SUPREME COURT OF NOVA SCOTIA
Citation: *LeBlanc v. Cushing Estate*, 2019 NSSC 360

Date: 20191202
Docket: Yarmouth No. 484289
Registry: Yarmouth

Between:

Sarah LeBlanc

Applicant

v.

R. Andrew Kimball in his capacity as personal representative of the Estate of Russell Cushing

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Pierre L. Muise
Heard:	August 8, 2019 in Yarmouth, Nova Scotia
Written Decision:	December 2, 2019
Summary:	The Applicant, Ms. LeBlanc, was the common law partner of Russell Cushing. He passed away. His will left nothing to her. She filed an application in court seeking, among other things, relief as a dependant under Section 3 of the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 (the "TFMA"). This preliminary motion was to determine whether a common law partner can be a "dependant" as defined in the TFMA.
Issues:	Whether the word "widow", in the TFMA definition of "dependant", includes a surviving female who was in a common law relationship with the testator at the time of the testator's death.
Result:	"Widow", in the definition of "dependant" under Section 2(b) of the TFMA, does not include a surviving female who was in a common law relationship with the testator at the time of the testator's death, unless, at the time of the testator's death, they

were registered as a domestic partnership that was valid and had not been terminated by the occurrence of one of the events listed in Section 55 of the *Vital Statistics Act*.

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Counsel:	Richard Norman and Sarah Shiels, for the Applicant Rubin Dexter, Jane O'Neil, QC, and Benjamin Carver, for the Respondent Jeremy Smith and Jeff Waugh, making representations on behalf of the Attorney General of Nova Scotia

INTRODUCTION

[1] The Applicant, Sarah LeBlanc, was the common law partner of Russell Cushing, who passed away. His will, which he had made about three years before he and Ms. LeBlanc moved in together, left nothing to her.

[2] She filed an application in court seeking, among other things, relief as a dependant under Section 3 of the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 (the "TFMA"). Her application also challenged the constitutionality of the definition of "dependant" in the TFMA to the extent that it may preclude common law spouses from claiming relief under the Act.

[3] That necessitated the within preliminary motion to determine whether a common law partner can be a "dependant" as defined in the TFMA. The TFMA defines "dependant" as meaning "the widow or widower or the child of a testator".

ISSUE

[4] The only issue to be determined on this motion is whether the word "widow", in the TFMA definition of "dependant", includes a surviving female who was in a common law relationship with the testator at the time of the testator's death.

ANALYSIS

[5] This question must be determined because, pursuant to Section 3 of the TFMA, the Court only has discretion to grant relief if the application is made "by or on behalf of the dependant".

[6] Section 3(1) states:

> "Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant."

[7] Section 2(b) states: " 'dependant' means the widow or widower or the child of a testator". The TFMA does not provide a definition of widow or widower.

[8] This Court must determine whether it includes the survivor of common-law partners.

GENERAL POSITIONS OF THE PARTIES AND THE ATTORNEY GENERAL

Ms. LeBlanc

[9] Ms. LeBlanc submits that, applying the modern approach to statutory interpretation, considering today's values and that the TFMA is to be construed liberally because it is social welfare legislation, "widow" should be interpreted to include a surviving common-law partner. In the alternative, she submits that, if the term "widow" is ambiguous, considering the cases from other provinces which declared dependants' relief legislation which excluded common law spouses unconstitutional, that ambiguity should be resolved in favour of a *Charter*-compliant interpretation, which would require it to include common-law partners.

The Estate of Russell Cushing

[10] The Estate of Russell Cushing submits that, applying the same approach to statutory interpretation, considering the manner in which the Nova Scotia legislature has dealt with the question of common law partners, clearly and unambiguously shows that it deliberately chose to exclude a surviving common law partner from the term "widow" in the TFMA definition of "dependant". In the alternative, it submits that, considering the Supreme Court of Canada decisions which held that the exclusion of common-law couples from some property division and support regimes was constitutional, "the presumption of *Charter* compliance does not mandate that common law spouses be included".

The Attorney General

[11] The Attorney General's submissions were made only to assist the Court. It took no position on the outcome of the motion. It noted that the purpose of the TFMA, as discussed in the debates preceding its enactment, in the *Law Reform Commission of Nova Scotia, Division of Family Property, Final Report* (Law Reform Commission of Nova Scotia, September 2017 – Halifax), and in caselaw, including from the Supreme Court of Canada, is "to ensure the financial well-being of spouses and other dependants, and to ensure they [do] not become a charge on the state". It highlighted the divided reasons and opinions in **Québec (Attorney General) v. A.**, 2013 SCC 5, where the majority concluded the exclusion of common-law partners from the property division and spousal support regimes in the Québec Civil Code was constitutional.

THE MODERN APPROACH TO STATUTORY INTERPRETATION

[12] The modern approach to statutory interpretation was described by Justice Iacobucci, at paragraphs 26 to 30 of **Bell ExpressVu Limited Partnership v. Rex**, 2002 SCC 42, with some authority references omitted, as follows:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings … . I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted … "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described … as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". …
>
> 28 Other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision. …
>
> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" … . The words of the provision must be "reasonably capable of more than one meaning" …. By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement … is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, <u>each equally in accordance with the intentions of the statute</u>, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation". [Emphasis by underlining in the original.]

[13] Ms. LeBlanc refers to three sets of questions from Ruth Sullivan, *Sullivan and Driedger on the Construction of Modern Statutes, Fourth Edition* (Butterworths Canada Ltd. 2002 – Markham), ch. 1, p.3, as being "additional questions which Courts may consider when interpreting statutes". I agree with the

comments of the Attorney General that they are questions to "help the interpreter to apply Driedger's modern approach which takes into account the scheme of the Act, the object of the Act, and the intention of the legislature". I add the caveat that the extent of the legal norms to be considered in the third set of questions depends on whether the interpretive exercise leaves genuine ambiguity.

[14] Those three questions, which are also in Ruth Sullivan, *Sullivan on the Construction of Statutes, 6th Ed* (LexisNexis Canada, 2014), at §2.8, are as follows:

- what is the meaning of the legislative text?
- what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
- what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

[15] §2.2 to 2.5 explain the foundation of those questions as follows:

> **§2.2** The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.

> **§2.3** The first dimension emphasized is textual meaning. …
>
> **§2.4** A second dimension endorsed by the modern principle is legislative intent. … Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.
>
> **§2.5** A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. In the second edition he wrote:
>
> > It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
> >
> > • the expressed intention — the intention expressed by the enacted words;
> >
> > • the implied intention — the intention that may legitimately be implied from the enacted words;
> >
> > • the presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
> >
> > • the declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.
>
> Presumed intention embraces the entire body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Their primary source, however, is the common law. Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for the strict and liberal construction doctrine and the presumptions of legislative intent. These norms are an important part of the context in which legislation is made and read.

[16] However, as already noted, Justice Iacobucci, in **Bell ExpresVu**, stated that "other principles of interpretation — such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision".

[17] *Sullivan on the Construction of Statutes*, *6th Ed*, at §2.33, explained the impact of **Bell ExpressVu** on the extent to which the third dimension, being that of considering whether the legislation complies with legal norms, should be relied upon. It did so by referring to other decisions of the Supreme Court of Canada that relied on **Bell ExpressVu**, as follows:

> **§2.33** ***Backsliding into ambiguity: Bell ExpressVu.*** After the *Rizzo* case, one would have expected the question of whether a text is ambiguous to have no bearing on the question of what a court should look at in resolving the statutory interpretation problem. In every case, the entire context is to be taken into account. Yet the courts frequently backslide, especially when it comes to reliance on legal norms and extrinsic aids. In *Re Canada 3000 Inc.*, for example, dealing with s. 56 of the *Civil Air Navigation Services Commercialization Act*, the Court refused to factor in respect for private rights, a well-established common law norm, because the words to be interpreted no longer seemed ambiguous once the textual and purposive analyses were complete. Binnie J. wrote:
>
> > The Ontario motions judge applied a narrow approach to the Detention Remedy on the basis that it invades what would otherwise be the proprietary rights of the legal titleholders … However, only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". …
>
> In *Charlebois v. Saint John (City*), the majority of the court refused to presume compliance with Charter values in interpreting a provision of New Brunswick's *Official Languages Act*. Charron J. wrote:
>
> > In this case, it is particularly important to keep in mind the proper limits of *Charter* values as an interpretative tool …
> >
> > … In this respect, Daigle J.A. [in the court below] properly instructed himself and rightly found … that the contextual and purposive analysis of the *OLA* "removed all ambiguity surrounding the meaning of the word 'institution'". Absent any remaining ambiguity, *Charter* values have no role to play.
>
> In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, the Supreme Court of Canada refused to look at extrinsic material on the grounds that the language to be interpreted was not ambiguous.

[18] More recently, the Supreme Court of Canada, in **R. *v.* Alex**, 2017 SCC 37, at paragraphs 31 to 33, made it clear that "relevant" legal norms are to be considered along with context and purpose, stating, with some case references omitted:

> [31] This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms: … . In the words of McLachlin C.J. and Deschamps J. in *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, this is necessary because (para. 10):
>
> > Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
>
> [32] Ruth Sullivan makes a similar point in *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9:
>
> > At the end of the day . . . the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.
>
> [33] In sum, while Mr. Alex's interpretation may be an arguable reading of the opening words, it cannot prevail if it is at odds with the purpose and context of the provisions.

[19] When **Alex** is considered in conjunction with **Bell ExpressVu**, it appears that at least Charter-related legal norms are not part of the "relevant" legal norms to be considered unless there is a genuine ambiguity.

[20] The reasons for that are outlined at paragraphs 62 to 67 of **Bell ExpressVu**. They include the following:

(a) "[A] blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent."

(b) Courts would be consulting the *Charter* in interpreting legislation rather than applying it in reviewing legislation.

(c) This would make it almost impossible for legislatures to "enact reasonable limits on *Charter* rights and freedoms"

(d) The constitutionality of a provision may be determined following determination on interpretation.

[21] The Nova Scotia Court of Appeal, in **Sparks v. Nova Scotia (Assistance Appeal Board)**, 2017 NSCA 82 and **Nova Scotia (Office of the Ombudsman) v. Nova Scotia (Attorney General)**, 2019 NSCA 51, among other decisions, noted that the directives and factors outlined in S. 9(5) of the *Interpretation Act*, R.S.N.S 1989, c. 235 are consistent with, and part of the "modern approach to statutory interpretation".

[22] Section 9(5) of the *Interpretation Act* states:

> **(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

[23] Those directives are to be followed, and those factors are to be considered, as part of the process of interpreting statutes, prior to determining if ambiguity remains: **Sparks**, *supra*, para 28.

[24] In addition, S. 9(1) of the *Interpretation Act* states:

> "The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning."

[25] In **Tataryn v. Tataryn Estate**, [1994] 2 S.C.R. 807, at pages 814 and 815, the Court concluded that a similar provision in the British Columbia *Interpretation Act*, combined with the broad language of its then *Wills Variation Act*, meant "that the Act must be read in light of modern values and expectations".

[26] The Court in **Lawen Estate v. Nova Scotia (Attorney General)**, 2019 NSSC 162, at paragraph 15, noted that the *Wills Variation Act* considered in **Tartaryn** was "substantively identical" to the TFMA.

[27] Consequently, though, as indicated in *Sullivan on the Construction of Statutes, 6th Ed*, the intent of the legislature at the time the TFMA was passed is to be considered, the Act must be interpreted "in light of modern values and expectations".

[28] In addition, the TFMA is at least in part, social welfare legislation. Therefore, it is to be interpreted "broadly and liberally" and any ambiguity "resolved in the complainant's favour": **Gray v. Ontario (Director of Disability Support Program)**, 2002 CarswellOnt 1196 (C.A.), at paras. 9 and 10.

[29] The Court in **Sparks** included the social welfare legislation "favour the claimant" interpretive principle under the heading of "Other Interpretive Aids", and stated, at paragraph 53: "we should interpret social welfare legislation in a manner that benefits the claimants". Therefore, that is one of the principles which need only be applied if there is genuine ambiguity.

[30] With these points in mind, I will apply the modern approach to the interpretation of the meaning of widow in the TFMA under the following headings:

1. Ordinary Meaning
2. Scheme of the TFMA
3. Object of the TFMA
4. Intention of the Legislature
5. Consequences of Interpretation
6. Consistency with Legal Norms
7. Other Principles of Interpretation.

APPLICATION OF MODERN APPROACH TO STATUTORY INTERPRETATION

Ordinary Meaning

[31] Ms. LeBlanc states that "Sullivan defines ordinary meaning as the 'reader's first impression meaning', and also as a dictionary meaning".

[32] At §3.9 of the *6th Edition,* Sullivan states:

> The expression "ordinary meaning" is much used in statutory interpretation, but not in a consistent way. Sometimes it is identified with dictionary meaning, sometimes with "literal meaning" and sometimes with a meaning derived from reading words in their literary context. Most often, however, ordinary meaning refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context — in the words of Gonthier J., "the natural meaning which appears when the provision is simply read through". This last sense of "ordinary meaning" is the one adopted in this text.

[33] At §3.12 she adds that the "extra-textual aspect of immediate context is supplied by the reader and consists of the knowledge stored in his or her brain".

[34] She goes on to warn of the dangers of relying on dictionary definitions because they are "a-contextual". However, at §3.37 she recognizes they "do have a role in statutory interpretation".

[35] Ms. LeBlanc notes that "Black's Law Dictionary, 7th ed, defines 'dependant' as "one who relies on another for support …'". The definition continues stating: "one not able to exist or sustain oneself without the power or aid of someone else". However, that definition is of little assistance in interpreting whether "widow" includes a female surviving common law partner. That is because, as stated in **Lawen Estate**, at paragraph 12:

> To be a "dependant" within the meaning of the definition does not require actual dependency or need. One need only be a child, widow or widower of the testator."

[36] Ms. LeBlanc emphasizes that the definition of dependant uses the words "widow or widower" as opposed to "wife or husband". She points to the definition

of "widow" in *Barron's Canadian Law Dictionary*, *Sixth Edition*, which is: "A woman whose spouse is deceased and who has not remarried".

[37] She further argues that *Barron's Canadian Law Dictionary* defines "spouse" to include common-law spouses. The definition of "spouse" in that dictionary commences by referring to Acts in relation to which persons need to be legally married to meet the definition of spouse, which can include same sex marriages. It then states:

> "Some provincial and territorial statutes also recognize unmarried persons, both opposite sex and same sex, cohabiting in a common law relationship as a 'spouse' for the purpose of the particular statute. … Under certain federal legislation … some benefits are extended to common-law spouses."

[38] Unfortunately, the differing definitions of spouse in different statutes provides little assistance in assessing the meaning of spouse in the *Barron's Canadian Law Dictionary* definition of "widow".

[39] However, it is noteworthy that the *Barron's Canadian Law Dictionary* definition of "widow" refers to the spouse not having "remarried". That indicates it meant that the survivor and the deceased had been married.

[40] Ms. LeBlanc argues that, "while the word 'widow' may once have only meant or implied the female survivor of a lawful marriage" it is now "broad enough to include a common law spouse".

[41] However, the authors of two recent publications do not read it as including a common law spouse.

[42] The *Law Reform Commission of Nova Scotia, Division of Family Property, Final Report*, at page 250, in footnote 819, states: "The Nova Scotia *Testator's Family Maintenance Act* does not currently allow common law partners to bring an application."

[43] Stalbecker-Pountney and Holland, *Cohabitation: The Law in Canada* (2019 Thomson Reuters Canada Limited – Toronto), at §4.4.9 states that the TFMA "does not cover cohabitees, but defines dependant to be the widow or widower … of a testator".

[44] These comments suggest, and I agree, that "the natural meaning which appears when the provision is simply read through" and the "first impression meaning" is that the definition of "widow" does not include the female survivor of a common law couple. That meaning is supported by the definition of "widow" in *Barron's Canadian Law Dictionary*.

Scheme of the TFMA

[45] Prior to the enactment of the TFMA in 1956, testators had "absolute testamentary autonomy". The TFMA limits that autonomy "for the proper

maintenance and support of" the "widow or widower or the child" of the testator: **Tataryn**, *supra*, at page 815.

[46] There is no means and needs analysis to determine if a person fits in the TFMA definition of "dependant". It is limited to "the widow or widower or the child" of the testator. If the claimants fit in one of those categories, the judge can consider their application for relief under the TFMA.

[47] The requirement for a needs and means analysis on an initial TFMA application arises from two provisions. Firstly, there is the direction in Section 3 of the TFMA that the judge: determine whether the testator has died "without having made adequate provision" in their will "for the proper maintenance and support of a dependant"; take "into consideration all relevant circumstances of the case"; and, exercise their discretion to order that "whatever provision" they deem "adequate be made out of the estate of the testator for the proper maintenance and support of the dependant". Secondly, there is the direction in Section 5(1) to consider "all matters that should be fairly taken into account" including a non-exhaustive list of factors, some of which are related to means and needs.

[48] Those include:

(b) "whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support";

(c) "the financial circumstances of the dependant";

(d) "the claims which any other dependant has upon the estate"; and,

(e) "any provision which the testator while living has made for the dependant and for any other dependant".

[49] Section 7 outlines multiple means and needs factors to be considered on a variation application.

[50] Other factors listed in Section 5(1) assist in determining whether it is fair, in the circumstances, to limit the testator's testamentary autonomy. They include:

(a) "whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act";

(b) "the relations of the dependant and the testator at the time of his death";

(c) "any services rendered by the dependant to the testator"; and,

(d) "any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any

business or occupation or for maintenance or medical or hospital expenses".

[51] Section 5(3) expressly provides that "the judge may receive any evidence the judge considers relevant of the testator's reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a dependant, including any statement in writing signed by the testator".

[52] This provision is another part of the scheme of the TFMA which imports a consideration of the fairness of limiting testamentary autonomy.

[53] The TFMA scheme allows the Court to limit testamentary autonomy to the extent that it is fair to provide for widows, widowers and children only, not any others, irrespective of whether the testator had been supporting them prior to dying.

[54] The scheme in the TFMA itself does not provide additional reason to accept, nor any reason to reject, the ordinary meaning.

[55] However, the TFMA itself is not the only part of the legislative scheme to be considered.

[56] As stated at §13.26 of *Sullivan on the Construction of Statutes, 6th Ed*:

> "The provisions of related legislation are read in the context of the others and the presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act. Definitions in one statute are taken to apply in the others and any purpose statements in the statutes are read together."

[57] A related statute is the *Law Reform (2000) Act*, S.N.S. 2000, c. 29. Sections 32 to 45 of that Act amended various sections of the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, and added Sections 52 to 59. Those amendments render the *Vital Statistics Act* a directly related statute.

[58] The amended Sections and Sections 52 to 59 of the *Vital Statistics Act* deal with domestic-partner declarations. Sections 52 to 59 provide for their formation, registration, effect, and termination, as well as for registration of their termination.

[59] Section 54(2) of the *Vital Statistics Act* states that "[u]pon registration of a domestic-partner declaration, domestic partners, as between themselves and with respect to any person, have as of the date of the registration the same rights and obligations as a spouse under", initially, eleven named Acts and as "a widow or widower under the *Testators' Family Maintenance Act*". It also states that those Acts "apply *mutatis mutandis* to domestic partners". An amendment in 2001 added that "the domestic partners, the registration of their domestic-partner declaration and their domestic partnership are subject to and give rise to the same operations of

law that relate to those classes of persons under those Acts". These effects, of course, are dependent on the domestic-partner declaration being valid: Section 56(2).

[60] There have also been some additional Acts added to the list. I will discuss one of them, the *Wills Act* later. For now, I will explain my analysis based on the originally named Acts. The same principle applies using the added Acts.

[61] Section 54(2) is worded such that the associated words rule applies. The common feature among them is that they refer to a spouse or surviving spouse. Therefore, it equates "widow or widower" with surviving spouse.

[62] For eight of those eleven named Acts, the *Law Reform (2000) Act* amends them by adding "or common law partner" after "spouse". For five of those eight, it amends them by defining "spouse" as meaning "either of a man or woman who are married to each other". Those five are the *Fatal Injuries Act, Health Act, Hospitals Act, Insurance Act, and, Maintenance and Custody Act.*

[63] The remaining three of those eight are the *Members' Retiring Allowance Act, Pension Benefits Act,* and *Provincial Court Act*. The definitions of spouse applicable to the *Pension Benefits Act* and *Provincial Court Act* involve marriage or a domestic partnership which includes registration. A definition of "spouse" was

added to the *Members' Retiring Allowances Act* in 2011 which includes "persons cohabiting in a conjugal relationship of at least two years". At the same time, "or common partner" was struck from Section 24(1), and Section 24(2), which defined common law partner, was repealed, presumably because the inclusion of cohabitees in the definition of "spouse" made those no longer necessary.

[64] The remaining three of the eleven named Acts are the *Matrimonial Property Act*, *Intestate Succession Act*, and *Probate Act*. Section 5(1) of the *Matrimonial Property Act* specifies that it "applies to spouses who entered into marriage". Spouse is not defined in the *Intestate Succession Act* or the *Probate Act*. However, there is no reason for them to have had a different definition than the other Acts did at the time the *Law Reform (2000) Act* was passed.

[65] Therefore, the references to "spouse", with which the reference to "widow or widower" was grouped in Section 54(2) of the *Vital Statistics Act*, expressly or impliedly, were references which involved marriage or a registered domestic partnership. The associated words rule suggests that the reference to "widow or widower" also involved marriage or a domestic partnership.

[66] The requirement for marriage or registration of a domestic partnership also adds certainty to the dependants' relief legislative scheme. Both involve registration. Divorce clearly terminates a person's status as a spouse. Section 55

lists four events upon which "a domestic partner becomes the former domestic partner of another person" thus terminating a domestic partnership. Three of them are clear and certain. They are: registering a "statement of termination"; one partner marrying another person; and, making "a written agreement that would qualify as a separation agreement under Section 52 of the *Parenting and Support Act* [formerly the *Maintenance and Custody Act*". The other event is that the parties have lived "separate and apart for more than one year and one or both parties has the intention that the relationship not continue". However, termination based on separation may be caused to be registered by either party pursuant to Section 57, which does provide certainty in any event.

[67] Certainty and the accompanying ease of proof is an important element of the legislative scheme because any application for relief is made only after the testator has passed away, and is no longer able to present their view of the relationship that existed prior to and up to the time of his death.

[68] In addition, since a testator can still be married to one person and living in a common law relationship with another person at the same time, if "widow or widower" includes common law partners, that raises the potential that two widows or widowers will be making an application under the TFMA at the same time. The impossibility of a person being both married and in a valid domestic partnership at

the same time, prevents such a situation from arising. That is a benefit of the domestic partnership registration scheme which applies to the TFMA.

[69] The *Wills Act*, R.S.N.S. 1989, c. 505, is also a related statute because it also contains provisions which limit a testator's testamentary autonomy. It only does so in relation to marriages, registered domestic partnerships and termination of same. Its applicability to registered domestic partnerships arose in 2001, when "a wife or husband under the *Wills Act*" was added to the list of Acts in Section 54(2) of the *Vital Statistics Act*.

[70] Section 17 of the *Wills Act* provides that "[e]very will is revoked by the marriage of the testator", subject to three expressly specified exceptions.

[71] Section 19A, which was added in 2006, provides that "except where a contrary intention appears by the will or a separation agreement or marriage contract" where "the testator's marriage is terminated by a judgment absolute of divorce or is declared a nullity", the following are revoked: a devise or bequest to the former spouse; an appointment of that former spouse as executor or trustee; and, the conferral of a power of appointment on that former spouse.

[72] Both Sections apply only in situations involving marriage or a registered domestic partnership.

[73] Therefore, common law partners who are not in a registered domestic partnership would not be subject to the same automatic revocation of devises or bequests under the will. In that way, their inclusion in "widow or widower" in the TFMA definition of "dependant" would give them benefits without the risk of that burden. That would result in incoherence and inconsistency between the *Wills Act* and the TFMA.

[74] Similarly, the Section 17 revocation-by-marriage provision is a benefit to persons that are married or in a registered domestic partnership. That same benefit is not advanced to common law partners, creating another incoherence and inconsistency.

[75] The fact that the *Wills Act*, as related legislation, confines limitations on testamentary autonomy to situations involving marriage and registration of domestic partnerships, suggests a consistent and coherent approach should be taken with the TFMA.

[76] For these reasons, the scheme created by the TFMA and these related statutes supports an interpretation of "widow or widower" which does not include common law partners unless they have registered as domestic partners.

Object of the TFMA

[77] No Hansard record of the legislative debates leading to the enactment of the TFMA is available. However, some of the debates were reported in the *Chronicle Herald*, Volume 8, number 65, "Court Right to Alter Will Disputed in House Debate", dated March 16, 1956. The article notes the following comments in support of the legislation which give some indication of its object.

[78] Opposition leader Stanfield stated: "It is desirable that some measure be provided for correcting miscarriages of justice."

[79] G.I. Smith stated: "Which is more distasteful … the bill or the hardships which go unhelped if this legislation was not passed?"

[80] Those comments indicate the object of the TFMA included, as submitted by the Attorney General "correcting miscarriages of justice and helping hardships".

[81] In the *Law Reform Commission of Nova Scotia, Division of Family Property, Final Report*, at page 36, it is noted that:

> In 1956, the Nova Scotia legislature introduced the *Testators' Family Maintenance Act* to ensure the financial well-being of spouses and other dependants, and to ensure they did not become a charge on the state. The *Testators' Family Maintenance Act* provided, as it does today, for the "proper maintenance and support of the dependant" where the testator has failed to do so.

[82] *Oosterhoff on Wills, Eight Edition* (2016 Thomson Reuters Canada Limited – Toronto), at § 22.1.2, in reference to the New Zealand *Testators' Family*

Maintenance Act 1900, upon which the TFMA was modelled, states: "Its purpose was clear – to provide real rights to women and children for their maintenance after death of the testator, and, to protect the state against having to care for them."

[83] **Garrett v. Zwicker**, 1976 CarswellNS 9 (S.C., A.D.), at paragraph 19, includes the following quote from a New Zealand court:

> The Act … is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.

[84] Ms. LeBlanc submits that:

> "The object of the TFMA as a whole is to provide the court with a means of allowing equitable relief to dependants who were not sufficiently included in a testator's will, and will unfairly suffer as a result."

[85] This formulation encompasses the object of correcting injustice, "helping hardships" and providing for "moral claims" and "proper maintenance and support". However, the following comments in **Tartaryn**, at page 815, indicate a more complete formulation of the object which balances the "interests protected by the Act":

> The two interests protected by the Act are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. … At a minimum this meant preventing those left behind from becoming a charge on

> the state. … It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on death of the person who held it, even in the absence of demonstrated need.
>
> The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouse and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances."

[86] The *Chronicle Herald* article notes that the bill which was being debated was entitled "an act to authorize provision for the maintenance of certain dependants of testators". The definition of "dependant" in the TFMA limits those "certain dependants" to widows, widowers and children. That shows that the object of the act was limited to specified categories of dependants.

[87] In **Lawen Estate**, the Court narrowed the group of people who qualify as "child" for the purpose of the definition of "dependant" in the TFMA. In doing so, it: found that testamentary autonomy is a fundamental right under Section 7 of the *Charter*; and, concluded that, to the extent that it was "undermined by being subject to a purely 'moral' claim by an independent adult child", the TFMA violated that right and the violation was not justified under Section 1 of the *Charter*. The decision did not address "legal" claims. However, it highlights the importance of the testamentary autonomy portion of the object of the TFMA.

[88] A more complete description of the object of the Act than that proposed by Ms. LeBlanc, encompasses the balancing of interests purpose noted in **Tartaryn** and the limited definition of dependant in the TFMA. It is "to provide the court with a means of allowing equitable relief to" certain specified "dependants who were not sufficiently included in a testator's will, and will unfairly suffer as a result", while taking into consideration all relevant circumstances, including the testator's reasons for the dispositions or provisions made or not made in their will.

[89] Ms. LeBlanc argues that:

> "A relationship of dependency, between spouses, is not contingent on the presence of a legal marriage, and therefore to take an originalism approach to interpreting the TFMA would frustrate the broader intended purpose."

[90] She was likely referring to the fact she had conceded that, when the TFMA was originally enacted, "widow and widower" would have meant the surviving spouse of a testator to which that spouse had been married.

[91] I agree that common law partners can be equally as dependent on each other as married spouses. I also agree that, if the applicable legislative scheme does not show an intention to do so, excluding common law partners from the definition of widow or widower would frustrate the intended purpose.

[92] However, as I have noted, the legislative scheme does not encompass all dependants, only specified categories of dependants. Therefore, it is only if the

legislature intends that common law partners be included that its overall intended purpose would be frustrated.

[93] I will deal with the intention of the legislature under the next heading.

Intention of the Legislature

[94] It is conceded and clear that, when the TFMA was enacted, the legislature did not intend "widow or widower" to include the surviving partner in a common law relationship.

[95] In **O'Connell Estate, Re**, 1979 CarswellNS 411 (S.C., T.D.), the Court, interpreting the TFMA, found that "the term 'widow' implies a lawful marriage", even though legislation dealing with maintenance of wives and children had already amended the definition of wife to include a woman in a common law relationship.

[96] A lot of time has passed since then, and, as noted in **Tartaryn**, the TFMA must be interpreted "in light of modern values and expectations".

[97] However, the legislature has not been silent on the question of the definition of "widow or widower" in the TFMA since the **O'Connell Estate** decision.

[98] In the *Law Reform (2000) Act* amendments to the *Vital Statistics Act*, it made it clear that "widow and widower" included a surviving domestic partner, as long as a valid domestic-partner declaration was registered.

[99] Ms. LeBlanc and the Attorney General submit that the domestic partnership registration scheme is a separate way the legislature created for persons to signal to the world that they are in the type of relationship that fit in the definition of "widow or widower" and that the legislature did not intend it to exclude common law partners who had not registered. They note that the *Law Reform (2000) Act* was in response to multiple court decisions and meant to provide benefits to a pool of people broader than common law partners.

[100] However, as conceded, it is clear that common law partners, as well as the broader range of persons, can register as domestic partners.

[101] Further, the legislature, in the *Law Reform (2000) Act* amended multiple other acts by adding "or common law partner" after "spouse". If it had intended to, it could just as easily have amended the definition of "dependant" in the TFMA to read: "means the widow or widower or the child of a testator, or a person who was, at the time of the testator's death, a common law partner of the testator". The question of the rights and responsibilities of common law partners was a significant part of the *Law Reform (2000) Act*. The only court decision interpreting

the definition of widow or widower had found it implied marriage. Therefore, one would have expected the legislature to amend the definition of "dependant" in such a way, if it intended it to include common law partners.

[102] It did not do. Instead it expressly stated that persons in registered domestic partnerships would have the same rights and obligations as widows and widowers under the TFMA. The persons who can register as domestic partners include common law partners. That indicates the legislature intended surviving common law partners to fit in the definition of "widow or widower" only if they were registered as the testator's domestic partner at the time of his death and that domestic partnership had not been terminated.

[103] Ms. LeBlanc submits that the *Law Reform (2000) Act* does not truly reflect the intentions of the legislature because it was a forced response to decisions, including the decision in **Walsh v. Bona**, 2000 NSCA 53. That decision declared Section 2(g) of the *Matrimonial Property Act* unconstitutional because it provided a definition of "spouse" which excluded common law partners. Then, as highlighted by Ms. LeBlanc, that decision was overturned by **Nova Scotia (Attorney General) v. Walsh**, 2002 SCC 83.

[104] If the legislature was intending to follow the Court of Appeal decision in **Walsh v. Bona** it could simply have said that "widow and widower" included a

survivor who had been living common law with the deceased and defined what common law partner meant. In relation to the TFMA, it did not. It chose to implement the registered domestic partnership scheme.

[105] Further, if the legislature was of the view that a decision which was subsequently overturned had compelled it to enact legislation it did not intend, it has had plenty of time to amend or repeal it. However, it has not done so in relation to the TFMA.

[106] Ms. LeBlanc argues that it does not make sense that the *Parenting and Support Act* would allow a claim for support by a separated common law partner, while the testator is living; but, not the TFMA after the testator has passed away. That argument can be taken as suggesting that the legislature could not have intended a differing range of application between the two Acts.

[107] That argument finds some support in the *Chronicle Herald* article reporting on the TFMA legislative debates, which states:

> "A living person must carry out moral duties to his wife and children, and Mr. Smith said there should be no reason why death should enable any man to escape their duties."

[108] However, the *Parenting and Support Act*, R.S.N.S. 1989, c. 160, (formerly the *Maintenance and Custody Act*), at Section 2(m) specifically defines spouse as meaning, among other things:

> "[E]ither of two persons who
>
> ….
>
> (v) not being married to each other, cohabited in a conjugal relationship with each other continuously for at least two years, or
>
> (vi) not being married to each other, cohabited in a conjugal relationship with each other and have a child together."

[109] That definition, in that formulation, was added in 2015.

[110] The legislature could just as easily have added a similar definition for "widow or widower" in the TFMA. It did not do so. It similarly did not make the *Matrimonial Property Act* applicable to common law partners.

[111] Like the TFMA, the *Matrimonial Property Act* provides for a surviving spouse to make application for division of property on death. Though, the TFMA gives a judge discretion to make an order for "proper maintenance and support", the cost is covered by taking assets from the deceased's estate.

[112] Under the *Parenting and Support Act*, the separated partner would generally pay support from ongoing income, which, depending on the situation, may or may not include pension income. After death, the estate is comprised of all the assets of the testator. Thus, the pool of assets from which the TFMA claimant is seeking maintenance and support is different.

[113] Further, under the *inter vivos* support legislation, freedom to dispose of assets is not a consideration. Under the TFMA the rights of testators to dispose of their assets as they wish is a significant feature.

[114] Therefore, the legislature does have reason to keep the application of the TFMA narrower than that of the *Parenting and Support Act*. There is no indication it intended them both to have the same breadth of application.

Consequences of Interpretation

[115] Ms. LeBlanc argues that "limiting the meaning of 'widow' to a woman who was lawfully married would not be in accordance with modern values" and "would be discriminatory". She submits the legislative language can accommodate a "non-discriminatory interpretation". In support, she cites **R. v. Lomond**, 2015 ONCJ 109, where the Court, in the absence of a *Charter* challenge, extended the non-compellability aspect of the spousal immunity rule by interpreting it as applying to common law couples.

[116] **Lomond** dealt with the common law spousal immunity rule, not the provisions of the *Canada Evidence Act*. In the case at hand, it is statute law that is being interpreted. As stated in **Bell ExpressVu**, I am only to apply "the '*Charter*

values' presumption" to the statutory interpretive process if there is "genuine ambiguity". I will address that point under the next heading.

[117] The Estate argues that **R. v. Nguyen**, 2015 ONCA 278, shows that **Lomond** was wrongly decided. However, **Nguyen** decided the constitutionality of spousal incompetency not extending to common law spouses. It did not have to decide the constitutionality of the compellability aspect of the common rule governing the testimony of spouses. The interpretation in **Lomond** related to compellablity.

[118] "Widow" in the TFMA is not limited to a woman who was lawfully married. It includes a woman who was in a registered domestic partnership. A woman in a common law relationship qualifies to so register unless there are circumstances prohibiting it, such as her common law partner being still married.

[119] "Modern values" do not necessarily support common law partners having all the same rights and obligations and as married spouses. An example is the Supreme Court of Canada decision in **Nova Scotia (Attorney General) v. Walsh**, which I have already discussed. A more recent example is **Quebec (Attorney General) v. A.**, a 2013 decision of the Supreme Court of Canada, in relation to which, as I have already noted, the Attorney General has highlighted the divided reasons and opinions. Nevertheless, a majority of the Court found that legislation

which excluded "*de facto* spouses" from its spousal support and division of property regime was constitutional.

[120] Ms. LeBlanc also submits that: "Interpreting the law in a way which allows common-law spouses to advance claims against estates will bring the TFMA in line with most other provincial statutes." As already discussed, the legislature, when it enacted the *Law Reform 2000 Act*, selected the Acts in which it would include common law partners, without requiring them to register as domestic partners, and those in which it would not. The Acts to which common law partners were added deal generally with benefits to be obtained from government or third parties, or *inter vivos* support. The Acts to which they were not added deal generally with division of assets and estates of deceased persons. Therefore, there was some coherence within each of the two separate groups of statutes.

[121] In those circumstances, interpreting the TFMA as requiring uniformity with the majority of statutes would improperly interfere with the role of the legislature.

[122] *Oosterhoff on Wills, Eight Edition* (2016 Thomson Reuters Canada Limited – Toronto), at § 22.1.2, states:

> "What is optimal in the balancing of the legitimate proprietary interests of testators and the legitimate interests of his or her heirs in respect of family provision is a rough symmetry between the *inter vivos* family law support regime and the testamentary support regime in the law of succession."

[123] Excluding common law partners who have not registered as domestic partners from the application of the TFMA, while they are included in the definition of spouse under the *Parenting and Support Act*, would, to some extent, disrupt that rough symmetry, resulting in a somewhat suboptimal balancing. However, legislatures need not enact optimal legislation, they need only enact constitutionally valid legislation.

[124] Interpreting the TFMA to require common law partners to register as domestic partners to access the rights of widows and widowers would add that extra obligation. In some cases, the ability to register would be blocked by one partner's refusal to consent. However, that is no different than marriage, it also requires the consent of both parties.

[125] One may argue it would defeat the main purpose of the TFMA, which is to provide for the "support and maintenance" of dependants. However, as noted, from its inception, the TFMA has been limited to "certain dependants", and the *Law Reform 2000 Act* amendments to the *Vital Statistics Act* have only extended it to common law partners who have registered as domestic partners.

[126] Interpreting "widow or widower" to include the survivor of a common law relationship would be incoherent with the legislative scheme which requires registering as a domestic partnership.

[127] In addition, it would interfere with the choices common law partners have been making.

[128] The ability to register as domestic partners has been available since 2000. Many common law couples have not done so. The *Law Reform Commission, Division of Family Property, Final Report*, at page 93, stated:

> The option to register a domestic partnership under the *Vital Statistics Act* has not had a strong uptake. Vital Statistics reports for the years 2008 to 2014 indicate that an average of 59 domestic partnerships were registered with Vital Statistics each year.

[129] There is no evidence of the reasons why many common law partners do not register. However, in relation to those for which it is a conscious choice, the interpretation proposed by Ms. LeBlanc would interfere with how they have decided to structure their affairs.

[130] Overall, these consequences provide at least as much support for an interpretation which excludes common law partners who have not registered as domestic partners as it does for the interpretation advanced by Ms. LeBlanc.

Consistency with Legal Norms

[131] Ms. LeBlanc submits that the interpretation she proposes "is consistent with the norms which the legislature is expected to abide by".

[132] She referenced constitutional norms. However, as indicated, **Bell ExpressVu** made it clear that the interpreting Court is only to apply the presumption of compliance with constitutional norms where there is genuine ambiguity. She has raised consistency and coherence with other statutes, which I partly addressed under the "Consequences" heading. She has implied fairness and rationality.

[133] Another relevant norm is predictability.

[134] It is also important to weigh competing legal norms.

[135] The concern for consistency and coherence within the dependants' relief scheme, and between it and other statutes dealing with division of property and the estates of deceased persons, carries more weight than the concern for consistency and coherence between the TFMA and the other statutes dealing with *inter vivos* support and government or third party benefits.

[136] Ms. LeBlanc submits it is not rational that the child of a common law couple, where one partner parent has died, can make a claim under the TFMA, but that the surviving partner cannot. On its face, that suggests inconsistency with the legal norm of rationality. However, it is well recognized that child support takes precedence over spousal support. In addition, any choice regarding registering or

not registering as domestic partners is that of the parents; and, they cannot bargain away a child's right to support. Therefore, in that sense, the dichotomy is consistent with *inter vivos* support principles.

[137] Looking in isolation at the exclusion of common law partners from the definition of "dependant" and thereby foreclosing their ability to make a claim under the TFMA, at a time when they are likely to be the most vulnerable, appears unfair. However, the step to be taken to gain that ability is not onerous. It merely requires registration of a domestic partnership.

[138] The requirement for such registration, combined with the need for both partners to be unmarried, the specified acts of termination of a domestic partnership, and the ability to register the termination, create certainty and predictability as to who may apply for relief. It also ensures that only one "widow or widower" may make a claim. That is consistent with the object of limiting relief to "certain dependants".

[139] The legislature has not enacted the same definition of common law partner for all statutes that include such a definition. Therefore, if the TFMA was interpreted as being available to unregistered common law partners, it would create uncertainty and unpredictability as to who would qualify as a common law partner.

[140] Further, these norms are common law norms; and, the common law has created alternate means for a common law partner to seek equitable relief. For example, in **Kerr v Baranow**, 2011 SCC 10, the Court applied the law of unjust enrichment to allow claims by separated common law partners who had been cohabiting in a "joint family venture". There does not appear to be any reason why a common law partner cannot seek relief under the same principles against the estate of their deceased common law partner. Such an application was granted in **Smith v. Wettlaufer**, 2015 NLTD(G) 41. Ms. LeBlanc has claimed such relief, and other common law relief in her Notice of Application.

[141] Considering such competing legal norms, even considering the principle of broad and liberal construction of social welfare legislation, but leaving aside the presumption of compliance with constitutional norms, an interpretation which requires common law partners to register as domestic partners is an acceptable outcome.

Other Principles of Interpretation

[142] As noted in **Bell ExpressVu**, at paragraph 29:

> "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[143] One example of the "other principles of interpretation" the Court provided was "the '*Charter* values' presumption".

[144] At paragraphs 29 and 30, the Court provided the following additional comments that help guide the determination of whether there is genuine ambiguity:

> 29 … By necessity, … one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. …
>
> 30 [A]mbiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" … ."

[145] Almost every time an interpretation question is before the Court for determination someone is spending money or resources to back opposing views. The opposing interpretations must be equally plausible. Therefore, that last expression of the measure for a finding of ambiguity is likely meant to convey that there is genuine ambiguity if, after applying the modern approach to statutory interpretation, the Court finds that each of parties advancing opposing interpretations has an equally strong case.

[146] Differing conclusions by courts would suggest at least some ambiguity. The fact that is insufficient, and the alternative interpretations must not only be plausible, they must be "equally in accordance with the intentions of the statute", indicates a substantial threshold for a finding of genuine ambiguity.

[147] The analysis at paragraph 44 of **Bell ExpressVu** indicates that, even where the Act in question is silent on a point in contention, a provision in related legislation can remove ambiguity that might otherwise exist.

[148] In the case at hand, the TFMA does not address the questions of whether common law partners are included in "widow or widower". However, the *Vital Statistics Act*, as amended by the *Law Reform (2000) Act*, does. I have already discussed how.

[149] The extent to which the context, ordinary meaning, scheme of the act, object of the act and intention of the legislature accord with each other and the alternative interpretations is to be considered in determining whether a genuine ambiguity exists. For the reasons stated under each of the preceding interpretation headings, I find that they generally accord with each other and clearly accord best with the interpretation that "widow or widower" in the TFMA definition of "dependant" does not include a person who was in a common law relationship with the testator

at the time of the testator's death, unless they had validly registered as a domestic partnership.

[150] Therefore, there is no ambiguity and no need to turn to other principles of interpretation, including the presumption of compliance with constitutional norms.

CONCLUSION

[151] Under the foregoing headings I have read the words of the TFMA "in their entire context", including that provided by related statutes, "and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of" the legislature. For the reasons noted under those headings, I conclude that it is appropriate to interpret the word "widow", in the TFMA definition of "dependant", to include a surviving female who was in a common law relationship with the testator at the time of the testator's death, only if they were registered as a domestic partnership that was valid and had not been terminated.

[152] For the reasons noted, such an interpretation is plausible in that it:

(a) complies with the relevant body of legislative text;

(b) promotes the legislative intent of limiting the categories of "dependants", recognizing the importance of testamentary autonomy,

not adding common law partners to the definition and requiring registration of a domestic partnership;

(c) is more supported by compliance with legal norms than the interpretation advanced by Ms. LeBlanc; and,

(d) considering all relevant factors as whole, is a reasonable and just interpretation.

[153] Therefore, the answer to the narrow question in this motion is as follows.

[154] "Widow", in the definition of "dependant" under Section 2(b) of the TFMA, does not include a surviving female who was in a common law relationship with the testator at the time of the testator's death, unless, at the time of the testator's death, they were registered as a domestic partnership that was valid and had not been terminated by the occurrence of one of the events listed in Section 55 of the *Vital Statistics Act*.

ORDER

[155] I ask Counsel for the Estate to prepare the Order.

COSTS

[156] If the parties are unable to reach agreement on the question of costs, I ask them to provide their submissions in writing on the issue.

Pierre L. Muise, J.