

Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325, 2002 SCC 83

The Attorney General of Nova Scotia

Appellant

v.

Susan Walsh and Wayne Bona

Respondents

and

**The Attorney General of Canada, the Attorney General for Ontario,
the Attorney General of Quebec, the Attorney General of British Columbia
and the Attorney General for Alberta**

Interveners

Indexed as: Nova Scotia (Attorney General) v. Walsh

Neutral citation: 2002 SCC 83.

File No.: 28179.

2002: June 14; 2002: December 19.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for nova scotia

Constitutional law — Charter of Rights — Equality rights — Division of matrimonial property — Definition of “spouse” — Definition of “spouse” in matrimonial property legislation limited to a man and a woman who are married to

each other — Whether exclusion of unmarried cohabiting opposite sex couples discriminatory within meaning of s. 15(1) of Canadian Charter of Rights and Freedoms — Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 2(g).

Family law — Division of matrimonial property — Definition of “spouse” — Definition of “spouse” in matrimonial property legislation limited to a man and a woman who are married to each other — Whether exclusion of unmarried cohabiting opposite sex couples from definition of spouse constitutional — Canadian Charter of Rights and Freedoms, s. 15(1) — Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 2(g).

The parties, B and W, cohabited for approximately 10 years. W applied for spousal support, child support and a declaration that the definition of “spouse” in s. 2(g) of Nova Scotia *Matrimonial Property Act* (“MPA”) was unconstitutional for failing to provide her with the presumption, applicable to married spouses, of an equal division of matrimonial property, in violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The trial judge held that the exclusion of common law spouses from the definition of “spouse” did not constitute discrimination within the meaning of s. 15(1). The Court of Appeal set aside the decision, concluding that the legislation infringed s. 15(1) and that the infringement was not justifiable under s. 1 of the *Charter*.

Held (L’Heureux-Dubé J. dissenting): The appeal should be allowed. The exclusion from the *MPA* of unmarried cohabiting persons of the opposite sex is not discriminatory within the meaning of s. 15(1) of the *Charter*. The distinction does not affect the dignity of these persons and does not deny them access to a benefit or advantage available to married persons.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: The three-part test for determining whether an impugned statute violates the s. 15(1) equality guarantee was set out in *Law*. With respect to the first two inquiries, the Crown conceded that the *MPA* provides differential treatment for the purpose of s. 15(1) and that marital status is an analogous ground of discrimination. With respect to the third inquiry, it can be stated, in the present case, as whether a reasonable heterosexual unmarried cohabiting person, taking into account all of the relevant contextual factors, would find the *MPA*'s failure to include him or her in its ambit has the effect of demeaning his or her dignity.

The equality guarantee is a comparative concept. The comparator groups in this case are married and unmarried heterosexual cohabitants. Although in some cases certain functional similarities between these two groups may be substantial, it would be wrong here to ignore the significant heterogeneity that exists within the claimant's comparator group. Reliance solely on certain "functional similarities" between the two groups does not adequately address the full range of traits, history and circumstances of the comparator group of which the claimant is a member.

Although the courts and legislatures have recognized the historical disadvantages suffered by unmarried cohabiting couples, where legislation has the effect of dramatically altering the legal obligations of partners, choice must be paramount. The decision to marry or not is intensely personal. Many opposite sex individuals in conjugal relationships of some permanence have chosen to avoid marriage and the legal consequences that flow from it. To ignore the differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state.

Examination of the context in which the discrimination claim arises also involves a consideration of the relationship between the grounds and the claimant's characteristics or circumstances. The *MPA* deems married persons to have agreed to an economic partnership wherein both pecuniary and non-pecuniary contributions to the marriage partnership are considered to be of equal worth entitling each spouse, *inter alia*, to an equal division of a pool of assets upon marriage breakdown. The *MPA* also confers other benefits and imposes other obligations on the spouses. The decision to marry, which requires the consent of each spouse, encapsulates within it the spouses' consent to be bound by the *MPA* proprietary regime. Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. If they so choose, however, they are able to access all of the benefits applicable to married couples under the *MPA*. They are free to marry, enter into domestic contracts, own property jointly or register as domestic partners. There is thus no discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them.

The decision to live together is insufficiently indicative of an intention to contribute to and share in each other's assets and liabilities. While many unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship, it does not necessarily follow that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship. People who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties.

Even if the freedom to marry is sometimes illusory, it does not warrant setting aside an individual's freedom of choice and imposing on that individual a regime that was designed for persons who have made an unequivocal commitment encompassing the equal partnership described in the *MPA*. While inequities may exist in certain unmarried cohabiting relationships which may result in unfairness on relationship breakdown, there is no constitutional requirement that the state extend the protections of the *MPA* to those persons. Alternative choices and remedies are available to persons unwilling or unable to marry.

In sum, the application of the *MPA* to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected. Moreover, the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of these essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life. Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to the liberty interest.

Per Gonthier J.: There is agreement with the majority reasons. Legislative provisions that attach burdens and advantages to marriage are not discriminatory in and of themselves. Legislatures are entitled to define and promote fundamental institutions

such as marriage, which is founded on the consent of the parties and is contractual in nature. It is therefore fitting that certain attributes, rights and obligations which serve to give marriage its unique character are not conferred on unmarried couples.

The *Charter* does not require that the legislature treat married and unmarried couples identically. The right to equality is a comparative right requiring reference to an appropriate comparator group. The purpose of such a comparison is to determine whether the person invoking s. 15(1) of the *Charter* is subject to differential treatment sufficient to constitute a violation of the equality right. The situation of couples who have chosen life commitment through marriage is not comparable to that of unmarried couples when one considers that with married couples, there is a permanent and reciprocal life commitment, to which the legislature has attached, among other things, a presumption of equal division of matrimonial assets. Unmarried couples do not make that same commitment, and rights and duties akin to marriage should not as a result follow. The fundamental differences between common law and married couples make them inappropriate comparator groups in this respect. The fact that some unmarried couples have relationships similar to those of married couples does not undermine the central distinguishing feature of the institution of marriage: permanent contractual commitment. When couples marry, they commit to respect the consequences and obligations flowing from their choice. It is this choice that legitimates the system of benefits and obligations attached to marriage generally, and, in particular, those relating to matrimonial assets. To extend the presumption of equal division of matrimonial assets to common law couples would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system. To presume that common law couples want to be bound by the same obligations as married couples is contrary to their choice to live in a common law relationship without the obligations of marriage.

Although there has been growing recognition that common law spouses should be subject to the same spousal support regime as married spouses, this recognition does not extend to a division of matrimonial property, as different principles underlie the two regimes. The objective of matrimonial property division is to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the main objective of support is to meet the needs of spouses and their children. The support obligation is non-contractual and responds to situations of dependency that may occur in common law relationships.

Per L'Heureux-Dubé J. (dissenting): In conducting the three-stage analysis set out in *Law* to determine whether legislation infringes s. 15(1), it must be remembered that fundamental to the equality rights guarantee is its broad remedial purpose to recognize the innate dignity of each human being in society. This fundamental purpose is violated whenever a sufficient distinction is drawn between individuals or groups on an enumerated or analogous ground in such a way as to reflect the stereotypical application of presumed group or personal characteristics or so as to create the effect of perpetuating or promoting the view that the claimant is less capable, or less worthy, of recognition or value as a human being. In this case, the Court is required to identify differential treatment by observing the way the legislation treats two comparator groups: heterosexual married cohabitants and heterosexual unmarried cohabitants. The question is whether a person reflecting objectively on the claimant's situation would regard the exclusion of all heterosexual unmarried cohabitants as being a violation of the claimant's dignity.

With respect to the first two steps of the *Law* analysis, the Crown conceded that the *MPA* draws a distinction between married and heterosexual unmarried

cohabitants in the definition of spouse and that the distinction is based on the personal characteristic of marital status, which constitutes an analogous ground of discrimination under s. 15(1). Since formal discrimination has been established, it is left to determine whether the distinction violates the purpose of s. 15(1) by diminishing the claimant's dignity by promoting the view that she is less capable or worthy of recognition or value as a human being. A number of contextual factors must inform this analysis, to ensure that the claim is situated in its full legal, social and historical context in order to serve the broad remedial purpose of s. 15(1). The four factors enumerated in *Law*, the purpose of the *MPA* and other relevant considerations lead to the conclusion that the distinction drawn in the *MPA* has the effect of diminishing the claimant's dignity.

Heterosexual unmarried cohabitants have historically faced disadvantages through a legal system that fails to acknowledge them as legitimate family forms. This pre-existing disadvantage has abated in recent years but remains exacerbated by the denial of equal treatment in the *MPA*. In failing to account for these people, the *MPA* does not serve a justifiable ameliorative purpose, nor does it provide a remedy in response to the actual needs of unmarried people. The *prima facie* right to an equal division of property and assets is of fundamental importance and the most expedient means of resolving the very difficult matters associated with the dissolution of a long-term relationship at a time where patience and emotional stability are at a premium. The failure to provide the benefits of the *MPA* to heterosexual unmarried cohabitants thus constitutes a failure to provide a fundamental benefit at a time when it is most needed. In doing so, the legislature draws a distinction based on a status wholly unrelated to the actual needs of people whose relationships of interdependence have come to an end and who, as a result, require redistribution of economic resources through property equalization and support. Heterosexual unmarried cohabitants

experience similar needs as their married counterparts when the relationship comes to an end. In this sense, the relationships are functionally equivalent. Each of these relationships performs the same valuable functions and the law should apply equally to both. Since the purpose of the *MPA* is to recognize this need and to alleviate it, limiting the recognition to married cohabitants implies that the needs of heterosexual unmarried cohabitants are not worthy of the same recognition solely because the people in need have not married. Further, the *MPA* equal presumption is based on the recognition of the contribution made by both spouses to the family. Functionally, spouses contribute to various types of families. The *MPA*'s refusal to recognize the contributions made by non-married persons to their relationships sends the message that, by virtue of their marital status alone, their relationship is less worthy of respect and value.

Although unmarried cohabitants have relationships, on average, of shorter duration, the *MPA* has built-in devices to allow the court to rebut the presumption of equal sharing where appropriate. It is no excuse to deny the benefit of equal sharing to all heterosexual unmarried cohabitants simply because some members of the group do not deserve or want this equal division. The legislature is in the best position to craft legislation that takes into account the difficulties associated with extending the benefit.

The dignity of the members of the claimant's group is further attacked by claims that the *MPA* is designed to give effect to the intentions of married and unmarried persons at the outset of their relationships. The *MPA* has nothing to do with choice or consensus, and everything to do with recognizing the needs of spouses at the end of the relationship. Initial intentions are, therefore, of little consequence. People are often unaware of their legal rights and obligations and do not organize their

personal lives in a manner to achieve specific legal consequences. Matrimonial property legislation imposes a wealth distribution regime on marriage dissolution without regard for the wishes of married cohabitants at the outset of their relationship, not on some pre-conceived consensus. Furthermore, many heterosexual unmarried cohabitants cohabit not out of choice but out of necessity. For many, choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation. Even if research were to show that unmarried cohabitants choose to cohabit in order to avoid the legal consequences of marriage, those findings would be irrelevant as it is the reality of the relationship at its termination that the *MPA* addresses, not the intentions of the parties at its outset.

Courts and legislatures in this country have also recognized that denying certain benefits to a class of persons on the basis of their marital status is unjust where the need for these benefits is felt by both unmarried and married cohabitants equally. Both courts and legislatures have extended certain benefits to heterosexual unmarried cohabitants. The appreciation of an injustice and the resulting actions reinforce the view that the denial of marital property benefits demeans the dignity of heterosexual unmarried cohabitants. The steps taken constitute an acknowledgement of an historic attack upon the dignity of these individuals. Lastly, the *MPA* cannot survive a s. 15(1) scrutiny because of the availability of alternative remedies. These remedies are inadequate relative to those accorded spouses under the *MPA*. The claimant's dignity is demeaned by offering her remedies that are greatly deficient relative to the legislated property regime.

Given these conclusions, it follows that the *MPA* infringes s. 15(1). This infringement cannot be saved by s. 1 of the *Charter*. There does not appear to be a

pressing and substantial objective for the omission of heterosexual unmarried cohabitants from the *MPA*. Taken as a whole, the true objective of the *MPA* is the protection of married individuals from the harmful effects following the breakdown of the marriage to the exclusion of all non-married cohabitants. This is not a constitutional objective. Assuming that the objectives of the *MPA* are pressing and substantial and justify a breach of a constitutional right, the means chosen are not proportional to the objectives considered due to the absence of any rational connection between the exclusion of heterosexual unmarried cohabitants from the *MPA* and the purported purpose of the statute.

Cases Cited

By Bastarache J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; **referred to:** *M. v. H.*, [1999] 2 S.C.R. 3; *Clarke v. Clarke*, [1990] 2 S.C.R. 795; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Oakes*, [1986] 1 S.C.R. 103; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

By Gonthier J.

Distinguished: *M. v. H.*, [1999] 2 S.C.R. 3; **referred to:** *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Egan v. Canada*, [1995] 2

S.C.R. 513; *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28.

By L'Heureux-Dubé J. (dissenting)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497; *M. v. H.*, [1999] 2 S.C.R. 3; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Lavoie v. Canada*, [2001] 1 S.C.R. 769, 2002 SCC 23; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Gammans v. Ekins*, [1950] 2 All E.R. 140; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Clarke v. Clarke*, [1990] 2 S.C.R. 795; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266; *Woycenko Estate, Re* (2002), 315 A.R. 291, 2002 ABQB 640; *C.L.W. v. G.C.W.* (1999), 182 Sask. R. 237; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

Statutes and Regulations Cited

Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, s. 27.

Act Respecting the Conseil de la famille et de l'enfance, R.S.Q., c. C-56.2, preamble.

Bill 75, *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, 1st Sess., 58th Leg., Nova Scotia, 2000, cl. 3 [now S.N.S. 2000, ch. 29, s. 3].

Canadian Charter of Rights and Freedoms, ss. 1, 15(1).

Civil Code of Québec, S.Q. 1991, c. 64, art. 365.

Common-Law Partners's Property and Related Amendments Act, S.M. 2002, c. 48 [not yet proclaimed].

Constitution Act, 1867, ss. 91(26), 92(12).

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 8(2).

Divorce Act, S.C. 1967-68, c. 24.

Domestic Relations Act, R.S.A. 2000, c. D-14, s. 1 "spouse".

Family Law Act, R.S.N. 1990, c. F-2, s. 35(c) [am. 2000, c. 29, s. 1].

Family Law Act, R.S.O. 1990, c. F.3, preamble, ss. 1(1) [am. 1999, c. 6, s. 25(1)], 29 [idem, s. 25(2)], 33(9) [am. 1997, c. 20, s. 3; am. 1999, c. 6, s. 25(6)].

Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1).

Family Law Act, S.P.E.I. 1995, c. 12, s. 29(1)(b).

Family Maintenance Act, R.S.M. 1987, c. F20, ss. 1, 4(3), 14(1).

Family Maintenance Act, 1997, S.S. 1997, c. F-6.2, s. 2 [am. 2001, c. 51, s. 5(4)].

Family Property Act, S.S. 1997, c. F-6.3.

Family Property and Support Act, R.S.Y. 1986, c. 63, s. 1 [am. 1998, c. 8, s. 10(1)].

Family Relations Act, R.S.B.C. 1996, c. 128, s. 1 [am. 1997, c. 20, s. 1©].

Family Services Act, S.N.B. 1980, c. F-2.2, s. 112(3) [am. 2000, c. 59, s. 1].

Federal Law — Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5.

Human Rights Act, R.S.N.S. 1989, c. 214.

Law Reform (2000) Act, S.N.S. 2000, c. 29, s. 3.

Maintenance and Custody Act, R.S.N.S. 1989, c. 160, ss. 2(aa) [ad. 2000, c. 29, s. 3(a)], (m) [rep. & sub. idem, s. 3(b)], 3, 4, 52(1).

Maintenance Enforcement Act, S.N.S. 1994-95, c. 6, s. 2(e).

Matrimonial Property Act, R.S.N.S. 1989, c. 275, preamble, ss. 2(g), 3(1), 5(1), 6(1), 11(1)(a), 12, 13.

Matrimonial Property Act, S.N.S. 1980, c. 9, preamble.

Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 1.1.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Art. 16.

Vital Statistics Act, R.S.N.S. 1989, c. 494.

Authors Cited

Alberta. Institute of Law Research and Reform. Research Paper No. 15. *Survey of Adult Living Arrangements: A Technical Report*. Edmonton: The Institute, 1984.

Blumberg, Grace Ganz. "The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State" (2001), 76 *Notre Dame L. Rev.* 1265.

Brinton, C. *French Revolutionary Legislation on Illegitimacy 1789-1804*. Cambridge: Harvard University Press, 1936.

Canada. Law Reform Commission. Working Paper. *Studies on Family Property Law*. Ottawa: The Commission, 1975.

Canada. Royal Commission on the Status of Women in Canada. *Report of the Royal Commission on the Status of Women in Canada*. Ottawa: The Commission, 1970.

Canada. Statistics Canada. *1996 Census: Marital Status, Common-law Unions and Families*. Ottawa: Statistics Canada, 1997.

Canada. Statistics Canada. *Age, Sex, Marital Status and Common-law Status*. 1996 Census Technical Reports. Ottawa: Minister of Industry, 1999.

Canada. Statistics Canada. *Profile of Canadian families and households: Diversification continues*. Ottawa: Statistics Canada, 2002.

Canada. Statistics Canada. *Report on the Demographic Situation in Canada 1996: Current Demographic Analysis*. Report prepared by Jean Dumas and Alain Bélanger. Ottawa: Minister of Industry, 1997.

Des Rosiers, Nathalie. "Should Conjuality Matter in Law and Social Policy?" Remarks for a Keynote Address to the North American Regional Conference of the International Society of Family Law. Ottawa: Law Commission of Canada, 2001.

- Eichler, Margrit. *Family Shifts: Families, Policies, and Gender Equality*. Toronto: Oxford University Press, 1997.
- Eisenberg, Melvin Aron. "The Limits of Cognition and the Limits of Contract" (1995), 47 *Stan. L. Rev.* 211.
- Ellman, Ira Mark. "'Contract Thinking' Was Marvin's Fatal Flaw" (2001), 76 *Notre Dame L. Rev.* 1365.
- Holland, Winifred. "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000), 17 *Can. J. Fam. L.* 114.
- Holland, Winifred H. "Marriage and Cohabitation — Has the Time Come to Bridge the Gap?", in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality*. Scarborough, Ont.: Carswell, 1994, 369.
- Kuffner, Kara L. "Common-Law and Same-Sex Relationships Under *The Matrimonial Property Act*" (2000), 63 *Sask. L. Rev.* 237.
- Lempriere, T. "A New Look at Poverty" (1992), 16 *Perceptions* 18.
- McLeod, James G. Annotation to *Pettkus v. Becker* (1981), 19 R.F.L. (2d) 166.
- McLeod, James G. Annotation to *Walsh v. Bona* (2000), 5 R.F.L. (5th) 190.
- McLeod, James G. "Unequal Division of Property", in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality*. Scarborough, Ont.: Carswell, 1994, 141.
- Mossman, Mary Jane. "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994), 17 *Dal. L.J.* 5.
- New Brunswick. Department of Justice. Law Reform Division. Discussion Paper. *Matrimonial Property Reform for New Brunswick*. Fredericton: The Department, 1978.
- New Encyclopædia Britannica*, vol. 19, 15th ed. Chicago: Encyclopædia Britannica, 1990.
- Nova Scotia. House of Assembly. *Debates and Proceedings*, 80-44, May 8, 1980, p. 2011.
- Nova Scotia. Law Reform Advisory Commission. *Development of Matrimonial Property Law in England and Nova Scotia: An Historic Perspective*. Halifax: The Commission, 1975.
- Nova Scotia. Law Reform Commission. Discussion Paper. *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act*. Halifax: The Commission, 1996.
- Nova Scotia. Law Reform Commission. *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*. Halifax: The Commission, 1997.

- Ontario. Law Reform Commission. *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act*. Toronto: The Commission, 1993.
- Payne, J. D. “Legislative Amelioration of the Condition of the Common Law Illegitimate: The Legitimacy Act (Saskatchewan), 1961” (1961), 26 *Sask. Bar Rev.* 78.
- Payne, Julien D., and Marilyn A. Payne. *Canadian Family Law*. Toronto: Irwin Law, 2001.
- Pineau, Jean. *Mariage, séparation, divorce: L'état du droit au Québec*. Montréal: Presses de l'Université de Montréal, 1976.
- Smart, Carol. “Stories of Family Life: Cohabitation, Marriage and Social Change” (2000), 17 *Can. J. Fam. L.* 20.
- Tasmania. Law Reform Commission. *Report on Obligations Arising From De Facto Relationships*, No. 36. Hobart, Tas.: Government Printer, 1977.
- Wu, Zheng. *Cohabitation: An Alternative Form of Family Living*. Don Mills, Ont.: Oxford University Press, 2000.

APPEAL from a judgment of the Nova Scotia Court of Appeal (2000), 183 N.S.R. (2d) 74, 568 A.P.R. 74, 5 R.F.L. (5th) 188, 186 D.L.R. (4th) 50, [2000] N.S.J. No. 117 (QL), 2000 NSCA 53, with supplementary reasons (2000), 185 N.S.R. (2d) 190, 575 A.P.R. 190, 7 R.F.L. (5th) 451, 186 D.L.R. (4th) 83, [2000] N.S.J. No. 173 (QL), 2000 NSCA 73, setting aside a decision of the Nova Scotia Supreme Court (1999), 178 N.S.R. (2d) 151, 549 A.P.R. 151, 67 C.R.R. (2d) 297, [1999] N.S.J. No. 290 (QL). Appeal allowed, L'Heureux-Dubé J. dissenting.

Edward A. Gores, for the appellant.

Katherine A. Briand and *Stephen M. Robertson*, for the respondent Susan Walsh.

No one appeared for the respondent Wayne Bona.

Christopher M. Rupar, for the intervener the Attorney General of Canada.

Sarah Kraicer and *Daniel Guttman*, for the intervener the Attorney General for Ontario.

Hugo Jean and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Timothy P. Leadem, Q.C., for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. was delivered by

BASTARACHE J. —

I. Introduction

1 This case involves a *Charter* challenge to the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (“*MPA*”), and asks whether its failure to include unmarried cohabiting opposite sex couples from its ambit violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The challenge revolves around the definition of “spouse” in s. 2(g) of the *MPA*, which is limited to a man and a woman who are married to each other.

2 The question before this Court, then, is whether the exclusion from the *MPA* of unmarried cohabiting persons of the opposite sex is discriminatory. In my view, it is not. The distinction chosen by the legislature does not affect the dignity of unmarried persons who have formed relationships of some permanence and does not deny them access to a benefit or advantage available to married persons. It is, therefore, not discriminatory within the meaning of s. 15(1).

II. Factual Background

3 Susan Walsh and Wayne Bona lived together in a cohabiting relationship for a period of 10 years, ending in 1995. Two children were born out of this relationship, in 1988 and 1990 respectively. Walsh and Bona owned a home as joint tenants, in which Bona continued to reside after the separation, assuming the debts and expenses associated with the property. In 1983, Bona received as a gift from his father a cottage property which was sold after separation for \$20,000. Approximately \$10,000 was used to pay off the respondents' debts. Bona also retained 13 acres of surrounding woodland in his own name, valued at \$6,500. The total value of assets retained by Bona at the date of separation including the house, cottage, lot, vehicle, pensions and RRSPs, was \$116,000, less "matrimonial" debts of \$50,000, for a net value of \$66,000.

4 The respondent Walsh claimed support for herself and the two children. She further sought a declaration that the Nova Scotia *MPA* was unconstitutional in failing to furnish her with the presumption, applicable to married spouses, of an equal division of matrimonial property. Her claim for a declaration was rejected by the chambers judge, whose decision was reversed on appeal.

5 My colleague, Justice L’Heureux-Dubé, chooses not to make reference to
the *Law Reform (2000) Act*, S.N.S. 2000, c. 29 (“*LRA*”), in the course of her analysis.
I mention it as a new contextual consideration but, as will become clear below, my
conclusion on the constitutionality of the *MPA* does not depend on the existence of the
LRA.

6 In response to the Court of Appeal judgment, the Nova Scotia legislature
introduced legislation, Bill 75, *An Act to Comply with Certain Court Decisions and to
Modernize and Reform Laws in the Province* (now the *LRA*), on November 6, 2000,
that effectively amends the definition of “spouse” to “common-law partner”.
Heterosexual and same sex partners are both included in the definition of “common-
law partner”, and these may be either registered under the *Vital Statistics Act*, R.S.N.S.
1989, c. 494, or unregistered. Only registered partnerships are eligible for the benefits
of the *MPA* and other legislation: *LRA*.

7 Walsh’s counsel advised the Court that subsequent to leave to appeal
having been granted ([2001] 1 S.C.R. vi), Walsh and Bona have settled the litigation
between them respecting the division of property.

III. Relevant Statutory Provisions

8 *Matrimonial Property Act*, R.S.N.S. 1989, c. 275

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.

12 (1) Where

(a) a petition for divorce is filed;

(b) an application is filed for a declaration of nullity;

(c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or

(d) one of the spouses has died,

either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

Canadian Charter of Rights and Freedoms

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.

IV. Judicial History

A. *Supreme Court of Nova Scotia* (1999), 178 N.S.R. (2d) 151

9

The matter came before Haliburton J. as a *Charter* application, as the respondent Walsh alleged that she had suffered discrimination under the *MPA* because the presumption of equal division of matrimonial property applicable to married

spouses did not apply to her as a common law spouse. Instead, the onus was on her, by way of constructive trust, to prove the extent, if any, to which she might have been entitled to a share in property held in Bona's name alone.

10 Haliburton J. first considered whether there was discrimination under s. 15(1) of the *Charter*, noting that the section prohibits discrimination on the basis of certain personal characteristics. Applying the analysis sanctioned in *Miron v. Trudel*, [1995] 2 S.C.R. 418, then in *M. v. H.*, [1999] 2 S.C.R. 3, he first found that there was no question that married and unmarried spouses are treated differently with respect to the onus of proof required to establish an interest in property under the *MPA*. Next, Haliburton J. considered whether that difference resulted from discrimination as defined by s. 15(1) on the basis of an enumerated or analogous ground. In *Miron, supra*, this Court held that an unmarried spouse was entitled to insurance benefits because she had lived in a relationship analogous to marriage.

11 Haliburton J. noted the strong dissent in *Miron, supra*, and distinguished it on the basis that it involved all-encompassing legislation, to which the distinction complained of was incidental; whereas in the present case, the distinction is a specific incident governing the rights of married persons to a division of matrimonial property. "Secondly, the contest is between the parties themselves and reflects directly their decision, whether individually or jointly, to marry or not to marry" (para. 17). Haliburton J. observed from s. 12 of the *MPA* that the legislators had only contemplated that it would apply to couples who were legally married. In his view, extending the provisions of the *MPA* to unmarried couples would create uncertainty, injustice, and impediments to property transactions and the rights of third parties because married couples relinquish the right to deal with their property as sole owners upon marriage.

12 Haliburton J. considered the concept of marriage in our society, approving of the explanation made in the *Miron* dissent, where it was described as an institution and the basic framework upon which our society rests. He concluded that the distinction drawn between married and unmarried spouses was one that certainly created a disadvantage for those unmarried, and then assessed whether the distinction was based on irrelevant personal characteristics such as those enumerated in s. 15(1) of the *Charter*.

13 Relying upon the *Miron* dissent concerning marriage, he also acknowledged the majority comment that the failure of the parties to marry may not be a matter of free and independent choice and stated at para. 21:

I would argue, nonetheless, that as a general rule, it is a matter of freedom of choice. There are certain attributes of “marriage” which have existed not only in our society but in all societies since time out of memory. Such attributes encompass the public acknowledgment in the presence of community and family by two persons who enter into a binding, lifetime relationship.

14 After reviewing the history of matrimonial property legislation, he observed that married women have been deprived of their independence and interest in their property in the past but that men and women fare equally well under the *MPA*. “To impose the regime created by this statute upon a person *who chooses not to marry* and to do so retroactively would be as likely to create injustice as to resolve it” (para. 22 (emphasis in original)). He referred to my reasoning in *M. v. H.*, *supra*, where I observed at para. 289: “The comparison is best made, not with married couples, whose status was consensually acquired, but with unmarried cohabiting couples.” He stated at para. 23:

From that brief quotation, I would argue that the property regime imposed by the *Matrimonial Property Act* is one which is or ought to be consciously acquired by the consent of the parties contracting to marry and knowing the statutory and other legal implications of doing so.

15 Although he concluded that Walsh had not suffered discrimination on the basis of s. 15(1), Haliburton J. considered, at para. 26, whether the impugned section would be saved by s. 1 of the *Charter*, employing the *Oakes* test (®. *v. Oakes*, [1986] 1 S.C.R. 103), as recently reiterated in *M. v. H.*, *supra*:

The principle is that the objective of the legislation must be of sufficient importance to override the constitutional right which is impaired by the statute. The objective must be “pressing and substantial” and must be evaluated or weighed in terms of the importance of these two competing values. Specifically referring to *M. v. H.*, the court has said where the violation results from “underinclusion”, the object of the legislation as a whole must be considered. In the case of the *Matrimonial Property Act*, the announced purpose is to regulate property rights between the two parties to marriage. As will be clear from earlier comments, “marriage”, as contemplated, refers to the status gained by persons who go through a legally authorized and recognized form of matrimony. The statute is intended to regulate the property rights of the parties during marriage as well as on marriage breakdown. It orders the presumptions which will apply in the event of a division of marital assets and sets out guidelines for determining which assets of one of the parties is a marital asset and which are not. The ultimate goal of the legislation is *to provide a framework for property ownership by the parties to a marriage which will afford certainty and predictability to both the marriage partners and third parties dealing with them.* It is this aspect of *certainty and predictability* which is the objective which is “pressing and substantial”. The regime permits parties to engage in commerce utilizing their own separate resources without impairment. It permits third parties to understand they are dealing with a marriage partner with confidence. . . . I would observe that unlike the circumstances reviewed in *M. v. H.* where the Ontario *Family Law Act* was considered, the *Matrimonial Property Act* is not concerned with the support of spouses on marriage breakdown, nor with the maintenance of children. Its concern is exclusively with the division of wealth which one of the parties has acquired, either before or during the marriage and sets out guidelines to assist in determining whether that wealth continues to be separate property or whether it becomes common property of the parties. [Emphasis in original.]

16 Haliburton J. noted that certain other legislation recognized rights of unmarried couples, and that they were free to enter into an agreement to share property or to acquire property jointly. Likewise, he reasoned, they should be free to choose not to share their separate property. In his view, the impugned law is rationally connected to the objective of providing certainty and stability to property issues between married spouses.

17 He next considered whether the rights of the respondent Walsh were impaired no more than necessary in order to accomplish the statutory objective. He noted that the stated intentions of the legislation are to strengthen the role of family in society and to provide for an orderly settlement upon marriage termination, recognizing household management and financial support as joint responsibilities. He observed that no other legislatures accord property rights to unmarried cohabitants and that many uncertainties exist with respect to common law relationships. He noted that the result sought by the respondent was a shift of the burden of proof of property entitlement from one party to the other, so that there would be a presumption of equal sharing. He held at para. 31:

The deleterious effects of requiring a person in the position of the present applicant to establish her entitlement to share in the property held by the respondent is outweighed by the values of the scheme which, as I have said, provide certainty and predictability for persons who are legally married.

18 Haliburton J. concluded that marital status was not an analogous or protected ground under s. 15(1) of the *Charter*; that the exclusion of common law spouses from the definition of “spouse” in s. 2(g) of the *MPA* did not constitute discrimination; and that if it were, it was demonstrably justified pursuant to s. 1.

B. *Nova Scotia Court of Appeal* (2000), 183 N.S.R. (2d) 74, 2000 NSCA 53

19 On appeal, the Crown conceded that since the *MPA* applies only to married spouses, there was differential treatment pursuant to s. 15(1) of the *Charter*, and that marital status is an analogous ground of discrimination. Its principal submission was that the differential treatment is not discriminatory, and if it is, then it is saved by s. 1 of the *Charter*.

20 Flinn J.A., for the court, referred to *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, where Iacobucci J. summarized the approach to s. 15(1) analysis. Flinn J.A. then reviewed the Law Reform Commission's report on the Nova Scotia matrimonial property regime, which permits each spouse to retain property in his or her name and to dispose of it without the consent of the other, with the exception of the matrimonial home. A right to equal division of property only arises on marriage breakdown: see Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (1997).

21 Flinn J.A. held that on the basis of *Miron, supra*, the chambers judge was in error in concluding that marital status was not an analogous ground. He then considered whether the differential treatment of the respondent Walsh by the *MPA* was discrimination within the meaning of s. 15(1) of the *Charter*, referring to the majority judgment in *M. v. H., supra*, which in turn relied upon *Law, supra*, particularly where it was stated at para. 60:

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.

22 Flinn J.A. noted that in making this determination, the court is required to take into account other contextual factors such as pre-existing disadvantage, stereotyping or prejudice experienced by the group in issue, the relationship between the grounds and the claimant's characteristics and circumstances, the ameliorative purpose or effect of the legislation which may establish that human dignity has not been violated and the nature of the interest affected. As Iacobucci J. stated in *Law, supra*, at para. 83: "In every case, though, a court's central concern will be whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim." Within these guidelines, Flinn J.A. turned to an analysis of Walsh's discrimination claim.

23 Flinn J.A. came to the conclusion that a reasonable person in circumstances similar to those of the respondent Walsh would find that the *MPA*, which imposes differential treatment, has the effect of demeaning the respondent's dignity, resulting in a violation of s. 15(1). In his opinion, the *MPA* perpetuated the view that unmarried spouses are less worthy of value as members of Canadian society, sufficient to establish an infringement of s. 15(1). In arriving at this decision, Flinn J.A. considered that the respondents' relationship had all the hallmarks of a marriage with the exception of a formal ceremony, that provisions in other legislation provide for support and occupation rights for unmarried spouses, and that the loss suffered by unmarried cohabitants of the presumption of equal sharing of property was by reason only of their marital status. He recognized that common law spouses have the right to deal with their

property in an agreement, but stated that the problem in this is that both parties must agree to the terms. He noted that while the preamble to the statute recognizes the contribution of both spouses to the economic growth and survival of the family (*Clarke v. Clarke*, [1990] 2 S.C.R. 795), this contribution is unrecognized when made by an unmarried spouse. Flinn J.A. examined the position of common law spouses within two of the contextual factors identified by Iacobucci J. in *Law, supra*: pre-existing disadvantage and the nature of the interest affected. He referred to the reasoning of McLachlin J. (as she then was) in *Miron, supra*, wherein she recounted how an unmarried spouse has historically been regarded as less worthy than a married spouse, resulting in the denial of many benefits. Flinn J.A. reasoned that the fact that some benefits have been accorded to unmarried partners is a recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.

24 Flinn J.A. rejected Crown submissions that, because married partners only enjoy a presumption of a 50 percent entitlement, there is no denial of an equal benefit. He noted the words of Cory J. in *M. v. H., supra*, at para. 66:

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. . . .

25 He further rejected the Crown's position that *Miron, supra*, could be distinguished on the basis that, in that case, no other avenue was open to the unmarried spouses to obtain the insurance benefits whereas, in the present case, Walsh may advance a claim using constructive and resulting trust. Flinn J.A. noted the difficulties inherent in pursuing these remedies. With respect to the Crown's argument that the presumptive entitlement in the *MPA* does not deal with the merit of the relationship and therefore does not go to human dignity, Flinn J.A. concluded at para. 50 that the

respondent's "dignity is violated because her relationship with [Bona] 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*".

26 Having found the *MPA* discriminatory, Flinn J.A. proceeded with the s. 1 analysis. He relied upon the framework established in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, and considered that the legislation as a whole, the impugned provisions and the omission itself must all be taken into account in determining whether the objective is pressing and substantial. He noted that the inclusion of unmarried spouses in the legislation would have no impact on either married spouses, or, financially, on the government. He rejected the statement in the preamble that one of its purposes was to "strengthen the role of the family in society" because its functional purpose is to provide for the resolution of property disputes upon termination of marriage.

27 Flinn J.A. noted that the Law Reform Commission of Nova Scotia reported that the *MPA*, by deeming contributions to a marriage to be equal, had recognized women's contributions to the economic growth and survival of the family and, in that regard, the legislative purpose is pressing and substantial. In his view, however, the exclusion of unmarried spouses could not be linked to any clear objective or purpose that was pressing and substantial. He observed that the Commission recommended changes to the *MPA* to extend its benefits to any two adults who have cohabited for at least a 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" (para. 65). He dismissed the Crown's argument that marriage and cohabitation are different and should be accorded different treatment, referring to the judgments in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, and *Peter v. Beblow*, [1993] 1 S.C.R. 980. The Crown's position that marriages are more stable as a justification for the differential treatment was

similarly rejected, because there was no evidence to substantiate this argument. In Flinn J.A.'s view, stability "is hardly justification for providing that only married persons should have the benefits of legislation" (para. 70). He observed the growing trend of common law families across Canada and stated (at para. 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*.

28 Flinn J.A. referred to other provincial legislation extending benefits to common law spouses, and noted that the *Human Rights Act*, R.S.N.S. 1989, c. 214, prohibits discrimination on the basis of marital status. He reasoned, at para. 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." Finally, he held that any problems with respect to conveyancing and estate matters which could create uncertainty and affect the rights of third parties with respect to extending property rights to unmarried spouses could be overcome with carefully drafted legislation. In his view, this practical problem "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*" (para. 78). He concluded that the Crown had failed to demonstrate that the exclusion of common law spouses from the provisions of the *MPA* was "pressing and substantial" (para. 79).

29 In terms of a remedy, he declined to read into the legislation a definition of "spouse" that included unmarried cohabitants and opted to declare s. 2(g) as having

no force or effect, suspending the effect of the declaration for a period of one year 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*” (para. 85).

V. Issues

30 By order of the Chief Justice dated June 25, 2001, the following constitutional questions were stated for this Court’s consideration:

1. Does s. 2(g) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the *Charter*?
2. If the answer to question 1 is “yes”, is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

VI. Analysis

31 In *Law, supra*, this Court set out the test for determining whether an impugned statute violates the equality guarantee. Iacobucci J. formulated a three-part inquiry as follows, at para. 88, at pp. 548-49:

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?

32 There is little debate in this case with respect to the first two broad inquiries. Firstly, as Flinn J.A. correctly notes, the *MPA* extends only to persons who are legally married and does not extend to persons in a common law relationship. The appellant concedes that the *MPA* provides differential treatment for the purpose of s. 15(1). Secondly, although marital status is not an enumerated ground, this Court in *Miron, supra*, has stated clearly that marital status is an analogous ground on which a claim of discrimination can be made. Following her review of the numerous factors supporting the view that marital status is an analogous ground of discrimination, McLachlin J. found as follows, at para. 156:

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. The essential elements necessary to engage the overarching purpose of s. 15(1) — violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making — are present and discrimination is made out.

The Crown also concedes that marital status is an analogous ground.

33 It is with respect to the third broad inquiry that the appellant argues the Court of Appeal erred. In *Law, supra*, Iacobucci J. set out four non-exhaustive factors for consideration of whether impugned legislation violates a claimant's human dignity:

(a) pre-existing disadvantage, stereotyping or vulnerability of the claimant;

(b) correspondence between the claim and the actual need or circumstances of the claimant;

(c) the ameliorative purpose or effect of the impugned law on other groups in society; and

(d) the nature and scope of the interest affected.

34 In considering the four contextual factors, the Court of Appeal held pre-existing disadvantage and the nature of the interest affected to be most relevant. The appellant argues that the Court of Appeal failed to fully consider the nature of the relationships involved before determining that Walsh's dignity was infringed. It points out that the court did not make any finding with regard to whether the parties had, upon entering into or during their relationship, any intention to contribute to one another's property acquisition or whether they deliberately avoided marriage and the consequences that flow from it. That is to say, the appellant argues that there is no evidence on which to conclude that the respondent considered herself disadvantaged by the non-marriage. Moreover, the appellant argues that it would in fact be unfair to make assumptions about all relationships and to impose a matrimonial property regime on persons who have chosen not to marry. It urges this Court to consider the exclusion

of unmarried persons from the *MPA* as arising out of respect for the autonomy and self-determination of those who choose not to marry.

35 I agree with the appellant that the examination of pre-existing disadvantage and the nature of the interest affected is dependent on the proper characterization of the relationships involved. In my view, the most important aspect of this question is not whether the situation in which Walsh and Bona found themselves at the time of trial was similar to that of married persons, but whether persons entering into a conjugal relationship without marrying are in fact entering into a relationship on the same terms as persons who marry. On the one hand, we have persons who choose to marry and thereby indicate their intention to assume all of the legal rights and responsibilities that the *MPA* attributes to persons who have that status. On the other, we have persons who cannot be presumed to have accepted all of the obligations of marriage. This is a significant aspect of the context in which the respondent's claim of discrimination arises.

36 The respondent Walsh argues and the Court of Appeal held that the *MPA*, by excluding unmarried spouses from its purview, serves to perpetuate the view that unmarried couples are less deserving of recognition and respect in Canadian society. I cannot agree. As this Court reasoned in *Law, supra*, consideration of whether the differential treatment is discriminatory must always be done in a purposive and contextual manner. As Iacobucci J. noted, at para. 60:

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. 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.

37 Iacobucci J. noted that the evaluation of the contextual factors must be conducted from the position of the claimant. He also held that this evaluation has both an objective and subjective component. As he later phrased it in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 55:

The question to be asked is whether, taking the perspective of a “reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim” (*Law, supra*, at para. 88 (p. 550)), the law has the effect of demeaning a claimant’s human dignity (*Egan v. Canada*, [1995] 2 S.C.R. 513, *per* L’Heureux-Dubé J. at para. 56).

38 In the present case, then, the inquiry can be stated as whether a reasonable heterosexual unmarried cohabiting person, taking into account all of the relevant contextual factors, would find the *MPA*’s failure to include him or her in its ambit has the effect of demeaning his or her dignity.

39 As this Court has stated on numerous occasions, the equality guarantee is a comparative concept. It requires the location of an appropriate comparator group from which to assess the discrimination claim. The two comparator groups in this case are married heterosexual cohabitants, to which the *MPA* applies, and unmarried heterosexual cohabitants, to which the *MPA* does not apply. Although in some cases certain functional similarities between these two groups may be substantial, in this case it would be wrong to ignore the significant heterogeneity that exists within the claimant’s comparator group. The contextual analysis of the respondent’s claim reveals that reliance solely on certain “functional similarities” between the two groups

does not adequately address the full range of traits, history, and circumstances of the comparator group of which the claimant is a member.

40 It is indeed clear from the evidence that some cohabitants have specifically chosen not to marry and not to take on the obligations ascribed to persons who choose that status (see: Z. Wu, *Cohabitation: An Alternative Form of Family Living* (2000), at pp. 105-6, 116, 120-21; and Alberta Law Research and Reform Institute, *Survey of Adult Living Arrangements: A Technical Report* (1984), at pp. 64-72). In his study of alternative family forms, Professor Wu makes several conclusions, which include: (1) that common law relationships tend to be of much shorter duration than married relationships; (2) that cohabitation can be a “trial marriage”; (3) that cohabitation can be a deliberate substitute for legal marriage; (4) that persons who do not marry tend to have less conventional attitudes toward marriage and family and reject the institution of marriage on the basis of personal choice. These findings are indicative not only of the differences between married couples and cohabiting couples, but also of the many differences among unmarried cohabitants with regard to the manner in which people choose to structure their relationships.

41 This Court has recognized both the historical disadvantage suffered by unmarried cohabiting couples as well as the recent social acceptance of this family form. As McLachlin J. noted in *Miron, supra*, at para. 152:

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.

42 Since *Miron, supra*, significant legislative change has taken place at both the federal and provincial levels. Numerous statutes that confer benefits on married persons have been amended so as to include within their ambit unmarried cohabitants. Nevertheless, social prejudices directed at unmarried partners may still linger, despite these significant reforms. In light of those social prejudices, this Court recognized in *Miron, supra*, that one’s ability to access insurance benefits was not reducible to simply a matter of choice. L’Heureux-Dubé J., in her concurring judgment, reasoned as follows, at para. 102:

To recapitulate, the decision of whether or not to marry is most definitely capable of being a very fundamental and personal choice. The importance actually ascribed to the decision to marry or, alternatively, not to marry, depends entirely on the individuals concerned. For a significant number of persons in so-called “non-traditional” relationships, however, I dare say that notions of “choice” may be illusory. It is inappropriate, in my respectful view, to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between “choice” or “no choice”. Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law. [Emphasis in original.]

43 Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it. As M. Eichler posited:

Treating all common-law relationships like legal marriages in terms of support obligations and property division ignores the very different circumstances under which people may enter a common-law union. If they choose to marry, they make a positive choice to live under one type of regime. If they have chosen not to marry, is it the state's task to impose a marriage-like regime on them retroactively?

(M. Eichler, *Family Shifts: Families, Policies, and Gender Equality* (1997), at p. 96)

To ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state.

44 Examination of the context in which the discrimination claim arises also involves a consideration of the relationship between the grounds and the claimant's characteristics or circumstances. As Iacobucci J. described it in *Law*, at para. 70:

It is thus necessary to analyze in a purposive manner the ground upon which the s. 15(1) claim is based when determining whether discrimination has been established. As a general matter . . . legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity. . . . The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee. In line with the reasons of McIntyre J. and Sopinka J., I mean simply to state that it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances.

45 Consideration of the extent to which the impugned legislation properly accommodates the claimant's circumstances begins with the *MPA* and the changes it

brought about. The purpose of the *MPA* is revealed in its preamble and through the debates of the House of Assembly at the time it was introduced. On second reading of the *MPA* Bill on May 8, 1980, the legislative purpose was described as follows:

The intent and purport of the legislation, Mr. Speaker, is to be found in the preamble. . . . The intent, by virtue of the introduction and, hopefully, the ultimate passage of this legislation, is to establish clearly that marriage is a partnership and that that partnership carries with it an understanding of equality, and equality in all senses and, as it relates to this particular piece of legislation, equality at the time any such marriage should come to an end, by reason either of separation, divorce or upon death. [Emphasis added.]

(Nova Scotia, House of Assembly, *Debates and Proceedings*, 80-44, May 8, 1980, at p. 2011)

46 The *MPA* created a regime of “deferred sharing”, replacing the regime of absolute separate property. The new legislative scheme deems married persons to have agreed to an economic partnership wherein both pecuniary and non-pecuniary contributions to the marriage partnership are considered to be of equal worth. The *MPA* provides *inter alia* that property acquired by each spouse before and during the marriage constitutes a pool of assets, which may be divided, regardless of legal title, in equal shares upon marriage breakdown, divorce or death of either spouse. It also provides each spouse with an equal right of possession in the matrimonial home, without regard to title, and provides that no sale or mortgage of the matrimonial home may occur without the consent of both spouses: Law Reform Commission of Nova Scotia, *supra*, at pp. 5-7. As a whole, then, the *MPA* is designed to ensure the economic partnership between married persons by affording protections to the non-title holding spouse both during the marriage and at its end, whether due to divorce or death.

47 The respondent Walsh is correct in noting that the *MPA* was designed to remedy the wrongs of the past and to support the equality of both spouses as a result

of their joint commitment to share equally in the matrimonial assets. As Wilson J. reasoned in *Clarke, supra*, 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.

48 This remedying of inequities is recognized in the *MPA*'s preamble and is achieved by the matrimonial property regime that it creates. Although the respondent focusses her argument on the provision in the *MPA* that confers upon married spouses the right to apply for a presumptive equal division of matrimonial assets on marriage breakdown, it must be remembered that the presumption of equal division of property is only one part of the overall scheme. The *MPA* also provides other significant benefits and imposes significant obligations on the spouses: a right of possession to the marital home; protection against disposition of the marital home; a right to redeem the interest in the marital home *vis-à-vis* execution creditors; a right to apply for division of assets on the death of a spouse in addition to rights by way of will or intestacy. Moreover, even the division of matrimonial assets brings with it significant obligations to the spouses. The manner in which the property division is achieved is to calculate the total value of the matrimonial assets and subtract from that amount the total value of the matrimonial debts, without regard, in both cases, to the title in whom these assets or liabilities rest. Thus the *MPA*, by deeming all marriages to be economic partnerships, imposes a significant alteration to the *status quo* of an individual's proprietary rights and obligations. Moreover, these statutorily created proprietary restrictions and obligations arise as at the time of the marriage and continue throughout

the duration of the marriage until separation or death. The decision to marry, which necessarily requires the consent of each spouse, encapsulates within it the spouses' consent to be bound by the proprietary regime that the *MPA* creates.

49 Unmarried cohabitants, on the other hand, maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. These couples are free to marry, enter into domestic contracts, to own property jointly. In short, if they so choose, they are able to access all of the benefits extended to married couples under the *MPA*. Though my conclusion in this case is no way dependent upon the existence of the *LRA*, this new legislation offers another means by which unmarried cohabitants can access these benefits. The *LRA* is tailored to persons who, for myriad reasons, choose not to marry but who nevertheless consent to be bound legally to the same regime of economic partnership with all of the rights and obligations that it entails. The general principle is that, without taking some unequivocal consensual action, these cohabiting persons maintain the right to deal with any and all of their property as they see fit.

50 The *MPA*, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excludes from its ambit those persons who have not taken such a step. This requirement of consensus, be it through marriage or registration of a domestic partnership, enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design. As Iacobucci J. phrased it in *Law*, at para. 102, “[t]he law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects.”

51 Relying mostly on the decisions of this Court in *Miron, supra*, and *M. v. H., supra*, the respondent Walsh says that even if some common law couples may benefit from the inapplicability of the *MPA* to their relationship breakdown, this does not address the statute's effect in perpetuating the view that an unmarried spouse is less entitled to recognition and respect than a married spouse. The respondent insists that not all members of the claimant group need be negatively affected, that the potential denial of the right to equality to any member of the group suffices.

52 Following the reasoning of McLachlin J. in *Miron, supra*, Walsh argues that there may be many factors that preclude certain individuals from marrying and thereby availing themselves of the *MPA*, even though their relationships have all the functional markings of a marriage. By excluding from its ambit unmarried couples, whom the respondent submits are the functional equivalents of married couples, the *MPA* has the effect of perpetuating the view that these alternative family forms are less deserving of recognition and respect.

53 In *Miron, supra*, this Court held the denial of insurance benefits to unmarried spouses to be discriminatory within the meaning of s. 15(1). In that case, the impugned legislation denied automobile insurance benefits to persons in circumstances similar to married persons. Short of agreeing to marry, the cohabitants had no ability to control the availability to each other of the benefits. Moreover, the extension or denial of these benefits had no impact on the rights and obligations of the spouses *vis-à-vis* each other. The discriminatory distinction at issue in *Miron, supra*, concerned the relationship of the couple as a unit, to third parties. The marital status of the couple should have had no bearing on the availability of the benefit.

54 In the present case, however, the *MPA* is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bear this out. It does not necessarily follow, however, that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship. As Eichler, *supra*, points out, at pp. 95-96:

There is a distinct difference between a young couple living together, having a child together, and then splitting up, and an older couple living together after they have raised children generated with another partner. If a middle-aged couple decide to move in together at the age of fifty-five and to split at age sixty, and if both of them have children in their thirties, the partners may wish to protect their assets for themselves and for their children — with whom they have had a close relationship for over thirty years — rather than with a partner with whom they were associated for five years.

55 In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. It is true that the benefits that one can be deprived of under a s. 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in *M. v. H.*, *supra*. It has not been established, however, that there is a discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a

way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status, this is not a s. 15(1) issue. The *MPA* only protects persons who have demonstrated their intention to be bound by it and have exercised their right to choose.

56 The respondent Walsh argues that the choice to marry, to enter into a domestic contract or to register a partnership under the *LRA* still does not address her situation, nor does it address the circumstances of those individuals whose unmarried partner either refuses to marry or to register their domestic partnership. For these persons, as Walsh argues, the decision is not entirely within their control. Similarly, she argues that maintaining the proprietary *status quo* in unmarried cohabiting relationships unduly disadvantages both the non-title holding partner, who have historically been women, as well as the children of the relationship. The respondent argues that protection of women and children from the potentially dire economic consequences of marriage breakdown is one of the main purposes of the *MPA*. Excluding unmarried cohabitants, then, constitutes a denial of equal protection of women in conjugal relationships and the children of those relationships, the persons whom the legislation was specifically designed to protect.

57 On this basis, the respondent submits that the only constitutionally acceptable formula is to extend the ambit of the *MPA* to all unmarried cohabitants, while providing consenting couples the opportunity to opt out, as the current *MPA* does with regard to married couples. The problem with that proposition, in my view, is that it eliminates an individual's freedom to decide whether to make such a commitment in the first place. Even if the freedom to marry is sometimes illusory, does it warrant setting aside an individual's freedom of choice and imposing on her a regime that was designed for persons who have made an unequivocal commitment encompassing the

equal partnership described in the *MPA*? While there is no denying that inequities may exist in certain unmarried cohabiting relationships and that those inequities may result in unfairness between the parties on relationship breakdown, there is no constitutional requirement that the state extend the protections of the *MPA* to those persons. The issue here is whether making a meaningful choice matters, and whether unmarried persons are prevented from taking advantage of the benefits of the *MPA* in an unconstitutional way.

58 Persons unwilling or unable to marry have alternative choices and remedies available to them. The couple may choose to own property jointly and/or to enter into a domestic contract that may be enforced pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 52(1), and the *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6, s. 2(e). These couples are also capable of accessing all of the benefits of the *MPA* through the joint registration of a domestic partnership under the *LRA*.

59 It is true that certain unmarried couples may also choose to organize their relationship as an economic partnership for the period of their cohabitation. Similarly, some couples, without making a public and legally binding commitment, may simply live out their lives together in a manner akin to marriage. In these cases, the law has evolved to protect those persons who may be unfairly disadvantaged as a result of the termination of their relationship.

60 Firstly, provincial legislation provides that an unmarried cohabitant or “common-law partner” may apply to a court for an order of maintenance or support: *Maintenance and Custody Act*, s. 3. The court is empowered to take into consideration a host of factors pertaining to the manner in which the parties organized their relationship as well as the particular needs and circumstances of both of the parties.

61 For those couples who have not made arrangements regarding their property at the outset of their relationship, the law of constructive trust remains available to address inequities that may arise at the time of the dissolution. The law of constructive trust developed as a means of recognizing the contributions, both pecuniary and non-pecuniary, of one spouse to the family assets the title of which was vested wholly in the other spouse: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus, supra*; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Peter, supra*. After the enactment of the *MPA*, the law of constructive trust remained and remains as a recourse for unmarried partners who find themselves unfairly disadvantaged *vis-à-vis* their former partner. Those situations where the fact of economic interdependence of the couple arises over time are best addressed through the remedies like constructive trust as they are tailored to the parties' specific situation and grievances. In my view, where the multiplicity of benefits and protections are tailored to the particular needs and circumstances of the individuals, the essential human dignity of unmarried persons is not violated.

62 All of these factors support the conclusion that the extension of the *MPA* to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected.

63 Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336; *Oakes, supra*; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 117. Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

64 Accordingly, I do not find that s. 2(g) of the *MPA* violates s. 15(1) of the *Charter*. Having found no discrimination in this particular case, it is unnecessary to proceed with a s. 1 analysis.

VII. Disposition

65 I would allow the appeal and answer the constitutional questions as follows:

1. Does s. 2(g) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the *Charter*?

No.

2. If the answer to question 1 is "yes", is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

No answer is required.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) —

I. Introduction

66 This case considers the constitutionality of the exclusion of heterosexual unmarried cohabitants from the definition of “spouse” contained in s. 2(g) of Nova Scotia’s *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (“MPA”). The respondent Walsh challenges this definition alleging a violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* that is not saved by s. 1.

67 For the reasons given by the Court of Appeal ((2000), 183 N.S.R. (2d) 74, 2000 NSCA 53) and those that follow, I conclude that the exclusion of heterosexual unmarried cohabitants from this definition is discriminatory and that this discrimination is not justified by virtue of s. 1 of the *Charter*. As the respondents Walsh and Bona have settled their respective property claims and as the matrimonial property regime has since been amended, I will not consider the appropriate remedy to grant in the present case.

II. Facts

68 The respondents Susan Walsh and Wayne Bona entered into a relationship in the mid-1980s that culminated in their cohabitation. For reasons unknown to this Court, they never married. The story of their long-term relationship is only half told by reference to the record. I would venture to say that beneath the official facts lies a relationship marked by periods of romance, love, happiness, sorrow, despair, and

anger. This is characteristic of the many types of relationships formed in this country and is not unique to Walsh and Bona. While I confine myself to their story, I readily acknowledge that the following could describe any number of couples living in Canada today.

69 When they began cohabitating, the respondents both lived in Dartmouth, Nova Scotia. At the time, Bona worked as a community development worker with the Department of Community Services. Walsh also held two jobs in Dartmouth as an outreach worker at a senior citizen's centre and as a part-time certified nursing assistant. In 1988, Bona was transferred to River Bourgeois in Richmond County. Walsh, now residing with Bona, uprooted and moved with him from Dartmouth to continue their lives together. That same year, the respondents became parents after Walsh gave birth to a son, E. Bona. Two years later, she gave birth to another son, P. Bona.

70 On arriving at their new location, Bona and Walsh purchased a home together as joint owners. Bona continued to work while Walsh stayed home to raise their two children. Income came from Bona's employment and, for some time, Walsh's unemployment insurance benefits.

71 In 1995, the relationship fell apart. It is accepted that this union lasted for a period of approximately 10 years. After the relationship ended, Bona sold some cottage property he had acquired as a gift prior to the commencement of cohabitation. The proceeds of sale were used in part to pay off joint debts accumulated by both he and Walsh during their time together. As far as the record is concerned, the story of the relationship ends there.

72 Walsh applied for both child and spousal support. At the same time, she asked that the definition of “spouse” in s. 2(g) of the *MPA* be declared unconstitutional. Specifically, she argued that the definition, which covers men and women who are “married to each other”, “married to each other by a marriage that is voidable and has not been annulled”, or who have “gone through a form of marriage with each other” violates s. 15(1) of the *Charter*. This claim failed at first instance but was successful on appeal. The appellant, by leave, asks this Court to allow the appeal and restore the decision of the chambers judge.

73 As my colleague Justice Bastarache notes, the legislature in Nova Scotia has since responded to this litigation by enacting legislation entitling individuals, including heterosexual unmarried cohabitants, to register their domestic partnership with the province. Upon registration, these couples acquire the same presumptive right of equal sharing available to married couples through the *MPA*. Further, Bona and Walsh have now settled their respective claims. As such, the case before the Court is purely an academic exercise, albeit one of the utmost importance.

III. Issues

74 The following constitutional questions were stated by the Court:

1. Does s. 2(g) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the *Charter*?

2. If the answer to question 1 is “yes”, is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

IV. Legislation and Judicial History

75 I do not feel it is necessary to set out the appropriate legislative provisions nor to summarize the decisions taken in the Nova Scotia Supreme Court ((1999), 178 N.S.R. (2d) 151) and Court of Appeal. My colleague Bastarache J. has done a commendable job of both, rendering it unnecessary to repeat the exercise here.

V. Analysis

A. *Scope of the Inquiry*

76 Nova Scotia's matrimonial property regime was altered in 2000 to offer heterosexual unmarried cohabitants the option of opting in to the matrimonial property regime by simply registering their partnership under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494: see *Law Reform (2000) Act*, S.N.S. 2000, c. 29. This new legislation was not in force at the time the respondent Walsh applied for her declaration. I see no need to refer to the new legislation in conducting my analysis. I will therefore confine myself to the wording of the *MPA* as it stood at the time she made her original application.

77 In doing so, I should observe that several provinces — including Nova Scotia — have either amended their legislation or considered amendments to offer the benefits of the presumption of equal sharing to heterosexual unmarried cohabitants. Pronouncing on the constitutional validity of the legislation currently in force in Nova Scotia might stultify this ongoing process in which several legislatures are now engaged. Legislatures have several options if they should choose to include cohabitants within the scope of their matrimonial property regimes. Possible options include allowing heterosexual unmarried cohabitants to opt in to the regime, presuming inclusion unless they opt out by way of contract or through legislated means, ascribing

matrimonial status to those who meet particular criteria, or a combination of the above. Legislatures need to know whether a total exclusion of heterosexual unmarried cohabitants from the ambit of their regimes is unconstitutional. It is only they who have the authority to decide who is to be included, subject to the requirements of the *Charter*.

B. *Section 15(1)*

78 The first question is whether the definition of “spouse” in the *MPA* violates s. 15(1) of the *Charter*. I need look no further than this Court’s decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, for the appropriate principles to apply to this analysis. While other cases in this Court have since dealt with the formula enunciated in *Law*, the fundamental concepts associated with s. 15(1) continue to find their greatest expression in the *Law* test.

79 In *Law*, the Court set out a three-stage approach to determine whether s. 15(1) is violated, noting the existence of three broad inquiries (para. 39). One begins by looking to see if the law draws a formal distinction between the claimant and others based on one or more personal characteristics or whether the law takes into account the claimant’s disadvantaged position in society resulting in substantively differential treatment between the claimant and others based on one or more personal characteristics. The second step entails an examination as to whether this differential treatment is based on a personal characteristic that is enumerated in s. 15(1) or analogous to one such characteristic. Finally, the Court considers whether this differential treatment substantively discriminates. This final inquiry draws inspiration from the purpose of s. 15(1) as a remedial tool against prejudice, stereotyping, and historical disadvantage. I will specifically deal with each of these steps later in my

reasons. It suffices to note that the third step involves a full and complete review of several contextual factors.

80 In conducting this three-stage analysis, it is appropriate to remember that fundamental to the equality rights guarantee is its broad remedial purpose, namely, the recognition of the innate dignity of each and every human being in our society. This fundamental purpose is violated whenever a sufficient distinction is drawn between individuals or groups on an enumerated or analogous ground in such a way as to reflect the stereotypical application of presumed group or personal characteristics or so as to create the effect of perpetuating or promoting the view that the claimant is less capable, or less worthy, of recognition or value as a human being: *Law, supra*, at para. 51.

81 Iacobucci J., in *Law*, sets out at para. 53 this Court's understanding of what is meant by 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?

Dignity is by its very nature a loaded and value-ridden concept comprising fundamental assumptions about what it means to be a human being in society. It is an essential aspect of humanity, the absence of which is felt by all members of society.

82 To this end, the promotion of human dignity and the prevention of actions that compromise its full exercise is a matter with which every member of society is concerned. It is for that reason that the promotion of human dignity finds expression in one of our most important legal documents, namely, the *Charter*. The importance of the remedial aspect of s. 15(1) must also be borne in mind when dealing with each stage of the *Law* analysis, but, most especially, the third stage. At the third stage, the Court is concerned with whether a distinction that is being drawn constitutes discrimination in the substantive sense that the distinction fails to serve the aforesaid purposes. As such, all courts must bear in mind that the guidelines in *Law* are merely guidelines — they do not represent a strict test: see *Law, supra*, at para. 88; and, *M. v. H.*, [1999] 2 S.C.R. 3, at para. 46. Instead, this Court must approach this case with regard to the full context in which this challenge is brought. A mechanical or overly formal approach may serve to undermine the purposes of s. 15(1) described above whereas a broad, liberal, contextual approach enables the Court to fully appreciate the claim and the alleged violation of human dignity.

83 It should also be borne in mind that differential treatment is by nature a comparative concept. The Court is required to identify differential treatment by observing the way the legislation treats two comparator groups. I do not propose to speak any further on this matter. It is clear in this case that the groups under comparison are heterosexual married cohabitants and heterosexual unmarried cohabitants. The *MPA* confers its benefits only on the former. The latter is the group to which the respondent Walsh belongs. The Court is merely concerned with whether

drawing a distinction between heterosexual cohabitants on the basis of their marital status constitutes a violation of s. 15(1) of the *Charter*.

84 I conclude these preliminary remarks by observing that this Court is required, when conducting the above analysis, to review the claim from the perspective of a reasonable, dispassionate person, fully apprised of the circumstances, and possessing similar attributes to those of the claimant: *Law, supra*, at para. 60, referring to my comments in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 56. This subjective-objective appraisal is necessary in order to recognize the reality of the claimant's situation while situating that claimant in the proper comparator group. The fact that the respondent Walsh has gone to the trouble of initiating this litigation and carrying it through this far suggests that, subjectively, she regards the definition of "spouse" as constituting a violation of her inherent human dignity. The question, however, is whether a person reflecting objectively on the claimant's situation would regard the exclusion of all heterosexual unmarried cohabitants as being a violation of the claimant's dignity. The objective element of the test also enables the Court to conduct the full contextual appraisal I noted earlier, evaluating in particular the individual's or group's "traits, history and circumstances": *Law*, at para. 60. No analysis would be complete without this broad evaluation.

1. Step 1 — Differential Treatment

85 As the appellant concedes, the *MPA* draws a distinction between married persons and heterosexual unmarried cohabitants. Only the former are included within the definition of "spouse". The latter are wholly excluded. This results in one regime for married persons (the matrimonial property regime) and another for unmarried ones (through the use of doctrines such as unjust enrichment). A formal distinction is thus

drawn based on a personal characteristic, namely marital status. The distinction itself results in substantially differential treatment between the two groups. I prefer to deal with that issue at Step 3 where I enter into the discussion of the sufficiency of common law remedies as an aspect of human dignity.

86 The appellant argued in the Court of Appeal that the respondent Walsh was not denied equal benefit under the law. In essence, no distinction was being drawn. The Attorney General based its argument on the fact that married couples are themselves not “entitled” to 50 percent of the matrimonial assets upon dissolution of the marriage. They are merely given a presumption of entitlement. The Court of Appeal correctly rejected this argument. What we are dealing with here is a clear denial of a benefit to all heterosexual unmarried cohabitants, namely, the benefit of a strong presumption favouring equal sharing. As Cory J. says in *M. v. H.*, *supra*, at para. 66, referring to *Egan*, *supra*, at paras. 158-59, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 87:

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. . . .

Absent the presumption, people are left with the burden of proving contribution to the acquisition and maintenance of assets, a burden not easily discharged without incurring higher litigation costs than one would incur with a presumption of equal contribution and benefit.

87 It must also be observed that the *MPA* confers other benefits on spouses not available in other legislation or at common law. For example, ss. 6(1) and 11(1)(a) provide each spouse with a right to apply to court for an order of exclusive possession

of the matrimonial home. The “matrimonial home” is defined in s. 3(1) as a home occupied by a person and that person’s “spouse” and in which at least one of these two persons has a property interest. Given the definition of “spouse” in the *MPA*, this benefit is unavailable under the *MPA* to heterosexual unmarried cohabitants.

88 Overall, these people are denied both access to a process that could confer a benefit (the presumption) as well as direct benefits solely by virtue of their unmarried status. Again, I will deal with this in greater depth at the third stage of the *Law* analysis. It suffices for me to indicate at this point that the remedies available at common law are sufficiently different from those under the *MPA* that substantially differential treatment has been made out here.

2. Step 2 — Enumerated or Analogous Grounds

89 While marital status does not find expression in s. 15(1) of the *Charter*, this distinction is based on an analogous ground to those listed therein (a matter which the appellant also conceded). Marital status was specifically recognized by this Court in *Miron v. Trudel*, [1995] 2 S.C.R. 418, to be an analogous ground under s. 15(1) of the *Charter* (para. 156). In light of this Court’s comments in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8, and in *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 41, it is now the law that once a ground is determined to be analogous, it is permanently regarded as analogous in all subsequent cases. As a result, the finding in *Miron, supra*, that marital status constitutes an analogous ground of discrimination binds this Court to make the same finding in this case.

3. Step 3 — Substantive Discrimination

90 Given the appellant's concessions with respect to the first two steps, it has already been established that there exists formal discrimination in this case. The real question raised by this appeal is whether the distinction drawn in the *MPA* violates the purpose of s. 15(1) by drawing a distinction which has the effect of diminishing the claimant's dignity. Does this distinction reflect the stereotypical application of presumed group or personal characteristics so as to create the effect of perpetuating or promoting the view that the claimant is less capable, or less worthy, of recognition or value as a human being?

91 In *Law*, Iacobucci J. noted a number of contextual factors one should take into account at this stage of the analysis. I will review each of these factors first following which I shall enter into a review of other matters that ought to inform the analysis at this stage. I reiterate that this broader review is necessitated by the need to ensure that this claim be situated in its full legal, social, and historical context so as to ensure that the broad, remedial purpose of s. 15(1) is served. Simply looking at *Law*'s four contextual factors is not sufficient to accomplish this task in the present case.

92 In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. observed the following, at pp. 174-75:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

These comments were quoted with approval most recently in *Law, supra*, at para. 26. The reason such distinctions rarely escape the charge of discrimination is that groups sharing similar characteristics seldom have needs, desires and expectations that are so

different from each other so as to justify treating them differently as a whole based on their membership in that group. Differential treatment is far easier to justify where the legislation provides benefits based on actual needs, merit and capacity. Are heterosexual unmarried cohabitants so different from married ones as a whole so as to justify denying all members of the group access to the benefits of the *MPA*? This question can only be answered by reference to the four factors enumerated in *Law* as well as the purpose of the *MPA*, the choice of marriage and non-marital cohabitation, the present sociological reality of multiple family structures, the current recognition cohabitants already enjoy at law, and the present inadequacies with those remedies currently available to separating cohabitants.

(a) *Pre-existing Disadvantage*

93 The existence of pre-existing disadvantage, vulnerability, stereotyping, or prejudice is an important indicator that the claimant forms part of a group historically regarded as deserving less concern, respect, and consideration: see *Law, supra*, at para. 63. This vulnerability is exacerbated whenever the legislative provisions under scrutiny continue to draw a distinction on a ground touching on this pre-existing disadvantage: *M. v. H., supra*, at para. 68.

94 With respect to the present case, this Court has recognized that unmarried heterosexual cohabitants have historically suffered a degree of vulnerability and disadvantage not experienced by married cohabitants. In *Miron, supra*, McLachlin J. (as she then was) wrote the following, at para. 152:

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.

95 In the 1960s, marriage was the only legally recognized family form. As W. Holland points out, the few acknowledgments of the existence of unmarried cohabitants and their families tended to be scathing and insulting: “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000), 17 *Can. J. Fam. L.* 114, at p. 127. In 1936, C. Brinton, speaking on the topic of marriage and children, spelled out the following prevailing conception of marriage and its notional legitimacy:

Bastardy and marriage in this world are quite supplementary — you cannot have one without the other. In another world, you may indeed separate the two institutions and eliminate one of them either by having marriage so perfect — in various senses — that no one will ever commit fornication or adultery, or by having fornication so perfect that no one will ever commit marriage. But these are definitely other worlds.

(C. Brinton, *French Revolutionary Legislation on Illegitimacy 1789-1804* (1936), at p. 83, cited in J. D. Payne, “Legislative Amelioration of the Condition of the Common Law Illegitimate: The Legitimacy Act (Saskatchewan), 1961” (1961), 26 *Sask. Bar Rev.* 78.)

96 Such notions creep into the case law as well. In *Gammans v. Ekins*, [1950] 2 All E.R. 140 (C.A.), the defendant resisted an order of possession by a landlord of property leased to a woman with whom the defendant had a close relationship lasting some 20 years. The relevant legislation required proof that the defendant was a member of the tenant’s “family” in order to make out any defence. In rejecting the defence, Asquith L.J. made the following comments (at pp. 141-42):

If . . . the relationship involves sexual relations, it seems to me anomalous that a person can acquire a “status of irremovability” by having lived in sin, even if the liaison has been, not a mere casual encounter, but one protracted in time and conclusive in character. . . . To say of two people masquerading, as these two were, as husband and wife . . . that they were members of the same family, seems to me an abuse of the English language

Comments like these would have appeared perfectly acceptable to a society that regarded children born out of wedlock as bastards, for instance. In a society that associated unmarried cohabitation with sin or immorality, the recognition of these relationships as ones deserving respect and consideration would have been seen as absurd: see further Statistics Canada, *Report on the Demographic Situation in Canada 1996: Current Demographic Analysis* (1997), prepared by J. Dumas and A. Bélanger, at pp. 123-24, for their review of the historical treatment of unmarried heterosexual cohabitants.

97 In many respects, the pre-existing disadvantage faced by heterosexual unmarried cohabitants was mainly the result of omission. People living together outside of marriage were generally ignored: J. G. McLeod, Annotation to *Pettkus v. Becker* (1981), 19 R.F.L. (2d) 166, at p. 168. Statistics showing the number of heterosexual unmarried cohabitants living in Canada were not available until 1981: Z. Wu, *Cohabitation: An Alternative Form of Family Living* (2000), at p. 43. The 1991 Census contained the first questions ever asked specifically related to common-law status: see Statistics Canada, *Age, Sex, Marital Status and Common-law Status* (1999), at p. 40. These facts are perhaps not surprising when one considers that the first law reform reports dealing with attempts at providing for modern matrimonial property regimes in the late 1970s and early 1980s never dealt with heterosexual unmarried cohabitants. The one exception was New Brunswick where a discussion paper appeared in 1978 recommending the extension of some matrimonial property rights to

this group: see New Brunswick Department of Justice, Law Reform Division, Discussion Paper, *Matrimonial Property Reform for New Brunswick* (1978), at p. 24. None of the other law reform commissions appear to have turned their mind to the issue at all before the enactment of legislation in their respective provinces.

98 It is therefore clear that, notwithstanding recent strides made towards recognition, the extent of which I shall discuss further below, heterosexual unmarried cohabitants have historically suffered and continue to suffer, to some extent, from the existence of disadvantages associated with their non-marital status. The failure to recognize this in the *MPA* therefore contributes greatly to a loss of dignity for members of this group.

(b) *Relationship Between Grounds and the Claimant's Characteristics or Circumstances*

99 Under this heading, the Court is asked to consider the extent to which the legislation in question takes into account the actual needs, capacity, or circumstances of the claimant: *Law, supra*, at paras. 69-70. In order to avoid an overly mechanical application of the *Law* factors, I would prefer to deal with the needs of the claimant and all heterosexual unmarried cohabitants later. In order to properly understand this matter, one must inquire into both their needs and the extent to which the law already accounts for them. It suffices to point out now that the disintegration of a long-term relationship of 10 years such as the one involved in the present case is one that creates a real need for a redistribution of wealth, both by means of support and division of assets. In *Peter v. Beblow*, [1993] 1 S.C.R. 980, Cory J. observed at p. 1014 that the 12-year unmarried relationship involved in that case was by no means insignificant. According to him, such a relationship ought to give rise to mutual rights and obligations. By failing to accord the claimant a presumption of equal contribution and

equal sharing, the *MPA* denies her access to the most expedient means of resolving the very difficult matters associated with the dissolution of a long-term relationship at a time where patience and emotional stability are at a premium. Instead, the *MPA* forces the claimant to make out her claim in equity, with all the attendant expense and problems of proof associated with such a claim. This contributes to a violation of the dignity of both the claimant and all heterosexual unmarried cohabitants.

(c) *Ameliorative Purpose or Effects*

100 This factor involves a consideration of the *MPA*'s ameliorative purpose or effects upon a group or person more disadvantaged than the claimant or heterosexual unmarried cohabitants in general. There does not appear to be such an ameliorative aspect to the *MPA*. Instead, the present case is more akin to the situation in *M. v. H.*, *supra*, where Cory J. observed, at para. 71, that underinclusive ameliorative legislation which excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination: see also *Law, supra*, at para. 72, referring to *Vriend, supra*, at paras. 94-104.

101 The present case does not involve an attempt by the legislature to allocate scarce resources among members of various disadvantaged groups. As the Court of Appeal commented at para. 58, including heterosexual unmarried cohabitants within the scope of the *MPA* will involve no cost consequences to both the government and married cohabitants. A reasonable individual possessing the claimant's attributes would infer from this that the exclusion of heterosexual unmarried cohabitants serves no ameliorative purpose and has no such beneficial effect. Instead, the absence of such attributes merely confirms the perception that the *MPA* constitutes an attack upon the dignity of the claimant and all heterosexual unmarried cohabitants.

(d) *Nature of the Interest Affected*

102 This final *Law* factor is clearly enunciated in *M. v. H.* at para. 72, as follows:

. . . the discriminatory calibre 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.

103 Cory J. observed that the interest protected by the legislation in that case, namely the right to spousal support, was fundamental in nature. Spousal support is an essential means by which individuals meet their basic financial needs following the dissolution of a relationship characterized by intimacy and economic interdependence. The same holds true for matrimonial property. In *Moge v. Moge*, [1992] 3 S.C.R. 813, I wrote at p. 849 that the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), requires a “fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender”. I also observed earlier in those reasons that this equitable distribution can be achieved in many ways: by spousal support, child support, the division of property and assets, or a combination of these. Those comments apply with equal vigour to proceedings taken under various provincial statutes.

104 What these remarks demonstrate is that both spousal support and asset division serve the same purpose of alleviating the economic burden imposed by the dissolution of a longstanding relationship of intimacy and mutual economic dependence. Functionally, there is indeed no real dividing line between support

obligations and those imposed by matrimonial property regimes: Holland, *supra*, at p. 153. It follows from this discussion that the *prima facie* right to an equal division of property and assets is of fundamental importance. Since the right to spousal support has already been recognized as fundamental, any other result would prove to be inconsistent. The fact that the claimant and all heterosexual unmarried cohabitants are being denied such a fundamental right as opposed to a trivial one adds important weight to the argument that the *MPA* discriminates.

(e) *Recognizing Contributions to Non-marital Relationships — The Purpose of the MPA*

105 At para. 35, my colleague Bastarache J. stresses the importance of distinguishing between the intentions of married persons and heterosexual unmarried cohabitants upon entering into their respective relationships:

. . . the most important aspect of this question is not whether the situation in which Walsh and Bona found themselves at the time of trial was similar to that of married persons, but whether persons entering into a conjugal relationship without marrying are in fact entering into a relationship on the same terms as persons who marry.

In effect, the appellant's position was that it was constitutionally justified in treating two different relationships differently, most notably by giving effect to the intentions of those entering into the two types of conjugal relationships involved. The Court of Appeal instead chose to focus on whether the complete non-recognition of the contributions made by heterosexual unmarried cohabitants to their relationship constituted discrimination. Given the purpose of the *MPA*, I believe that the Court of Appeal's focus on this crucial point was sound. In this section, I will deal with the purpose of the *MPA* and the non-recognition of contributions made by non-married

persons. In doing so, I am mindful of McLachlin J.'s comments in *Miron, supra*, at para. 134, that the goal under s. 15(1) is to examine the actual impact of the distinction on the members of the targeted group (in this case, heterosexual unmarried cohabitants). In section (f), I will focus on the notion of intention in the formation of relationships.

(i) Purpose of the MPA — Recognizing a Need

106

Prior to the enactment of the predecessor to the *MPA* and to all matrimonial property statutes in the various provinces, the situation for married spouses was a grim one in Canada. At the time, common law provinces administered the regime of separate property. The concept of separate property was simply that each party to a marriage retained title to their respective property both during the marriage and after its dissolution. Separate property was a revolutionary concept developed in the late 19th century as a means of ending the oppression caused by common law matrimonial property laws then in existence. Those earlier laws subordinated any interest the wife would normally have to property to that of her husband with the husband becoming the sole owner of any property belonging to the wife: Nova Scotia Law Reform Advisory Commission, *Development of Matrimonial Property Law in England and Nova Scotia: An Historic Perspective* (1975), at pp. 2-3.

107

Under such a regime, the end of a marriage meant that each partner walked away with all of the property in which they had title or in which they were regarded as the legal owner. The problems this created were real, but far less acknowledged in a society where the incidence of divorce was somewhat low. After the *Divorce Act*, S.C. 1967-68, c. 24, was enacted in 1968, divorce became more common as a social phenomenon. With divorce came the economic problems associated with it and

resulting court challenges to redress those situations. At first, claims to a share in property belonging to the other spouse fell on deaf ears. In the notorious case of *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 (Laskin J. (as he then was), dissenting), this Court refused to allow a wife of 25 years to obtain any interest in the property, the title to which was held in her husband's name. All claims in equity and partnership failed. Despite one successful attempt by this Court a few years later to redress this shameful situation, in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, the result in *Murdoch* served as the ultimate catalyst for legislative reform of existing separate property regimes.

108 The roots of these reforms can be traced back to a desire to ensure that the contributions of each spouse to the marital relationship be recognized. In 1970, the Royal Commission on the Status of Women in Canada issued a report dealing with a considerable number of issues relevant to women at the time. In this report, a significant part dealt with the issue of matrimonial property law. The following recommendation was drafted:

. . . we recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage. . . .

(Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada* (1970), at p. 246)

It is clear from this passage that the principal consideration animating the attempt to reform the law of property in this area was the desire to recognize and acknowledge the contribution of each spouse to the marriage. Implicit in this statement is the understanding that existing property laws did not adequately serve those purposes.

109 In 1975, Canada's Law Reform Commission echoed these sentiments in a working paper. It went even further by stating that the existing regime of separate property constituted an affront to the dignity and worth of the spouse whose contributions are not recognized:

Marriage almost invariably creates a differentiation in functions between the partners. Application to a family unit of the ordinary property laws that exist in a separate property jurisdiction fails to recognize this fact. The result is not only economic inequality but also a denial of the legal dignity and worth of the spouse who raises the children and works in the home rather than taking outside employment. [Emphasis added.]

(Law Reform Commission of Canada, Working Paper, *Studies on Family Property Law* (1975), at p. 41)

110 In response to these fervent criticisms of existing property laws and to the injustices caused by their application in cases such as *Murdoch*, Canada's provinces and territories enacted legislation recognizing marriage as a socio-economic partnership. This recognition took the form of a presumption of equal entitlement to a specific set of assets, which presumption would apply on the breakdown of the marital relationship. Nova Scotia enacted its first matrimonial property legislation in 1980, the predecessor to the *MPA*: see the *Matrimonial Property Act*, S.N.S. 1980, c. 9.

111 The preamble to the *MPA* and to its predecessor contains the following pronouncements:

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 desirable to recognize that child care, 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;

112 In stark and simple terms, the preamble depicts a desire to recognize the contribution made by each spouse to the relationship and to the family, such contribution taking on the form of childcare, household management, and financial support. These three facets are acknowledged to be the joint responsibility of each spouse. In recognition of this joint responsibility and its discharge, the legislation presumes an equal entitlement to the matrimonial assets. The central theme, clearly, is the recognition of all contributions made by both spouses to the care and support of the family, it being stated that the family is central to society.

113 In *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at p. 807, Wilson J. wrote that the *MPA*'s predecessor is "remedial in nature". She further states that the statute 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". I pause here to observe that the *MPA* is designed to be gender neutral. It recognizes the contribution made by both the male and female spouse. Wilson J.'s comments merely reflect the reality that the pre-*MPA* property regime had a greater prejudicial effect on women than on men. Finally, Wilson J. holds that this purpose must be borne in mind and the *MPA* must be given "a broad and liberal construction which will give effect to that purpose". I agree with these comments, given my review of the historical context giving rise to the enactment of the first matrimonial property statutes. The statutes are remedial in nature. In effect, a remedial statute is one that recognizes a need and remedies it.

114 Similar comments have been expressed by this Court on other occasions involving related pieces of legislation. As I note earlier, I wrote in *Moge, supra*, at p. 849, that the *Divorce Act* is designed to alleviate the economic burden created by the dissolution of the marital relationship. In *M. v. H., supra*, at para. 93, Iacobucci J. identified several purposes served by the spousal support provisions in Ontario's *Family Law Act*, R.S.O. 1990, c. F.3. These included lessening the burden on the public purse that would otherwise result without spousal support, and providing for a fair and equitable resolution to disputes arising upon the dissolution of the relationship. The preamble to Ontario's *Family Law Act* is written in much the same way as the preamble to the *MPA*. Both are designed to recognize a need, namely the need for an equitable resolution to the dissolution of the relationship and the need to ensure that the public does not needlessly pay the costs associated with this breakdown. Both recognize this need through different means. In the case of the *MPA*, this is through a presumption of equal property sharing while in Ontario, the statute covers spousal support, child support, and the division of property. The consistent message from this Court is that family legislation of this type is remedial in that it recognizes a need and provides for its relief.

115 This remedial interpretation is further supported by reference to the fact that the presumption of equal sharing only arises when the relationship comes to an end:

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. [Emphasis in original.]

(Law Reform Commission of Nova Scotia, *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act* (1996), at p. 7)

Until the relationship has ended, there is no need for wealth redistribution of the kind contemplated by the *MPA*. The need the legislation addresses is one that only arises when the relationship is terminated.

116 This need is further illustrated by the desire to avoid diverting funds from the public purse in order to support separated individuals. It is no secret that divorce increases the likelihood that one of the divorced spouses will fall below the poverty line. This problem is no different for heterosexual unmarried cohabitants who experience the end of their relationship. In a report released in 1992, one author noted that:

. . . the end of a marriage or common-law relationship increased the likelihood of poverty substantially. For those who were married and had children, the risk of poverty rose from 3.1 per cent to 37.6 per cent after divorce or separation. . . . In 1982-86, the family income of women (adjusted for changes in family size) dropped by an average of about 30 per cent in the year after their marriage ended. [Emphasis added.]

(T. Lempriere, "A New Look at Poverty" (1992), 16 *Perceptions* 18, at pp. 19-20, cited in M. J. Mossman, "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994), 17 *Dal. L.J.* 5, at p. 6)

117 The goal of matrimonial property regimes, and indeed the goal of family law generally, is a redistribution of economic resources on the breakdown of the family. While the relationship is a going concern, this redistribution is presumed to occur automatically. Family law only steps in on dissolution to distribute resources and alleviate economic burdens: see G. G. Blumberg, "The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State" (2001), 76 *Notre Dame L. Rev.* 1265, at p. 1266. The preamble, this Court's previous statements concerning the goals of matrimonial property and similar legislation, the prevention of poverty, and the use of public funds all point to one purpose for the *MPA*,

that of recognizing the problems that erupt at the end of the relationship and redistributing wealth to ensure that these problems are resolved. Infused in this interpretation is the notion that both parties have contributed to the relationship and that, in recognition of this contribution, wealth will be presumed to be distributed to each party equally.

(ii) The Needs of Heterosexual Unmarried Cohabitants

118 This brings me to the central theme of this factor. I hold that heterosexual unmarried cohabitants experience similar needs as their married counterparts when the relationship comes to an end. In this sense, the relationships are functionally equivalent. Since the purpose of the *MPA* is to recognize this need and to alleviate it, limiting the recognition to married cohabitants implies that the needs of heterosexual unmarried cohabitants are not worthy of the same recognition solely because the people in need have not married. Further, the *MPA* equal presumption is based on the recognition of the contribution made by both spouses to the family. Functionally, spouses contribute to various types of families. Failing to recognize the contribution made by heterosexual unmarried cohabitants is a failure to accord them the respect they deserve. This failure diminishes their status in their own eyes and in those of society as a whole by suggesting that they are less worthy of respect and consideration. Their dignity is thereby assaulted: they are the victims of discrimination.

119 In the past 20 years, Canada has seen a remarkable increase in the number of people living together in unmarried relationships. The number of families involving two unmarried parents has also greatly increased. Canadian society is therefore at a stage where it is no longer realistic to talk about familial bonds, the socialization of children, and all other aspects of the family in a “married couples only” vacuum. The

reality of modern society dictates a richer understanding of the various forms of familial relations in this country and the shedding of the idea that family life is reserved to one particular conception of what is deemed to be an acceptable family model.

120 Support for this change in family structures can be gleaned from a number of surveys and related materials. In 1997, Statistics Canada published its report on the data gathered in the 1996 census related to “common-law unions”: see Statistics Canada, *1996 Census: Marital Status, Common-law Unions and Families* (1997). Parts of this report are reproduced by the Court of Appeal. In 1996, 920,635 “common-law couple families” were counted, up 28 percent from 1991. This meant that one couple in seven in Canada was living “common-law”. Comparatively, only one couple in 16 was in a common-law union in 1981: see Dumas and Bélanger, *supra*, at p. 4. 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” (Statistics Canada, *1996 Census: Marital Status, Common-law Unions and Families, supra*, at p. 2). In Nova Scotia, approximately 10 percent of all families counted in 1996 were common-law families.

121 I also note that the 1996 Census counted 1,827,285 persons living in common-law unions. At the same time, 13,509,895 people were living in couples generally. As a result, 13.53 percent of people living in couples lived in a common-law union. In Nova Scotia, there were 430,095 people living in couples in 1996. 47,925 of these people (or 11.14 percent) lived in common-law unions: see Statistics Canada, *Age, Sex, Marital Status and Common-law Status, supra*, at p. 34. Interestingly, among all Canadians only 713,210 people lived in a common-law union in 1981: Wu, *supra*, at p. 43.

122 More interestingly, nearly 40 percent of all people aged 15 to 29 living as a couple lived in a common-law union in 1996. The number was only 30 percent in 1991. The growth in the number of people living in non-marital relationships does not appear to be diminishing. If anything, this statistic signals an increased trend away from marriage towards unmarried cohabitation relationships. For example, between 1990 and 1994, the number of first-union marriages formed in Canada (Quebec excluded) equalled the number of first-union common-law unions formed: Dumas and Bélanger, *supra*, at p. 4. During that same period, the ratio was four to one in favour of new common-law unions in Quebec. Dumas and Bélanger postulate that if the same rate of growth is maintained for marriage and non-marital unions, the number of married couples will equal the number of common-law couples in Canada by 2022 (p. 130).

123 The Census report noted above further details the growing change in Canadian society by reference to the increasing number of children born to heterosexual unmarried cohabitants. In 1996, 735,565 children were living in “common-law couple families”. This represented a significant increase of 52 percent over the same number of such children in 1991.

124 Many of these trends are further reflected in the latest statistical data. In 2001, nearly 14 percent of all Canadian families were classified as “common-law families”, up from the 13.53 percent mark set five years earlier: see Statistics Canada, *Profile of Canadian families and households: Diversification continues* (2002), at p. 24. In Nova Scotia, the percentage of families labelled as “common-law families” went up from 9.5 percent to 11.4 percent.

125 What these statistics indicate in a nutshell is that the phenomenon of non-marital cohabitation is by no means an isolated one. Increasingly, Canadians have come to live in non-marital relationships. Further, they are choosing more and more to raise their children within these relationships. Based on these and other statistics, several authors have advocated for the redefinition of what is meant by the term “family”. Wu’s conclusion, *supra*, at pp. 88-89, is simple:

The rise in non-marital fertility and the decline in teen fertility are consistent with my unconfirmed view that much of the increase in non-marital fertility in recent decades may have been largely a consequence of the increase in non-marital cohabitation and that more and more children have been born into cohabiting families over time. If I am correct, then cohabitation is slowly but surely becoming a substitute for legal marriage as a social institution where children are born, raised, and socialized to become members of our society. [Emphasis added.]

A similar conclusion is reached by Dumas and Bélanger: “[t]he common-law union is no longer a trial period of living together, but increasingly a substitute for marriage” (p. 154).

126 The increased incidence of heterosexual unmarried cohabitation as a means by which children are raised and socialized and as a form of economic, emotional and social interdependence dictates some form of recognition of the functional equality displayed by both heterosexual married and unmarried cohabitants. The family is no longer an institution reserved for married persons. In essence, the family is a matrix of relationships through which values are transmitted, members are socialized, and children are raised. Disregarding the matrix because two of its members are unmarried fails to take into account the social reality that the same incidents of interdependence are faced by both the married and the unmarried living together in these relationships.

127 I am not the first to say this. In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, the Court was faced with an attempt by two heterosexual unmarried cohabitants to extend the equitable principles developed in *Rathwell, supra*, for married couples to those not legally married. Dickson J., as he then was, saw no reason not to grant this request: “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” (p. 850). This was the first step in this Court’s attempt to identify heterosexual unmarried cohabitation as functionally equivalent to married cohabitation.

128 The trend continued in a few later cases dealing with family law generally. In *Moge, supra*, at pp. 848-49, I defined the family in terms of the values associated with it and the purposes it serves. Families provide for the emotional and socio-economic well-being of its members. The family serves as a support system for its members. It is the place where human beings find their most intimate human contact. The family was also described as a forum where values are transmitted and social skills are fostered and developed. I further observed that the family is a structure that often entails the making of sacrifices by its members.

129 Picking up on this theme in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, I wrote the following, at p. 632:

What is important is that children be nurtured. The critical factor is not the family form, nor the presence of mixed sex role models, but the provision of a loving and nurturing environment. From this perspective, the ideal family is one which meets the needs of its members, and best attempts to realize the values that lie at the base of family. As Jane Larson says:

It is the social utility of families that we all recognize, not any one proper form that “the family” must assume; it is the responsibility and community that the family creates that is its most important social function and its social value.

(“Discussion” (1992), 77 *Cornell L. Rev.* 1012, at p. 1014)

My reasons in *Mossop* indicate that the family, as a concept, is not limited to those involving two heterosexual parents who are married. The family is a functional concept based on a structure that meets the needs of its members and nurtures them in the manner described earlier. Defining the family with reference to one form ignores the reality that the functions of the family are served by all types of families in modern society. This is something that has been recognized in this Court.

130 It is for this reason that I disagree with my colleague Justice Gonthier’s attempt to equate marriage with the family. While Gonthier J. is right in his attempt to signal the importance of marriage to society and to acknowledge the distinctions that inhere in families where the primary caregivers are married and those where they are not, it is my view that referring to these distinctions does not, in itself, end the analysis. The presence of such differences cannot be used to deny benefits where the provision of these benefits is not tied to those differences.

131 In fact, it is quite legitimate to recognize differences in family forms and to be pro-family and pro-marriage without having to resort to denying benefits to other legitimate family forms. As I wrote in *Mossop, supra*, at pp. 633-34:

Given the range of human preferences and possibilities, it is not unreasonable to conclude that families may take many forms. It is important to recognize that there are differences which separate as well as commonalities which bind. The differences should not be ignored, but neither should they be used to de-legitimize those families that are thought to be different, and as Audre Lorde puts it in “Age, Race, Class, and Sex: Women Redefining Difference” in *Sister Outsider* (1984), 114, at p. 122:

... we must recognize differences among (people) who are our equals, neither inferior nor superior, and devise ways to use each others’ difference to enrich our visions and our joint struggles.

...

In light of all this, it is interesting to note that, in some ways, the debate about family presents society with a false choice. It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.

132 By denying functionally equal relationships benefits based on a status wholly unrelated to their needs, the *MPA* ends up drawing an inappropriate distinction. N. Des Rosiers puts it this way:

. . . in a democratic society, hierarchies between forms of relationships based on status are not appropriate — the best that a state can do is create conditions for equal and non-exploitative relationships to develop.

(N. Des Rosiers, “Should Conjugal Matter in Law and Social Policy?”, Remarks for a Keynote Address to the North American Regional Conference of the International Society of Family Law (2001), at pp. 3-4)

133 The equivalency of functions described above gives rise to identical needs upon the breakdown of the family relationship. As both marital and non-marital cohabitation can be characterized by emotional, social, and economic interdependence, it follows that the termination of these relationships generates similar problems. This is implicit from Dickson J.’s decision in *Pettkus, supra*, where the Court finds no underlying reason to treat heterosexual unmarried cohabitants differently as regards the division of assets through equity. A more express statement of this Court’s acceptance of the fundamental similarities associated with the breakdown of both types of relationships is to be found in the judgment of La Forest J. in *Egan, supra*, at para. 23:

. . . many of the underlying concerns that justify Parliament’s support and protection of legal marriage extend to heterosexual couples who are not legally married. Many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in

the human psyche. These couples have need for support just as legally married couples do in performing this critical task, which is of benefit to all society. Language has long captured the essence of this relationship by the expression “common law marriage”.

134 Academic commentators have long since taken note of the fact that the difficulties associated with the breakdown of a traditional marriage manifest themselves in other less traditional relationships. K. L. Kuffner writes:

Common-law couples often share many of the same characteristics as married couples: shared accommodations, pooling resources, emotional and financial interdependence, and the raising of children. Some cohabitants have become financially dependent on their spouse, similar to some married spouses. Consequently, cohabitants often suffer similar hardships upon breakdown of such relationships.

(K. L. Kuffner, “Common-Law and Same-Sex Relationships Under *The Matrimonial Property Act*” (2000), 63 *Sask. L. Rev.* 237, at p. 239; see also J. G. McLeod, Annotation to *Walsh v. Bona* (2000), 5 R.F.L. (5th) 190, at p. 191.)

Similar sentiments are expressed by Holland, *supra*, at pp. 151-52:

Today, there is very little difference between marriage and cohabitation. Marriage encompasses a range of relationships, some characterized by various forms of dependency, while others involve spouses who are quite independent, financially and otherwise. Marriage may or may not involve procreation. Cohabitation relationships are found along a similar spectrum. There is no reason to differentiate between the two based on the notion that cohabitation is different from a *traditional* marriage. When we compare cohabitation and modern-day marriage there are few distinctions. [Emphasis in original.]

135 These facts have not been lost on law reformers as well. In Nova Scotia, the Law Reform Commission released its report in 1997 dealing with proposed changes to the *MPA* that would allow individuals, including heterosexual unmarried cohabitants, to claim similar benefits to their married counterparts. The Commission’s

conclusions regarding the nature of unmarried relationships are aptly set out at p. 21 of their Final Report:

. . . the Commission has reached the view that most cohabitation relationships are functionally similar to marital relationships, and deserve to be treated similarly by the law. Human beings seek out long-term relationships for a variety of reasons, including companionship, love, emotional support, sexual intimacy, procreation, economic need and social expectation. Such relationships, especially but not exclusively where there are children, often generate patterns of economic dependency. These patterns, which may not be apparent during the relationship, are exposed on its termination. . . . The reason for the law to impose property division in marriage and cohabitation relationships is to respond to the economic interdependence which arises in such relationships, and to ensure that the dependent partner is not punished for the role which he or she has played during the relationship.

(Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (1997))

136 Similar thoughts are echoed in the Ontario Law Reform Commission *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (1993). At page 27 of the Report, the Commission observes that society values the performance of the functions associated with marital and non-marital relationships. Having linked the two together based on the functions each performs and the recognition of the value of those functions, the Commission concludes that the law ought to apply equally to both types of relationships.

137 One complaint that could arise from the extension of the benefits accorded married cohabitants under the *MPA* to heterosexual unmarried ones involves the fact that the latter are, on average, relationships of shorter duration than marriages. It is argued that, as a result, a greater percentage of unmarried cohabitants do not leave their relationship in a similar state of mutual interdependence as does the average married

cohabitant on the dissolution of marriage. Assuming this to be true, there are several responses to this objection.

138 First of all, the matter of whether attenuated or no benefits should be offered to certain heterosexual unmarried cohabitants is a matter best left to the legislature. They are the ones best able to decide at what point benefits ought to be extended. In the case of marriage, the legislature has chosen to extend the presumption to all married cohabitants regardless of the duration of their relationship or the lack of mutual interdependence. It is well known that some marriages, like some unmarried cohabitation relationships, are of short duration. Despite this, the legislature nevertheless offered the benefit to all married cohabitants.

139 Further, the *MPA* has built-in devices to allow courts to rebut the presumption of equal sharing where appropriate to do so. Section 13 of the *MPA* lists certain factors the court may consider in delineating a smaller share of the assets including, at para. (d), the “length of time that the spouses have cohabitated”. This provision or its equivalent has been applied by courts throughout the country to diminish the percentage entitlement of one spouse on the dissolution of a short-term marriage. I do not propose to review the jurisprudence on this provision here, but commend the reader to a text and article on the subject: see J. D. Payne and M. A. Payne, *Canadian Family Law* (2001), at pp. 321-25; and J. G. McLeod, “Unequal Division of Property”, in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality* (1994), 141, at pp. 154-56.

140 It is no excuse to deny the benefit of equal sharing to all heterosexual unmarried cohabitants simply because some members of the group do not seem to deserve nor want this equal division. The legislature is in the best position to craft

legislation that takes into account the difficulties associated with extending the benefit. It is clear, though, based on the purpose of the *MPA* and the functional equivalency of the two types of relationships relative to that purpose, that extending the benefit of the equal presumption solely to married cohabitants constitutes a serious attack upon the dignity of the claimant and all heterosexual unmarried cohabitants. It sends the message that, although the need for a simple means of dividing the assets on dissolution exists, only certain people are entitled to the benefit because of a status wholly unrelated to that need. In short, it demeans the dignity of an equal to treat him or her with less respect than his or her functional equals. Like the Court of Appeal, I agree that the *MPA* fails to recognize the contributions made by parties to a non-marital relationship and that such non-recognition has the effect of demeaning them as human beings.

(f) Choosing to Marry and Choosing to Cohabit — Effect on Dignity

141 One of the appellant's main submissions was that the deliberate non-recognition of the contribution made by heterosexual unmarried cohabitants to their relationships is done as a means of giving effect to the intentions of those entering into such relationships. In a different vein, the appellant also argues that marriage involves a considered choice to enter into a relationship that, by its very nature, is infused with certain legal rights. The same cannot be said, it is asserted, for those who enter into unmarried relationships. Based on this belief, legislation that fails to extend its benefits to heterosexual unmarried cohabitants merely gives effect to their intentions. In fact, it serves to enhance their dignity by respecting their choice not to be bound by the rigours associated with marriage.

142 With the greatest respect, such an argument fundamentally misconceives the reasons people enter into relationships in the first place. It is an assumption based on scant evidence at best. I will in fact show that the *MPA* has nothing to do with consensus and everything to do with recognizing the needs of spouses (as discussed earlier).

143 I believe it to be highly problematic to conceive of marriage as a type of arrangement people enter into with the legal consequences of its demise taken into account. In the first place, most people are not lawyers. They are often not aware of the state of the law. Worse, many maintain positive misconceptions as to what obligations and rights exist in association with marriage and other relationships: Law Reform Commission of Canada, *Studies on Family Property Law, supra*, at p. 267. The Law Reform Commission in Nova Scotia accepted that there is anecdotal evidence that unmarried partners believe that the *MPA* applies to them after one year of cohabitation: Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia, supra*, at p. 22.

144 Even assuming that people contemplating marriage are, as a whole, fully aware of their legal rights and obligations as married people, it is a mistake to base the obligations imposed by the *MPA* on the partners' perceived consensus to be bound by these obligations through marriage. Commenting on both the choice of marriage and the choice not to marry, the Law Reform Commission in Tasmania wrote the following:

Sometimes two people choose to live together in absolute freedom and choose not to marry, just to avoid the responsibilities of marriage. But, although this is becoming more common, it affects a small minority of de facto relationships, and we believe that the vast majority of people who live together without marrying do so without thought of the legal

consequences. It is we think, fanciful to think that any more than a handful of people organise their *personal* lives in this way in order to achieve specific legal consequences. [Emphasis in original.]

(Law Reform Commission of Tasmania, *Report on Obligations Arising From De Facto Relationships* (1977), at p. 5)

145 Couples do not think of their relationship in contract terms. The observations of one author on this point are particularly poignant:

Now, the confusion in the law arises from the fact that while marriages (and domestic partnerships) are quite obviously more like friendships than hamburgers, they also give rise to legally enforceable obligations, which lead some people to forget the obvious and think they are like hamburgers after all. The error apparently arises from the mistaken assumption that the legal obligations arising from marriage must have their source in a bargained-for exchange. The mistake is probably facilitated by the fact that the reciprocal nature of a successful marriage gives it a superficial resemblance to a bargained-for exchange, which is, after all, the source of so many legal obligations. But we must remain clear about the difference. Lunch with my friend may leave me with a sense of social debt that is real, but non-specific. . . . Friendship involves communicating interest in and concern for one another's welfare over a longer time horizon; opportunities to reciprocate may not present themselves in a convenient sequence for turn-taking. The debt to the restaurant, by contrast, involves paying \$23.37 — now.

(I. M. Ellman, “‘Contract Thinking’ Was *Marvin*'s Fatal Flaw” (2001), 76 *Notre Dame L. Rev.* 1365, at pp. 1373-74)

146 In other words, the fact that marriage gives rise to legal obligations does not, by itself, signal that the source of those obligations is some bargained-for exchange or the product of a consensus. While the price of a hair cut is known in advance and can be contracted for (with a higher price for perms than for brushcuts), the same cannot be said about marriage. The marital relationship changes over time. Houses and other assets are bought and sold, one of the partners is promoted or loses their job, children are born, accidents occur, or a member of the family becomes ill. These and other events are rarely anticipated at the outset and appropriately bargained

for. Further, neither spouse can anticipate who will contribute what to the marriage. As a consequence, even the most intelligent of adults lacks the capacity to evaluate the commitments involved in any agreement dealing with the consequences of a dissolution that will only come after great change occurs in the relationship: see further the analysis of cognition in M. A. Eisenberg, “The Limits of Cognition and the Limits of Contract” (1995), 47 *Stan. L. Rev.* 211.

147 Recognizing the obvious limits to conceptualizing the obligations flowing from marriage as a form of consensus, the legislature in Nova Scotia first enacted its matrimonial property legislation without regard for the wishes of married cohabitants at the outset of their relationship. Section 5(1) of the *MPA* explicitly states that the matrimonial property regime applies to spouses who entered into marriage “before or after the first day of October, 1980”. The *MPA*’s predecessor contained similar wording. Two persons who married in the 1960s, for example, would fall within the statutory presumption of equal sharing. In the 1960s, marriage did not entail the existence of this presumption. If there was any contract or consensus regarding the legal obligations accruing on dissolution, a default presumption of this sort would not have figured in the discussion. One can draw from this one simple conclusion: that the *MPA* does not base the presumption of equal division on some preconceived consensus. If anything, s. 5(1) serves to nullify any consensus parties may have had regarding the division of assets when they married before the enactment of the *MPA*’s predecessor. I consider it somewhat facetious for the appellant to argue that the *MPA* is designed to give effect to the choices made by married and heterosexual unmarried cohabitants when the legislation expressly applies to people who married at a time prior to the enactment of the *MPA* or its predecessor.

148 If I am incorrect in concluding that the source of the obligations in the *MPA* is not based on the choice of marriage, it does not follow that heterosexual unmarried cohabitants enter into their relationships specifically to avoid those legal obligations. In other words, the choice argument fails from both sides: many unmarried partners do not choose to cohabit or remain unmarried so as to avoid the legal consequences of marriage.

149 The reasons why people choose to cohabit are numerous. Some people have attempted to catalogue these potential reasons. An excellent list is found in Payne and Payne, *supra*, at p. 50. These authors list eight potential reasons why parties choose to cohabit, reasons which I would say are not mutually exclusive:

- the existence of a legal impediment to marriage;
- the existence of some religious obstacle to marriage;
- the perception by one or both of the potential cohabitants that marriage constitutes a relic of patriarchy with its assumed roles of male domination and female subordination;
- the wish to avoid some or all of the legal rights and obligations associated with marriage;
- the removal of the stigma associated with unmarried cohabitation due to the weakening of religious influence;
- the desire to enter into a “trial marriage”;

- the wish to maintain entitlements to particular benefits that would be lost in marrying; and,

- simple convenience.

150 It is impossible to pin any one of these reasons on all people who choose not to marry. In her study of heterosexual unmarried cohabitants living in Britain, C. Smart concluded that:

The majority of the men and women in our study did not cohabit because they were selfish and immoral, or because they rejected the ideological/patriarchal basis of marriage. Cohabitation was not necessarily a self-centred nor a progressive form of union. On the contrary, some of these cohabiting unions seemed to be [*sic*] very similar to an ideal type of marriage with its emphasis on companionship, shared interests, commitment to children and shared economic resources. Other cohabiting unions however seemed to reproduce some of the worst aspects of traditional heterosexual marriage such as domestic violence, a rigid sexual division of labour and financial insecurity for mothers. Only about a quarter of those interviewed saw themselves as taking a stand against marriage as an institution or saw marriage as an irrelevance in the light of a superior form of private commitment. Many of the women we interviewed actually wanted to get married (albeit to a better person than they had yet to meet). Equally, some of the men went on to marry other women with whom they formed relationships later on. We cannot, therefore, simply describe these trends as “progressive” or “regressive” — the choices people make have different meanings in different contexts and we need to be constantly in tune with these complexities rather than oversimplifying and overgeneralising.

(C. Smart, “Stories of Family Life: Cohabitation, Marriage and Social Change” (2000), 17 *Can. J. Fam. L.* 20, at p. 50)

The choices made by the cohabitants in her study were occasionally based, in whole or in part, on the desire to avoid the legal consequences of marriage. However, this could not be said of all heterosexual unmarried cohabitants. The moral of the story is that not all people choose to cohabit to avoid the legal consequences of marriage. Those that do often do for other reasons as well.

151 Some commentators go even further by suggesting that personal autonomy and choice are very rarely involved in the choice to cohabit. In “Marriage and Cohabitation — Has the Time Come to Bridge the Gap?”, in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality*, *supra*, 369, at p. 379, W. H. Holland espouses this view in the following words:

. . . in many cases, there is little planning and the parties cohabit without having given very careful thought to where the relationship is heading. In fact, it is doubtful whether many couples are aware of the differences in the legal consequences of marriage and cohabitation and that cohabitation is chosen to avoid the legal consequences of marriage. As Macklin pointed out [E. D. Macklin, “Nonmarital Heterosexual Cohabitation” (1978), 1 *Marr. and Fam. Rev.* 1, at p. 6]:

(L)iving together is seldom the result of a considered decision . . . and in a survey of married and unmarried couples to all or most of them the future seemed to be something diffuse that one does not discuss or think about in detail.

152 I agree with this interpretation. It also reflects the fact that the existence of many heterosexual non-marital relationships are rarely the product of choice in the sense that the choice not to marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other: “The flip side of one person’s autonomy is often another’s exploitation” (*ibid.*, at p. 380). Under these circumstances, stating that both members of the relationship chose to avoid the legal consequences of marriage is patently absurd.

153 The argument that cohabitation is mainly the result of a considered choice was also rejected by the Court in *Miron, supra*. Commenting on whether distinctions based on marital status are distinctions founded on immutable characteristics, McLachlin J. wrote the following, at para. 153:

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. [Emphasis added.]

I made the same observations at paras. 95-97, concluding that “[i]t is small consolation, indeed, to be told that one has been denied equal protection under the *Charter* by virtue of the fact that one's partner had a choice”. Nothing has changed since *Miron* was decided to indicate that these statements are incorrect. They apply with equal vigour to the *Charter* challenge in the present case.

154 Incidentally, arguments calling for the drawing of a distinction between married cohabitants and heterosexual unmarried cohabitants based on the choices made by these two types of couples have been wholeheartedly rejected by Nova Scotia's Law Reform Commission: see *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia, supra*, at p. 22; and *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act, supra*, at pp. 26-27.

155 In support of their choice argument, the appellant placed great emphasis on the findings of the Alberta Institute of Law Research and Reform contained in an 18-year-old survey: *Survey of Adult Living Arrangements: A Technical Report* (1984). This survey was reviewed by the Alberta Court of Appeal in *Taylor v. Rossu* (1998),

161 D.L.R. (4th) 266, a decision holding that the restriction in the *Domestic Relations Act*, R.S.A. 1980, c. D-37, on the availability of spousal support to married cohabitants violated the *Charter*.

156 The survey found that the average non-marital cohabitation relationship lasts 2.08 years. The 1995 General Social Survey indicates that this average has gone up to three years since 1984: Dumas and Bélanger, *supra*, at p. 149. Although the data contained in the Alberta survey is obviously dated, it is still of historical interest to review their conclusions. For instance, heterosexual unmarried cohabitants ranked the reason “didn’t want the legal commitment of marriage” as the fourth most important reason for choosing not to marry (for the purposes of these comments, I am presuming that all the respondents had a choice, something I rejected earlier). Each respondent was asked to rank each of the possible reasons for not marrying on a scale of 1 to 5. Curiously, only half of the respondents ranked the legal commitment answer at all. This is not reflected in the survey, as the order of importance is based on the mean score regardless of how many people even chose it as a reason. Nearly twice as many respondents ranked “love” and “companionship” as the reason(s) why they chose to cohabit non-maritally. The mean score for these responses was far higher than the one for the legal commitment answer. Further, there is no indication as to what is meant by the words “legal commitment”. There is no way of knowing whether this constituted a specific reference to all of the legal rights associated with marriage (support, property, intestacy, and dower rights, for example) or whether it is a vague reference to the fact that marriage is formally entered into. A lot of people speak about legal commitments in vague terms. Few people think of legal commitments in the precise manner that lawyers and judges do. Overall, the findings of the survey are somewhat flawed and uncertain. They can hardly be relied upon as justifying a wholesale distinction being drawn on the basis of marriage. Even if these findings do show

that unmarried cohabitants as a whole generally choose to cohabit to avoid the legal consequences of marriage, those findings would be irrelevant. The realities of the relationship at its termination are what the *MPA* addresses, not the intentions of the parties at the outset.

157 Based on the above comments, it is my view that the argument that the claimant's dignity was not violated by legislation enacted to respect her choice (and the choice of all heterosexual unmarried cohabitants) fails. This argument fails to account for the fact that the *MPA* rights are not based on choice or consensus. Moreover, it is incorrect to paint each unmarried cohabitant with the same brush as regards the "choice" to cohabit. For many, choice is not an option. For those where choice is in fact an option, few structure their lives by marrying or not marrying to take advantage or avoid particular legal obligations. The *MPA* does not therefore promote the dignity of the claimant. In fact, its failure to appreciate the absence of choice many cohabitants face with its concomitant exploitative features demeans the dignity of heterosexual unmarried cohabitants.

(g) *Current Recognition of Heterosexual Unmarried Cohabitants*

158 Courts and legislatures in this country have taken stock of the fact that denying certain benefits to a class of persons on the basis of their marital status is unjust where the need for these benefits is felt by both unmarried and married cohabitants equally. In response, courts have extended certain benefits to heterosexual unmarried cohabitants where the legislature has refused to do so. Legislatures, too, have enacted a flurry of legislation to extend certain benefits to heterosexual unmarried cohabitants. The appreciation of an injustice and the resulting actions reinforce the view that the denial of marital property benefits demeans the dignity of heterosexual

unmarried cohabitants. The steps taken constitute an acknowledgment of an historic attack upon the dignity of these individuals. By attempting to redress this unjust situation, the message is sent that there is an awareness of its existence and the need to stamp it out.

159 On the litigation front, a challenge to legislated insurance provisions extending benefits solely to unmarried heterosexual cohabitants was successful: *Miron, supra*. In Alberta, the Court of Appeal struck out a definition of “spouse” that limited the right to spousal support to those who were legally married: *Rossu, supra*. In *Woycenko Estate, Re* (2002), 315 A.R. 291, 2002 ABQB 640, the court declared unconstitutional a limited definition of “spouse” contained in Alberta’s dependants’ relief legislation. Finally, a *Charter* challenge to the definition of “spouse” found in Saskatchewan’s old marital property legislation was successful in *C.L.W. v. G.C.W.* (1999), 182 Sask. R. 237 (Q.B.).

160 On the legislative front, each province and territory now has legislation on the books defining “spouse” in a way so as to extend child and spousal support obligations to certain heterosexual unmarried cohabitants: *Domestic Relations Act*, R.S.A. 2000, c. D-14, s. 1; *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1, as am. by S.B.C. 1997, c. 20, s. 1(c); *The Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2, s. 2, as am. S.S. 2001, c. 51, s. 5(4); *The Family Maintenance Act*, R.S.M. 1987, c. F20, ss. 1, 4(3), and 14(1); *Family Law Act*, R.S.O. 1990, c. F.3, ss. 1(1) and 29, as am. by S.O. 1999, c. 6, s. 25(1) and (2); *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 27, adding a registered civil union regime to the *Civil Code of Quebec*, S.Q. 1991, c. 64; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 112(3), as am. by S.N.B. 2000, c. 59, s. 1; *Family Law Act*, R.S.N. 1990, c. F-2, s. 35(c), as am. by S.N. 2000, c. 29, s. 1; *Family Law Act*, S.P.E.I. 1995, c. 12, s.

29(1)(b); *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 2, as am. by S.N.S. 2000, c. 29, s. 3; *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 1, as am. by S.Y. 1998, c. 8, s. 10(1); and, *Family Law Act*, S.N.W.T. 1997, c. 18, s. 1(1).

161 With respect to marital property, a number of provinces and territories have extended the benefit of the presumption of equal sharing to certain heterosexual unmarried cohabitants. These include: Nova Scotia; Manitoba (*The Common-Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48 (not yet proclaimed)); Saskatchewan (*The Family Property Act*, S.S. 1997, c. F-6.3); and, Nunavut and the Northwest Territories (*Family Law Act*, S.N.W.T. 1997, c. 18). Quebec enacted legislation in 2002 extending the rights and obligations of marriage to particular registered civil unions. Further, several provincial law reform commissions have called for the reform of their province's legislation. For example, the current recommendation from the Law Reform Commission in Ontario is that the definition of "spouse" in that province's marital property statute be extended to include heterosexual unmarried cohabitants: Ontario Law Reform Commission, *supra*, at p. 31.

162 The enactment of the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, by the federal government has also virtually eliminated any distinctions in federal legislation that existed between heterosexual married and unmarried cohabitants. It should also be noted that human rights legislation throughout Canada recognizes "marital status" as a ground of discrimination. Finally, there exists a great number of other statutes at the provincial level that include heterosexual unmarried cohabitants within a more expanded definition of "spouse".

163 The legislative branch has made great strides to ensure that heterosexual unmarried cohabitants are given the respect due them in society. This recognition

through the extension of benefits speaks volumes to the injustice previously caused by virtue of exclusions based on marital status. By recognizing the injustice of denying equal benefits to functional equals, legislatures confirm the injustice of maintaining similar distinctions in granting marital property rights. The deliberate choice to extend many benefits falling short of extending marital property ones exacerbates the feeling that the needs of heterosexual unmarried cohabitants are being ignored. The message is that, with respect to dividing assets and ensuring the orderly dissolution of the relationship, heterosexual unmarried cohabitants do not have similar needs as their married counterparts. Such a message simply demeans the dignity of the claimant and her fellow unmarried cohabitants.

(h) *Inadequacy of Current Equitable Remedies*

164 No analysis of the effects of the underinclusive *MPA* on the claimant's dignity would be complete without some reference to the existing remedies available to heterosexual unmarried cohabitants. I accept that the failure to acknowledge these people in the *MPA* may not violate their dignity or self-worth if adequate alternatives are available. One must presume that the legislature is aware of these legal alternatives in choosing not to extend the presumption of equality under the *MPA*. They may be of the view that heterosexual unmarried cohabitants are already sufficiently protected by the common law and equity, rendering legislative intervention unnecessary.

165 The Supreme Court has made many strides since *Murdoch* to recognize the presence of unjust enrichment in situations involving the dissolution of non-marital relationships. The Court has been of great assistance to these litigants by recognizing, for instance, that the provision of domestic chores may constitute the granting of a significant benefit under the first step of unjust enrichment: see *Sorochan v. Sorochan*,

[1986] 2 S.C.R. 38. The Court has also made it easy for parties who pass the first step (conferral of benefit) to prove that there has been a corresponding deprivation. At page 45 of *Sorochan*, the Court noted that the devotion of one's free labour typical in most relationships can easily be seen as a deprivation. On the third step, the Court has also reduced the claimant's burden by linking the absence of a juristic reason for the enrichment and deprivation to the absence of any obligation on the part of the contributing spouse to perform the work and services carried out during the relationship: *Sorochan, supra*, at p. 46. *Peter, supra*, at p. 1018, even contains the comment that the provision of services by itself creates a presumption that they were provided with the expectation of compensation.

166 While I fully endorse and applaud this Court's attempts to make the unjust enrichment doctrine more accessible to litigants, I am the first to acknowledge the limitations inherent in seeking out a remedy under this head of obligation. In the first place, the principles relating to the proper remedy to grant are complex and uncertain. For a constructive trust to arise, the claimant must show a direct link between the property and the services rendered: *Peter, supra*, at p. 997. This concept can lead to fairly uncertain results.

167 For instance it is fairly difficult to establish the quantum of one's trust entitlement. Measuring the value of household services, domestic chores, and other such intangibles, is no easy task. It is also highly unpredictable. Should the claimant benefit from a trust of 10 percent, 25 percent, 50 percent, or more for simply doing regular domestic chores? Are farmers' cohabitants more likely to get a greater share because they perform farm chores in addition to the usual domestic services? Unfortunately, great uncertainty prevails in the answer. Counsel must find it difficult to advise their client regarding what they can expect from an application for a remedy

under unjust enrichment. The uncertainty makes negotiated settlements much more difficult to achieve. To have recourse to the courts is prohibitively costly. Overall, these are problems unmarried cohabitants have to face at a very difficult time in their lives. Married persons undergoing divorce are offered a simple alternative: the contribution of both spouses is automatically acknowledged with a 50 percent presumed entitlement. It is easier to do the accounting when a strong benchmark such as this is offered. It is not nearly as simple when the quantum is up in the air and left to be established by a court or by the parties after long and costly negotiations. Many of these comments are reiterated by Nova Scotia's Law Reform Commission in their 1997 report advocating for an extension of the presumption to cover heterosexual unmarried cohabitants (p. 21).

168 The situation facing heterosexual unmarried cohabitants today is no different than the one facing married couples in the late 1970s. The same inadequate, costly remedies that led to reform for married couples are now the only remedies available to non-marital cohabitants. By 1980, the Supreme Court of Canada had already awarded one divorced wife a constructive trust in a significant number of her ex-husband's assets: *Rathwell, supra*. Despite the presence of equitable remedies through unjust enrichment and trust law for separated married persons, the predecessor to the *MPA* was enacted. The legislature must have realized at the time that the judge-made remedies insufficiently dealt with the realities faced by divorcing couples. In stipulating a presumption of equal contribution to the marriage, the legislature avoided the difficulties of establishing contribution and the degree of that contribution. If these remedies did not adequately address the concerns of married couples, it follows that the same problems are to be found today for heterosexual unmarried cohabitants.

169 There is a significant difference between the marital property regime and the remedies currently available under trust law and unjust enrichment doctrines. I hold that it is incorrect to say that the claimant's dignity is not demeaned by offering her remedies that are greatly deficient relative to the legislated property regime. Those remedies do not come close to affording heterosexual unmarried cohabitants equal treatment with those who are married.

4. Conclusions Respecting Section 15(1) of the *Charter*

170 Heterosexual unmarried cohabitants have historically faced disadvantages through a legal system that fails to acknowledge them as legitimate family forms. This pre-existing disadvantage has abated in recent years but remains exacerbated by the denial of equal treatment in the *MPA*. In failing to account for these people, the *MPA* does not serve a justifiable ameliorative purpose, nor does it provide a remedy in response to the actual needs of unmarried people. Worse, this failure to provide the benefits of the *MPA* constitutes a failure to provide a fundamental benefit at a time when it is most needed. In doing so, the legislature draws a distinction based on a status wholly unrelated to the actual needs of people whose relationships of interdependence have come to an end and who, as a result, require redistribution of economic resources through property equalization and support. These needs exist whenever any relationship of dependency breaks apart: the need is not tied to marriage itself but to the interdependence created through long-term relationships. In short, the *MPA* fails to recognize the contributions made by non-married persons to their relationships. This refusal to acknowledge their contribution sends the message that, by virtue of their marital status alone, their relationship is less worthy of respect, recognition and value.

171 Members of this group feel the loss of dignity by this lack of acknowledgment. Moreover, their dignity is further attacked by claims that the *MPA* is designed to give effect to the intentions of married and unmarried persons at the outset of their relationships. Such claims ignore the express purpose of the *MPA* to remedy ills associated with the termination of these relationships. The right to a presumption of equal contribution, after all, only arises when the relationship comes to an end. Initial intentions are, therefore, of little consequence. In fact, few people realistically believe that any significant number of human beings enter into relationships of love, affection, and companionship in order to produce a particular legal outcome. If anything, some people are unaware or positively mistaken about their legal rights as married or unmarried cohabitants. Worse still, many heterosexual unmarried cohabitants cohabit not out of choice but out of necessity. For many, choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation. It certainly does not enhance the dignity of those who could not “choose” to cohabit.

172 Recognition of the value of unmarried cohabitation by courts and by legislatures also bolsters the view that historic non-recognition was unjust. Attempts to remedy this injustice confirm the existence of the injustice in not providing a remedy. Finally, it cannot be said that the *MPA* survives s. 15(1) scrutiny because of the availability of alternative remedies. These remedies are inadequate relative to those accorded spouses under the *MPA*. They were not good enough for married people in 1980. That has not changed for their unmarried counterparts. I conclude that the purposes of s. 15(1) are not furthered by the unamended *MPA*. As such, the claimant has successfully shown a violation of her dignity.

173 Given my conclusions on the first three steps, it follows that the *MPA* violates s. 15(1) of the *Charter* and is, therefore, *prima facie* unconstitutional.

C. Is the Legislation Saved by Section 1 of the Charter?

174 Having found a violation of s. 15(1) of the *Charter*, it remains to be considered whether the *MPA* is saved by virtue of the application of s. 1. I conclude that the s. 1 justification test fails on the first step of the analysis (pressing and substantial objective). It also fails the first aspects of the second step of the analysis (the proportionality analysis). There is no rational connection between the exclusion of heterosexual unmarried cohabitants and the legitimate purposes of the *MPA*. There is no need to consider the second and third aspects of the proportionality analysis.

1. General Principles

175 The question of whether the *MPA* constitutes a reasonable limit that can be demonstrably justified in a free and democratic society can only be answered by reference to the principles first set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and since interpreted by this Court on countless occasions, the most recent in the context of a s. 15(1) challenge being *M. v. H.*, *supra*, and *Lavoie*, *supra*.

176 Two broad inquiries are involved. First, the goal of the legislation is ascertained to determine if it relates to concerns “which are pressing and substantial in a free and democratic society”: *Oakes*, *supra*, at pp. 138-39. It is only these objectives that are of sufficient importance to justify a breach of the *Charter*. The second stage amounts to a proportionality analysis which balances the interests of society with those of groups and individuals. The proportionality stage is divided into

three inquiries or branches. First, is the *MPA* rationally connected to this objective? Secondly, does the *MPA* impair the right no more than is reasonably necessary to accomplish this objective? Finally, a balancing is conducted between the effect of the discrimination and the benefit achieved by it to determine if they are proportionate. A negative answer to any of these inquiries resolves the matter in favour of the claimant and against the government.

177 The burden under s. 1 is an onerous one. It is best captured in this passage from *Lavoie, supra*, at para. 6:

This brings us to s. 1 of the *Charter* and the question of whether the discrimination this law effects is justified in a free and democratic society. In conducting the s. 1 analysis, “it must be remembered that it is the right to substantive equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found” (*Corbiere, supra, per L’Heureux-Dubé J.*, at para. 98 (emphasis deleted)). Indeed, “cases will be rare where it is found reasonable in a free and democratic society to discriminate” (see *Adler v. Ontario*, [1996] 3 S.C.R. 609, *per L’Heureux-Dubé J.*, at para. 95 (citing *Andrews, supra, per Wilson J.*, at p. 154)). Discrimination on the basis of non-citizenship will attract close scrutiny. To quote La Forest J. in *Andrews, supra*, at p. 201:

If we allow people to come to live in Canada, (we) cannot see why they should be treated differently from anyone else. Section 15 speaks of every individual. There will be exceptions no doubt, but these require the rigorous justification provided by s. 1.

The majority of this Court in *Andrews* held that the burden of justification in cases such as this is “onerous”.

178 In the present case, the onus fell on the appellant to justify the *Charter* violation. In its attempt to discharge the onus, the appellant presented this Court with no proof on the record as to the legislative intent surrounding the enactment of the *MPA* and its predecessor. While I would have preferred evidence on this matter, I nevertheless will deal with the appellant’s attempt to discharge its onus.

2. Pressing and Substantial Objective

179 In *Vriend, supra*, at para. 109, Iacobucci J. states that, where a law has been found to violate the *Charter* due to underinclusion, the purpose is to be gleaned by a consideration of the legislation as a whole, the provision under scrutiny, and the omission itself.

180 With respect to the *MPA*, its overall purpose can easily be gauged by reference to the preamble set out earlier in these reasons. The general purpose appears to be to strengthen the family by providing for a needed redistribution of wealth at the termination of marriage. This redistribution, according to the preamble, is facilitated by acknowledging the contribution made by both spouses to the marriage. The appellant in its factum writes, at para. 89, that the objective of the *MPA* is “the protection of individuals from the harmful economic effects following the breakdown of the marriage”. I agree with this characterization of the objective especially in light of the explicit wording of the preamble. The analysis is not complete, however, without a review of the provision defining the word “spouse”.

181 When the provision in question and the omission are added into the mix, the objective becomes a little less clear. It is argued that, considering the legislation as a whole as well as the definition of “spouse” with its inherent omission, the *MPA*’s purpose is the promotion of marriage through the creation of a simple regime available on its dissolution. In light of this Court’s decision in *Miron*, the objective of promoting marriage over other, functionally equal forms of intimate relationships like heterosexual unmarried cohabitation is not permissible. It is a discriminatory objective. As Dickson J. states in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at

p. 331: “both purpose and effect are relevant in determining constitutionality”. I therefore agree with the finding of the Court of Appeal in the case at bar that the appellant is not entitled to rely on an objective that supports the institution of marriage over non-marital cohabitation relationships.

182 Looking at the omission of heterosexual unmarried cohabitants specifically, I do not see what pressing and substantial objective such exclusion pursues. I have already dealt with the reasons put forward by the appellant for this exclusion. I found them to be unconvincing. There was no contractual or choice basis for drawing the distinction between the two groups in question. Further, there was no major difference between the two relationships relative to the consequences felt by both on dissolution. There does not therefore appear to be a pressing and substantial objective to the omission of heterosexual unmarried cohabitants. Taken as a whole, the appellant’s characterization of the objective is incomplete. The true objective of the *MPA*, to use the appellant’s words and my own, is “the protection of [married] individuals from the harmful economic effects following the breakdown of the marriage [to the exclusion of all non-married cohabitants]”. As a whole, this is not a constitutional objective.

183 As a result of the foregoing analysis, I conclude that the appellant has not met the onus under s. 1 to demonstrate that the purpose of the *MPA* and provision in question is so substantial as to justify a breach of a constitutional right.

3. Proportionality

184 Although it is not strictly necessary for me to continue with the proportionality branch of the *Oakes* test, a full answer to the questions before this Court would not be complete without some comments on this matter. For the purposes

of the proportionality analysis, I will assume that the *MPA* serves one of two constitutional objectives. The first objective is the promotion of marriage, one that I have found not to be pressing and substantial in light of the discriminatory nature of the objective. The second, broader objective, is that of ensuring that parties facing the dissolution of any relationship of some interdependence are given full and fair access to an equitable means of resolving their differences through wealth redistribution in the form of marital asset equalization. This broader objective is acknowledged not to be the one pursued by the *MPA*, given the limitation on the definition of “spouse”. I would add to these objectives the goal of reducing the pressures on public welfare. Minimizing the burden on the welfare system has been advocated as one of the purposes of legislation that distributes wealth through support or property division: see Ontario Law Reform Commission, *supra*, at pp. 29-31; and *M. v. H.*, *supra*, at para. 98.

185 At the rational connection stage, one begins by determining whether there is a nexus between the objective and the means chosen to further that objective. The means here include the provision and the omission: *M. v. H.*, *supra*, at para. 108. In this case, the provision and omission are indistinguishable, both being contained in the definition of “spouse” with its inherent exclusion.

186 Taking the broadest possible objective first, that of providing for an equitable means of resolving property disputes on the dissolution of all relationships of some permanence and interdependence, it is quite clear that excluding a whole group that displays the very characteristics of permanence and interdependence (as well as the same needs on dissolution) is not rationally connected to this objective. In terms of the welfare objective of the *MPA*, this exclusion creates potential situations of poverty for people who have grown dependent on their unmarried partner and find

themselves without the means of self-support at the end of the relationship nor with an easy way to access the potential wealth held by the former partner.

187 Adopting the narrower objective of promoting marriage, I do not see how excluding non-married persons promotes the institution of marriage. If the institution of marriage is promoted by way of a presumption of equal contribution, it makes little difference if that same presumption is accorded to any other group of people. The presumption will still be there for married persons. For them, the vaunted *MPA* benefits are always available no matter who else has access to them. In other words, excluding or including others within the scope of the *MPA* is not a means that can be said to be rationally connected to the objective of promoting marriage. Like Iacobucci J. who, in *M. v. H.*, concluded that the exclusion of same-sex couples from the spousal support regime of Ontario's *Family Law Act* does not further the objective of assisting heterosexual women, I conclude that the exclusion of heterosexual unmarried cohabitants does not assist married cohabitants. The rational connection test fails.

4. Conclusion Respecting Section 1

188 The appellant has failed to discharge its onus under s. 1. None of the objectives considered are pressing and substantial. Assuming that they are, the means chosen are not proportional to the objectives due to the absence of any connection between the exclusion of unmarried heterosexual cohabitants from the *MPA* and the purported purpose of the statute. There is no need to enter into any of the other steps under the proportionality analysis.

VI. Conclusion

189 The definition of spouse contained in s. 2(g) of the *Matrimonial Property Act* violates s. 15(1) of the *Charter* in a manner that is not saved by s. 1. Since the *MPA* has been amended and since the parties have settled their dispute as regards the division of property and assets, I do not need to discuss the issue of remedy. Accordingly, this appeal is dismissed with costs throughout. I would answer the constitutional questions as follows:

1. Does s. 2(g) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, discriminate against heterosexual unmarried cohabitants contrary to s. 15(1) of the *Charter*?

Yes.

2. If the answer to question 1 is “yes”, is the discrimination a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

No.

The following are the reasons delivered by

190 GONTHIER J. — I am in agreement with the reasons of Justice Bastarache. However, I wish to add certain comments to emphasize the individual and social importance of the choice to enter into marriage. The right to equality is a comparative right, the scope of which can only be understood with reference to an appropriate comparator group. The purpose of such a comparison is to determine whether the person invoking s. 15(1) of the *Canadian Charter of Rights and Freedoms* is subject to differential treatment sufficient to constitute a violation of the equality right. A range of factors must be taken into account in determining the appropriate comparator group and comparative factors, including, most notably, the social, political and legal

context (*R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1331-32). The respondent Walsh claims that she is a victim of discrimination because she does not benefit from the presumption of equal division of matrimonial property applicable to married couples. In her opinion, the similarities between a common law union and a marriage are such that differential treatment necessarily violates her dignity. In short, she suggests that all benefits and burdens conferred on married couples must equally be accorded to common law couples.

191 Legislative provisions that attach burdens and advantages to marriage are not discriminatory in and of themselves. Legislatures are entitled to define and promote certain fundamental institutions. The institution of marriage is founded on the consent of the parties. As Bastarache J. expressed, marriage is contractual in nature. It is therefore fitting that certain attributes, rights and obligations, which serve to give marriage its unique character, are not conferred on unmarried couples. Indeed, these are the characteristics that distinguish marriage from other forms of cohabitation.

I. Marriage and the Family

192 Marriage and the family existed long before any legislature decided to regulate them. For centuries they have been central to society, contributing to its social cohesion and fundamental structure (see generally, *The New Encyclopædia Britannica* (15th ed. 1990), vol. 19, at pp. 59-83). As stated by Professor J. Pineau: [TRANSLATION] “[t]he state cannot be unconcerned with marriage, since it provides the necessary stability in a family’s life: ‘according to the true order, the laws relating to marriage should be those which are first determined in every state’, said Plato” (*Mariage, séparation, divorce: L’état du droit au Québec* (1976), at p. 16). Marriage

and the family promote the psychological, social and economic well-being of all members of the family unit.

193 It is within the family that individuals can express their deepest and most intimate feelings. The preamble to the *Act Respecting the Conseil de la famille et de l'enfance*, R.S.Q., c. C-56.2, recognizes the family as “the first cultural and social environment in which every individual is born” and, further, states that “the welfare of society is based on the welfare of the family and of the individuals composing it” (emphasis added). Marriage, a commitment that is entered into on the basis that it is permanent and irrevocable, gives structure to the family, providing it with the stability best suited to the education and rearing of children. Indeed, the concepts of marriage and the family are intimately intertwined. Article 16 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), illustrates the link between these institutions, as well as their central importance to our society:

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. [Emphasis added.]

Similarly, in *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 848, this Court made the following comments:

Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the

development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.

194 The fundamental nature of marriage inheres in, among other things, its central role in human procreation, and its ability to offer both children and parents a framework for the development of values within the family. Living together as a family and rearing children in this context is foundational to our society. Marriage and family life are not inventions of the legislature; rather, the legislature is merely recognizing their social importance.

195 The modern state regulates marriage through numerous legislative measures and, thereby, recognizes the importance of this institution. As La Forest J. stated in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 21: “marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions”. The institution of marriage is shaped through legislation, and its role as a fundamental institution is recognized at both the provincial and national levels. In recognition of the importance of the social act of marriage, the Fathers of Confederation saw fit to divide powers in this area between the provincial and federal governments. Section 91(26) of the *Constitution Act, 1867* gives Parliament jurisdiction over marriage and divorce. Under this head of power, it recently enacted the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12. Section 1.1 of this statute states that the amendments made by the new Act “do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others”. In Quebec, s. 5 of the *Federal Law — Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, serves to define the institution of marriage by providing that “[m]arriage requires the free and enlightened consent of a man and a woman to be the spouse of the other” (emphasis added).

196 Section 92(12) of the *Constitution Act, 1867* provides that jurisdiction over “[t]he Solemnization of Marriage in the Province” belongs to the provinces. Thus, for instance, art. 365 of the *Civil Code of Québec*, S.Q. 1991, c. 64, states that “[m]arriage shall be contracted openly, in the presence of two witnesses, before a competent officiant” (emphasis added). Furthermore, common law definitions of marriage support the view that it is a lawful and voluntary union of one man and one woman to the exclusion of all others (see: *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, *per* Lord Penzance; *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.)). The Constitution clearly empowers the legislature to determine, in formulating social policy, the rights and obligations of married couples and to decide whether it will confer some or all of these rights and obligations on unmarried couples.

197 In Nova Scotia, the legislature expressed its intention to promote the family through marriage in the preamble to the *Matrimonial Property Act*, S.N.S. 1980, c. 9:

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 child care, 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; [Emphasis added.]

198 This Act addresses matrimonial assets acquired during the marriage by considering the effect of marriage breakdown on the assets of the spouses. It offers married couples a legal framework within which the division of matrimonial assets will be addressed. The Nova Scotia legislature chose not to extend the application of the *Matrimonial Property Act* to unmarried couples. Although the wording of the Act makes the intention of the legislature very clear, I refer nonetheless to comments made in the final report of the Nova Scotia Commission that studied the issue of division of matrimonial assets:

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. [Emphasis added.]

(Law Reform Commission of Nova Scotia, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (1997), at p. 5)

II. Contractual Nature of Marriage

199 Married status can only be acquired through the expression of a clear, free and personal choice, without which the marriage may be annulled. As I wrote in *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 46 :

The decision to marry includes the acceptance of various legal consequences incident to the institution of marriage, including the obligation of mutual support between spouses and the support and raising of children of the marriage. In my view, freedom of choice and the contractual nature of marriage are crucial to understanding why distinctions premised on marital status are not necessarily discriminatory: where individuals choose not to marry, it would undermine the choice they have made if the state were to impose upon them the very same burdens and benefits which it imposes upon married persons. The authors Michael

D. A. Freeman and Christina M. Lyon, in *Cohabitation without Marriage* (1983), at p. 191, make just these points:

. . . marriage is a voluntary institution in which the parties express their willingness to commit themselves to each other for life. Whether they are completely cognisant of all the legal effects of such a commitment is immaterial; the commitment is made, nevertheless, and marital rights and obligations inevitably follow. Cohabiting couples do not make that same commitment, and rights and duties akin to marriage should not as a result follow. The danger with imposing the incidents of marriage on a cohabiting couple is that it constitutes a denial of a fundamental freedom.

200 Marriage is an institution in which couples agree to participate by the expression of a formal and public choice. The contractual nature of marriage distinguishes married couples from common law couples who have not expressed their wish to be bound by the obligations of marriage. This is not to deny that many unmarried couples have relationships similar to those of married couples, marked by love and longevity. Clearly, although marriage can offer an environment conducive to the well-being of the family, marriage is not the only way to achieve this end. As my colleague Justice L'Heureux-Dubé states in her reasons, more and more couples are choosing not to marry in Canada, and legislatures have responded to this reality by enacting numerous legislative provisions that seek to promote values traditionally associated with marriage, while also imposing obligations and conferring benefits on unmarried couples. However, the fact that some unmarried couples have relationships similar to married couples does not undermine the central distinguishing feature of the institution of marriage: permanent contractual commitment. Marriage is of a solemn and permanent nature, and couples who have entered into such a contractual commitment constitute a large majority in this country. As Professor Z. Wu demonstrates, the marital relationship is the most stable form of relationship. Almost 90 percent of first marriages last at least 10 years, whereas only 12 percent of common

law relationships achieve this duration: *Cohabitation: An Alternative Form of Family Living* (2000), at p. 108. According to Professor Wu (at p. 108):

There is no doubt that cohabiting unions are more vulnerable and less stable than marital unions. Indeed, less than half of all cohabiting unions are expected to last for three years.

201 It is by choice that married couples are subject to the obligations of marriage. When couples undertake such a life project, they commit to respect the consequences and obligations flowing from their choice. The choice to be subject to such obligations and to undertake a life-long commitment underlies and legitimates the system of benefits and obligations attached to marriage generally, and, in particular, those relating to matrimonial assets. To accept the respondent Walsh's argument — thereby extending the presumption of equal division of matrimonial assets to common law couples — would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system. In effect, to presume that common law couples want to be bound by the same obligations as married couples is contrary to their choice to live in a common law relationship without the obligations of marriage.

202 The permanent nature of marriage is not altered by the fact that one party can terminate it when the criteria set out in the *Divorce Act* are met. While young married couples hope for a lifetime of love and family unity, circumstances can of course transform the dream into a nightmare. In contemplation of this possibility, Parliament has provided a means for parties to put an end to marriage. However, s. 8(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), sets out the conditions to be met in order to obtain a divorce:

8. . . .

(2) Breakdown of a marriage is established only if

(a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or

(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,

(i) committed adultery, or

(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

Even if the philosophy of the *Divorce Act* has developed in recent years from a system for sanctioning errant spouses to one that recognizes marriage breakdown, divorce is nevertheless a very confined measure, applicable only when specific criteria are met. Marriage is still, in principle, a life-time commitment. The *Divorce Act* provisions simply serve to remedy marriage failure.

203

It is true that in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 177, I recognized that there is “a growing political recognition that cohabiting opposite-sex couples should be subject to the spousal support regime that applies to married couples because they have come to fill a similar social role”. However, I want to underline the fundamental difference between spousal support, based on the needs of the applicant, and the division of matrimonial assets. While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need. Section 33(9) of the *Family Law Act*, R.S.O. 1990, c. F.3, demonstrates this distinction. This paragraph indicates, among other things, the factors relevant to determining the quantum of support, for which an equivalent may be found in s. 4 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160:

33. . . .

(9) In determining the amount and duration, if any, of support for a spouse, same-sex partner or parent in relation to need, the court shall consider all the circumstances of the parties, including,

- (a) the dependant's and respondent's current assets and means;
- (b) the assets and means that the dependant and respondent are likely to have in the future;
- (c) the dependant's capacity to contribute to his or her own support;
- (d) the respondent's capacity to provide support;
- (e) the dependant's and respondent's age and physical and mental health;
- (f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;
- (g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
- (h) any legal obligation of the respondent or dependant to provide support for another person;
- (i) the desirability of the dependant or respondent remaining at home to care for a child;
- (j) a contribution by the dependant to the realization of the respondent's career potential;

This provision demonstrates that a request for support must always be based on the particular needs of the applicant and the respondent and their capacity to provide for themselves and each other.

The division of matrimonial assets and spousal support have different objectives. One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children. This

Court also recognized in *M. v. H.*, *supra*, at para. 93, that one of the objectives of spousal support is to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those spouses who have the capacity to support them. The support obligation responds to social concerns with respect to situations of dependency that may occur in common law relationships. However, that obligation, unlike the division of matrimonial property, is not of a contractual nature. Entirely different principles underlie the two regimes. To invoke s. 15(1) of the *Charter* to obtain spousal assets without regard to need raises the spectre of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.

205

The fundamental differences between common law and married couples make them inappropriate comparator groups in this respect. As Binnie J. stated in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 46, “while a s. 15 complainant is given considerable scope to identify the appropriate group for comparison, ‘the claimant’s characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups’ (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497], at para. 58)”. The situation of couples who have chosen life commitment through marriage is not comparable to that of unmarried couples when one considers the nature of their respective relationships. In the case of married couples, there is a permanent and reciprocal life commitment, to which the legislature has attached, among other things, a presumption of equal division of matrimonial assets, while, in the absence of marriage, this foundational quality does not exist. The *Charter* does not require that the legislature treat the two groups identically.

206 For the foregoing reasons and those expressed by Bastarache J., I would answer the constitutional questions as answered by Bastarache J., and I would allow the appeal.

Appeal allowed, L'HEUREUX-DUBÉ J. dissenting.

Solicitor for the appellant: Nova Scotia Department of Justice, Halifax.

Solicitor for the respondent Susan Walsh: The Nova Scotia Legal Aid, New Glasgow.

Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Edmonton.