate matters. An extension of proprietary interests, particularly in the sphere of real estate, to include cohabitants under the Act may well do considerable harm to the interests of outsiders who will be affected and who have no notice of the state of the internal affairs cohabitants.....

[78] In my view, this is a practical problem which can be overcome by carefully drafted legislation prepared after consultation with members of the legal profession. Further, whatever that practical problem is, it is not so insurmountable as to justify what

has been determined in these reasons to be a violation of s .15(1) of the **Charter**. As an aside, whatever the practical problem, it did not prevent the Legislature of the Northwest Territories from providing a regime for both those in a marriage relationship and those in a defined common law relationship to have the same rights with respect to property and assets in its new **Family Law Act**. This Statute was adopted by Nunavut (see **Family Law Act** (Nunavut) S.N.W.T. 1997, c. 18, as duplicated for Nunavut pursuant to the **Nunavut Act**, S.C. 1993, c. 28, s. 29; as am. S.C. 1998, c. 15, s. 4.)

[79] In view of all of the above, the Crown has not demonstrated that the exclusion, from the provisions of the **MPA**, of those in a common law relationship, is "pressing and substantial". That being the case, the Crown has failed to discharge its onus of proving that the discrimination in this case is demonstrably justified in a free and democratic society.

REMEDY:

[80] The remedy which the appellant seeks is an order reading into the definition of "spouse" in s. 2(g) of the **MPA** the definition of common law spouse contained in the Nova Scotia **Family Maintenance Act**. The definition of common law spouse as contained in s. 2(m) of the **Family Maintenance Act** provides as follows:

> **2** In this Act,
>
> .....
>
> (m) "spouse" means a person married to another person and, for the purpose of this Act, includes a man and woman who, not being married to each other, live together as husband and wife for one year.

[81] I agree with the submission of the Crown that such is not an appropriate remedy in the circumstances of this case.

[82] The Supreme Court of Canada held in **Schachter v. Canada**, [1992] 2 S.C.R. 679 that severance and reading in will only be warranted in the clearest of cases and the courts should be careful to ensure that the severance/reading in would not constitute an unacceptable intrusion into the legislative domain.

[83] The Crown makes the following submissions in its factum with which I agree:

> The Act [**MPA**] includes provisions which act as preconditions to applications that presume the existence of a legal marriage. Section 12 sets out when an application for division of matrimonial assets may be made - only after a petition for divorce is filed, an application is filed for a declaration of nullity, after a separation or death of a spouse. These preconditions presuppose the existence of a legal marriage and are not available to unmarried cohabitants. Unless these preconditions are struck, or the provisions establishing entitlement to the preconditions are themselves amended to include unmarried cohabitants, merely including the phrase "common law spouse" in the word "spouse", as requested by the Appellant, has no practical effect since unmarried spouses cannot meet the existing preconditions.
>
> There is no universally accepted definition of common law spouse: Rossu v. Taylor (1998), 39 R.F.L. (4th) 242]. Even the [Final Report of the Law Reform Commission of Nova Scotia] advocates a remedy significantly different than that claimed by the Appellant. It is not appropriate to pick and choose from any one of possibly ninety pieces of legislation which provide for recognition of differing forms of relationships to become the basis of reading in: see for example, *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, s. 13; *Compensation for Victims of Crime Act*, R.S.N.S. 1989, c. 83, s. 2(2); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m); *Insurance Act*, R.S.N.S. 1989, c. 231; *Medical Professional Corporation Act*, S.N.S. 1995-96, c. 11, s. 2(h); *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299, s. 2(i); *Occupational Therapists Act*, S.N.S. 1998, c. 21, s. 2(y); *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 2(aj); *Public Service Superannuation Act*, R.S.N.S. 1989, c. 377, s. 2(k); *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 1(ab). The legislation provides for different meanings for the phrases and one cannot simply cut and paste from one to another. ..... The government ought to have the opportunity to design a new legislative scheme that conforms with *Charter* requirements, rather than having the Court amend some parts and the legislature other parts, with the result that the whole would be less than ideal.

[84] In my opinion, it is for the Legislature, not the Court, to define with precision common law relationships which are to be included within the provisions of the **MPA** so as to comply with the constitution. Obviously, it is not required that the **MPA** apply to any transitory relationship. However, whether the recommendations of the Law Reform Commission of Nova Scotia (supra), some refinement of those recommendations, or a completely different scheme is adopted, is a matter which is best decided by the Legislature. Likewise, it is the Legislature's role to deal with such other refinements to the **MPA** which are occasioned by the inclusion of parties in a common law relationship, including whatever transitional provisions are deemed necessary.

[85] I would, therefore, allow this appeal. I would declare s. 2(g) of the **MPA** to be of no force or effect. However, I would temporarily suspend the effect of that declaration for a period of twelve (12) months to enable the Legislature to devise new criteria for eligibility under the **MPA**, including whatever transitional provisions may be deemed necessary, and to pass new legislation that meets the constitutional requirements of s. 15(1) of the **Charter**, as set out in these reasons for judgment.

[86] As counsel agreed, there will be no order as to costs.

[87] In the course of preparing these reasons for judgment I have given consideration to the question of what, if any, individual remedy may be available, and

appropriate, to the appellant given the circumstances which result to her from these reasons for judgment. This particular issue was not addressed by counsel at the hearing of this appeal.

[88] If counsel for the appellant wishes to make a submission to the panel on this issue (what, if any, individual remedy may be available and appropriate to the appellant given the reasons for judgment on this appeal) the panel is prepared to receive that submission and hear counsel on the matter.

[89] The submission on behalf of the appellant is to be filed with the Court, with counsel for the Crown and with the respondent Mr. Bona, on or before May 8th, 2000. Any responses by the Crown and the respondent Mr. Bona are to be filed with the Court, and counsel for the other parties, on or before May 23rd, 2000. The Registrar will then contact counsel and make arrangements for a date on which the parties can be heard.

[90] If counsel for the appellant does not wish to make a submission on this issue, counsel should advise the Registrar accordingly, and the Court will issue an order giving effect to these Reasons for Judgment. Otherwise, the Order for Judgment will await the Court's ruling on the further submissions.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.