1996 CarswellAlta 847, 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

1996 CarswellAlta 847, 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

Taylor v. Rossu

Bernice Taylor (Plaintiff) and Laszlo Rossu (Defendant)

Alberta Court of Queen's Bench

Power J.

Judgment: October 28, 1996
Docket: Calgary 9401-07155

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Counsel: *Diann P. **Castle*** and *Joanne M. Anquist*, for plaintiff.

Edward McCann and *Laurie J. McMurchie*, for defendant.

Subject: Family; Constitutional

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

Family law — Support — Spousal support under provincial statutes — Entitlement — General — Sections 15 and 22 of Domestic Relations Act offending Charter of Rights and Freedoms by excluding common law spouses from their operation — Defendant common law husband being ordered to pay support to plaintiff — Domestic Relations Act, R.S.A. 1980, c. D-37.

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

Constitutional law — Charter of Rights and Freedoms — Nature of remedies under Charter — General — Sections 15 and 22 of Domestic Relations Act offending Charter of Rights and Freedoms by excluding common law spouses from their operation — Severance of provisions leading to no spouse being entitled to support — Better options being reading in and partial severance to allow common law spouses to receive alimony — Domestic Relations Act, R.S.A. 1980, c. D-37.

The parties lived together in a common law relationship for 30 years. The plaintiff common law wife brought an action for support under the *Domestic Relations Act*.

Held:

Action allowed.

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Sections 15 and 22 of the *Domestic Relations Act* offend the *Charter* by excluding from their operation common law spouses. The definition of spouse in the Act is underinclusive by excluding opposite sex couples who act as an economic union without the benefit of a marriage ceremony. Severance of the offensive provisions would make any spouse ineligible for alimony: better options were the remedial ones of reading in and selective severing. The legislature would have provided for dependent spouses, even common law spouses, rather than see all of the dependent spouses left without maintenance and support. The exclusion of common law spouses from the meaning of the word spouse was not a reasonable limit and was not justified in a free and democratic society. The defendant should pay to the plaintiff alimony of $750 per month.

Cases considered:

Armstrong v. McLaughlin Estate (1994), 150 A.R. 343, 112 D.L.R. (4th) 745 (Q.B.) [reversed (1995), 130 D.L.R. (4th) 766, 178 A.R. 125, 110 W.A.C. 125 (C.A.)] — *considered*

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 27 B.L.R. 297, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 55 A.R. 291, 55 N.R. 241, 9 C.R.R. 355, 11 D.L.R. (4th) 641 — *considered*

Egan v. Canada, 95 C.L.L.C. 210-025, 12 R.F.L. (4th) 201, C.E.B. & P.G.R. 8216, 124 D.L.R. (4th) 609, 182 N.R. 161, 29 C.R.R. (2d) 79, [1995] 2 S.C.R. 513, 96 F.T.R. 80 — *considered*

Griswold v. Connecticut, 85 S. Ct. 1678, 381 U.S. 479, 14 L. Ed. 2d 510 (1965) — *considered*

Miron v. Trudel, 10 M.V.R. (3d) 151, [1995] I.L.R. 1-3185, 13 R.F.L. (4th) 1, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253, [1995] 2 S.C.R. 418, 29 C.R.R. (2d) 189 — *applied*

Murray v. Roty (1983), 41 O.R. (2d) 705, 14 E.T.R. 125, 34 R.F.L. (2d) 404, 147 D.L.R. (3d) 438 (C.A.) — *considered*

Schachter v. Canada, 92 C.L.L.C. 14,036, 139 N.R. 1, 93 D.L.R. (4th) 1, 10 C.R.R. (2d) 1, 53 F.T.R. 240, [1992] 2 S.C.R. 679 — *applied*

Thibaudeau v. R., 12 R.F.L. (4th) 1, 95 D.T.C. 5273, (sub nom. *Thibaudeau v. Canada)* [1995] 1 C.T.C. 382, 124 D.L.R. (4th) 449, 29 C.R.R. (2d) 1, [1995] 2 S.C.R. 627, (sub nom. *Thibaudeau v. Minister of National Revenue)* 182 N.R. 1 — *considered*

Vriend v. Alberta, 18 C.C.E.L. (2d) 1, 37 Alta. L.R. (3d) 364, 96 C.L.L.C. 230-013, 132 D.L.R. (4th) 595, [1996] 5 W.W.R. 617, 181 A.R. 16, 116 W.A.C. 16, 34 C.R.R. (2d) 243, 25 C.H.R.R. D/1 [additional reasons 40 Alta. L.R. (3d) 352, [1996] 8 W.W.R. 405, 184 A.R. 351, 122 W.A.C. 351] (C.A.) — *applied*

Statutes considered:

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

s. 1*referred to*

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s. 15*considered*

s. 15(1)*considered*

s. 32(1)(*b*)*referred to*

Criminal Injuries Compensation Act, R.S.A. 1980, c. C-33 — *referred to*

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

s. 15*considered*

s. 22*considered*

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

Pt. 3*referred to*

Family Relations Act, 1975 (S. Aust.) — *referred to*

Fatality Inquiries Act, R.S.A. 1980, c. F-6 — *referred to*

Income Tax Act, S.C. 1970-71-72, c. 63 — *referred to*

Insurance Act, R.S.A. 1980, c. I-5 — *referred to*

Old Age Security Act, R.S.C. 1985, c. O-9

s. 2 "spouse"*referred to*

Workers' Compensation Act, S.A. 1981, c. W-16 — *referred to*

Action by common law spouse for support under Domestic Relations Act.

***Power J.*:**

1 The issue in dispute between the parties in this Application is the following:

> Does the Alberta Court of Queen's Bench have jurisdiction under the Domestic Relations Act, R.S.A. 1980, c. D-37, to direct the Defendant to pay support to the Plaintiff?

2 The Plaintiff Bernice Taylor (also known as Bonnie Taylor), born January 1, 1942, is currently 54 years of age and suffers from bipolar affective disorder which has the effect of causing cyclical manic and depressive episodes which can be treated with the appropriate medication.

3 The Plaintiff and the Defendant Laszlo Rossu met in 1964. The parties began cohabitation that year and separated in 1994. They lived together in a common law relationship for 30 years.

4 When the parties began cohabitation, the Plaintiff had a child, Donna, who also moved in with them. The Plaintiff was also pregnant with another child, a boy whom she gave up for adoption. At the time the Plaintiff

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moved in with the Defendant, Child Welfare was going to apprehend her daughter Donna. The Defendant asked Child Welfare not to apprehend the child and told them he would help to raise her and take care of her. The Defendant helped the Plaintiff raise Donna until she was 24 years old. During the relationship, Donna called the Defendant "dad" as she was growing up. The Defendant provided funds to support Donna, paid the groceries, bought her clothing and other items.

5 The parties had sexual relations for 25 years during their cohabitation although they did not share a bedroom. During the course of their relationship, the Defendant supported the family from 1964 to 1994.

6 The Plaintiff worked during part of the 30 year relationship at the Palliser Hotel in Calgary for 4 to 5 years, and at other places. The parties had a joint bank account for 4 to 5 years.

7 The Plaintiff helped the Defendant with activities around the house from approximately 1964 to 1989.

8 The Defendant worked for the C.P.R. during the course of the relationship and is currently retired and receives a pension of $835.00 per month from the C.P.R. In addition, he receives Canada Pension and Old Age Security in the amount of $671.00.

9 The Defendant owns a home at 60 Canyon Drive N.W., Calgary, valued at $100,000.00 and in addition has R.R.S.P.'s with the Royal Bank of Canada worth $25,722.87 as of February 5, 1996, and $26,829.23 with the Bank of Montreal.

10 The Defendant had the Plaintiff removed from the home in 1994 through a court order.

11 Common law marriages or cohabitation rights are not recognized in any Alberta legislation.

12 In *Armstrong v. McLaughlin Estate*, (sub nom. *Armstrong v. Elder*) issued on February 11, 1994, by Madam Justice J. P. Veit of the Alberta Court of Queen's Bench [reported 112 D.L.R. (4th) 745], at page 13 she stated:

> ... there is no evidence of the recognition of common law marriages or cohabitation rights in any Alberta legislation. None of The Matrimonial Property Act, The Parentage and Maintenance Act, The Domestic Relations Act, The Maintenance Order Act, The Maintenance Enforcement Act or The Reciprocal Enforcement of Maintenance Orders Act make any provision for common law spouses or cohabitees.

13 Madam Justice Veit goes on to state under the heading "Interpret Statutes According to Normal Rules of Construction" at page 16:

> The Alberta legislature must have been aware of the movement in Canadian law towards recognizing rights in common law marriages or in cohabitations. If it had wished to limit the construction of the word "spouse" to a particular definition or to a particular point in time, it could easily have done so. There are no statutes *in pari materia* which argue that the legislature deliberately chose to keep a traditional definition of the word "spouse" in the statute. In these circumstances, a court may interpret the word "spouse" according to the usual principles of statutory construction. Here, the ordinary meaning approach might well include a legal spouse and a common law spouse or, indeed, a cohabitee.

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14 Madam Justice Veit came to the conclusion that the court has the jurisdiction to define "spouse" as including someone other than a legal spouse.

15 If the Alberta legislature were to provide maintenance for common law spouses, it would properly fall under the *Domestic Relations Act*. By section 15 of the *Domestic Relations Act*, the granting of alimony is limited to cases where the spouse is entitled to a judgment of judicial separation or a judgment or restitution of conjugal rights. S. 15 of the *Domestic Relations Act* reads as follows:

> 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.

16 In the opinion of the Court, section 15 offends the *Charter of Rights and Freedoms* in that it excludes from its operation common law spouses, and married spouses who are not entitled to a judgment of judicial separation or a judgment for restitution of conjugal rights. By section 22 of the *Domestic Relations Act*, the court may order maintenance and support after a divorce of nullity. Taken together, these two provisions allow for maintenance and support for all couples who have been married. It excludes couples who are in an economic union without the benefit of the marriage ceremony. S. 15 and s. 22 of the *Domestic Relations Act* singularly and collectively offend s. 15(1) of the *Charter* which 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.

17 The ideal embodied in s. 15(1) of the *Charter* is that a law expressed to bind all should not have, because of irrelevant personal differences, a more burdensome or less beneficial impact on one than another. It is not every distinction or differentiation in treatment at law which will violate the equality guarantee. In order to govern effectively, legislatures must treat different individuals and groups in different ways. This section spells out four basic rights which apply to all persons, whether citizens or not:

1. The right to equality before the law;

2. The right to equality under the law;

3. The right to equal protection of the law;

4. The right to equal benefit of the law.

18 These four rights are granted with the direction that they be without discrimination. Discrimination exists where a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual group, has the effect of imposing burdens, obligations or disadvantages not imposed upon others or withholding or limiting access to opportunities, benefits and advantages available to other members of society.

19 Equality before the law at a minimum requires that no individual or group of individuals be treated more harshly than another under the law. Finding that discrimination exists will, in most cases, necessarily entail a

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search for a disadvantage that exists apart from and independent of the particular legal distinction being challenged. Victims of discrimination will often be members of a discrete and insular minority who come within the protection of s. 15 of the *Charter*.

20 The Court has three options in correcting a violation of the *Charter* inherent in s. 15:

1. It may sever the entire section;

2. It may "read in" common law spouse; or

3. It may sever the limitations inherent in the section.

If the Court severs the entire provision, no spouse will be eligible for alimony. The Court agrees that the better options are the remedial ones of "reading in" and selective severing.

21 The definition of "spouse" is underinclusive in that it excludes opposite sex couples who act as an economic union without the benefit of a marriage ceremony. The definition thereby offends s. 15 of the *Charter*.

22 In *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1, the Supreme Court of Canada made it clear that the courts have the power to "read in" parties to legislation where the provision offends s. 15 of the *Charter*. The Court stated at 12-13:

> The same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

23 The benefit to spousal support is a positive right and in *Schachter v. Canada, supra*, at page 29, the Court stated:

> ... Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declarations of invalidity than to mandate an immediate striking down.

24 The federal government has established guidelines for the entitlement and granting of spousal support. Therefore, the doctrine of paramountcy and equality under the law requires that the provincial governments maintain those standards in their legislation.

25 Section 15 of the *Domestic Relations Act* violates section 15 of the *Charter of Rights and Freedoms* and therefore the Court has jurisdiction pursuant to *Schachter v. Canada, supra*, to "read in" common law spouses

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for entitlement to alimony.

26 In *Murray v. Roty* (1983), 147 D.L.R. (3d) 438 (Ont. C.A.), Cory J.A., delivering the judgment of the Court, stated at p. 444:

> ... The parties lived together and worked together during a significant span of time. From the words and deeds of Roty, Charlotte Murray believed they were working towards common goals. In spite of her arduous toil and significant contributions, her efforts will benefit only Roty unless judicial intervention is warranted to protect her interest. It may well be necessary and appropriate to scrutinize closely the contributions of business partners to the acquisition of property. It is unnecessary and inappropriate to scrutinize the contributions of married couples or couples in relationships such as this one in the same way. Instead, equity and fairness should guide the court.

27 In *Miron v. Trudel* (1995), 13 R.F.L. (4th) 1 (S.C.C.), McLachlin J. (Sopinka, Cory and Iacobucci J.J. concurring) stated at p. 49:

> The analysis under s. 15(1) of the Charter 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 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.

28 And further at p. 50:

> 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.

29 The goal of the legislation here at issue under the *Domestic Relations Act* is to sustain spouses, when the members of the relationship decide to go their separate ways. The 1990 definition of "spouse" as adopted in *Miron v. Trudel*, which includes heterosexual couples who have cohabited for three years or more or who have lived in a permanent relationship with a child or children, should be read in to the legislation.

30 In *Miron v. Trudel*, McLachlin J. stated at p. 55:

> Section 15 of the Charter forbids discrimination, and "in particular ... discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The ground upon which the distinction in this case is based - marital status - is not included in the list of particularized grounds. We must therefore determine whether marital status is an analogous ground.

31 Further at p. 56:

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> ... "The principle of equality, which is but the other side of the coin of discrimination and which the law of every democratic country strives to realize in pursuit of justice of decency, means that one must apply, for the purpose of the (legislative) goal in question, equal treatment for all people, where there are no real differences among them that are relevant to that goal." *Bononovsky v. Chief Rabbis of Israel*, P.C. CH [25](1), 7,35.

32 The Court then went on to state at p. 57:

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

33 In the Province of Ontario, under Part 3 of the *Family Law Act*, R.S.O. 1990, c. F-3, the right to spousal maintenance is not conditioned on marriage. The legislation establishes a right to spousal support for those who have cohabited at least three years or who have cohabited in a relationship of some permanence and have children. Other provinces have adopted similar benefit thresholds. This suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.

34 The quotation of Douglas J. in *Griswold v. Connecticut*, 381 U.S. 479 (1965), at 486 is very appropriate:

> We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political face; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

35 I am mindful of the comments expressed by my colleague Veit J. where she stated in *Armstrong v. Elder*,

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supra, at p. 14:

> I accept that a court cannot amend a statute. Indeed, it cannot read words into a statute that are not there. However, a court is entitled to find content for general words such as "spouse". A normal speaker of English uses expressions like "common law wife", "common law husband".

36 I conclude then that the Alberta Legislature would have provided for dependent spouses, even common law spouses, rather than see all of the dependent spouses left without maintenance and support. Therefore, section 15 of the *Domestic Relations Act* should be remedied by "reading in" rather than striking the section.

37 In a paper entitled *Revenge of the Charter: "Public" and "Private" in Family Law* by D. A. Rollie Thompson of Dalhousie Law School, at page 25-45 he quotes from Professor Hogg's text *Constitutional Law of Canada*:

> The effect of *Miron* is that all of the attributes of a legal marriage must now be extended to unmarried couples. Any failure to do so would discriminate on the basis of marital status, and would be unconstitutional, except in the unlikely event that the law could be justified under section 1 [of the Charter]. While individuals will no doubt continue to get married for social, religious or personal reasons, their choice cannot be invested with any legal consequences, for example with respect to spousal support obligations, spousal property rights, or tax or benefit programmes. This could be regarded as no more than the logical culmination of many piecemeal legislated recognitions of common-law relationships. However, it is a radical result, which would certainly be controversial if made in a legislative body ....

38 The article by D. A. Rollie Thompson continues with the following statement at page 25-46:

> ... As almost all provinces now make some provision for common-law heterosexual couples in support laws, it will be impossible to deny the functional "private" similarities, i.e. economic dependence and the similar "public" advantages, i.e. savings in social assistance budgets. The one exception here may be Alberta, which does not include common-law spouses within even its support definitions and whose Court of Appeal has indicated some hostility to gay and lesbian rights.
>
> . . . . .
>
> It appears from the *Miron-Egan* opinions that the Supreme Court of Canada is prepared to accept some differentiation or hierarchy of family forms, in descending order of "rights": legally-married couples, common-law couples meeting the statutory test, same-sex couples meeting the statutory test, common-law couples who are cohabiting but don't meet the statutory test, same-sex couples who don't meet the statutory test, unmarried non-cohabiting fathers.

39 The Court recognizes that in order to establish a s. 15(1) constitutional infringement by otherwise valid provincial legislation, it is necessary to demonstrate two things.

> 1. That equal treatment of the class allegedly discriminated against [here, the common law spouse] is not provided for under the *Domestic Relations Act*.

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2. That the impugned law the [*Domestic Relations Act*] has a discriminatory impact because it excludes all common law spouses from financial support.

It clearly denies access to financial opportunities or benefits that are available to married couples in the population.

40 The content of the *Domestic Relations Act* as it presently reads is not neutral and does not support the common law spouse in the community. The *Domestic Relations Act*, being Alberta legislation, is captured by s. 32(1)(b) of the *Charter* and is constitutionally invalid to the extent that it violates s. 15, the equality provisions of the *Charter*. The equality provisions are violated because the *Domestic Relations Act* fails to provide for financial support for common law spouses and therefore discriminates against this group of individuals in the community.

41 S. 32(1)(b) makes the *Charter* applicable to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. It is patent that provincial laws are subject to the *Charter*. The fact that the Alberta Legislature has omitted common law spouses in the *Domestic Relations Act* is sufficient to engage the *Charter*.

42 The Supreme Court of Canada has approached s. 15(1) in a number of recent cases, including the following:

1. *Egan v. Canada*, [1995] 2 S.C.R. 513;

2. *Miron v. Trudel*, [1995] 2 S.C.R. 418;

3. *Thibaudeau v. R.*, *(*sub nom. *Thibaudeau v. Minister of National Revenue)* [1995] 2 S.C.R. 627.

43 In the *Miron v. Trudel*, *supra*, case the question of whether the exclusion of unmarried partners from accident benefits available to married partners violated s. 15(1). The problem arose in relation to the definition of "spouse" under an insurance policy, the terms of which policy were prescribed by Ontario provincial insurance legislation. McLachlin, J. delivered a judgment on behalf of Sopinka, Cory and Iacobucci, J.J., concluded that s. 15(1) had been breached. L'Heureux-Dubé, J. agreed with the result but based upon an approach that she outlined thoroughly in the *Egan*, *supra*, case.

44 In the *Egan*, *supra*, case s. 15 was breached by the definition of "spouse" in the *Old Age Security Act*, R.S.C. 1985, c. O-9, which limited certain benefits to persons of the opposite sex who lived together. Egan and Nesbitt, homosexuals who had cohabited since 1948, claimed that this definition discriminated on the basis of sexual orientation. La Forest J. for Lamer C.J. and Major and Gonthier JJ., concluded that there had been no breach of s. 15(1).

45 The *Thibaudeau*, *supra*, case involved the validity of a provision in the *Income Tax Act* that required custodial parents to include as income any amount received for the support of those children. Gonthier J. applied the *Miron*, *supra*, approach to conclude that there was no breach. Sopinka and La Forest JJ. agreed.

46 I agree with the approach of Hunt J.A. in *Vriend v. Alberta* (1996), 181 A.R. 16 at 52 [37 Alta. L.R. (3d) 364] (C.A.), where she states:

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> A third approach is that legislatures cannot avoid a s. 15(1) analysis *merely* because they have failed to extend a protection or benefit to a particular group. In other words, a failure to legislate, (or legislative silence or omission), can *of itself* attract Charter scrutiny.

47 In *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *(*sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145 [33 Alta. L.R. (2d) 193], Dickson C.J. at 155 noted that constitutions (including the *Charter*) who must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framer." This is a consideration that has to be examined by the judiciary in interpreting constitutional provisions. The discrimination suffered by common law spouses over the past number of years is demonstrated by the fact that most other provincial and territorial jurisdictions in the Country, with the exception of Alberta, Prince Edward Island and Quebec, have extended legislation to protect common law spouses so that they can seek financial support from their former common law partner.

48 The Court takes into consideration that *Charter* rights are not absolute. Governments can justify *Charter* breaches through the provisions of s. 1; and if that step is taken, consideration should be given to the difficult choices that legislatures have to make and reasons why a particular *Charter* breach may be justified. The Court fully understands that the legislatures can use the "opting out" provisions of the *Charter* to override the judgment of the courts. This clearly limits the power of the courts in making a final determination.

49 The "reading in" provisions can be used when the question of how to amend the Statute to comply with the Constitution can be answered with sufficient precision, and clearly it is for the Alberta Legislature and not the courts who should fill in the necessary details.

50 In Alberta, the following statutes grant rights and impose restraints upon non-marital cohabitation. The principle examples of such legislation are the *Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33; the *Fatality Inquiries Act*, R.S.A. 1980, c. F-6; the *Insurance Act*, R.S.A. 1980, c. I-5; various pension plan acts and the *Workers' Compensation Act*, S.A. 1981, c. W-16.

51 South Australia is an example of a state the laws of which partially assimilate cohabitation with marriage [*Family Relations Act*, 1975 (S. Aust.)]. There, a person who has cohabited with another as husband or wife for a defined period of time, or with whom he or she has had a child, may apply to the court for a declaration that he or she possesses the status of "putative spouse". Once that status is declared by the court to exist then the putative spouse has the same entitlement as the married person in a number of specified areas.

52 The Alberta Law Reform Institute prepared a paper entitled, "Towards Reform of the Law Relating to Cohabitation Outside Marriage", Report No. 53, June 1989, and stated as follows at p. 17:

> The arguments that commend option (c) (a broad maintenance obligation), are as follows:
>
> i. *In fact*, the obligation to pay spousal maintenance is only imposed by judges acting in divorce proceedings in the two hardship situations referred to above. It is therefore unnecessary to arbitrarily curtail judicial discretion as would be the case under option (b) ... Guidelines similar to those set out in the Divorce Act would be sufficient to ensure that maintenance only be awarded in cases of hardship.
>
> ii. This solution would bring Alberta into line with the legislation of many other provinces.

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> A majority of the Board favoured option (b). That is, a majority of the Board recommended that a maintenance obligation exist as between cohabitants in two situations only, namely (1) where one person has the care and control of a child of a cohabitational relationship and is unable to support him or herself by reason of the child care responsibilities; (2) where a person's earning capacity has been adversely affected by the cohabitational relationship and some transitional maintenance is required to help the applicant to adjust his or her life.

53 Further at p. 18:

> ... The applicant would have to go further and show that in all the circumstances of the case it is reasonable that a maintenance order be made. In assessing what is or is not reasonable a court should take into account factors corresponding to those the court considers in making an order for spousal support under the Divorce Act [s. 15(5)]. Further, the court should be directed to have in mind objectives corresponding to those a court has in mind in making an order for spousal support under the Divorce Act [s. 15(7)].

54 The exclusion of common law spouses from the meaning of the word "spouse" is not a reasonable limit and is not justified in a free and democratic society.

55 I direct that the Defendant pay to the Plaintiff alimony or maintenance in the amount of $750.00 per month to commence November 1, 1996.

56 The Court has considered the question of costs and, because of the limited resources of both litigants, directs that each party pay his or her own costs.

Action allowed.

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