1998 CarswellAlta 523, 161 D.L.R. (4th) 266, 216 A.R. 348, 175 W.A.C. 348, 39 R.F.L. (4th) 242, [1999] 1 W.W.R. 85, (sub nom. Rossu v. Taylor) 53 C.R.R. (2d) 219, 68 Alta. L.R. (3d) 213, 1 W.W.R. 85, [1998] A.J. No. 648, 1998 ABCA 193

1998 CarswellAlta 523, 161 D.L.R. (4th) 266, 216 A.R. 348, 175 W.A.C. 348, 39 R.F.L. (4th) 242, [1999] 1 W.W.R. 85, (sub nom. Rossu v. Taylor) 53 C.R.R. (2d) 219, 68 Alta. L.R. (3d) 213, 1 W.W.R. 85, [1998] A.J. No. 648, 1998 ABCA 193

Taylor v. Rossu

Laszlo Rossu, Appellant (Defendant) and Bernice Taylor, Respondent (Plaintiff)

Alberta Court of Appeal

Fraser C.J.A., O'Leary, Russell JJ.A.

Heard: February 24, 1997
Judgment: June 16, 1998[FN*]
Docket: Calgary Appeal 96-16793

Proceedings: varying (1996), 44 Alta. L.R. (3d) 388 (Alta. Q.B.)

Counsel: *L.J. McMurchie*, for the Appellant.

D.P. ***Castle*** and *J.M. Anquist*, for the Respondent.

Subject: Family; Constitutional

Family law --- Support — Spousal support under provincial statutes — Entitlement — General

Unmarried woman applied for spousal support from man — Trial judge granted application on basis that provisions in Domestic Relations Act limiting support to married parties violated s. 15 of Charter — Man appealed — Appeal dismissed — Canadian Charter of Rights and Freedoms, ss. 1, 15 — Domestic Relations Act, R.S.A. 1980, c. D-37, s. 15, Pts. 2, 3.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General

Unmarried woman applied for spousal support from man — Trial judge declared that provisions in Domestic Relations Act which limited spousal support to married parties violated s. 15 of Charter — Trial judge's remedy was to read in "common law spouse" in legislation so as to allow unmarried parties to apply for support — Remedy replaced on appeal by simple declaration of unconstitutionality so that legislature could rewrite offending provisions — Canadian Charter of Rights and Freedoms, ss. 1, 15 — Domestic Relations Act, R.S.A. 1980, c. D-37, s. 15, Pts. 2, 3.

A man and a woman separated after having lived together for 30 years. The woman subsequently applied for support. Section 15 of the *Domestic Relations Act* limited the right to spousal support to married parties only by providing that alimony could be granted only if the plaintiff was entitled to a judgment of either judicial separation or restitution of con-

jugal rights. The woman argued that this and related sections found in Parts 2 and 3 of the *Act* violated the equality provisions found in s. 15 of the *Canadian Charter of Rights and Freedoms*. The trial judge agreed. His remedy was to read in "common law spouse" in place of "spouse" in the applicable provisions. He also awarded the woman interim support. The man appealed.

Held: The appeal was dismissed.

Case law established that discrimination on the basis of marital status is analogous to the prohibited grounds of discrimination set out in s. 15 of the *Charter*, and the subject provisions of the *Act* do discriminate on that basis by limiting the right to apply for support to only married parties. Whether an applicant would be entitled to an order for support pursuant to such an application was irrelevant for purposes of the discrimination argument. Furthermore, the prohibition of the *Charter* against discrimination on the basis of marital status is not limited only to those situations where the couple are living together.

The discrimination created by the *Act* was not reasonably justifiable pursuant to s. 1 of the *Charter*. It did not meet the first part of the test established by case law, in that the discrimination found in the impugned sections was not rationally connected to the goals of the legislation. The two goals of the provisions were to relieve dependency upon the breakdown of an intimate relationship and to promote marriage by limiting claims of support to persons who are legally married. There was no rational connection to the second goal as there was no evidence that limiting support to legally separated or divorced spouses promoted marriage or discouraged common law relationships, for there was evidence that the latter type of relationship was on the increase. The exclusion of common law spouses from access to spousal support was not necessary to promote marriage. As for the first goal, the exclusion of a large number of Alberta couples from the right to apply for support was not rationally connected to the relief of dependency.

The trial judge erred in reading in "common law spouse" to the impugned sections of the *Act*. This remedy had no practical effect because of the presence of preconditions which entitled spouses to support only if they were eligible for divorce or decrees of nullity. As well, there was no universally accepted definition of "common law spouse", and it was better for the legislature, rather than the courts, to establish a definition and make other appropriate changes to the province's support regime, as well as to other legislation that discriminated on the basis of marital status. In the circumstances, the correct remedy was to strike all of Parts 2 and 3 of the *Act*, but to suspend the declaration of invalidity to allow the government time to draft appropriate revisions.

Annotation

In *Taylor v. Rossu*, the Alberta Court of Appeal completes the second third of the judicial rewriting of family law legislation in Canada. In *M v. H* (1996), 31 O.R. (3d) 417, *(*sub nom. *M. v. H.)* 142 D.L.R. (4th) 1, 25 R.F.L. (4th) 116, *(*sub nom. *M. v. H.)* 96 O.A.C. 173, *(*sub nom. *M. v. H.)* 40 C.R.R. (2d) 240 (C.A.), the Ontario Court of Appeal held that s. 29 of the *Family Law Ac*t, R.S.O. 1990, c. F-3 was invalid insofar as it granted to partners in opposite-sex relationships support rights that it denied to partners in same-sex relationships. In *Taylor v. Rossu*, the Alberta Court of Appeal heldthat the support provisions of the *Domestic Relations Act* were invalid insofar as the Act granted to married partners support rights that it withheld from unmarried partners. The logic and analysis of the courts' reasons in the cases lead to the conclusion that family law statutes in Canada are invalid insofar as they grant to married partners rights that are withheld from unmarried partners, regardless of sexual orientation. The Supreme Court of Canada has not yet released its conclusions or reasons in *M v. H*, which should settle the issue.

The Alberta Court of Appeal engages in a more in-depth analysis of the issues in *Taylor v. Rossu* than did the Ontario

Court of Appeal in *M v. H.* However, both courts are assuming the legislatures' role to determine social policy within the province for matters falling within the scope of s. 92 of the *Constitution Act, 1867*. With respect, judges and the judicial process are ill-equipped to decide major social policy for a province or the country. Judges are limited by the case before them and the evidence that is presented in the case. Often the parties have insufficient resources to ensure that all points of view are addressed in court. As a result, courts depend on intervenors to broaden the perspective of the discussion. However, intervenors usually represent special interest groups, who cannot be counted on to provide a balanced view of the issues and problems involved. In *Taylor v. Rossu*, the Alberta Legislature did not participate in the appeal. Accordingly, the Court of Appeal did not have the benefit of the Legislature's reasons for maintaining the support provisions of the *Domestic Relations Act*.

The court relies on a study by Dumas and Belanger to show the large number of cohabiting partners who are affected by the support legislation or lack of legislation in Alberta. Quite aside from the issues of how the evidence was received, whether the statistics were accurate, whether the conclusions follow from the numbers and whether the numbers and conclusions remain, the report raises the question of whether the economic problems facing cohabiting couples when a relationship ends are sufficiently important to require judicial reversal of legislative policy.

Dumas and Belanger refer to a union of two people who cohabit as a "common law union". The Court of Appeal and most other courts also describe people who cohabit outside marriage as "common law" spouses. With respect, "common law marriage" is a term of art describing a form of marriage that complies with formal requirements of the common law. Cohabiting couples are not married in any sense of the word, and it is inaccurate for courts to describe the relationship as a common law union or the partners as common law spouses. By doing so, however, the courts are able to institutionalize cohabiting relationships and thus make it easier for them to justify extending legal rights to such relationships.

As the court points out, one of the problems of extending rights to unmarried couples is to define what type of relationship should generate "spousal" rights. One of the benefits of restricting rights to married partners is certainty. The people know that if they marry, rights and obligations are inherent in their relationship. It is more difficult to characterize unmarried relationships. How long must the relationship exist before its members have "spousal" rights against each other? How interrelated must the partners' lives be before they have formed a "common law" union? In *Nowell v. Town Estate* (1997), 35 O.R. (3d) 415, 30 R.F.L. (4th) 107 (C.A.), the Ontario Court of Appeal extended rights to a person who had been in a relationship that resembled a quasi-spousal relationship (whatever that is). The Alberta Court of Appeal recognizes the problem of defining those unmarried relationships that should be characterized as equivalent to marriage for family law purposes and suggests that the Legislature establish a workable definition. With respect, if the court was satisfied that a relationship existed that should be classed as equivalent to marriage, it should have defined the relationship. As it is, the Legislature is left to speculate what type of relationship justifies spousal rights. A person who is in a relationship similar to those the Legislature decides to characterize as "spousal" but omitted from them presumably will allege that the amended legislation is still unconstitutional.

Assuming Dumas' figures are accurate reflections of society, many people form "common law" unions with no intention of marrying. Arguably, these people want to be able to unwind their relationship easily and quickly if the relationship does not work. They do not want to undergo the problems married partners face when a marriage breaks down. Most of these problems involve support and property division. Divorce itself is almost a non-issue. Spouses can obtain a divorce after one year of separation by affidavit evidence. It is submitted that courts and legislators should intervene in a private relationship to impose legal obligations on people only in order to promote a valid social objective. Had the man in *Taylor v. Rossu* known that cohabitation would lead to support rights, he might not have been willing to cohabit.

Dumas and Belanger recognize that people cohabit for various reasons. Many people who cohabit end up marrying. They

acquire rights on marriage and do not need any extension of legislation to protect their interests. Others may wish to marry but for one reason or another are not able to marry. They are prohibited by law from marrying. Unless the reason for the prohibition is itself discriminatory under the *Charter*, should a court extend marital rights to people whom the law prohibits from marrying? The Alberta Court of Appeal does not address this question in *Taylor v. Rossu*. Other people do not marry because they do not want to be married. Should a court extend marital rights to people who refuse to marry for personal reasons? The Alberta Court of Appeal does not address this question in *Taylor v. Rossu*.

People who cohabit can agree to provide each other with rights akin to those married spouses enjoy by entering a domestic contract. The problem is that no agreement is possible if one person refuses to agree. If a person is willing to cohabit with someone who will not marry and will not agree to extend spousal rights, why should judges grant him or her spousal rights? The Alberta Court of Appeal does not address this question in *Taylor v. Rossu*.

The Alberta Court of Appeal accepts that in many cases women suffer economic disadvantage following the breakdown of an informal relationship, just as wives do when a marriage breaks down. Since wives are entitled to rights, someone in the position of a wife should acquire similar rights. Are cohabiting relationships so important to society as to justify the state's intervening in a private relationship and imposing rights on the parties that they did not consider or agree to themselves? The Alberta Court of Appeal does not address this question in *Taylor v. Rossu*. On the other hand, a court reasonably may impose rights on cohabiting couples to reduce the public cost of supporting one of the partners if the relationship breaks down and he or she is not able to support himself or herself. Either the public pays or someone else pays. If this is the reason for extending support rights to unmarried couples, then the entitlement and quantum rules should be different from those that apply to married couples. As well, it is not obvious that such a rationale justifies extending the provincial matrimonial property regime to unmarried couples.

The question of whether to extend rights to partners in quasi-spousal relationships involves complex social, political, religious and economic issues. With respect, such issues should be dealt with by the legislators, not the judiciary. That being said, it is probably too late to stop the inexorable process of judicial rewriting of family law. The legislators' inaction in most provinces forced the judiciary into the role of lawmakers to ensure that certain policy ends are achieved. Unfortunately, most judges are hesitant to identify just what social policy is achieved by granting support rights to unmarried spouses. Lots of people are dependent on others for financial or emotional support, but judges and legislators do not impose a legal obligation on one to support the other. Judges decided that unmarried couples resemble married couples and should have the same or similar rights as married couples and are prepared to use constitutional law to reform family law. If the legislators disagreed with the judges's actions, they could have invoked the "notwithstanding" clause in the *Charter* to validate their legislation. To date, no level of government has done so.

The reality is that many politicians are content to let judges make hard social decisions. The legislators and judges appear to have reached an uneasy compromise whereby judges will decide what relationships should be characterized as "quasi-spousal" and the legislators will accept the decision.

Some people hold social or religious views that militate against extending "spousal" status to unmarried couples. It is easy to dismiss these people as homophobic or religious zealots. However, they have as much right to their views as those advancing rights for unmarried couples have to theirs. Society must find a way to accommodate both interests. Historically, legislators have assumed this role. Now it appears that judges will do so. Few appellate courts in the 1990s have shown sympathy for traditional conservative family values.

The courts' use of "spousal" labels is unfortunate. The Ontario Legislature found out just how difficult it can be to convince "society" to extend spousal rights to non-spouses: cf. discussion of abortive legislation to extend spousal rights to

same sex couples in *M v. H*, supra. The labels evoke emotional responses that could have been avoided by using different language. For example, the courts created an equivalent-to-spousal property regime for unmarried couples through manipulating the law of unjust enrichment with much less furore than they caused by rewriting support legislation.

The Alberta Court of Appeal stopped short of rewriting the *Domestic Relations Act*. The court recognized the difficulty of defining the group who should receive "spousal" support rights and left it up to the Legislature to do so. The definition of the subject group is critical. If it is too narrowly defined, there will be another constitutional challenge. The courts control what violates the *Charter* since they interpret the *Charter*.

The court held that the provisions of the *Domestic Relations Act* were invalid insofar as they discriminated in favour of married couples and should be struck. The effect of striking the legislation is that no one is entitled to support. The effect of denying support to one group is to deny support to any group. This should be contrasted with the Ontario Court of Appeal's reaction in *M v. H*, where the court rewrote the legislation to remove the discrimination. In both cases, the effect of the declaration was stayed to give the Legislature an opportunity to provide a legislative solution. However, the stay is more form than substance.

In *M v. H*, if the Legislature declines to do what the Ontario Court of Appeal declared, the legislation will be declared invalid and rewritten. In Alberta, the Legislature is not likely to allow all support laws to be struck. Both legislatures have only two choices — do what the courts direct or invoke the "notwithstanding" clause in the *Charter*. Both legislatures will do what the courts direct, because it is easier than making the hard decisions themselves. The legislators may complain about what the judges did, but they are unwilling to decide how to deal with the issue themselves. The legislators have the power to override the courts if they are willing to make the hard decisions. They choose not to. Either the court decides, or no one deals with the issues. Legislatures have no one to blame but themselves if they do not like the direction in which judges are taking family law.

James G. McLeod

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Armstrong v. McLaughlin Estate (1994), 150 A.R. 343, 112 D.L.R. (4th) 745 (Alta. Q.B.) — applied

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Gostlin v. Kergin, 3 B.C.L.R. (2d) 264, 1 R.F.L. (3d) 448, [1986] 5 W.W.R. 1 (B.C. C.A.) — considered

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

s. 1 — considered

s. 15 — referred to

s. 15(1) — considered

Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1

s. 112(3) — considered

s. 112(4) — considered

Code civil du Québec, L.Q. 1991, c. 64

art. 633 — considered

1998 CarswellAlta 523, 161 D.L.R. (4th) 266, 216 A.R. 348, 175 W.A.C. 348, 39 R.F.L. (4th) 242, [1999] 1 W.W.R. 85, (sub nom. Rossu v. Taylor) 53 C.R.R. (2d) 219, 68 Alta. L.R. (3d) 213, 1 W.W.R. 85, [1998] A.J. No. 648, 1998 ABCA 193

Citizenship Act, R.S.C. 1985, c. C-29

Generally — referred to

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

Generally — considered

Domestic Relations Act, R.S.A. 1980, c. D-37

Generally — referred to

Pt. 2 — unconstitutional

Pt. 3 — unconstitutional

s. 6 — unconstitutional

s. 8 — unconstitutional

s. 15 — unconstitutional

s. 16 — unconstitutional

s. 16(1) — unconstitutional

s. 16(2) — unconstitutional

s. 22 — unconstitutional

Domestic Relations Act, R.S.N.W.T. 1988, c. D-8

Generally — referred to

s. 10 — considered

Education Act, R.S.O. 1990, c. E.2

Generally — referred to

Estate Administration Act, R.S.B.C. 1979, c. 114

Generally — referred to

Family Law Act, R.S.N. 1990, c. F-2

s. 35(c) "spouse" — considered

Family Law Act, R.S.O. 1990, c. F.3

Preamble — considered

Pt. II — referred to

s. 29 — considered

s. 30 — considered

Family Law Reform Act, S.O. 1978, c. 2

Generally — referred to

Family Law Reform Act, R.S.P.E.I. 1988, c. F-3

Generally — considered

Family Maintenance Act, R.S.M. 1987, c. F20; C.C.S.M. c. F20

s. 4(3) — considered

s. 4(4) — considered

Family Maintenance Act, R.S.N.S. 1989, c. 160

s. 2(m) "spouse" — considered

s. 3 — considered

s. 6(3) — considered

s. 31 — considered

Family Maintenance Act, S.S. 1990-91, c. F-6.1

s. 2 — considered

s. 4 — considered

Family Property and Support Act, R.S.Y.T. 1986, c. 63

s. 35 — considered

Family Relations Act, R.S.B.C. 1979, c. 121

Generally — referred to

s. 1 "spouse" (c) — considered

Family Relief Act, R.S.A. 1980, c. F-2

Generally — referred to

Fatal Accidents Act, R.S.A. 1980, c. F-5

Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

s. 10(1) "marital status" — considered

Insurance Act, R.S.O. 1990, c. I-8

Generally — referred to

Intestate Succession Act, R.S.A. 1980, c. I-9

Generally — referred to

Maintenance Order Act, R.S.A. 1980, c. M-1

Generally — referred to

Matrimonial Property Act, R.S.A. 1980, c. M-9

Generally — referred to

Succession Law Reform Act, R.S.O. 1990, c. S.26

Generally — referred to

Pt. V — referred to

Workers' Compensation Act, S.A. 1981, c. W-16

Generally — referred to

APPEAL by man from judgment reported at (1996), 44 Alta. L.R. (3d) 388, [1997] 1 W.W.R. 672, 140 D.L.R. (4th) 562, 191 A.R. 252, 39 C.R.R. (2d) 362 (Alta. Q.B.), which awarded interim spousal support to woman and declared provisions of the *Domestic Relations Act* that limited spousal support to married parties to be unconstitutional.

***Per curiam*:**

1 This appeal involves a challenge to the constitutionality of the support provisions of the Alberta *Domestic Relations Act*, R.S.A. 1980, c. D-37 (*DRA*). At trial, the Respondent Taylor successfully argued that her equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms (Charter)*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 were breached because the support provisions of the *DRA* applied only to legally married spouses. Taylor and Rossu lived together for some 29 years. By withholding the benefit of access to support from her, the trial judge held that the legislation discriminated on the basis of marital status. Reliance was placed on *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693, 13 R.F.L. (4th) 1 (S.C.C.) (cited to R.F.L.) (*Miron*), in which it was held that marital status was analogous to the prohibited grounds of discrimination enumerated in s. 15 of the *Charter*.

2 After finding that the word "spouse" in the *DRA* could not be interpreted as meaning both legally married and common law spouses, the trial judge held that the *Act* breached the respondent's *Charter* rights. His remedy was to read in "common law spouse" to the word "spouse" in the impugned provisions. He then awarded Taylor interim support. No trial has yet been held in this matter. Thus the claim for permanent support, as well as claims for a division of property, including an unjust enrichment action and a *Charter* challenge of the *Matrimonial Property Act*, R.S.A. 1980, c. M-9, remain outstanding.

3 The Appellant Rossu appeals that ruling.

Facts

4 Taylor and Rossu lived together between 1964 and 1994. For most of that period they resided in a Calgary house that Rossu had purchased prior to the commencement of the relationship. Taylor had a daughter from a previous relationship, and was having difficulties with her finances and with child welfare authorities when she met Rossu. Rossu's concern for the child's welfare played a large role in his decision to allow Taylor and her child to move into his home. He promised the child welfare authorities that he would provide for the child, and he believed it was incumbent upon him to honour this commitment.

5 During the relationship, Rossu assisted with the child's care and provided funds for her support, including paying for groceries, clothing and other items. The child lived with Rossu and Taylor until she married in her early twenties. Rossu also supported Taylor during the relationship while she assisted him with chores around the house. She worked during part of the relationship and the parties had a joint bank account for a four- or five-year period.

6 The parties had sexual relations throughout the first 25 years of the relationship, although they maintained separate bedrooms. Rossu's affidavit states that Taylor was repeatedly unfaithful to him. This caused difficulties between the parties, but Taylor allegedly answered Rossu's reproaches with comments to the effect that as she was not married to him, she was free to do whatever she wanted. Rossu states that he ceased having sexual relations with Taylor in 1989 because he was concerned about possible health consequences of her infidelity.

7 Rossu is now 68 years of age. The trial judge found his current income to be $1,506.00 per month. This income is composed of his pension from the Canadian Pacific Railway (C.P.R.), the Canada Pension Plan (C.P.P.) and Old Age Security (O.A.S.). He also has approximately $50,000.00 in R.R.S.P.'s. He lives alone in the house in which the parties cohabited, which is worth approximately $100,000.00.

8 Taylor is now 54 years of age. She suffers from bipolar affective disorder. This disorder causes cyclical manic and depressive episodes but can be treated with medication. She lives with her daughter. Her income is $549.00 per month from social assistance. At trial she claimed monthly expenses of $638.48 (including legal fees of $138.48) but at the appeal she quantified those expenses at $500.38 per month.

9 Taylor may have certain claims to Rossu's income beyond this litigation. She can apply for a division of his C.P.P. credits, which would have the effect of reducing his pension income, and entitling her to a pension at age 60. She has not yet applied for these credits because Rossu has disputed that she was his common law partner. It is unclear whether her pension entitlement is being eroded by this delay. In the event of his death, she would be entitled to a survivor's benefit of $433.00 from the C.P.R. If she predeceases him, she realizes no benefit. There also appears to be a survivor's benefit based on actuarial values under the O.A.S.

10 The trial of this action includes a constructive trust claim, a claim under the *Matrimonial Property Act*, and a

claim for permanent support. The property division and permanent support arguments are accompanied by *Charter* arguments comparable to the argument here. The Queen's Bench order under appeal granted Taylor interim alimony in the amount of $750.00 per month. It also prevented Rossu from dissipating his assets before the trial.

Queen's Bench Decision Under Appeal

11 The trial judge granted Taylor interim alimony in the amount of $750.00 per month. In doing so, he made the following findings that are the subject of this appeal:

> 1) that the support provisions of the *DRA* (sections 15, 16 and 22) breach s. 15 of the *Charter* by failing to include common law spouses;
>
> 2) that this breach of s. 15 cannot be saved under s. 1 of the *Charter*;
>
> 3) that the appropriate remedy is to read in "common law spouse"; and
>
> 4) that the correct quantum of support was $750.00 per month, which is approximately half of the payor's income.

Government of Alberta

12 The provincial Department of Justice has had notice of these proceedings but has declined to appear. The government's decision not to take a position on this challenge to their legislation warrants comment. It is exceedingly difficult for this Court to properly conduct a *Charter* analysis, particularly at the s. 1 stage, without submissions from government about the objectives and rationale of the legislation. Submissions on the broad and important public policy aspects of this issue would also have been invaluable. By choosing not to assist the Court on this important issue, the government has left it to the litigants and to the Court to determine the justification for the legislation. While Counsel have presented well-constructed arguments, they are clearly not in the best position to defend the legislation.

13 Taylor argues that we should infer from the government's absence that it cannot defend its legislation. She suggests that the support provisions of the *DRA* are unjustifiable. While this argument has some attraction, it is not compelling. Other explanations for the government's absence are conceivable. Indeed, during argument, counsel advised us that counsel for the government has been in regular telephone contact with them. We were invited to speculate that the government could benefit from a finding that the legislation is invalid because such a finding would create the potential for subrogated claims against former common law partners of welfare recipients. Hence, it was asserted that this would put the government in a position of conflict of interest. We decline to participate in this speculative exercise without any adequate evidentiary foundation. Therefore, we take nothing from the government's non-appearance other than the obvious; it has declined to take any position on the alleged breach or to offer any justification under s. 1 of the *Charter* for the impugned legislation if we were to find it in breach of the *Charter*.

The Legislation

Canadian Charter of Rights and Freedoms

14 Section 1 of the *Charter* states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15 Section 15 of the *Charter* states:

> 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.

16 Section 15 is widely understood to provide four rights. First, every individual is equal before the law. Second, every individual in equal under the law. Third, every individual has the right to the equal protection of the law. Fourth, every individual has the right to the equal benefit of the law. Each of these rights must be bestowed without discrimination.

Domestic Relations Act

17 The term "spouse" is not defined in the *DRA*. Section 15 of the *DRA* provides for applications for permanent alimony:

> 15. The Court has jurisdiction to grant alimony to either spouse in an action limited to that object only in a case where the plaintiff would be entitled to a judgment of judicial separation or a judgment for restitution of conjugal rights.

18 Section 15 thus contains a precondition to the award of support. The plaintiff must be entitled to either a judgment of judicial separation, or a judgment for restitution of conjugal rights.

19 Sections 6 and 8 of the *DRA* set out the circumstances under which a judgment for judicial separation may be obtained:

> 6(1) A judgment of judicial separation may be obtained from the Court by either spouse if the other spouse has since the celebration of marriage been guilty of
>
> (a) adultery,
>
> (b) cruelty,
>
> (c) desertion
>
> (i) for 2 years or upwards without reasonable cause, or
>
> (ii) constituted by the fact of the other spouse having failed to comply with a judgment for restitution of conjugal rights,
>
> or
>
> (d) sodomy or bestiality, or an attempt to commit either of those offences.
>
> (2) In this Act "cruelty" is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes any course of conduct that in the opinion of the Court is grossly insulting and intolerable, or is of such a character that the person seeking the separation could not reasonably be expected to be willing to live with the other after the other has been guilty of that conduct.

20 Section 8 of the *DRA* sets out the circumstances under which courts will refuse applications for judicial separation:

> 8. No judgment of judicial separation shall be granted when it is made to appear at the hearing of the case that the plaintiff has
>
> (a) in any case where judicial separation is sought on the ground ofadultery, been accessory to or connived at the adultery of the other party,
>
> (b) condoned the matrimonial offence complained of,
>
> (c) presented or prosecuted the claim in collusion with the respondent, or
>
> (d) during the existence of the marriage committed adultery that has not been condoned.

21 Section 22 of the *DRA* provides that support is also available in cases involving divorce and nullity:

> 22(1) When a decree of divorce or declaration of nullity of marriage has been obtained, the Court may order that either party, to the satisfaction of the Court, secure to the other party an annual sum of money for any term not exceeding the lifetime of the other party that the Court considers reasonable having regard to the fortune, if any, of that other party, the ability to pay of the party against whom the order is made, and the conduct of both parties.
>
> (2) If it thinks fit, the Court may in addition to or in the alternative order that one of the parties pay to the other during their joint lives a monthly or weekly sum for the other party's maintenance and support, that the Court thinks reasonable.
>
> (3) On a decree of divorce, an order may be made in favour of either party, notwithstanding that the party has been guilty of adultery.

22 Section 16 of the *DRA* deals with circumstances under which an application may be made for interim alimony. The relevant parts of the section are as follows:

> 16(1) When an application is made in an action for
>
> (a) alimony,
>
> (b) dissolution of marriage, or
>
> (c) a declaration of nullity, judicial separation or restitution of conjugal rights,
>
> an interim order for the payment of alimony to the plaintiff pendente lite may be made, and in the event of an appeal the alimony may be continued by a further interim order until the determination thereof.
>
> (2) No interim order shall be made if the plaintiff has from any source whatsoever sufficient means of support independent of the defendant...

Statistical and Social Context

23 Statistics Canada conducts a census every 5 years. Those statistics reveal a sharp upward trend in the prevalence

of common law unions over the last decade. Statistics Canada defines common law unions as unions,

> made up of two people who live together on a daily basis over an extended period of time, and who share privileges and obligations.
>
> (Dumas, Jean, "Report on the Demographic Situation in Canada in 1988", *Current Demographic Analysis* (Ottawa: Minister of Supply and Services, 1990) (*Dumas 1988*) at 24-26.)

24 Since this definition differs from that found in most Canadian statutes, all of the couples described as common law in the census would not necessarily be so described under the law of their respective provinces. Nonetheless, it is clear that common law unions are becoming more prevalent (*Dumas 1988, supra* at 21). In fact, the propensity of Canadians to live in common law unions increased 43% over the five years between 1981 and 1986 (*Dumas 1988, supra* at 23). There are some regional differences. For example, the Quebec prevalence rate increased 68% between 1981 and 1986, while in Alberta, it increased only 23% (*Dumas 1998, supra* at 23).

25 A 1984 survey showed that 46% of men and 43% of women who lived in a common law union later married their partner. Hence, cohabitation is not always a permanent alternative to marriage; it is frequently a prelude to marriage (Turcotte, Pierre, "*Common-law Unions: Nearly Half a Million in 1986", Canadian Social Trends*, Autumn 1988 (*Turcotte 1988*) at 39). More recent numbers indicate that:

> In 1990, about one-third (34%) of the population who had ever lived in a common-law union said their first union had ended in marriage, while 36% reported separation as the reason and 26% were still living in their first common-law union.
>
> (McDaniel, Susan, *General Social Survey Analysis Series: Family and Friends* (Statistics Canada, August 1994) (*McDaniel 1994*) at 14.)
>
> In 1990, 19% of currently married Canadians had lived common law with their spouse before marrying. ... The common-law experience among the married varied by age group. While 37% of people aged 18-29 and 28% of those aged 30-39 had lived common law before marriage, only 12% in the age group 40-49 and 4% of people aged 50-64 had done the same.
>
> (*McDaniel 1994, supra* at 12.)

26 The tendency of common law unions to end in marriage may be partially explained by the fact that the young make up a disproportionate number of the common law unions. As couples age, they are more likely to marry each other (46%) than to continue to live together (26%).

27 In 1995, Statistics Canada conducted a General Social Survey, which is a telephone survey of a relatively small sample of the Canadian population. Jean Dumas and Alain Belanger published the results of this survey in their "*Report on the Demographic Situation in Canada 1996*" in *Current Demographic Analysis* (Ottawa: Statistics Canada, 1997) (*Dumas and Belanger*). They report that in 1995, nearly two million persons, or 14.3% of all couples, were living in common law relationships. The annual rate of growth in common law relationships rose slightly in the period from 1991 to 1995 — to almost 10% (*Dumas and Belanger, supra* at 129-30). More than 6 million Canadians *had been* or still were in a common law union in 1995. They represented more than one quarter (26%) of the population aged 15 and over (*Dumas and Belanger, supra* at 136). Dumas and Belanger conclude:

> In summary, from 1981 to 1995 the number of people in common-law unions increased at an annual rate of 80.4 per

> 1,000, or 6.5 times more quickly than the married population, among whom the average annual increase was 12.5 per 1,000. To illustrate this remarkable 15-year-growth, consider that if the relative growth rates were maintained for the two groups, by the year 2022 there would be as many common-law couples as married couples. Thus, in half a century (1970 to 2020), marriage would have relinquished its place as the conjugal norm in Canada. Such a projection may seem extravagant, but in Quebec, where common-law unions are more widespread, common-law couples now constitute 25% of all couples; and the percentage is even higher among younger people (42% of Canadians under 30 living as a couple, 64% of Quebeckers in the same age group).
>
> (*Dumas and Belanger*, *supra* at 130.)

28 Dumas and Belanger also comment on a variety of qualitative aspects of cohabitation in 1995. They classify common law unions into six categories:

> (1) prelude to marriage (cohabitants marry within 1 year of setting up household);
>
> (2) trial marriage (cohabitation lasts more than one year but less than three);
>
> (3) unstable union (union which ends within 3 years without producing a child);
>
> (4) stable union, but without commitment (union lasts more than 3 years but cohabitants do not produce a child);
>
> (5) substitute for marriage (couples who produce a child within 3 years and remain unmarried for at least 6 months following birth); and
>
> (6) other (includes couples who converted their common law relationship into a legal marriage within 3 years but who had a child more than 6 months before the marriage, and couples whose union ended within 3 years without marriage, but who had a child before the relationship ended).
>
> (*Dumas and Belanger*, *supra* at 147-148.)

29 In relation to these categories, the authors state that half (51%) of common law unions, comprised of 36% stable unions without commitment and 15% substitutes for marriage, last longer than 3 years. The stable union without commitment is the most common type of union for both first common law unions and others. More than one-third (36%) of unions fall into this category. Just over one-quarter of common law unions were only a short-term stage prior to marriage (11% were a prelude to marriage and 16% were trial marriages), and 18% were classified as unstable (*Dumas and Belanger*, *supra* at 149).

30 Dumas and Belanger note that

> [c]ommon-law unions have changed considerably over the past 12 years. From around 1978 to 1990, the number of persons who established a first common-law union increased dramatically from 530,000 to 921,000. Despite this, the number of common-law unions that were quickly converted into marriages dropped 13% for preludes to marriage and 19% for trial marriages. Since the number of unions in the three other categories increased more rapidly than the overall number, the proportion of first common-law unions converted into marriage within three years fell dramatically: it dropped by half during the same period, from 38% of the total to 18%...
>
> The number of persons establishing common-law unions without any apparent intention of marrying more than doubled. For these people, common-law living is not another stage in the conjugal cycle, but a domestic arrangement

equivalent to marriage.

(*Dumas and Belanger*, *supra* at 151.)

31 Dumas and Belanger make a number of other observations. They note that the older the cohabitants, the more likely their union will be stable but without commitment. They state that an increasing proportion of all births take place out of wedlock (from 13% in 1980 to 30% in 1994), and that the average number of children born to women in common law unions is about 25% lower than for married women. Women whose parents separated before they were 15 are 77% more likely to form a common law union as a first union that those whose parents did not separate. Women who went to university are less likely to choose marriage as a first union, and women who gave birth to a child before forming their first union are 45% more likely to choose a common law union and 22% more likely to marry than women without children (*Dumas and Belanger*, *supra* at 153-176).

32 The authors conclude that the increase in the rate of common law unions logically coincides with the increase in the number of divorces. They state:

> The enthusiasm for common-law unions, or more precisely the disenchantment with marriage in Canada at the end of the 20th century, is not a chance occurrence. This disaffection appeared at the same time as the number of divorces began increasing because both phenomena result from the same thinking. After all, if legal authorities ... can agree to end a marriage and thus cancel the provisions associated with it, why would they not recognize couples that have not been formally legitimized?
>
> The tendency to reject marriage as a conjugal choice is evidently part of a social revolution — one of a series of rejections of institutions founded on a social order that is falling out of fashion ...
>
> (*Dumas and Belanger*, *supra* at 178.)
>
> Seen in this way, marriage is a union that can be annulled at any time without serious consequences. It is not surprising that, under such conditions, we have seen the spread of the unsolemn union that can only result from mutual consent and imprecise commitments.
>
> (*Dumas and Belanger*, *supra* at 179.)

33 Dumas and Belanger predict that there will be a continued increase in common law unions, although this increase may not be as rapid as it has been in the recent past (*Dumas and Belanger*, *supra* at 181).

Legislation in other Canadian Jurisdictions

34 Most Canadian jurisdictions have extended their family legislation to provide for support for common law partners. However, the definition of common law spouse is not consistent among jurisdictions. Some require a two year relationship and application within one year of separation, and others impose five, three or one year qualifying periods. One jurisdiction simply specifies a relationship of "some permanence". Most jurisdictions agree that partners who have had a natural child together constitute common law partners, and some provide that partners who have adopted a child together constitute common law partners.

35 The extension of rights and obligations to common law partners has been done on a piecemeal basis. For example, those jurisdictions which extend support rights and obligations to cohabitants do not always extend rights and obligations with respect to property division. None make provision for unmarried cohabitants in their intestacy legislation.

However, several jurisdictions (British Columbia, Manitoba, New Brunswick, Ontario, P.E.I., Saskatchewan, Northwest Territories and Yukon Territory) provide for unmarried cohabitants in their dependant relief laws.

36 Alberta is in the minority of Canadian jurisdictions, along with Quebec, Prince Edward Island and the Northwest Territories, which have not extended their support legislation to provide support for nonmarried cohabitants.

37 The following information concerning provincial legislation came from the helpful Appendix of Statutes in the looseleaf volume entitled *Cohabitation: The Law In Canada*, edited by Winifred H. Holland and Barbro E. Stalbecker-Pountney (Toronto: Carswell, 1990, updated in 1998, Release 1).

British Columbia

38 The *Family Relations Act*, R.S.B.C. 1979, c. 121, includes common law spouses in its definition of spouse in s. 1, but places a time limit on the exercise of that status. A "spouse" in the *Act* may include:

> [(c)]... a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

Kirstie J. MacLise, in an article entitled "Common Law Spousal Maintenance" in *Cohabitation: Property and Maintenance* (Continuing Legal Education Society of British Columbia, 1994) (*MacLise 1994*) notes at 2.1.03 that there is no requirement that the two years be continuous. It may be possible that a period totalling two years may be sufficient, even if a period of separation interrupts the cohabitation.

39 MacLise refers to issues which have arisen respecting that legislation, such as how to determine whether a couple lived together "as husband and wife". She cites *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (B.C. C.A.), in which Lambert J.A. stated at 268:

> If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.
>
> Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement?

40 Once it has been established that a couple fall under the definition of spouse, the British Columbia *Act* treats married and unmarried spouses equally for the purposes of support, but not with respect to matrimonial property.

Manitoba

41 The *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 4(3) extends support obligations to men and women who,

> not being married to each other, have cohabited continuously for a period of not less than five years in a relationship in which the applicant has been substantially dependent upon the other for support, if an application under this Act is made while they are cohabiting or within one year after they cease cohabiting ....

42 Section 4(4) provides that no application shall be made under s. 4(3) where the parties have made their own written agreement with respect to maintenance, including an agreement to waive maintenance.

New Brunswick

43 The *Child and Family Services and Family Relations Act*, S.N.B. 1980 c. C-2.1, s. 112(3) and (4), extends support obligations to either of a man and a woman who have cohabited "continuously for a period of not less than three years in which one person has been substantially dependent on the other for support," or who cohabited "in a relationship of some permanence where there is a child born of whom they are the natural parents." The parties must have cohabited within the year preceding application for support.

Newfoundland

44 The *Family Law Act*, R.S.N. 1990, c. F-2, s. 35 defines "spouse" to include, for support purposes,

> [(c)] a person who has cohabited with another person of the opposite sex for more than 1 year, and who has custody of a child born of the relationship.

Northwest Territories

45 The *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8, is similar to the Alberta legislation. Section 10 provides for support for a spouse "in an action solely for alimony only if the spouse would be entitled to a judgment of judicial separation." The *Act* does not define "spouse" in regard to support actions.

Nova Scotia

46 The *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m) defines "spouse" as,

> a person married to another person and, for the purpose of this Act, includes a man and woman who, not being married to each other, live together as husband and wife for one year.

47 Section 3 permits a court to order one spouse to pay maintenance to the other. Married and common law spouses are therefore treated equally..

48 Section 6(3) provides that the right to maintenance is forfeited when the spouse marries, remarries, or lives together with another person as husband and wife.

49 Section 31 provides that the Court may consider the terms of any agreement respecting maintenance payable to a party, but is not bound by the agreement if the Court is of the opinion that the agreement is not in the party's best interests.

Ontario

50 The support provisions of the Ontario *Family Law Act*, R.S.O. 1990, c. F[.]3, have been extended in ss. 29 and 30 to a man and a woman who have cohabited continuously for not less than three years, or cohabited in a relationship of

some permanence in which they are the natural or adoptive parents of a child.

51 The preamble to the *Act* provides:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; 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 breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.

52 Recent Ontario cases have allowed support applications in a wide range of cases. In *Thauvette v. Malyon* (1996), 23 R.F.L. (4th) 217 (Ont. Gen. Div.), the man had four children from a previous relationship, and exercised access to them three days a week at his own residence. The woman had custody of her own three children, and they lived in a house the man purchased for them. The parties thus maintained separate residences, although the man slept at the woman's house during the four nights of the week he did not have his children. The Court found that the parties were in a common law relationship because their relationship was a committed one, including wedding bands, because the woman provided household services, and because the parties provided economic support to each other. Their desire to keep their children separate was not fatal to their status as spouses, and neither was their maintenance of separate residences.

53 While cohabitants are protected by statutory support provisions in Ontario, they are excluded from other benefits provided to married couples. For example, the parts of the *Act* dealing with division of property apply only to married couples. Cohabitants must make an unjust enrichment argument for property division (Holland, Professor Winifred H., "Marriage and Cohabitation - Has the Time Come to Bridge the Gap?", *Family Law: Roles, Fairness and Equality* (Special Lectures of the Law Society of Upper Canada, 1993) (*Holland 1993*) at 371). In addition, cohabitants are unable to access Part II of the *FLA*, which deals with occupational and other rights in the matrimonial home. They are not protected by the spousal intestacy provisions in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. Part V of that *Act* gives them the same status as other, non-spousal dependants (*Holland 1993*, *supra* at 377).

54 Professor Holland observes, however, that

> [t]he *Equality Rights Amendment Act, 1986* amended the definition of the term 'spouse' in a number of different statutes to include cohabitees. This statute was passed to bring Ontario statute law into conformity with s. 15(1) of the *Charter*, a fact expressly recognized in the heading to the statute. It must have been assumed by the Ontario government that marital status was an included head within s. 15(1).
>
> (*Holland 1993*, *supra* at 383 (footnotes omitted)).

55 Professor Holland also notes that the Ontario *Human Rights Code* extends its definition of marital status to non-married cohabitants. In s. 10(1), it defines marital status as:

> the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.
>
> (*Holland 1993*, *supra* at 383 (footnotes omitted)).

56 In 1993, the Ontario Law Reform Commission issued its Report on the Rights and Responsibilities of Cohabitants. It recommended that heterosexual cohabitants should have the same rights and responsibilities as married spouses throughout the *FLA*. Professor Holland states with respect to this Report:

> The Commission also proposes adopting the concept of a 'registered domestic partnership'. This would provide a mechanism for opting into the *Family Law Act*. It would be available to same sex couples, heterosexual couples and indeed any couple (for example two sisters) who wish to avail themselves of the opportunity to register as domestic partners. Appropriate formalities must be observed, the partners must be at least 18 years of age and not be already married or in a registered domestic partnership with another. Failure to comply with such requirements would render the agreement void. Registered domestic partnerships can be revoked unilaterally upon giving notice to the other partner. Presumably this option would be used by heterosexual cohabitants who have not lived together for three years (or whatever period is specified in the legislation) and not the parents of a child.
>
> (*Holland 1993*, *supra* at 398.)

57 We note that under the Commission's proposals, an individual would lack the capacity to enter a registered domestic partnership if he or she were already married or in a registered and unrevoked domestic partnership with another. There are even greater controls on legal marriage. Not only does a married person lack the capacity to enter a new marriage, but the criminal law prohibits bigamy. There are no comparable rules in place governing common law unions and the informal, unregistered nature of common law unions would make such laws challenging both to draft and to administer. We will return to the topic of capacity in the Remedy section of this judgment.

Prince Edward Island

58 The *Family Law Reform Act*, R.S.P.E.I. 1988, c. F-3, does not appear to extend support obligations to common law spouses.

Quebec

59 Article 633 of the *Civil Code of Quebec* provides that "Spouses, and relatives in the direct line, owe each other support", but the word "spouse" does not apply to a common law spouse. Under Quebec law, an unmarried partner may not claim support from his or her partner (Nicholas Bala and Marlene Cano, "*Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together*" (1989) 4 C.F.L.Q. 147 at 205; James G. McLeod, Annotation to *B. (G.) c. G. (L.)* (1995), 15 R.F.L. (4th) 201 (S.C.C.) at 223).

Saskatchewan

60 The *Family Maintenance Act*, S.S. 1990[-91], c. F-6. 1, ss. 2 and 4, extend support obligations to "either of a man and woman who are not married to each other and have cohabited as husband and wife; (a) continuously for not less than three years; or (b) in a relationship of some permanence, if they are the birth or adoptive parents of a child." Once status has been established, all spouses are treated equally under the *Act*.

Yukon

61 The *Family Property and Support Act*, R.S.Y.T. 1986, c. 63, s. 35, specifically provides that

> Either of a man or woman who, not being married to each other and not having gone through a form of marriage with each other, have cohabited in a relationship of some permanence, may, during cohabitation or not later than three months after the cohabitation has ceased, apply to a court for an order for support, and where the court is satisfied that an order for support is justified having regard to the need of the applicant for and the ability of the respondent to provide support, the court may determine and order support in accordance with this Act in the same manner and subject to the same considerations as apply in the case of an application under s. 34.

1998 CarswellAlta 523, 161 D.L.R. (4th) 266, 216 A.R. 348, 175 W.A.C. 348, 39 R.F.L. (4th) 242, [1999] 1 W.W.R. 85, (sub nom. Rossu v. Taylor) 53 C.R.R. (2d) 219, 68 Alta. L.R. (3d) 213, 1 W.W.R. 85, [1998] A.J. No. 648, 1998 ABCA 193

Alberta Law Reform Institute Recommendations

62 The Institute has conducted a number of projects relating to common law spouses over the last fifteen years, five of which are discussed below.

1. 1984 - Survey of Adult Living Arrangements: A Technical Report

63 In 1984, the Institute commissioned a study of cohabitation. It published the results in *Survey of Adult Living Arrangements: A Technical Report* (Research Paper No. 15, November 1984) (*1984 Survey*). While dated, the Survey contains invaluable information on the make-up of common law unions amongst urban (Calgary and Edmonton) Albertans aged 16+, and the Institute itself continues to rely on it. The study defined nonmarried cohabitants as:

> persons living with an unrelated partner of the opposite gender for six months or more. In addition, the relationship must have included at least one of the following characteristics: sexual intimacy, the provision of emotional support, the presence of dependent children in the home, the holding of property in common, or the pooling of resources.
>
> (*1984 Survey*, *supra* at i.)

64 The main findings listed on pages (ii) to (v), include the following:

> 1. 27.1% of respondents had at one time cohabited nonmaritally with an unrelated member of the opposite gender for a period of six months or more.
>
> 2. Three-quarters of nonmarried cohabitants were under 35. On average they are younger than married cohabitants.
>
> 3. Nonmarital cohabitational relationships last an average of 2.08 years.
>
> 4. Married cohabitational relationships last an average of 13.33 years.
>
> 5. Over one-half of nonmarried cohabitants described their relationship as "a common law marriage". Most of the remainder called it "a close personal relationship".
>
> 6. The education level of nonmarried cohabitants in relationships less than two years was similar to that of their married counterparts. The education level of nonmarried cohabitants in relationships longer than two years was lower than that of their married counterparts.
>
> 7. Nonmarried cohabitants report lower family income than married cohabitants in relationships of comparable duration.
>
> 8. Nonmarried male cohabitants are more likely to be unemployed than are married male cohabitants in relationships of similar duration.
>
> 9. Nonmarried female cohabitants are more likely to be employed or students, and less likely to be homemakers, than are married female cohabitants in relationships of similar duration.
>
> 10. One-third of nonmarried cohabitants report having been previously married, as opposed to only one-tenth of married cohabitants.
>
> 11. Nonmarried cohabitants report having separate bank accounts more often and joint bank accounts less often than

their married counterparts.

12. Nonmarried cohabitants are less likely to own a home than married cohabitants in relationships of similar duration. Those nonmarried cohabitants that do own a home are less likely to claim joint ownership than are married cohabitants.

13. The break up of marriages was reported to cause more economic difficulties than the break up of unmarried cohabitational arrangements.

14. There was a high degree of consensus that nonmarried cohabitants should not have the same adoption rights as married couples; and that surviving children of a "common law union" should be entitled to rights on intestacy.

15. There was a relatively weak degree of consensus about whether nonmarried cohabitants should have the same rights as married cohabitants in contesting the estate of a deceased cohabitational partner; and about how to handle property division when a nonmarital cohabitation ends.

16. There was a high degree of consensus that agreements between nonmarried cohabitants should be legally binding in matters such as child care, property division, sharing expenses and arrangements for break-up. There was little consensus on whether agreements in such matters as sexual conduct or household chores should be legally binding.

65 In 1984, the prevalence of urban Albertans aged 16+ who were cohabiting nonmaritally was 6.2%. The prevalence of urban Albertan *couples* who were cohabiting nonmaritally was 8.8% (*1984 Survey*, *supra* at 20). In addition,

> the present study reveals that a total of 27.1 percent of urban Albertans have at one time or another cohabited nonmaritally with an unrelated partner of the opposite gender for a period of six months or more. ... Among 'now married' respondents, 20.7 percent report that they had lived with their present spouse for six months or more before marrying. Among all respondents, 10.8 percent report that they had lived for a period of six months or more with an unrelated partner of the opposite gender with whom they are no longer living.
>
> (*1984 Survey*, *supra* at 22.)

66 Almost all (95.1%) nonmarried cohabitants had been living with their current partner for 10 years or less. In contrast, the majority (60.5%) of married cohabitants had been living with their current partner for more than 10 years. The Institute suggests this difference could be due to differences in the nature of the relationship, or to the recent popularity of nonmarital cohabitation. The average duration of nonmarried cohabitations was 2.08 years, and the average duration of marriages was 13.3 years (*1984 Survey*, *supra* at 25).

67 The difference in duration may also correspond to the age difference. Approximately three-quarters of nonmarried cohabitants were between 16 and 35. In contrast, the majority of married cohabitants were over 35. The Institute suggests this could reflect a contemporary view of courtship, or the recent popularity of nonmarital cohabitation as an alternative to marriage (*1984 Survey*, *supra* at 27-30).

68 The Institute reported that "there is an overall tendency for more nonmarried males to be unemployed and more nonmarried females to be employed relative to their married counterparts. In addition, nonmarried females are more likely to be in the labour force and less likely to be full-time homemakers than married females" (*1984 Survey*, *supra* at 35). This finding is interesting because it tends to indicate that married women are more financially vulnerable to relationship breakdown than nonmarried women.

69 Further, the Report provides that:

> Although the overall frequency was low, nonmarried cohabitants reported more difficulty in getting government benefits and employee benefits than did their married counterparts. Also, nonmarried females reported more difficulty in getting alimony and/or child support from a former spouse, whereas nonmarried males reported more difficulty in meeting claims for money or property made by a former spouse than did married respondents
>
> (*1984 Survey*, *supra* at 63).

70 In general, the Report suggests that "marriage breakups seemed to generate more economic difficulties than did the break up of a nonmarital living arrangement. There were, however, few if any substantial differences in the reporting of these difficulties which could be associated with the respondents' current ... living arrangements" (*1984 Survey*, *supra* at 63).

71 There are few differences in how male and female nonmarried cohabitants in relationships of less than two years describe their relationship. However, females in nonmarital relationships of more than two years describe their relationships as 'common law marriages' more often (65.9%) than males in long nonmarital relationships (54.5%). The Institute suggests that the use of the term 'common law marriage' may indicate that the parties regard their relationship as an alternative to marriage rather than a mere precursor, or extended form of courtship (*1984 Survey*, *supra* at 28).

72 The Institute concludes that:

> Nonmarried and married cohabitants alike rated love as the most important reason for choosing to live with their partner or spouse, both at the time the decision to cohabit was made and later. Companionship was rated second by nonmarried cohabitants and third, behind personal commitment, by married cohabitants.
>
> Although love and companionship were rated very highly by both nonmarried and married cohabitants, nonmarried cohabitants, on average, rated these reasons as being less important at the time the relationship was established than did married cohabitants.
>
> An important reason for about one-quarter of the nonmarried cohabitants was that one or the other partner was not legally free to marry. In general, however, avoiding the legal commitment that marriage involves was rated as a fairly important reason by nonmarried cohabitants. Married respondents, in contrast, reported that the legal commitment involved in marriage was a fairly important consideration for them.
>
> In general, the response patterns seem to suggest that nonmarried cohabitants, on average, are somewhat less committed to their living arrangement than married cohabitants. Nonmarried cohabitants, for example, placed a fair degree of 'importance' on the fact that they didn't really plan the living arrangement that they are now in, and that one of their considerations for staying in the relationship is its convenience. Neither of these considerations were rated very highly by married cohabitants.
>
> However, nonmarried cohabitants who described their living arrangement as 'a common law relationship' rather than as 'a close personal relationship' responded more like married cohabitants. For example, they rated such considerations as avoiding the legal, personal and social commitments that marriage involves, and convenience as less important than did those who described their living arrangement as 'a close personal relationship.'
>
> Interestingly, the gender of the respondent did not appear to have much influence on the ratings that were given. One exception was that married females tended to rate the personal and legal commitment that marriage involves higher

than married males.

(*1984 Survey*, *supra* at 73-75.)

73 The respondents in this survey were asked whether nonmarried cohabitants should have the same rights as married cohabitants in various areas. A score of "+3" would mean strong feelings that they should have the same rights. A score of "0" would mean no opinion. Many of the respondents indicated their opinions depended on the duration of the relationship. If a nonmarried couple had not been together for very long, the respondents felt they should have fewer rights (*1984 Survey*, *supra* at 77-78). We reproduce some of their findings as follows:

LEGAL RIGHT	MEAN	MEDIAN
1. Adoption of children	-1.05	-2
2. Paternal rights to make decisions on raising child (education, religion, medical treatment)	+0.97	+2
3. Intestacy rights for surviving partner	+0.30	+1
4. Intestacy rights for surviving children	+1.64	+2
5. Challenging partner's will	+0.36	+1
6. Division of property upon breakup	+0.52	+1
7. Support payments to dependent partner upon breakup	0.00	0

2. 1987 - Towards Reform of the Law Relating to Cohabitation Outside Marriage

74 In 1987, the Institute published an issues paper entitled *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (Issues Paper No. 2, October 1987) (*1987 Issues Paper*). The issues paper contains a research paper prepared for the Institute by Professor Christine Davies which expresses the view that support rights and obligations should not be extended to unmarried cohabitants (*1987 Issues Paper*, *supra* at 63-68). Her view is that the element of choice distinguishes unmarried from married cohabitants, and therefore disparate treatment of the two groups is acceptable. The Institute carefully refrained from officially endorsing her paper, saying the Board had not yet given it final endorsement, although it was in sympathy with many of the recommendations. The Institute therefore issued it as a well written and researched basis for discussion in a complex and controversial area. (In 1995, the dissent in *Miron v. Trudel* accepted the argument based on choice. However, that argument was rejected by the majority in that case, who concluded that the flip side of choice for one partner is the exploitation of the other partner.)

3. 1989 - Towards Reform of the Law Relating to Cohabitation Outside Marriage

75 In their 1989 Report (Report No. 53, June, 1989) (*1989 Report*), the Institute recognized that unmarried cohabitants were inadequately protected under Alberta law, but did not recommend that they be treated as married couples for two main reasons. First, it did not want to undermine the status of marriage and create more transitory relationships. Second, it seemed "wrong in principle to impose on people a status they have chosen to avoid." Rather it opted to consider individually each statute affecting cohabitants, and recommend only those reforms required to address inequity and cure hardship. "Cohabitants would not be considered married before the law, but *where necessary*, would be given the rights and obligations of married persons." (*1989 Report*, *supra* at iv) (emphasis in original.)

76 The Institute defined the cohabitation relationship for most purposes as a relationship "between a man and a woman who are living together on a *bona fide* domestic basis, but who are not married to one another." (*1989 Report*, *supra*

at iv.) It tightened this definition with regard to its recommendations on the *Fatal Accidents Act*, the *Workers' Compensation Act*, and the *Employment Pensions Act*. For those Acts, a cohabitant was a "person of the opposite sex who lived with that other person for the three years immediately preceding the relevant time and was, during that period, held out by that person in the community in which they lived as his consort." (*1989 Report*, *supra* at iv.)

77 The Institute noted that Alberta had no provision for support between cohabitants. It recommended that support be available to unmarried cohabitants only where it is reasonable that such an order be made, and:

> (i) the applicant for maintenance has the care and control of a child of the cohabitational relationship and is unable to support himself or herself adequately by reason of the child care responsibilities; or,
>
> (ii) the earning capacity of the applicant has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to re-adjust his or her life.

(*1989 Report*, *supra* at 19.)

78 Further the Institute recommended that any spousal support awarded to an unmarried cohabitant be a time-limited obligation. If spousal support was granted under (i) it should terminate when the child reached age 12, or, if the child was handicapped, when the child reached age 16. If the support was granted under (ii), the duration of the maintenance order should be limited to three years. It also recommended that an application could not be made by a person who, at the time of the application, had entered into a subsequent cohabitational relationship or had remarried (*1989 Report*, *supra* at 18-19).

4. 1993 - The Domestic Relations Act: Phase 1: Family Relationships: Obsolete Actions

79 This report was released in March 1993 as Phase 1, Report No. 65, of the Institute's ongoing work on the *Domestic Relations Act*. It deals with obsolete actions under the *DRA*. It recommends the abolition of actions for restitution of conjugal rights, for judicial separation and those involving tortious liability for interference with family relationships.

80 Phase 2 of this report will deal with the support provisions of the *DRA*, and is expected to be released shortly.

5. 1996 - Reform of the Intestate Succession Act

81 The Law Reform Institute has recently done some work on reforms to the *Intestate Succession Act*, and as part of this work has reviewed changes in family structures over the last thirty years. The report (Report for Discussion No. 16, January 1996) (*1996 Report*) states:

> Although the history of marriage is fascinating, for our purposes we need only look back at the changes that have taken place in this century, and, more importantly, in the last 35 years. Since the 1960s, the following trends have been observed: marriage is happening with less frequency (in fact more people are choosing not to marry at all), is occurring later in life, and is more often ending in divorce. The changes in the last 35 years in respect of marriage and divorce are nothing short of remarkable.
>
> The marriage rate, measured as marriages per 1,000 population, has varied over the last 70 years. It reached an all-time low of 5.9 marriages per 1,000 population in 1932 when Canadians put off marriage because of the lack of jobs in the Great Depression. It rebounded to a high of 10.9 during the Conscription Crisis of 1942. The fact single men were drafted before married men contributed to this high level. It reached this level again upon the return of the veterans from World War II. Since the mid-1940s, the marriage rate has declined, with the exception of a brief rally in

> the early 1970s. The marriage rate of 1990 is 7.1, which is very close to the marriage rate of the 1920s.
>
> The average age at first marriage has also varied over time. From 1921 until 1940 the average age of males at first marriage was near 28 and for females was near 24.5. From 1940 until 1960, the average age at first marriage for both sexes fell to 25.4 and 22.6 respectively. Since 1960 the average age at first marriage has steadily risen so that in 1990 the average age at first marriage for males was 27.9 and for females was 26. In fact, first marriage rates for teens and people in their early twenties has fallen dramatically. As will be discussed later, common law relationships have replaced marriage in the early conjugal years.
>
> (*1996 Report*, *supra* at 21-22 (footnotes omitted)).

82 This report estimates the number of Canadians aged 15 years or older who lived in a common law relationship in the years 1981, 1986 and 1991 as follows:

1981	713,215
1986	973,880
1991	1,451,905

83 In 1991, 60% of all Canadians in common law unions were under age 35. At the same time in Alberta there were 119,900 people in common law unions, which represents 10.2% of all couples in Alberta. Of the people in common law unions, 64.6% were under age 35 (*1996 Report*, *supra* at 26).

84 The Report quotes at 27 the Vanier Institute of the Family as follows:

> People under the age of 35 who are living common-law typically have never been married. Between the ages of 35 and 64, most people living common-law are legally separated or divorced, whereas most seniors in common-law relationships are widowed. From examining the patterns, we see that among people in common-law relationships, the never-marrieds decrease with age, the widowed increase with age, and the divorced and separated component peaks in the middle of the age scale.
>
> (The Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa: Vanier Institute, 1994) at 43.)

It then concludes that since

> individuals who are living in a common-law union are generally young and single, it is not surprising to learn that the majority of common-law couples have no children living at home and the majority of common-law couples without children living at home are childless. The age of cohabitants is also reflected in home ownership statistics. The majority of common-law couples are renters.
>
> (*1996 Report*, *supra* at 27-28 (footnotes omitted)).

85 Apparently the intention of the parties is the paramount consideration in the intestacy context, and the Report goes on to pose (and answer) certain questions:

> Does the cohabitant wish to leave his or her estate to the partner of the common-law union? The answer depends upon the level of attachment and attitude towards the relationship. Is cohabitation a relationship that precedes marriage or is it an alternative to marriage? What signals the blending of two economic units: marriage, the common-law

union or a certain period of cohabitation within a common-law union?

(*1996 Report*, *supra* at 28.)

86 Relying on a Statistics Canada publication by Jean Dumas and Yves Peron entitled *Marriage and Conjugal Life in Canada: Current Demographic Analysis* (Ottawa: Statistics Canada, 1992) to answer some of these questions, the Report finds that half of the common law unions formed in 1970 resulted in marriage. In addition, "[f]ew single Canadians have lived in a common law relationship with their first partner for very long." (*1996 Report*, *supra* at 29.) According to Dumas and Peron, "[m]ost first common law unions between singles led quite rapidly to either marriage or separation." (Quoted in *1996 Report*, *supra* at 29.) It also quotes at 29 the conclusions of Dumas and Peron's analysis as follows:

> For the past two decades, the institution of marriage has been in turmoil. Marriage has been less and less a prerequisite to establishing a couple, and had tended to vanish from early conjugal life. Marriage also seems increasingly fragile, as marriage breakdown occurs more frequently and with increasing ease. Nevertheless, marriage still retains a certain appeal among those who had disputed its necessity and its permanency. The majority of singles who had lived common law married eventually and many divorced person [sic] remarried. For these two reasons, Canadians continue to marry, at rates greater than expected, and marriage remains an important part of the conjugal life of Canadian men and women.
>
> However, the situation could worsen during the coming years. Births outside of marriage account for an increasing proportion: from 11% in 1977 to 22% in 1988. This growth would indicate that having children is considered acceptable by more and more couples living common law. Now that the legal distinction between a legitimate and illegitimate child has been eliminated, the main obstacle to having children outside marriage has been removed. Furthermore, financial and social law until now often favoured unmarried couples over married couples. Under these circumstances, common-law unions may become a durable substitute for marriage.
>
> (Statistics Canada, *Marriage and Conjugal Life in Canada: Current Demographic Analysis*, at 104.)

The Report takes exception to Dumas and Peron's conclusion, stating,

> The last paragraph is speculative. The problem is we need more time to see whether common-law unions will become an alternative to marriage as opposed to a prelude to marriage, which is the purpose they now usually serve.
>
> (*1996 Report*, *supra* at 29.)

Court Request for Supplementary Submissions

87 The Court requested supplementary submissions from the parties in several areas. In doing so, it was not our intention to invite new causes of action. Rather, we were seeking information regarding the availability of alternate relief.

Equitable Arguments

88 We asked the parties for submissions on the potential application of equitable principles to the issue of support for unmarried cohabitants. We thank the parties for their efforts in this area, but have decided that it would be inappropriate for this issue to be dealt with at this stage of the proceedings. In particular, since there has been no trial of this matter, there is insufficient evidence before the Court to permit us to assess the merits of an equitable claim in this case. In addition, providing interim relief on this basis would require the Court to presume a breach of fiduciary duty or unjust enrichment. Perhaps a case could be made for such a presumption where some property division is likely, or some contribution

made which enhances, benefits or privileges one party at the expense of the other. However, since Taylor's contribution to the relationship is disputed, and Rossu argues that Taylor has already been compensated for her housework since he supported her and her child by another man, such a presumption would be premature at this time. We decline to make a finding as to the applicability of equitable principles in either this case or this area of law. Our decision does not render this issue *res judicata*. The parties may raise equitable arguments contained in their pleadings at trial and will then have the opportunity to present the required evidence.

Maintenance Order Act Arguments

89 We also asked the parties for submissions on the potential application of the *Maintenance Order Act* (*MOA*) to the issue of support for unmarried cohabitants. Again, we thank the parties for their efforts, but we have decided that it would also be inappropriate for this issue to be dealt with at this stage. We base this decision on the fact that this *Act* was not raised in the pleadings, it was not argued in front of *the chambers judge*, and the parties have had no opportunity to adduce evidence on its applicability. This decision does not render the issue *res judicata*. The parties may raise this *Act* in their pleadings and argue its applicability at the Queen's Bench level. They will then have the opportunity to adduce the required evidence at trial. The trial judge may determine whether the terms "husband" and "wife" in the *MOA* can be interpreted to include common law partners, and, if not, whether the *Act* thereby breaches the *Charter*. The *MOA* has its own unique history, and evidence on this history may relate to the goal or object of the statute, which is a primary consideration in a s. 1 *Charter* analysis.

Domestic Relations Act

Statutory Interpretation

90 As stated above, the *DRA* does not define the word "spouse". Thus, Taylor's first argument was that the word "spouse" could be interpreted as including unmarried cohabitants. The trial judge rejected this argument. He held that the legislature did not intend to include unmarried cohabitants in the definition of "spouse". We note that those Canadian jurisdictions which have extended support rights to unmarried cohabitants have done so expressly through the revision of their legislation. In addition, there is little consistency in the definitions of common law spouse in the jurisdictions which have amended their legislation. Specifically, they have each defined "common law spouse" as requiring a certain qualifying period of cohabitation, but the periods range from a cohabitation of "some permanence" to a cohabitation of five years. Periods of one, two and three years are also used. Some provide that application for support must be made within three months, or within one year, after the cessation of cohabitation. Most jurisdictions recognize relationships of some permanence in which there is a child of the relationship.

91 Justice Richard of the Northwest Territories Supreme Court considered whether the word "spouse" could be interpreted as including "common law spouse" in the case *Andre v. Blake*, [1991] N.W.T.R. 351, 37 R.F.L. (3d) 322 (N.W.T. S.C.). He held that it could not since the ordinary meaning of the word "spouse" is a person joined in lawful marriage to another person. Veit J. distinguished this case in the context of the Alberta *Family Relief Act* in *Armstrong v. McLaughlin Estate* (1994), 112 D.L.R. (4th) 745, 150 A.R. 343 (Alta. Q.B.), but her decision was overturned on appeal on other grounds: (1995), 130 D.L.R. (4th) 766, 178 A.R. 125 (Alta. C.A.). In our view, the following reasoning of Richard J. is applicable in Alberta:

> In interpreting the word "spouse," the court must give effect to the ordinary meaning of the word, in the general context of the statute, unless to do so produces a result which is contrary to the purpose of the statute: see Sir Rupert Cross, ***Statutory Interpretation***, 2d ed., (London: Butterworths, 1987) p. 47. And the court must not read in words that are not in the statute unless they are necessarily there by implication: Cross, p. 47.

(*Andre v. Blake*, *supra* at 326-327 (R.F.L.).)

92 The ordinary meaning of the word "spouse" is a person who is joined in lawful marriage to another person. Richard J. stated that the "French word conjoint used in the statute has the same ordinary meaning". To give effect to this ordinary meaning of the word "spouse", it cannot be said to produce a result which is contrary to the purpose of the statute. Further, it cannot be said that the legislature, by using the word "spouse", was by inference, including "cohabitee". As Richard J. stated:

> If the legislature had intended that a cohabitee be considered a spouse for the purposes of this statute, then such an intention would have been clearly expressed in the statute, or by a subsequent amendment to the statute.
>
> When one looks to other statutes in pari materia, one indeed finds that the legislature can, and does, distinguish between a spouse and a cohabitee. Both the [Northwest Territories] ***Dependants Relief Act***, enacted in 1971 ... and the [Northwest Territories] ***Criminal Injuries Compensation Act***, enacted in 1973 ... define a "dependant" to include a cohabitee in addition to a spouse, for purposes of those statutes. In the [Northwest Territories] ***Workers' Compensation Act***, in 1974 ... the legislature provided for compensation to be paid to a cohabitee, separate and distinct from compensation to be paid to a spouse.
>
> It is for the legislature, if and when it sees fit, to amend the ***Maintenance Act*** to include cohabitees (as the legislature might specifically define that term) within the ambit of the legislation; however, the legislature has not done so. The Court must interpret and apply the legislation as it is written at present, not as it might be written.
>
> (*Andre v. Blake*, *supra* at 327 (R.F.L.).)

93 In our view, it is not for this Court to interpret the word "spouse" as encompassing "common law spouses who have cohabited for at least [a certain period of time]" when there is clearly no consensus on the appropriate duration of cohabitation. We agree with the trial judge that the word "spouse" in the support provisions of the *DRA* cannot be interpreted as including "common law spouse".

The Charter Challenge

94 Taylor argued that the exclusion of support provisions for unmarried cohabitants breached her s. 15(1) equality rights, and that this breach could not be justified under s. 1. She relied primarily on the majority finding in *Miron* that marital status is analogous to the prohibited grounds of discrimination enumerated in s. 15(1).

95 There are two themes underlying the parties' arguments. Taylor's theme emphasizes dependency. She argues that the legislation is intended to relieve dependency following the breakdown of relationships, and the presence or absence of legal marriage therefore ought not be determinative of support obligations. Rossu's theme centres on freedom of choice, and responsibility for that choice. He argues that many unmarried cohabitants may have deliberately chosen to avoid marriage in order to avoid the legal obligations of marriage. A party to such an unmarried cohabitation ought not to have marital obligations thrust upon him or her against his or her will. On the contrary, both parties chose to enter a relationship other than marriage, and this choice, along with its consequences, should be respected. He argues that where the legislature is faced with two equally valid policy alternatives, in this case protecting choice or protecting dependent partners, the Court should not interfere with the legislative decision.

96 We note that the majority in *Miron* expressly rejected the argument that marital status is a matter of free choice. They held that, along with the reluctance of one's partner to marry, religious, financial and social reasons can prevent an

individual from marrying. We agree that the decision of whether to marry is not made in a vacuum, and the will of one's partner or legal impediments can thwart a plan to marry. Clearly, however, the individual retains the right not to cohabit in that situation. But the result of *Miron* is that the decision to cohabit is respected in the same way as a decision to marry.

97 We note that the facts in *Miron* were different from the facts here. In that case, the parties made a public declaration that they were committed to each other. They were economically intertwined, and considered themselves a family in every sense of the word. In effect, their relationship could be characterised as a common law marriage in the traditional sense of that word. Although the couple did not undergo a legal marriage ceremony or registration, they did make a public announcement of their union, and made a personal and financial commitment to each other. In other words, the parties voluntarily undertook, and indeed demanded, the rights and obligations of marriage, albeit without a marriage certificate. There was no issue of coercing individuals into marital status against their will.

98 In this case, it is alleged there was no such declaration. On the contrary, Rossu denies the existence of any form of commitment or obligation between the parties, with the exception of his promise to raise Taylor's daughter, which he fulfilled. This lack of commitment was mutual he contends, as is demonstrated by his evidence that at various times during the relationship, Taylor was unfaithful to him, and explained her actions with comments to the effect that she was free to do as she liked since she was not married to him. Rossu argues that imposing marital obligations upon him in this case would be tantamount to coercive imposition of marital status upon him against his will. A unilateral declaration of a conjugal relationship may well be considerably different from the mutual, joint declaration found in *Miron*. Nevertheless, we accept the Supreme Court's finding that marital status is an analogous ground, and their rejection of the freedom of choice arguments in favour of protecting the dependent partner in common law unions. We must govern ourselves accordingly.

Section 15 Analysis

99 The courts have established several different approaches to s. 15 analysis. Jurists and academics have devoted considerable time to dissecting the case law in order to discern the correct approach. We do not propose to analyze the entire body of jurisprudence on this issue. Rather, we will concentrate on *Miron*, since it is recent, relevant and represents a number of approaches to s. 15 analysis. We have considered articles written by Lynn Smith and Bill Black of the Faculty of Law at the University of British Columbia ("The Equality Rights", Gérard Beaudoin and Errol Mendes eds., *The Canadian Charter of Rights and Freedoms*, (3d ed.) (Toronto: Carswell, 1996) (*Smith and Black*)), by Lynn Smith ("Does Section 15 Have a Future?" a revised version of a paper entitled "The Future of Constitutional Equality Rights - Do They have One?" prepared for the Canadian Institute for the Administration of Justice National Conference *Human Rights for the 21st Century* (Halifax, Nova Scotia, October 16-19, 1996)(*Smith*)), and by Janice Henderson-Lypkie of the Alberta Law Reform Institute ("Wills and Estates: *Miron v. Trudel*and its Aftermath", *Papers Presented at the Mid-Winter Meeting of the Alberta Branch of the Canadian Bar Association*, 1997 at 327) (*Henderson-Lypkie*)).

100 Three main approaches to s. 15 analysis have emerged in the case law. Each of the three sets of reasons in *Miron* applies a different approach. Since each of the first two approaches garners support from four members of the Supreme Court, neither is clearly more determinative than the other. The majority was formed by McLachlin J. and L'Heureux-Dubé J. because they arrived at the same conclusion, even though they employed different approaches.

101 The approach followed by McLachlin J. (Sopinka, Cory and Iacobucci JJ. concurring) in *Miron* first emerged in the *Andrews v. Law Society (British Columbia)* decision, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (S.C.C.). McLachlin J. summarizes her approach as follows:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of 'equal protection or equal benefit of the law', as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage ... the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination ... under s. 1 of the ***Charter***.
>
> (*Miron*, *supra* at 49.)

102 At page 50 she continued:

> This division of the analysis between s. 15(1) and s. 1 accords with the injunction [that] ... courts should interpret the enumerated rights in a broad and generous fashion, leaving the task of narrowing the prima facie protection thus granted to conform to conflicting social and legislative interests to s. 1.
>
> (*Miron*, *supra* at 50.)

103 McLachlin J. held that marital status was analogous to the prohibited grounds of discrimination enumerated in s. 15. She reasoned as follows:

> First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from ***Charter*** consideration on the ground that its recognition would trivialize the equality guarantee.
>
> Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the ***Charter***. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.
>
> (*Miron*, *supra* at 57-58.)

104 A different approach is applied in *Miron* by Gonthier J. (Lamer C.J.C., Cory and Major JJ. concurring). His approach differs from that of McLachlin J. in its inclusion of an internal relevance test at the s. 15 stage. Gonthier J. examines the relevance of the distinction to the impugned legislation or measure at the s. 15 stage, and in *Miron* finds that marital status is relevant to a law allocating certain benefits to married spouses. He therefore concludes there was no breach of s. 15.

105 The third approach is one developed by L'Heureux-Dubé J. It is summarized by Janice Henderson-Lypkie as follows:

> Using this method, a distinction is discriminatory under section 15(1) 'where it is capable of either promoting or per-

petuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration'.

(*Henderson-Lypkie*, *supra* at 334.)

106 Academics have made numerous efforts to reconcile the various approaches to the s. 15 analysis. Lynn Smith reviews the division in her article "*Does Section 15 Have a Future*?":

Four judges (McLachlin, Cory, Sopinka and Iacobucci JJ.) are prepared to continue on the ***Andrews*** path, which I shall refer to as the 'human rights' approach. Four others (Gonthier, Cory, and Major JJ, and Lamer, C.J.C.) wish to return to the kind of analysis previously rejected in ***Andrews*** as circular and incapable of permitting section 15 to fulfil its purposes. This I will refer to as the 'internal relevance' approach. Two (one on each side) may be ambivalent (Lamer, C.J.C. and Sopinka J.) And one (L'Heureux-Dubé J.) has advanced a new approach which, she suggests, amounts to an improvement on the original ***Andrews*** one.

Since May 1995, when the trilogy was released, the lower courts have either struggled with its import or have simply chosen either the human rights or the internal relevance approach (or sometimes a combination of the two) with little discussion as to why.

(*Smith*, *supra* at 2-3 (footnotes omitted)).

107 Smith argues that the *Andrews* decision remains good law.

There has been no case in which a majority of the Supreme Court has followed either of the new approaches (the internal relevance one or the L'Heureux-Dubé one) while majorities have, on numerous occasions, followed the human rights approach.

(*Smith*, *supra* at 27.)

108 Smith cautions against Gonthier J.'s approach because it is highly manipulable and almost inevitably circular. It replicates what is normally part of a s. 1 analysis. She contends that in *Andrews*, the Court rejected the suggestion that issues of reasonableness should be considered at the stage of deciding whether there has been a violation. After a claimant has successfully proven a breach of s. 15, the onus switches to the defendant (often government) to prove the infringement is a reasonable limitation, demonstrably justified in a free and democratic society. Smith argues that "[t]o move assessments about reasonableness into section 15 is to finesse the *Charter*'s scheme for allocating responsibility as between claimant and defender." (*Smith*, *supra* at 28.)

109 Smith and Black provide a helpful framework for the human rights/*Andrews* analysis in their article "*The Equality Rights*". They note that "[b]y a slim majority, the Supreme Court has maintained the general approach in *Andrews*, but a substantial minority of judges is prepared to embark on significant deviations from it." (*Smith and Black*, *supra* at 14-30.)

110 They also note that only four members of the Court have consistently supported the *Andrews* reasoning (*Smith and Black*, *supra* at 14-35). They summarize the *Andrews* approach as follows:

At the section 15(1) stage, then, there is to be an assessment whether the person complaining is not receiving equal treatment before and under the law or the law has a differential impact on that person in its protection or benefit,

whether the alleged ground of discrimination is enumerated or analogous, and whether the legislative impact of the law is discriminatory. At the section 1 stage, there is review of alleged justifications for the law based on reasonableness.

(*Smith and Black, supra* at 14-16.)

111 Smith and Black propose the following improved framework:

1. There is to be a three-stage inquiry under section 15:

(1) Is there a denial of equality before or under the law, or of the equal protection or equal benefit of the law, to an individual?

(2) If there is a denial of equality, is it with discrimination, as defined by the Supreme Court in ***Andrews***? There are two aspects to the determination of discrimination:

(a) the identification of the ground upon which the claim is based, to exclude cases not based upon enumerated or analogous grounds;

(b) meeting the definition of "discrimination" set out by McIntyre J. (for the majority in ***Andrews***):

... a distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. 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 capabilities will rarely be so classed.

(3) If there is a denial of equality with discrimination, is the provision or practice nevertheless a reasonable limit demonstrably justified in a free and democratic society, under section 1 of the ***Charter***?

2. Only claims involving the personal characteristics named in section 15 (race, colour, national or ethnic origin, religion, sex, mental or physical disability and age - usually referred to as 'enumerated grounds'), or characteristics analogous to them such as citizenship ('analogous grounds'), fall within the purview of section 15. Others, such as nature of commercial activity, are excluded.

3. The principles governing section 15 interpretation take the purpose of section 15 to be connected with the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beingsequally deserving of concern, respect and consideration.

4. Identical treatment may not amount to equal treatment, as confirmed by the existence of subsection 15(2). Instead, equality requires consideration of differences affecting groups.

5. Equality must be measured in relation to the larger social, political and legal context and must take account of persistent disadvantage experienced by certain groups independent of the law or conduct under scrutiny.

6. Section 15 gives the right to equality not only with respect to express differentiation and to the intentional

> creation of disadvantage, but also with respect to provisions that are neutral on their face and to unintentionally discriminatory effects.
>
> 7. There is to be no assessment of reasonableness or unfairness at the stage of determining whether section 15 is violated; justificatory factors come into play only at the section 1 stage, where the *Oakes* test applies in the usual way.

(*Smith and Black*, *supra* at 14-17, 14-18 (footnotes omitted)).

112 They note as well that the internal relevance approach suggested by Gonthier J. in *Miron* and by LaForest J. in *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, 12 R.F.L. (4th) 201 (S.C.C.) would leave almost no role to s. 1. In their view, reasonableness of the limitation should be considered only at the s. 1 stage (*Smith and Black*, *supra* at 14-35, 36).

113 Smith and Black maintain that the *Andrews*/human rights approach is the correct one, and the one that has been most consistently applied by the Supreme Court. In her most recent article "Does Section 15 Have a Future?", Smith notes that the three Supreme Court decisions since the *Miron*, *Egan* and *Thibaudeau* (*Thibaudeau v. R.*, [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449, 12 R.F.L. (4th) 1 (S.C.C.)) trilogy have not resolved the division. (*Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385 (S.C.C.)) involved an unsuccessful challenge to the Ontario *Education Act* because it failed to set up a presumption in favour of integrating special needs children into regular classrooms. The Supreme Court held that the Court of Appeal decision was invalid since there had been no notice to the Attorney General. It also held that there was no violation of s. 15, whichever of the competing approaches was applied. 143 D.L.R. (4th) 577 (S.C.C.) , involved a challenge to the *Citizenship Act*,

> which provided that children born abroad to Canadian mothers and non-Canadian fathers before February 15, 1977 would not have automatic entitlement to Canadian citizenship, while children born in the same circumstances to Canadian fathers and non-Canadian mothers would. The violation was not saved by section 1. The Court also held that it was not necessary to say determinatively which of the several approaches to s.15 was most appropriate since all the tests would yield the same result.
>
> (*Smith*, *supra* at 2, fn. 5.)

114 Because the *Andrews*/human rights approach has been more consistently applied, has not been overturned, and seems more in keeping with the purpose of s. 15, and has none of the circular reasoning inherent in the internal relevance approach, we are of the view that it is compelling and applicable to the facts of this case.

Miron v. Trudel

115 The facts in *Miron* concerned insurance benefits payable to married but not to unmarried cohabitants. The insurance company based its denial of benefits on the Ontario *Insurance Act*, which at that time did not include common law spouses in its definition of "spouse". Because the *Act* was amended to include common law spouses before the case was decided by the Supreme Court, the Court was essentially backdating the legislative changes for constitutional reasons. It was not making a potentially controversial change to the legislation, as it is alleged we are being asked to do here. Rossu asks that we note this important difference.

116 Rossu argues that there are a number of additional ways in which *Miron* may be distinguished from this case.

117 First, he argues that the Supreme Court's finding that marital status is analogous to the prohibited grounds of

discrimination enumerated in s. 15 in the context of insurance benefits, does not mean that marital status is always an analogous ground. He emphasizes the difference between rights granted by the government, or another third party, to an unmarried couple, and rights of unmarried partners between themselves. He concedes that in *Miron* unmarried couples were disadvantaged by the denial of benefits available to married couples, but emphasizes that the disadvantage accrued to the couple as a unit. He argues that the denial of support rights would at most disadvantage only 50% of unmarried spouses, since in any relationship one person would be a potential payor, and the other a potential payee. Since the potential payors are actually benefited by the denial of support rights, it cannot be said that the *DRA* disadvantages or discriminates against unmarried partners. It disadvantages only one of the partners. In his view, since the disadvantaged group consists only of the economically dependent unmarried partners, that is too narrow a group to be recognized under the *Charter*. Such recognition would individualize s. 15 and would be unacceptable given that, according to him, the purpose of s. 15 is to protect groups.

118 Second, Rossu argues that in *Miron* the partners' public declaration of commitment and economic interdependence may have been important. In *Miron*, there was no doubt that the couple considered themselves a family in every sense of the word and simply lacked a marriage certificate. In those circumstances, McLachlin J.'s comments about the freedom to live life with the mate of one's choice in the fashion of one's choice make sense. However, Rossu asserts that the same might not be true in the facts of this case. Here, not only had Taylor and Rossu not declared their commitment and interdependence, Rossu vehemently denies the existence of any commitment or economic understanding between them. Relying on Taylor's unilateral declaration that they had a spouse-like relationship would result in the coercive imposition of marital rights and obligations upon Rossu without his consent. Indeed, it is possible that Taylor and Rossu deliberately chose to remain unmarried in order to avoid the personal and legal obligations of marriage. There is some evidence that Taylor herself did not consider herself to be committed to Rossu during the relationship. Rossu alleges that Taylor was repeatedly unfaithful to him and would answer his reproaches with comments to the effect that she did not have to be faithful since she was not married to him.

119 The argument continues that forcing Rossu to assume marital obligations against his will, simply because Taylor now claims corresponding rights, would actually interfere with his freedom of choice. Imposing marital obligations in this situation would be akin to saying, "Yes, you have the right to live life with the mate of your choice in the fashion of your choice, provided that fashion is marriage, since we will impose marital obligations upon you regardless of the form of cohabitational relationship you choose."

120 Permitting one partner to coerce the other into marital obligations raises the issue of whether a third party such as the government can coerce a member of a common law union into marital obligations against the will of both partners. This situation could arise if an ex-partner to a common law union were receiving welfare, and the government had a subrogated claim to support from his or her ex-partner. Could the parties in that situation successfully argue they had no economic commitment to each other, or could the government impose marital obligations over the protests of both partners? This possibility raises the spectre of governmental inquiries into the intimate details of relationships even where neither party requested such intervention, and indeed where such inquiry may be against the will of both parties.

Defining the Affected Group

121 The composition of the affected group is also in issue in this case. Rossu argues that since not all unmarried spouses are disadvantaged by the *DRA*, the relevant group is not unmarried spouses, and the ground of distinction is not marital status.

122 We do not accept Rossu's arguments for several reasons. In our view, these arguments misunderstand the nature

of the benefit at issue here. The *DRA* does not confer a right to support since not every applicant for support will receive support. Rather, the *DRA* confers a right to apply for support. It is the right to apply that is the benefit married partners are given, and from which unmarried partners are excluded. Entitlement to support, and the quantum of that support, is determined at a later stage after an examination of the nature of the relationship and the parties' economic positions. It is only at the entitlement stage that the relative economic positions of the parties becomes relevant, and Rossu's argument about dependent versus independent partners arises. It may well be that a law which limits support claims to dependent common law spouses would survive *Charter* scrutiny. We need not address the full dimensions of that issue since it is clear that all unmarried partners have been deprived of the right to even apply for support.

123 It is not necessary to establish that every individual member of the group would exercise the entitlement to claim support. If it were, it would be akin to finding that a law prohibiting maternity leave is not discrimination on the basis of gender because only pregnant employed women are actually disadvantaged by it.

124 A better approach would be to examine whether a member of a group has access to a benefit regardless of whether he or she actually intends to claim the benefit, or would be entitled to receive it if he or she did so. In this case, unmarried spouses lack access to the benefit of a legislated right to apply for spousal support. We reiterate that the benefit provided by the *DRA* is the right to apply for support, and not a right to receive support. In other words, it does not confer an automatic entitlement to support. Whether any given individual were entitled to support could only be determined by the Court on a case by case basis after an application were made. We are only concerned here with the right to apply to have a court make that determination, and it is clear that all unmarried partners are excluded from that benefit. It is not necessary to fully examine the concept of dependency put forward by Taylor in this case since the nature of the relationship and the economic consequences of the relationship are not relevant until the later, entitlement stage of the analysis. This does not mean that the content of the substantive support rights granted to those living common law would be irrelevant to a s. 15 analysis. It only means that in this context it is enough that we have concluded that the inability to even advance the claim is by itself a breach of s. 15 equality rights.

125 There is no doubt how vital the definition of the affected group is to any alleged equality breach. Rossu asserts in effect that marital status as a proscribed ground of discrimination is only implicated when a couple living common law is affected as a couple. On this view, marital status claims would only be engaged if both parties were somehow disentitled from receiving a benefit that others legally married were entitled to receive. However, no equality breach based on marital status could be advanced where the differential treatment adversely affected one of the two members of the couple while benefiting the remaining member. In other words, Rossu invites this Court to treat any alleged breach of equality rights based on marital status as applying only where one is dealing with a couple as a couple and not one member of that couple — and certainly not where the one member of the couple is asserting a claim against the other member of the couple.

126 We do not agree with this analysis. Government legislation has many dimensions. It can affect groups and it can affect individual members of certain groups in different ways. There is no requirement for perfect symmetry between the impugned legislation and the adversely affected group. It may be enough if only a part of the group is negatively affected as long as the proscribed ground is the reason for the disadvantageous treatment. On Rossu's theory of how distinctions based on marital status should be evaluated, only those distinctions that both parties to a couple believe treat them unfairly as a unit should be the grounds for a *Charter* breach. Of course, this would work perfectly for a person in a common law marriage who wanted to take only the benefits of the relationship and none of the burdens.

127 The flaws and inequities in such an approach are obvious. First, and most importantly, distinctions based on marital status do not only affect people as couples. As this case demonstrates, they may also affect the individual mem-

bers of that relationship. Further, in this context, one cannot ignore the gender dimension to this entire issue. When marital relationships end, whether legal or common law, it is still more commonly the woman and not the man who has been financially disadvantaged. When women's child-bearing responsibilities are factored in, the disadvantages may be further exacerbated. Put simply, when legislation makes distinctions based on marital status, those distinctions may apply to the couple as a unit while living together. Or they may, as here, apply to the members when they terminate that relationship.

128 We see no reason to limit *Charter* scrutiny of distinctions based on marital status only to those situations in which the couple is living together as an intact family unit. To do so would allow couples to pick and choose those rights and responsibilities which they wished to have attached to their common law marriage. Not surprisingly, one could reasonably expect that the couple would be asserting rights to benefits rather than demanding that burdens be imposed on them. More troubling yet, it would potentially allow one member of the relationship to take all the benefits and leave the other with all the burdens. Those legally married do not enjoy this freedom to pick and choose what benefits and burdens will apply to them. We therefore decline to sanction an interpretation which would put those living common law in a better position than those legally married. Having a possible claim to secure support from each other under applicable government legislation is no different than securing access to government funded benefit plans for those who are "married" or for that matter, to those sponsored and paid for by private parties. If the latter two categories might possibly engage "marital status" as a prohibited analogous ground under s. 15 of the *Charter*, so too does the former. The only difference is that in the first example, one member of the common law relationship may be required to pay money to the other; in the last two, the money or benefit may be paid for by the public or the private parties. This distinction does not warrant differential treatment amongst these categories. Indeed, a more compelling case can be made that those living common law should, as between themselves, assume personal responsibility for the outcome of their relationship.

129 For all these reasons, we have concluded that the support provisions of the *DRA* discriminate against partners living in a common law relationship by depriving them of the benefit of a legislated right to apply for spousal support based on a prohibited analogous ground of discrimination under s. 15 of the *Charter* — marital status.

Section 1 Analysis

130 The test to be applied under s. 1 was set out in the *Oakes* decision and remains good law. In a s. 1 analysis, the onus is on the defender (usually the government, but in this case a private litigant) to show that the infringement is a reasonable limitation, demonstrably justified in a free and democratic society. In *Miron*, the Court explained the s. 1 test as follows:

> Determining whether it has been demonstrated that the impugned distinction is 'demonstrably justified in a free and democratic society' involves two inquiries. First, the goal of the legislation is ascertained and examined to see if it is of pressing and substantial importance. Then the court must carry out a proportionality analysis to balance the interests of society with those of individuals and groups. The proportionality analysis comprises three branches. First, the connection between the goal and the discriminatory distinction is examined to ascertain if it is rational. Second, the law must impair the right no more than is reasonably necessary to accomplish the objective. Finally, if these two conditions are met, the court must weigh whether the effect of the discrimination is proportionate to the benefit thereby achieved. See ***R. v. Oakes***, [1986] 1 S.C.R. 103.
>
> (*Miron*, *supra* at 61.)

What is the Goal and Is It A Pressing and Substantial Objective?

131 The first step in this analysis, therefore, is to determine the goal of the impugned legislation and assess whether

it is pressing and substantial. This task is more problematic given the absence of governmental intervention and submissions.

132 The trial judge found that the purpose of the support provisions of the *DRA* was "to sustain spouses, when the members of the relationship decide to go their separate ways." In other words, he concluded that the relief of dependency, rather than the promotion of legal marriage, was the purpose of the legislation. Although he did not specifically find that the exclusion of common law couples from the legislation was not rationally connected with the purpose of the legislation, we can infer this from his reasons. Since there was no rational connection, it was not necessary for him to look at whether the exclusion met the minimal impairment test or the proportionality test. He remedied the breach by reading in the broader definition of spouse adopted in *Miron* (which included heterosexual couples who have cohabited for three years or more, or who have lived in a permanent relationship with a child or children) to the support provisions of the *DRA*.

133 Rossu argues that the trial judge erred in that conclusion, and that the purpose of the support provisions of the *DRA* is to promote and protect marriage as a fundamental unit of our society. He argues that the legislature would not have expressly restricted the sections to married spouses if it intended to relieve dependency in any intimate relationship. He concedes that the majority of Canadian jurisdictions have amended their support legislation to include unmarried spouses, but denies that there is any constitutional mandate for such action. He distinguishes the finding of the Ontario Court of Appeal in *M v. H* (1996), 31 O.R. (3d) 417, 25 R.F.L. (4th) 116 (Ont. C.A.); appeal to S.C.C. heard and reserved on March 18, 1998, that what he claims is dependency is the crucial factor in support legislation, by pointing to an important difference between the legislation in Ontario and that in Alberta. The Ontario Legislature had already amended its support provisions to include unmarried cohabitants, so it was apparent that dependency rather than marital status was the determining factor. This is not the case in Alberta. Since the *DRA* restricts the application of its support provisions to married spouses, Rossu argues that dependency is not the determining factor.

134 There are three difficulties with this argument. First, it is debatable whether imposing support obligations on separated or divorced spouses promotes the institution of marriage. It could be argued that such obligations actually promote the breakdown of marriages by providing a type of governmental condonation of marital breakdown, while reducing the economic consequences of a break-up on the dependent spouse. That is, while the absence of support obligations benefits the economically powerful spouse at break-up, the presence of support obligations benefits the economically dependent spouse at break-up. Neither can clearly be said to promote the institution of marriage since neither provides an incentive or benefit to both parties to marry or remain married.

135 Second, and more important, is the fact that however fundamental the state of marriage may be to our society, the statistics show that the prevalence of families based on common law relationships is increasing dramatically:

> On census day [1991], the number of common-law unions was 725,950 ... The number had grown from 352,000 in 1981 to 486,920 in 1986, a 38.3% increase. The increase over the last five years [1986-1991] (239,040 couples) represents an even larger increase, at 49.1%. Such change illustrates that the trend towards choosing this mode of conjugal life is accelerating. Common-law unions accounted for 6.3% of all couples in 1981, and 8.3% by 1986. Such couples currently account for 11.3%. In other words, 1 out of 9 existing couples are not legally bound by marriage. This ratio was 1 to 12 five years ago...
>
> The first striking observation is that the acceleration is greater than the raw figures would suggest. The prevalence rate for Canada rose from 6.4% to 13.5%. The propensity to live common-law has thus increased by 111% over 10 years, and most of this increase occurred between 1986 and 1991.

(Dumas, Jean, "Report on the Demographic Situation in Canada in 1992" *Current Demographic Analysis* (Ottawa: Minister of Supply and Services, 1992), at 32, 34.)

136 To these figures we add the results of the 1996 census. In 1996, there were a total of 920,640 common law unions in Canada. This represents an increase of 194,690 (26.8%) common law unions in the five years between 1991 and 1996. The increase is smaller than the increase between 1986 and 1991, but it is not insignificant. In Alberta, on census day 1996, there were 72,320 couples living in common law unions. This represents 11.6% of all Alberta couples, or 144,640 Albertans living without legal status, and without support or property division obligations to each other.

137 Third, given the changes in the philosophical and policy underpinnings of Canada's spousal support laws over the last thirty years, it is difficult to conclude that the promotion of marriage is the underlying goal of the *DRA* support provisions. Certainly, the *Divorce Act* itself does not contemplate that the mere status of spouse will entitle a woman to continuing or any support on termination of the marriage. Instead, the focus is now on a wide range of factors, including need and the disadvantages that might have accrued to one of the spouses by reason of the marriage. While one might argue that the provisions of the *Divorce Act* are not relevant in assessing the goal of the *DRA* support provisions, we cannot ignore the fact that on divorce, the federal legislation governs, Thus, to the extent that the Federal legislation reflects that support laws are designed to rectify dependency arising as a result of marriage, this in turn impacts on all marriages in this country. Further, in any event, the *DRA* itself does not contemplate that support will be awarded based solely on status. In fact, we note that on an application for interim support, under s. 16(2), no order shall be made if the applicant has sufficient means of support independent of the defendant. This provision militates heavily in favour of the conclusion that the goal of the support provisions under the *DRA* is to relieve dependency.

138 We conclude from all this that the *DRA* support provisions have two possible goals: to relieve dependency upon the breakdown of an intimate relationship; and to promote marriage by limiting claims to support to those who are legally married. The first is most assuredly a pressing and substantial objective. Placing the burden of providing for an individual who has suffered economic disadvantage as a result of an intimate relationship upon his or her ex-partner, rather than upon the public purse, certainly falls into this category.

139 The more difficult question is whether the goal of relieving dependency is exclusive of, or inconsistent with, the goal of promoting marriage. Ensuring that dependency arising from a marriage will be redressed surely promotes those unions in terms of the benefits and obligations arising upon breakdown. But is it marriage itself that is promoted? Or is the goal rather to promote all forms of stable, enduring relationships that form the basis of a healthy social structure? It is argued that the objective of promoting and protecting a single type of relationship to the exclusion of all others, regardless of social changes, may not be a pressing and substantial objective. While marriage may be the most common family basis, statistical evidence shows that an increasing number of Canadian couples have chosen, and are choosing, an alternative. Promoting marriage as the sole form of legally recognized relationship in the face of this statistical evidence thus arguably does not reflect social reality and may not amount to a pressing and substantial objective.

140 While we recognize the increasing prevalence of common law unions, we concede that the statistical evidence is that many of these unions tend to be precursors to marriage, rather than replacements for marriage. They have been likened to a form of extended courtship. We also recognize the central role legal marriage has played, and continues to play, in our social system. In the end, it is not necessary for us to definitively resolve this controversial issue because other aspects of the s. 1 analysis compel us to conclude that the limitation cannot be justified whatever the goal of the legislation.

Proportionality Test

141 The second component of the s. 1 analysis is the three-branch proportionality test. The first branch involves an examination of whether the connection between the goal and the discriminatory legislation is rational. The goal of promoting and promulgating marriage fails the rational connection test for two reasons. First, there is no evidence that providing access to support for separated or divorced legal spouses promotes marriage in terms of encouraging both parties to enter or to remain in marriages. The existence of these provisions does not appear to have resulted in increased marriage rates, or reduced separation rates. Nor does it appear that people have been discouraged from entering common law relationships by the existence of this legislation. On the contrary, there is evidence that an increasing number of couples are choosing to cohabit without legal marriage. Moreover, we take judicial notice of the fact that divorce and separation rates amongst married couples have also increased over the last twenty years.

142 Second, there is no evidence that common law couples must be excluded from access to spousal support in order to promote marriage. There are other reasons and other values that lead individuals to choose legal marriage as a preferred lifestyle choice.

143 The goal of relieving dependency following the break-down of intimate relationships also fails the rational connection test, because the exclusion of 11.6% of Alberta couples from the right to apply for support is not rationally connected to the relief of dependency. If the government's intention were to relieve dependency, there would be no reason to restrict the application of the legislation to legally married spouses. Rather, the government would have drafted its legislation to capture as many intimate relationships as possible. In particular, it could easily have followed the example of most of the other Canadian jurisdictions in extending its provisions to common law spouses. In any event, the exclusion of common law spouses fails the rational connection test. Excluding an entire category of intimate relationships from access to support is not rationally connected to the goal of relieving dependency following the break-down of intimate relationships.

144 Since the legislation cannot pass the rational connection test, it is not necessary to determine whether it could pass the minimal impairment or proportionality tests. That said, we are of the view that this legislation would fail both of those branches of the test in any event. An absolute exclusion of all common law couples from the right to even apply for spousal support is not a minimal impairment of s. 15 equality rights. Similarly, any putative benefits to the institution of marriage are outweighed by the deleterious effects on economically dependent common law partners following the breakdown of the relationship. We fail to see any benefit in terms of relief of dependency that would not in fact be increased by the inclusion of common law couples in the legislation. We conclude that the support provisions of the Alberta *DRA* cannot be saved under s. 1.

Concerns

145 A number of concerns have been raised about the coercive nature of state imposition of marital obligations upon those who may have deliberately avoided marriage in order to avoid the attached obligations. While some of these concerns are appealing, the counter-arguments about the exploitation of the economically weaker partner for the benefit of the stronger, are, in our view, more meritorious. That reasoning can be applied to the situation in Alberta in which the economically stronger member of an unmarried relationship may enjoy all the benefits of marriage, both emotional and economic, without bearing any of the obligations, such as support and asset division. Where the unmarried relationship mimics a traditional marriage in all ways except a marriage certificate, the argument that they should be treated equally in terms of equal benefit to and of the law is compelling.

146 However, the parties to unmarried relationships remain unmarried for a myriad of reasons, and govern their affairs in a myriad of ways, some of which bear little resemblance to a traditional marriage. The argument that these rela-

tionships should not be treated as marriages is also valid. For example, a "modern" relationship in which both parties intend to be "free spirits", and conduct their affairs accordingly so that neither is disadvantaged by the relationship, would not be likely to attract a support order. We note that a comparable legal marriage would be similarly unlikely to attract a support order.

147 In *M v. H* (1996), 17 R.F.L. (4th) 365 (Ont. Gen. Div.) at 383-384; affirmed (1996), 25 R.F.L. (4th) 116 (Ont. C.A.), appeal to S.C.C. heard and reserved on March 18, 1998, Epstein J. reviewed the Ontario family law legislation and referred to comments made by the Minister who introduced the *Family Law Reform Act*, S.O. 1978, c. 2 as follows:

> The obligation of support would arise only where the person claiming was unable to support himself or herself and the other person had the means to provide support. Much of the criticism we have heard comes from people living in a common-law relationship who feel that this proposal is an infringement of their personal freedom because they entered into an arrangement 'with no strings attached.' These are the very people who will be unaffected by the legislation because they do not form a financial dependency on each other. That is the very essence of their 'no strings attached' relationship. If there is no financial dependency, there will be no need for support by the other party and there will not be a successful claim for support.
>
> (*Legislature of Ontario Debates*, 18 November 1976) at page 4793.)

148 If the legislature wishes to respect individuals' ability to choose intimate relationships other than traditional marriage while protecting the economically vulnerable in such relationships, support criteria could be revised to emphasize that support will be awarded only where the nature of the relationship was such that the parties could reasonably be said to have undertaken obligations to each other, or where one partner has been economically disadvantaged by the relationship. Couples who opted not to marry because they wanted to avoid the legal obligations of marriage are arguably in a different position than couples who were unable to marry because of philosophical, financial, legal or cultural difficulties. Members of the former group may be able to establish that there was no commitment or obligation between the partners. They may be able to avoid support obligations if they have structured their affairs in a way that did not result in economic disadvantage to either party.

Remedy

149 After finding that s. 15 of the *DRA* breached s. 15 of the *Charter*, and could not be saved under s. 1 of the *Charter*, the trial judge ordered the remedy of reading-in. He read in "common law spouse" to the term "spouse" in s. 15 of the *DRA*. There are a number of difficulties with this remedy. We have the following comments to make about the remedy, and about the issue in general.

150 First, the support provisions of the *DRA* not only exclude common law spouses from their definition of "spouse", they include preconditions to applications that presume the existence of a legal marriage. Section 15 of the *DRA* permits spouses to apply for support only when they are eligible for a judicial separation, or for an order for restitution of conjugal rights. Section 22 of the *DRA* permits spouses to apply for support only when they are eligible for divorce or decrees of nullity. All of these preconditions therefore presuppose the existence of a legal marriage and are unavailable to unmarried cohabitants. Unless these preconditions are struck, or the provisions establishing entitlement to the preconditions are themselves amended to include unmarried cohabitants, merely including the phrase "common law spouse" in the word "spouse" has no practical effect since unmarried spouses cannot meet the existing preconditions.

151 Second, since there is no universally accepted definition of common law spouse, simply reading in the term without defining it is insufficient. While most Canadian jurisdictions have extended their family legislation to provide for

support for common law partners, there are almost as many definitions as there are jurisdictions that have extended benefits. The trial judge accepted the definition found in *Miron*, which was based on the Ontario Legislature's three-year qualifying period. However, there is clearly no magic in that number, and the legislature, not the Court, is in the best position to say what would be appropriate in the Alberta context. Of course, we make no comment on whether the selected criteria would meet *Charter* concerns. That of course will depend on the definition adopted. Taylor argues that there should be no minimum period for eligibility since there is no equivalent duration requirement in marriages, and, in any event, dependency can arise after a very short relationship. But either a qualifying time period or other criteria such as a registration scheme may be necessary to retain some form of order in administering the system, and assuring that the parties to the relationship were committed to each other in a way akin to the commitment found in a marriage. The nature of the criteria to be applied is also better determined by the legislature rather than the Court. In any event, the trial judge did not explicitly read the definition into the *DRA*, and such a definition ought to be clearly set out in the legislation.

152 Third, if support obligations are extended to unmarried cohabitants, the government may choose to revise its support regime. For example, it could implement new guidelines for the award of support, such as permitting trial judges to consider the nature of the relationship and the extent of the commitment between the parties along with the normal considerations in awarding support. This would allow courts to consider the parties' reasons for not entering a legal marriage, and could help assuage concerns about imposing marital obligations on partners who deliberately chose not to marry in order to avoid the legal obligations of marriage. If the evidence is that the partners did not intend to assume economic responsibility for each other, and intended to maintain economic independence, and structured their affairs accordingly, the trial judge could refuse to award support. If the evidence is that the parties structured their affairs similarly to those found in traditional marriages, or if one person has been economically disadvantaged by the relationship regardless of the parties' initial intentions, the trial judge could award support. The government could also consider implementing an opting-out procedure, as has been done in Ontario, to permit couples to opt out of the legislative scheme. This type of measure could help to address concerns about maintaining individuals' freedom to choose intimate relationships other than marriage.

153 Fourth, the extension of rights and obligations to common law partners has been done on a piecemeal basis. For example, those jurisdictions that extend support rights and obligations to cohabitants do not always extend rights and obligations *vis a vis* property division. Others grant relief to unmarried cohabitants in intestacy legislation, but not in support legislation. This *Charter* decision that it is unconstitutional to distinguish between married and unmarried cohabitants with regard to their obligations *inter se* could preclude such piecemeal legislation unless it could be justified under s. 1. The government therefore may also choose to amend other legislation which distinguishes on the basis of marital status. It ought to have the opportunity to design a comprehensive new legislative scheme that conforms with *Charter* requirements, rather than having the Court amend some parts and the legislature other parts, with the result that the whole would be less than unified or ideal.

154 Fifth, the issue of capacity to enter legally recognized common law relationships must be addressed. Legally married people not only lack the capacity to enter a new marriage, but face criminal sanctions for doing so. There are no comparable bigamy rules in place to govern common law unions, and, as stated elsewhere in this judgment, the informal, unregistered nature of common law unions would make such laws challenging both to draft and to administer. But there are already cases in which a legally married person has been permitted to enter a binding common law union, complete with legal rights and obligations, despite the fact that person would not have had the capacity to enter another legal marriage. Therefore, the legislature may wish to consider whether there should be any impediment to individuals assuming the benefits of multiple common law marriages, as long as they are also, required to assume the associated financial responsibilities.

155 In *Wepruk (Guardian ad litem of) v. McMillan Estate* (1993), 26 B.C.A.C. 127, 77 B.C.L.R. (2d) 273, 49 E.T.R. 209 (B.C. C.A.); additional reasons at (1993), 33 B.C.A.C. 114, 87 B.C.L.R. (2d) 194 (B.C. C.A.), a woman who was legally married but living separately from her husband, was able to form a legally recognized common law union with another man. She married her husband in 1932, and separated from him in 1965 although they did not obtain a divorce. She commenced cohabiting with her common law spouse McMillan in 1974. McMillan died intestate in 1990, leaving an estate worth $338,000 and four adult children. Her husband died in 1991, never having divorced her. She brought action under the *Estate Administration Act* for a share of McMillan's estate, asserting that she had been in a spousal relationship with McMillan. Her action was dismissed at trial, but was successful on appeal. The B.C. Court of Appeal held that she was McMillan's spouse, and thereby entitled to a share of his estate amounting to $85,000. It did not deal with the capacity issue. This case is interesting since it supports the idea that parties have the capacity to enter a common law spousal relationship even when they are already legally married to someone else, and would not have had the capacity to enter another legal marriage.

156 For all of these reasons, we conclude that the correct remedy is to strike the offending legislation, but to suspend the declaration of invalidity to allow the government time to draft its own legislation in this complex area. Because it is not possible to extricate those sections of the legislation which specifically offend s. 15 of the *Charter* from the complex scheme of Parts 2 and 3 of the *DRA*, it is necessary in our view to strike those Parts in their entirety.

Conclusion

157 The appeal is allowed to the extent that we vary the remedy by declaring invalid and striking down Parts 2 and 3 of the *DRA*, but suspend that declaration for a period of 12 months. The government is free to seek an extension should it prove impossible to implement legislative changes within that time.

158 Having regard to the means of the parties, we affirm the order of the trial judge for interim spousal support.

Appeal dismissed.

FN* A corrigendum issued by the court on June 30, 1998 has been incorporated herein.

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