SUPREME COURT OF NOVA SCOTIA
Citation: *Jackson Estate v. Young*, 2020 NSSC 5

Date: 20200107
Docket: 478993
Registry: Pictou

Between:

Estate of Judith Marie Jackson , as represented by Laura Beth Kelly & Sarah Jillian Barnes in their capacities as Administrators of the Estate

Applicant

v.

Bill Young

Respondent

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	June 10, 2019, in Pictou, Nova Scotia
Counsel:	Daniel Boyle, for the Applicant Roseanne Skoke and Allison Kouzovnikov, for the Defendant Jeremy Smith, for the Attorney General of Nova Scotia

By the Court:

Background

[1] Judith ("Judy") Marie Jackson died intestate on August 26, 2017. At the time of her death, she was in a common law relationship with William ("Bill") Young. She had two adult daughters – Laura Kelly and Sarah Barnes – from her marriage to Brian David Kelly. Ms. Jackson and Mr. Kelly divorced in 1999, with Ms. Jackson retaining the matrimonial home at 327 Craig Road in Watervale, Nova Scotia.

[2] The relationship between Judy Jackson and Bill Young began in about 2004. Several years later, Mr. Young moved in with Ms. Jackson at 327 Craig Road. Although they were engaged to be married in 2009, no wedding ever took place.

[3] During her relationship with Mr. Young, Ms. Jackson dealt with various health problems, including bipolar depression, sciatica and hip pain. In 2015, she was diagnosed with melanoma. On August 7, 2017, Ms. Jackson was hospitalized and diagnosed with brain cancer. She was subsequently moved to the palliative care unit where she passed away on August 26.

[4] Following their mother's death, Laura Kelly and Sarah Barnes applied for and were issued a grant of administration of their mother's estate. On March 28, 2018, the property at 327 Craig Road was transferred to Ms. Kelly and Ms. Barnes as personal representatives of Ms. Jackson's estate. Although Ms. Kelly and Ms. Barnes asked Mr. Young to vacate the home on numerous occasions, he has refused to leave.

[5] On August 2, 2018, Ms. Kelly and Ms. Barnes, on behalf of Ms. Jackson's estate, filed an application in the Supreme Court for an order requiring Mr. Young to vacate the property, for occupation rent from August 2017 to the present, and for costs. Mr. Young filed a notice of contest and a notice of respondent's claim on August 14, 2018. He also filed a notice of claim in Probate Court on the same date. In both proceedings, Mr. Young takes the position that he is a "spouse" for the purposes of the *Intestate Succession Act*, R.S.N.S. 1989, c. 236, and is therefore entitled to inherit Ms. Jackson's property under that Act. In the alternative, he says the exclusion of common law spouses under the *Intestate Succession Act* infringes

s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In the further alternative, Mr. Young submits that he has an equitable interest in the property under the doctrine of unjust enrichment or proprietary estoppel. Mr. Young seeks, among other things, an order that the property be transferred to him.

[6] Mr. Young filed a notice of constitutional question on February 19, 2019. Counsel for the Attorney General attended the hearing but took no position and offered no evidence on the constitutionality of the *Intestate Succession Act*.

[7] This matter first came before Justice Murray in Chambers on August 16, 2018. In a written decision dated October 2, Murray J. ordered Mr. Young to grant access to the property, at reasonable times and upon reasonable notice, to the administrators for the purpose of carrying out their duties as personal representatives of the estate. Mr. Young allowed Laura Kelly and her partner, David Hape, to access the property on October 13, 2018. Mr. Young left the property while Ms. Kelly and Mr. Hape were present. While at the home, Ms. Kelly and Mr. Hape observed several marijuana plants and firearms. They called the RCMP and Mr. Young was arrested when he returned to the home. After appearing before a judge, Mr. Young was fined and placed on probation. He has not permitted Ms. Kelly or Ms. Barnes to return to the property since that time.

Issues

[8] The issues on this application are:

1) Does the term "spouse" under the *Intestate Succession Act* include a common law spouse?

2) If not, does the exclusion of common law spouses from Nova Scotia's intestate succession regime infringe s. 15(1) of the *Charter*?

3) If not, does Mr. Young have an equitable interest in the property at 327 Craig Road pursuant to the doctrine of unjust enrichment or proprietary estoppel?

4) If not, should Mr. Young be ordered to vacate the property?

5) If Mr. Young has no legal or equitable interest in the property, should he be ordered to pay occupation rent for the period of August 2017 to the date of judgment?

The evidence

[9] Before considering the issues, I will review the evidence.

William "Bill" Young

[10] Bill Young filed two affidavits and was cross-examined on them. Mr. Young is a 59-year-old carpenter. He has an adult daughter, Sophie Young, from a previous marriage.

[11] Mr. Young met Judy Jackson in 2003. They began dating a year or two later. At that time, he said, she was coming out of an abusive relationship and was living in her home in a remote rural area twenty minutes from town. Mr. Young said the home was "not in a great state of repair."

[12] Although Mr. Young stated in one of his affidavits that he moved into Ms. Jackson's home at 327 Craig Road in 2003, he testified on cross-examination that it was closer to 2008. Prior to moving in with Ms. Jackson, Mr. Young had been living with his parents after selling his own house in Salt Springs so that he could afford to make child support payments.

[13] In December 2009, Mr. Young bought a ring and proposed to Ms. Jackson. They never married. He said they intended to get married "when things went right for us", when they "both got all of our bills and stuff straightened out" and were in a stable financial position.

[14] According to Mr. Young, he was Ms. Jackson's confidant and provided for her emotional, psychological and financial wellbeing during their relationship. He said Ms. Jackson suffered ill health, and he provided her with love and care. He chauffeured her to medical appointments, pipe band practice and anywhere else she needed to go. Mr. Young said Ms. Jackson loved playing bagpipes and was a member of the Pictou County Pipes Band. She often did public performances with the band, and her friends consisted primarily of the other members.

[15] Mr. Young said that although most of the household bills were in Ms. Jackson's name, he assisted her with paying them. Even though they had separate bank accounts, they "had a lot of dependence on each other" when it came to their finances. Mr. Young considered himself "equally responsible for all the debt and contributed to the payment of the mortgage, taxes, household expenses". He and Ms. Jackson usually declared themselves as common law spouses on their income tax returns, except for one year when they were advised to file as "single" to facilitate Ms. Jackson receiving her disability pension from the government.

[16] Mr. Young stated that in 2006, Ms. Jackson obtained a Residential Rehabilitation Assistance Program Grant of $15,681.00 for chimney repairs, a new roof, and to replace some doors. The roof began to sag immediately after it was put on, which Mr. Young attributed to weak rafters. The bow in the roof has never been fixed.

[17] When Mr. Young came to live with Ms. Jackson, the house was subject to a pre-existing mortgage. In September 2010, Ms. Jackson refinanced the property through the Royal Bank of Canada, borrowing $41,000 to renovate and repair the home and to discharge the earlier mortgage. Mr. Young acknowledged that Ms. Jackson refinanced the home in her name only. She applied for HomeProtector life and disability mortgage insurance. Ms. Jackson was approved for the life insurance but denied disability insurance due to her various health issues. When Ms. Jackson died, the insurer paid off the mortgage.

[18] Mr. Young said that from 2013 to 2015, Ms. Jackson had no income, and he withdrew the entirety of his retirement savings – approximately $26,000 – to cover their expenses. He stated that during the times that Ms. Jackson was ill, he made his "best efforts to provide financially for her and to maintain the mortgage and the debt". In 2015, Ms. Jackson received disability benefit backpay in the amount of $32,378.94.

[19] Mr. Young gave evidence that in addition to providing financial support, he assisted with repairs and improvements to "our home". He renovated two bedrooms in the home "about five or six years ago". He said that both he and Ms. Jackson paid for these renovations. Mr. Young denied that David Hape, Laura Kelly's partner, was substantially involved with the bedroom renovations. Mr. Hape only helped "a little bit, not much". In addition to renovating the bedrooms, Mr. Young laid some used laminate flooring in the living room and in the hallway, repaired the flooring in the bathroom and replaced the toilet. He replaced the

refrigerator, stove, hot water tank and water tank over the course of his relationship with Ms. Jackson.

[20] Mr. Young stated that he also worked hard on landscaping the exterior of the home, and chopped wood for heat in the winter. He denied that David Hape ever assisted him with cutting wood unless the wood was for Mr. Hape's own use.

[21] When asked why the bedrooms were renovated, Mr. Young said that one of the reasons was mould. There were also dead rats in the walls. Mould had been an issue since before Mr. Young moved into the home. He explained that some insulation in the attic had gotten wet and had never been replaced. As a result, any time they painted over the mould, it came back. Mr. Young agreed that mould has returned to the renovated bedrooms, and it remains an issue throughout the home. He also acknowledged that the home is currently not insured and requires upgrades to the electrical and plumbing systems. He has not taken steps to remediate any of these issues and has no plans to do so until he knows whether he has the right to remain in the home.

[22] Mr. Young's evidence was that Ms. Jackson and his daughter Sophie had a close mother-daughter relationship. Sophie stayed with him and Ms. Jackson every second weekend from the time she was 14 years of age until she became independent. She had a bedroom in the home and shared all holidays and special occasions with Mr. Young and Ms. Jackson.

[23] According to Mr. Young, Ms. Jackson's two daughters, Ms. Kelly and Ms. Barnes, were estranged from their mother. He said they rarely spent time with her during the ten years before her death. He described them as having "no meaningful relationship" with Ms. Jackson. He explained that Ms. Kelly only contacted her mother when she wanted some of her medicinal marijuana, which Ms. Jackson had authorization to grow. As for Ms. Barnes, he said she kept her children away from Ms. Jackson. Mr. Young stated that neither daughter was around when Ms. Jackson was diagnosed with skin cancer in 2015. During her second bout with cancer, they only noticed that she was ill during the last month of her life.

[24] When Ms. Jackson was hospitalized in August 2017, she named Mr. Young as substitute decision-maker. After she died, he applied for and received the Canada Pension Death Benefit and the Canada Pension Widowers' Allowance. He attempted to pay her funeral expenses but the funeral home director did not return

his call. Mr. Young said he wanted to apply for administration of the estate but learned that he was not authorized to do so as a common law spouse.

[25] In October 2018, Mr. Young was ordered by the court to allow Ms. Jackson's daughters to attend the house to take inventory. Laura Kelly and her partner, David Hape, came to the home on October 13, 2018. Mr. Young left the property while they were present, as had been agreed, but his daughter Sophie and her boyfriend stayed behind. Mr. Hape and Ms. Kelly went through the home, taking photos. When Mr. Young returned, he was arrested for improper storage of a firearm, production of marijuana and possession of marijuana. After two nights in custody, he attended court and was given a fine and placed on probation.

[26] Mr. Young denied Ms. Kelly's assertion that he threatened to burn down the house, or that he made reference to having a shotgun waiting behind the door for anyone who tried to take his home from him.

Sophie Young

[27] Sophie Young is Bill Young's daughter. She is 28 years old and has worked at Lawton's Drug Store in Westville for the past five years. Ms. Young's evidence is that she first met Judy Jackson when she was 12 years old. Ms. Young considered Ms. Jackson to be her stepmother. She spent every second weekend with her father and Ms. Jackson at 327 Craig Road, along with holidays and other special occasions. Ms. Young said that her father and Ms. Jackson lived together as husband and wife, and they referred to the house on Craig Road as "their" home. They did everything together as a couple. Ms. Young went with her father to Peoples Jewellers in December 2009 and helped him pick out an engagement ring for Ms. Jackson.

[28] Ms. Young witnessed her father maintaining the house and doing landscaping over the years. She saw her father shovel manure and help till the garden. He replaced a door that had been previously replaced with the money from the grant. Ms. Young did not actually see her father install the door, but there was a new door when she next visited. Ms. Young did not know who paid for the door, but said her father "did a lot of carpentry and restoration work with a lot of different companies", and might have salvaged it from one of his jobs.

[29] Ms. Young said her father and Mr. Hape renovated two bedrooms. She did not see the work in progress, but only after completion. In addition, her father removed and replaced the subfloor in the bathroom and lifted the toilet because the

joist underneath was getting weak and the seal "was going" on the toilet. Again, Ms. Young only saw the finished product.

[30] Ms. Young did not have a relationship with Judy Jackson's daughters, as they did not spend much time at their mother's home. According to Ms. Young, Sarah Barnes had not visited since her daughter was an infant. Ms. Young said she had witnessed Ms. Jackson calling Ms. Barnes at various times and inviting her to the house for Ms. Jackson's birthday or for Easter, and that Ms. Jackson always ended up crying by the time she hung up the phone. Ms. Barnes never came. Ms. Young said Laura Kelly was present on only a few occasions during her time at 327 Craig Road. Ms. Kelly's son Jacob started coming to the house during the last two years before Ms. Jackson's death.

[31] Ms. Young agreed that Ms. Barnes texted her on August 8, 2017, to inform her that Ms. Jackson had been hospitalized. At that time, Ms. Young was caring for her stepfather who was also gravely ill.

[32] Ms. Young was present on October 13, 2018, when Ms. Kelly and Mr. Hape came to 327 Craig Road to do the home inspection. They took videos of the house, and never mentioned any concerns to her about Mr. Young having five marijuana plants and several hunting rifles on the property.

[33] Ms. Young always considered 327 Craig Road to be her second home, and called it her "safe place". She stated that Ms. Jackson always welcomed her and treated her as if she was her own daughter.

Pictou County Pipes Band members

[34] Mr. Young filed affidavits from five members of the Pictou County Pipes Band – Agnes Leadbetter, Donna MacKay, Jessie Elizabeth Langille, Joan Muise, and Mary Ellen Curley. None of the affiants were cross-examined. The affidavits all contain hearsay evidence, which I have disregarded.

[35] Each of the affiants observed Mr. Young being kind, considerate and loving to Ms. Jackson. They said Mr. Young and Ms. Jackson were together as a couple and were known in the community to be husband and wife. Mr. Young drove Ms. Jackson back and forth to band practice every week, and to parades and other special events. He accompanied Ms. Jackson along the parade route to support her and to be there in case she was tired or needed assistance.

[36] Four of the affiants stated that when Ms. Jackson was in palliative care, Mr. Young welcomed the band members to spend time with her. They went as a group and also individually. These same affiants observed Mr. Young to be loving and supportive toward Ms. Jackson until the very end of her life.

[37] Mary Ellen Curley had been a friend of Ms. Jackson's for four and a half summers prior to her death. She said she does not know Ms. Jackson's daughters and had not observed them at any band events. Donna MacKay had been Ms. Jackson's friend for five years, and also said that she does not know Ms. Jackson's children. Agnes Leadbetter, who had known and been a friend to Ms. Jackson for almost forty years, said she met Ms. Jackson's children for the first time when their mother was in palliative care.

Laura Kelly

[38] Laura Kelly is Judy Jackson's daughter and Sarah Barnes's sister. She has one child, Jacob, with her common law partner, David Hape.

[39] Ms. Kelly stated that her parents, Judy Jackson and Brian Kelly, purchased the home at 327 Craig Road in 1979 shortly after they were married. Ms. Kelly and her sister grew up in the home. When Ms. Jackson and Mr. Kelly divorced, Ms. Jackson retained the family home. She was the sole owner of the property from that time until her death.

[40] Ms. Kelly stated that at the time of her mother's death, Ms. Jackson had been living with Mr. Young at 327 Craig Road. Mr. Young moved in with her mother in late 2004.

[41] When Ms. Jackson died, she did not leave a will. Ms. Kelly and Ms. Barnes met with the Registrar of Probate and were advised that they were the legal heirs of their mother's estate. Ms. Kelly and Ms. Barnes applied for a grant of administration, which was issued on March 22, 2018. Six days later, Ms. Jackson's home was transferred to Ms. Kelly and Ms. Barnes as personal representatives of the estate.

[42] According to Ms. Kelly, Ms. Barnes advised her that she texted Mr. Young on September 6, 2017. In the texts, Ms. Barnes informed him about the outcome of their meeting with the Registrar, and their plans to apply to be joint administrators of their mother's estate. Ms. Barnes told Mr. Young that they did not expect him to find a new place to live immediately and that they would like to

figure things out with him in a reasonable manner. The text messages were attached as an exhibit to Ms. Kelly's affidavit. Ms. Kelly said she went to 327 Craig Road a few days after those texts were sent and explained to Mr. Young that she and her sister were the sole beneficiaries of Ms. Jackson's estate and that, as her daughters, they were the next of kin. Mr. Young responded that he was the next of kin as their mother's common law spouse. Mr. Young became visibly upset and, in a deep, yelling voice, stated that the house and all its contents were his and that no one was going to take what is his. According to Ms. Kelly, Mr. Young became increasingly upset and hostile, stating, "I will burn the house down before I let anyone else have it".

[43] Ms. Kelly disputed Mr. Young's claim that she never spent time with her mother at 327 Craig Road. On the contrary, she said, she and her partner David, and their son Jacob, regularly interacted with Ms. Jackson over the course of the last ten years of her life, including visiting her home, having her visit their home, and attending events like parades. Ms. Kelly filed various photographs as an exhibit to her affidavit which show her and her children spending time with Ms. Jackson on various occasions over the years. Ms. Kelly noted that she has not always owned a vehicle, and transportation sometimes dictated her ability to visit.

[44] Ms. Kelly acknowledged that, during her teenage years, her relationship with her mother had its ups and downs. When her parents divorced, Ms. Kelly was 14 years old and went to live with her father. Ms. Kelly agreed that her mother had mental health issues, including depression. She said that her relationship with her mother became closer, however, after her son Jacob was born. From that time forward, Ms. Kelly, her partner and Jacob spent every holiday with Ms. Jackson and Mr. Young. Ms. Kelly added that her relationship with her mother continued to grow closer after Ms. Kelly underwent open-heart surgery in February 2013. She denied that she and her sister were not there for their mother during her fight with cancer.

[45] According to Ms. Kelly, she never kept her son Jacob away from Ms. Jackson. Jacob frequently visited 327 Craig Road and assisted with baking, gardening and other yard work. He also had numerous sleepovers over the years, and helped Mr. Young paint Ms. Jackson's bedroom in 2015.

[46] Ms. Kelly knew Sophie Young to be Mr. Young's daughter, but said she rarely ever saw her at 327 Craig Road when she and her family were there to visit Ms. Jackson.

[47] In response to the affidavits of the Pictou County Pipes Band members, Ms. Kelly stated that she attended her mother's band practices on Tuesday evenings in the summer at Acadia Park in Westville regularly from 2013 to 2017, when she did not have to work. She also attended every July 1 parade in Westville. Ms. Kelly said she did not know all of her mother's band friends, as the only time she would see them was at parades and concerts, and the ladies tended to go their separate ways after performances.

[48] With respect to the condition of the house at 327 Craig Road, Ms. Kelly said that when Mr. Young moved into the home, it was habitable but was starting to age. In 2006, Judy Jackson applied for and obtained grants to replace the roof, chimney, siding, back door and basement door. The work was completed by contractors. The only other significant renovations occurred in 2015, when Ms. Kelly's partner Mr. Hape, their son Jacob, and Mr. Young renovated the bedrooms in the home. Also in 2015, Mr. Young installed a new toilet, and Frank Parker's Plumbing installed a new water pump and hot water tank. Ms. Kelly said she observed this work taking place, and that the renovations were necessitated by mould in the walls, a rat infestation, and general neglect of maintenance. She did not see Sophie Young at the home while the 2015 renovations were taking place.

[49] Ms. Kelly acknowledged that she called the RCMP after she and Mr. Hape visited the property on October 13, 2018. She noticed firearm parts lying about unsecured, as well as evidence of marijuana plants being grown inside the house and in the yard outside the home. She said she was concerned about drugs and firearms on the property, especially in light of Mr. Young's previous threats to her about his willingness to use his firearms.

[50] Ms. Kelly stated that as a result of her visit to the property in October 2018, she has numerous concerns about the maintenance and condition of the property. She is particularly concerned about the questionable condition of the electrical system and water entering the home through the roof, producing mould and causing damage to the kitchen ceiling. Ms. Kelly filed numerous photographs taken on October 13, 2018, showing the condition of the property.

[51] When asked about her plans for the house, Ms. Kelly said she intends to move into the home with her partner and son. She said her mother would have wanted Jacob to be taken care of and to have a place to live.

<u>David Hape</u>

[52] David Hape is Laura Kelly's common law partner. Mr. Hape met Judy Jackson in 1998 through her then-partner, with whom she was in a relationship from approximately 1998 until 2003. Mr. Hape began a relationship with Laura Kelly in 2001, and Ms. Kelly moved in with him the following year. The couple's son Jacob was born in August 2004. Mr. Hape said Ms. Jackson met Jacob shortly after his birth. She had been accompanied by Bill Young, who Mr. Hape understood had recently moved in with her. Mr. Hape had not previously met Mr. Young.

[53] Mr. Hape said that in 2006, Ms. Jackson obtained a government grant to replace the roof, siding, basement door, back door and chimney at 327 Craig Road. The work was completed by a contractor. Mr. Hape recounted a conversation that he had in August 2017 with Mr. Young and Gordon Barnes, husband of Sarah Barnes, regarding the state of the home. Mr. Young commented that he had not assisted Ms. Jackson in obtaining the grant because it was early in his relationship with her and he did not feel that it was his place to step in. Mr. Hape said the conversation arose because of some concerns he had with the workmanship of the jobs completed using the grant funding.

[54] According to Mr. Hape, beginning in 2007, he and Mr. Young would get firewood ready for winter at 327 Craig Road. They did this every year until the fall of 2016, and in 2012, Jacob began helping them. Jacob frequently helped his grandmother with baking, gardening, mowing the lawn and cleaning up the yard.

[55] Mr. Hape said that Ms. Jackson remortgaged her home in September 2010 but that no renovations took place at that time. In 2011, Mr. Hape said, their family dog had puppies and they gave one male and one female puppy to Ms. Jackson for companionship.

[56] Mr. Hape stated that in or around May 2015, Ms. Jackson received a back payment for CPP disability pension. That same month, she purchased materials to renovate the bedroom off the kitchen at 327 Craig Road. Mr. Hape and Mr. Young pulled out the old gyproc and insulation. They installed new insulation, gyproc and a new vapor-barrier. They also crack-filled, sanded, and painted the room, and laid new oilcloth flooring. Mr. Hape said the project took him and Mr. Young two weeks to complete. In July 2015, Ms. Jackson bought materials to renovate her bedroom and Mr. Hape and Mr. Young did the renovations on that room as well. Mr. Young and Jacob painted the room. Other than the bedroom renovations, Mr. Hape was aware that Mr. Young placed laminate flooring in the living room and

installed a new toilet in the bathroom. The only other plumbing work he was aware of at 327 Craig Road was the installation of a water pump and hot water tank by Frank Parker's Plumbing in 2015.

[57] Mr. Hape said that he has regularly attended 327 Craig Road since 1998, and the landscaping has changed very little in that time. The only significant change was the planting of eight Hosta bushes around the main yard and the removal of a few dead trees and brush.

[58] Following Ms. Jackson's passing, Mr. Hape says, he went to 327 Craig Road with Ms. Kelly and Jacob to speak with Mr. Young about Ms. Jackson's bills and house affairs. Mr. Young got angry and threatened Ms. Kelly and Sarah Barnes. That was the last time Mr. Hape saw Ms. Kelly speak to Mr. Young.

[59] Mr. Hape's evidence was that Ms. Kelly had a great relationship with her mother, and the relationship grew particularly close following February 2013 when Ms. Kelly had open heart surgery. He said that he and Ms. Kelly, and their son Jacob, had a close relationship with Ms. Jackson and Mr. Young, and frequently visited 327 Craig Road. They also had Ms. Jackson over to visit their home. They spent holidays together at 327 Craig Road or their home until Ms. Jackson's passing. In addition, Jacob had many sleepovers at his grandmother's home over the years.

[60] Mr. Hape said he is not well acquainted with Sophie Young, and he did not see her at 327 Craig Road when the bedroom renovations were underway. He had only seen her a few times and was not aware of her ever having lived at the home for any period. Mr. Hape was likewise unfamiliar with Ms. Jackson's band friends. He and his family did not attend all of Ms. Jackson's band events, but they did go to several of the big events over the years.

[61] Mr. Hape accompanied Ms. Kelly to 327 Craig Road on October 13, 2018. He described the house as being in a poorer state of repair than when Ms. Jackson died in August 2017. The house was dirty, had extensive mould growth and the kitchen ceiling was falling in. The roof was leaking, causing moisture damage inside the house. Mr. Hape said the house was not in such poor condition before Ms. Jackson's death and attributed the deterioration to neglect by Mr. Young.

Sarah Barnes

[62] Sarah Barnes is Judy Jackson's daughter and Laura Kelly's older sister. She has two children, Logan and Lily, with her husband, Gordon Barnes.

[63] Ms. Barnes confirmed that she had a "strained relationship" with her mother at the time of her mother's death. When her parents separated, but before they divorced, Ms. Barnes moved out of the home at 327 Craig Road and moved in with her grandparents. She was 17 years old at the time.

[64] As an adult, Ms. Barnes did not visit 327 Craig Road often. She said she did not approve of her mother and Bill Young's "marijuana growth, use, and trafficking behaviours based out of the house". She did not believe that her mother's home was a safe or suitable environment for her children on a regular basis. Ms. Barnes did, however, visit Ms. Jackson's home three or four times per year, mostly for holidays like Christmas or Ms. Jackson's birthday.

[65] Ms. Barnes denied Mr. Young's allegation that she restricted her mother's access to her grandchildren. Although she had concerns about her mother's home, Ms. Jackson was always welcome to visit their home. Ms. Barnes filed several photographs as an exhibit to her affidavit which show her and her children interacting with Ms. Jackson on various occasions over the years.

[66] Ms. Barnes denied Mr. Young's assertion that she had no meaningful relationship with Ms. Jackson. She said that it was not always easy for her to have a close relationship with her mother but that she made efforts, and at times chose to love her from a distance. This was due in part to her mother's mental illness, which Ms. Barnes believed was diagnosed as bipolar depression a few years before Ms. Jackson's death. According to Mr. Barnes, this illness affected her mother's behaviour and the things she said. Ms. Barnes described her mother's interpretation of their relationship as totally different from her own.

[67] Ms. Barnes noted that Mr. Young was another reason for the distance between herself and her mother. It was awkward to interact with her mother in Mr. Young's presence, as he was not welcoming to her or her family.

[68] Ms. Barnes denied Mr. Young's statement that she and Ms. Kelly were not around for Ms. Jackson's final fight with cancer. She acknowledged that during her mother's first bout of melanoma in 2015, she did not know many details about her situation because Ms. Jackson did not confide in her at that time. During her mother's second and final bout of cancer, however, Ms. Barnes and her sister were very supportive. Ms. Jackson contacted Ms. Barnes in July 2017 when she wasn't

feeling well, and Ms. Barnes took her mother to outpatient services. According to Ms. Barnes, she and her sister had to take over making decisions about their mother's care because Mr. Young was not providing adequate care at that time.

[69] After reviewing the photographs of 327 Craig Road taken by Ms. Kelly and Mr. Hape on October 13, 2018, Ms. Barnes became very concerned about the maintenance and poor condition of the property. She is worried that the conditions of the home will only worsen, as they remain unaddressed by Mr. Young.

Gordon Barnes

[70] Gordon Barnes is Sarah Barnes's husband, and was Judy Jackson's son-in-law. Mr. Barnes met Sarah Barnes in 1998, and they have two children together.

[71] Mr. Barnes said that Bill Young made visits to 327 Craig Road uncomfortable for him. On occasions when he went to the home with Sarah and their two children, Mr. Young rarely spoke to him and rarely interacted with Sarah and their children. He said that when they did interact, Mr. Young was usually angry and ranting about people he disliked.

[72] When Mr. Barnes went to 327 Craig Road with Sarah and their children, he generally observed Ms. Jackson and Mr. Young to be upset, and he did not believe this negativity was good for their family. They did visit as a family a few times per year, however, to mark special occasions, such as Christmases and occasionally Ms. Jackson's birthday, as well as Halloween when the children were younger. Ms. Jackson also visited the Barnes's home a few times per year and was always welcome. Mr. Young was not always in attendance on those occasions.

[73] Mr. Barnes said he has personally visited 327 Craig Road several times each year since 1998, and he has never noticed any improvements to the house above and beyond regular home repair and maintenance. In his view, the 2006 renovations and the 2015 bedroom renovations fell within that category. Mr. Barnes has not noticed evidence of any new landscaping. There was a small pre-existing garden, and a few bushes were planted over the years but Mr. Barnes did not observe any significant maintenance or improvements.

[74] Mr. Barnes said that he recalled a conversation with Mr. Young and David Hape about the state of the house at 327 Craig Road in August 2017. On that occasion, Mr. Young said he was not involved with preparation of paperwork or repairs funded by the 2006 government grant because it was early in his

relationship with Ms. Jackson and he felt that it was not his place to get involved at that time because the house was not his.

Findings of fact

[75] Having considered all of the evidence in this matter, I make the following findings of fact. Bill Young and Judy Jackson met in 2003, and began dating about a year later. At that time, Ms. Jackson's house was in a state of significant disrepair. I find that Sophie Young began spending weekends at Ms. Jackson's home before her father permanently moved in with Ms. Jackson.

[76] Although Mr. Young estimated that he moved in with Ms. Jackson in 2008, the other evidence satisfies me that it was more likely in 2006 or early 2007, not long after Ms. Jackson obtained the government grant and renovations were completed on the home. When Mr. Young moved in, mould was already an issue in the house.

[77] In December 2009, Mr. Young proposed to Ms. Jackson and she accepted. They never married. Mr. Young said that they were waiting for things to "go right", to pay off their own bills and to get themselves into a better financial position before planning a wedding. There is no other evidence on this point. Obviously we cannot know whether Ms. Jackson would have given the same explanation.

[78] I accept the evidence that Mr. Young and Ms. Jackson lived as a couple and presented themselves that way. They shared household duties like cooking, cleaning, and yard work. I find that Mr. Young did minor repairs to the home over the years, sometimes using materials he salvaged from his construction jobs. I further find that he contributed to the replacement of several appliances, although the degree of his contribution is unclear. With respect to the bedroom renovations in 2015, I find that Mr. Young and David Hape were equally involved.

[79] The evidence of Mr. Young's financial contributions to the relationship is scant. Although he said that he contributed equally to expenses, he offered no corroborating banking records or receipts. That said, the tax return information confirmed his testimony that Ms. Jackson had no income for the 2013 and 2014 tax years, and that in 2015, she received disability benefit backpay in the amount of $32,378.94. Mr. Young's own tax documents support his evidence that he withdrew his retirement savings during the period that Ms. Jackson was not

working. The 2013 documents show an RRSP withdrawal of $1,001.37. His 2014 tax return shows a RIF withdrawal of $17,999. In 2015, he withdrew $7,267.90. Mr. Young said he used those funds to pay the mortgage and other expenses for himself and Mr. Jackson, but there is no other evidence as to how those funds were used. In addition, there is evidence that Ms. Jackson borrowed $41,000 when she remortgaged the property in 2010. Some of the funds appear to have been used to pay out a previous mortgage, but it is not clear how much. There is no evidence that Ms. Jackson used the remaining funds to renovate the property or to make any other large purchases. It is therefore not clear on the evidence whether she had access to any of these funds during the period that she was not earning an income. In any event, I accept that Mr. Young contributed somewhat to household expenses during his relationship with Ms. Jackson, and that his contributions increased during the period that Ms. Jackson was not earning an income.

[80] I find that the relationship between Judy Jackson and Sarah Barnes was strained as a result of Ms. Jackson's mental illness, her relationship with Mr. Young, and the marijuana growth and use by Mr. Young and Ms. Jackson. I find that Laura Kelly's relationship with her mother was better than that of Ms. Barnes, but the two women were nevertheless not close. I find that Ms. Kelly overstated how often she was at Ms. Jackson's home or her band-related events. I accept Ms. Kelly's evidence, however, that when she spoke to Mr. Young about her and Ms. Barnes being Ms. Jackson's next of kin, he became angry and threatening.

[81] I find that the condition of 327 Craig Road has deteriorated since Ms. Jackson's death, and that any benefit to the property arising from the 2015 bedroom renovations has been lost due to neglect. There is mould throughout the home. The electrical system needs to be upgraded and the roof needs to be repaired to prevent water from continuing to enter the home. I find that Mr. Young has done nothing to remediate these issues since he learned that Ms. Jackson's daughters expected him to vacate the home.

[82] Mr. Young argued that the evidence proves that Ms. Jackson intended for him to keep her home after her death. I find, however, that it is not possible to know what Ms. Jackson intended. It is true that she was in a common law relationship with Mr. Young for about ten years, and that they supported each other emotionally and financially. In 2010, Ms. Jackson designated Mr. Young as her beneficiary under a life insurance policy, and, on August 17, 2017, she named him as her substitute decision maker. It is also true, however, that, notwithstanding her

2015 cancer diagnosis, her hospitalization on August 7, 2017, and her subsequent transfer to palliative care on August 17, Ms. Jackson took no steps to add Mr. Young to title on the property or to register their relationship as a domestic partnership under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494. Nor did she prepare a will that would have made her intentions known. Ms. Jackson and Mr. Young had each been previously married and divorced, and, as a result, had some understanding of matrimonial property rights. Although I accept that there were issues between Ms. Jackson and her daughters, it does not necessarily follow that she did not want them to inherit on her death. At the end of the day, however, the issues raised in this proceeding can be decided without proof of Ms. Jackson's specific intentions.

[83] I will move on to consider whether the word "spouse", as it is used in the *Intestate Succession Act*, should be interpreted to include a common law spouse.

The law of statutory interpretation

[84] The modern principle of statutory interpretation is that "[t]he 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" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In *Sparks v. Holland*, 2019 NSCA 3, the Court of Appeal noted that the modern principle can be broken down into three questions:

> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, Sullivan on the Construction of Statutes, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?

[85] The court also highlighted the importance of a purposive analysis, under which the legislature's purpose is considered at every stage of interpretation, including the initial determination of the text's meaning (para. 43). Interpretations that frustrate or defeat the legislature's purpose are to be avoided if there is a plausible alternative (para. 44).

The proper interpretation of "spouse"

[86] When a person dies without a will, their property is distributed according to the rules set out in the *Intestate Succession Act*. The Act lists the categories of heirs – those entitled to receive property – in order of priority, starting with the intestate's "surviving spouse". Under s. 4 of the Act, the surviving spouse is entitled to a preferential share of the estate:

> **Surviving spouse**
>
> 4 (1) If an intestate dies leaving a surviving spouse and issue, the intestate's estate, where the net value does not exceed fifty thousand dollars, shall go to the surviving spouse.
>
> (2) Where the net value of the estate exceeds fifty thousand dollars, the surviving spouse is entitled to fifty thousand dollars and has a charge upon the estate for that sum with accrued interest from the date of the death of the intestate.
>
> (3) In this Section,
>
> (a) "home" means a dwelling owned and occupied as the principal residence by the intestate at the date of death of the intestate and includes any land appurtenant thereto and all household goods and furnishings of the dwelling;
>
> (b) the value of the home shall be the fair market value less any charges attaching thereto.
>
> (4) Where the surviving spouse is entitled to fifty thousand dollars pursuant to subsection (2), the surviving spouse may elect to receive the home
>
> (a) in lieu of the said fifty thousand dollars where the value of the home is in excess of fifty thousand dollars; or
>
> (b) as part of the said fifty thousand dollars where the value of the home does not exceed fifty thousand dollars.
>
> (5) The residue of the estate shall be divided among the surviving spouse and children in the manner following:
>
> (a) if the intestate dies leaving a surviving spouse and one child, one half shall go to the surviving spouse;

> (b) if the intestate dies leaving a surviving spouse and more than one child, one third shall go to the surviving spouse.
>
> …

[87] The *Intestate Succession Act* does not define who qualifies as a "spouse" under the Act. Mr. Young submits that it should be interpreted to include an intestate's common law spouse. The Estate argues that the word "spouse" refers only to a person who was legally married to the intestate.

[88] The meaning of "spouse" for the purposes of the *Intestate Succession Act* has not been judicially considered in Nova Scotia. However, in *Re Rideout Estate*, [1995] N.S.J. No. 130 (C.A.), the Nova Scotia Court of Appeal considered whether a common law spouse qualified as a "spouse" under the *Probate Act*, R.S.N.S. 1989, c. 359, for the purpose of determining who is entitled to administer an intestate's estate. The court, *per* Clarke C.J.N.S., concluded that "spouse" must be given its ordinary meaning – a partner in legal marriage:

> 8 Section 21 of the Act states that the person first entitled to the administration of the estate of an intestate is "the surviving spouse". Neither "spouse" or "surviving spouse" is defined in the *Probate Act*.
>
> 9 Resort must be made to the interpretation which developed through the common law being one who is married or the surviving member of a marriage relationship recognized as such by law. Barring legislation to the contrary, for the purposes of the *Probate Act* of this province, these words do not apply to persons who consider themselves married without the benefit of a marriage ceremony. As an aid, *Black's Law Dictionary*, Sixth Edition 1990, at p. 1402 defines spouse as: "One's husband or wife, and 'surviving spouse' is one of a married pair who outlive the other". In our opinion the Legislature of Nova Scotia has not expanded the meaning of the words "spouse" and "surviving spouse" so far as the *Probate Act* is concerned. In other legislation in Nova Scotia, the Legislature has defined spouse to include a person with whom a relationship generally referred to as a common law partnership exists. Examples include: *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m); *Insurance Act*, R.S.N.S. 1989, c. 231, Sch. "A", s-s. 2-B(2) and *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 2(aj). Not so in the case of the *Probate Act*.
>
> 10 One of the maxims of statutory interpretation is *expressio unius est exclusio alterius*. In *Drieger on the Construction of Statutes*, Third Edition, 1994, by Professor Ruth Sullivan, the author writes of the maxim at p. 168:
>
> > An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing

> becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.
>
> 11 We are persuaded that by the inclusion of the words "spouse" and "surviving spouse" in the *Probate Act*, the Legislature cannot be taken to have intended a broader meaning or application than that which the words ordinarily mean. The words, by themselves, do not import an expanded meaning.

[89] The court went on to find that the exclusion of common law partners from the definition of spouse under the Act did not violate s. 15 of the *Charter* by creating a discriminatory distinction (para. 12).

[90] Four years later, in 1999, the Law Reform Commission of Nova Scotia released its *Final Report: Probate Reform in Nova Scotia* (Halifax: LRCNS, 1999) The Commission's recommendations for reform included:

> "Spouse" should be defined in probate legislation to include common law spouses, whether of the same or opposite sex. The *Intestate Succession Act* should be amended to include common law spouses, whether of the same or opposite sex, in the scheme of distribution. Common law spouses should be entitled to appointment as administrator.
>
> [p. iii]

Although a new *Probate Act* came into force the following year, it did not include the more expansive definition of "spouse" recommended by the Law Reform Commission. Nor did the legislature amend the *Intestate Succession Act*.

[91] Whether a common law partner is a "spouse" for the purposes of intestacy legislation has been decided in at least one other jurisdiction. In *Ferguson v. Armbrust*, 2000 SKQB 219, [2000] S.J. No. 312, Scheibel J. considered an application from Ms. Ferguson for a declaration that she was the "spouse" of her deceased common law partner, Mr. Armbrust, under *The Administration of Estates Act, 1998*, S.S. 1998, c. A-4.1 ("*AEA*") and *The Intestate Succession Act, 1996*, S.S. 1996, c. I-13.1 ("*ISA*"). In the alternative, Ms. Ferguson argued, the exclusion of common law spouses under both pieces of legislation was unconstitutional. The Attorney General of Saskatchewan was present at the hearing and made limited representations supporting the applicant's position that the word "spouse" in the Acts included common law spouses. The application was opposed by the

deceased's siblings, one of whom had applied for a grant of administration of her brother's estate.

[92] The chambers judge found the following facts. Ms. Ferguson and Mr. Armbrust met as teenagers in 1971, and, by 1986, they had become good friends. At some point between January and June of 1988, they began living together on Mr. Armbrust's farm. They continued to reside there together until his death in May 1999. During that time, they shared an exclusive, conjugal relationship and presented themselves as a couple. Although Ms. Ferguson and Mr. Armbrust kept their finances separate, the relationship was one of mutual support. They each contributed financially to the household and shared in the expenses of daily living. Ms. Ferguson contributed time, effort and financial support to the farm, while Mr. Armbrust provided her with vehicles and conveniences throughout their relationship. In addition, a quarter section of land and various pieces of farm equipment were purchased after the couple began living together. On May 27, 1999, Mr. Armbrust died unexpectedly, leaving behind Ms. Ferguson and his three siblings as his closest relatives. He died intestate, leaving an estate of $977,838.25.

[93] On the issue of whether "spouse" in the two Acts could be interpreted as including a common law partner, Scheibel J. referred to *Winik v. Wilson Estate*, (1999), 181 Sask. R. 11 (Q.B.), another decision of the same court. In that case, Dawson J. examined the definition of "spouse" to determine whether the applicant had standing to challenge the constitutional validity of the *ISA*. She concluded that the meaning of "spouse" in the *ISA* included only married spouses. Her decision was based in part on s. 20 of the *ISA*, which stated:

> 20 Where the spouse of an intestate has left the intestate and is living in adultery at the time of the intestate's death, the spouse takes no part in the intestate's estate.

Justice Dawson concluded that the legislature's use of the word "adultery" in s. 20 – a concept associated only with married couples – rather than "infidelity", demonstrated an intention to exclude common law partners from the category of spouse under the Act.

[94] According to Justice Scheibel, *Winik* was distinguishable because "[a] constitutional challenge or interpretation is significantly different than an application to determine the issue of standing to bring such a challenge" (para. 31). Furthermore, in his view, the legislature's use of the word "adultery" did not necessarily mean that the Act applied only to married spouses:

> 35 Although the word "adultery", quite correctly, connotes that a marriage is required before adultery can be committed, the definition of that word is not the only factor to consider when the Court is interpreting the word "spouse" in the *ISA*. By concentrating on the word "adultery", the section implies that the word "spouse" is limited to legally married spouses. However, s. 20 of the *ISA* is also capable of an alternative interpretation. As counsel for the applicant submitted, s. 10 of *The Interpretation Act, 1995* suggests a "fair, large, and liberal construction and interpretation" must be given to every enactment to "ensure the attainment of its objects."
>
> 36 In my view the entire *ISA* must be read so as to attain the objects of the legislation.
>
> 37 Thus in interpreting the meaning of the word "spouse" it is necessary to determine what object the legislation attempts to achieve. Although in a different context, counsel for Ms. Sali submits that one of the goals of the *ISA* is to provide a reasonable approximation of the deceased's intention with respect to the distribution of his assets when his intention has not been expressed.
>
> 38 I agree that one of the objects of the legislation is to attempt to ascertain the deceased's intention at the time of his death. One component of this object is the exclusion of certain people from the division of the deceased's property. Under s. 20 of the *ISA* an unfaithful spouse who has left the intestate is not entitled to receive a share of the deceased's assets that she is otherwise entitled to. This provision is based on the assumption that the deceased would not distribute his assets to a partner who has left the relationship and who has been unfaithful.
>
> 39 Having found that the purpose of the *ISA* is to prevent certain people from realizing the assets of the deceased, the court must next attempt to interpret the word "spouse" to attain this object. I find that s. 20 of the *ISA* should not be interpreted to exclude common-law spouses simply because they choose an alternative method of co-habitation that by definition can not be adulterous. The focus of the provision is not on the particular configuration of the relationship, but instead on an approximation of the intentions of the intestate at the time of his death. The purpose and the object of the Act remain the same, notwithstanding the relationship between the deceased and his spouse. As a result, I find s. 20 can also be interpreted to include common-law spouses.

[95] Justice Scheibel set out two basic propositions underlying his conclusion that the word “spouse” in s. 20 was capable of more than one interpretation:

> 40 The inclusion of a common-law spouse within the meaning of the word "spouse" is based on two basic propositions. First, the functional similarities between a common-law spouse and a legally married spouse make it difficult to differentiate between the two. A common-law relationship is socially equivalent as well as functionally similar to a legal marriage. Thus, any reason for differential treatment would appear to be arbitrary when the object of the *ISA* is to

> aid in the distribution of the deceased's property. Second, the reasonable expectations of the common-law spouse are the same as the legally married spouse. Both spouses expect to share in the assets acquired during the relationship, regardless of the designation attached to the relationship. In an intestacy situation, the expectations of a common-law spouse are also similar to those of a legally married spouse. Both spouses, given the choice before death, would likely exclude their partner from the distribution of their assets if the partner was unfaithful. For these reasons I find that the word "spouse" in s. 20 of the *ISA* is capable of an interpretation different from the one that is suggested by Dawson J. in *Winik*, supra.

[96] Faced with two possible interpretations, Scheibel J. held that only the more inclusive interpretation of "spouse" accorded with *Charter* values:

> 41 After hearing all of the arguments and carefully analyzing the *ISA* as a whole, I find that "spouse" may reasonably be interpreted as being limited to legally married spouses or as including both legally married spouses and common-law spouses as the context requires. The question of law then becomes which interpretation should prevail in the current legislation.
>
> 42 In these circumstances, the Court must adopt the interpretation that best accords with *Charter* values and that maintains the constitutional validity of the legislation. This principle was set out by Lamer J. (as he then was) in *Slaight Communications Inc. v. Davidson*, *supra*, and by McLachlin J. (as she then was) in *R. v. Zundel* [1992] 2 S.C.R. 731 at 771 wherein she states:
>
> > ... These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* (*Salituro*, *supra*, at p. 675), and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression ....
>
> 43 The interpretation of "spouse" that best supports the constitutional validity of the *AEA* and the *ISA* and best accords with *Charter* values includes both legally married spouses and common-law spouses and I find that to be the definition of "spouse" in those Acts.

[97] Having found that "spouse" in the *ISA* and the *AEA* should be interpreted to include common law spouses, Scheibel J. held that there was no *Charter* violation. He went on to find in the alternative, however, that the exclusion of common law spouses from "spouse" in the Acts would infringe the applicant's right to equality under s. 15 of the *Charter*, and that the infringement could not be justified under s. 1.

[98] The respondents appealed the chambers judge's decision: 2001 SKCA 122, [2001] S.J. No. 703. Between the hearing and the release of the Court of Appeal's decision, the legislature amended the definition of "spouse" in the *ISA* to include common law spouses. The Court of Appeal overturned the chambers judge's decision with respect to the interpretation of "spouse" for the purposes of the *ISA* and the *AEA*, but affirmed his ruling that exclusion of common law couples under these Acts was unconstitutional. The court, *per* Bayda C.J.S., summarized Ms. Ferguson's position on the statutory interpretation issue:

> 11 Ms. Ferguson's position, simply put, is this: a reasonable interpretation of the legislative history of *The Intestate Succession Act, 1996* does not evince a clear intent over the years to exclude an unmarried cohabitant from taking the share of an intestate's estate that the Act and its predecessors designated should go to the intestate's "spouse". The object of the Act, it is argued, essentially is to provide a statutory will for an intestate and, as much as possible, reflect the distribution of his/her property that he/she would have made had he/she made a will. The object, it is said, militates in favour of an unmarried cohabitant who not only cared for the intestate and provided for his/her physical and emotional needs, but worked together in the relationship with a view to acquiring assets and maintaining a household. Overarching these two factors is the notion that the term "spouse" should be construed in a contemporary context and with notice of the fact that a substantial number of cohabiting partners in today's society do not undergo a legal form of marriage but are content to pursue their conjugal relationship on the strength of their mutual informal commitments. All this, it is submitted on behalf of Ms. Ferguson, at the very least suggests that "spouse" is an ambiguous term. As such, the jurisprudence dictates that the term should be given an interpretation that does not conflict with the *Charter*. This leads to a conclusion that Ms. Ferguson and the deceased were spouses.

This argument mirrors Mr. Young's submission in the present application.

[99] The Court of Appeal stated that the history of the *ISA*, the wording of its provisions, and the wording of certain provisions in two related statutes passed by the legislature at the same session as the *ISA* all "raise obstacles" for Ms. Ferguson's argument (para. 12). Chief Justice Bayda wrote:

> 13 All of the predecessor Acts to *The Intestate Succession Act, 1996* starting with *The Devolution of Estates Act, 1907,* S.S. c. 16 and continuing through to *The Intestate Succession Act, 1965,* R.S.S. c. 126, did not refer to a "spouse" but to a "widow", to a "husband" and to a "wife". It was not until *The Intestate Succession Act, 1978,* R.S.S. c. I-13 was passed that the term "spouse" was introduced into the intestate succession legislation of this province.

> 14 Although the term "widow" was not defined in any of the Acts prior to 1978, there can be little doubt that the term meant the legally married wife of the deceased husband and did not include a woman to whom the intestate was not legally married but with whom he was living as her husband. This meaning is reinforced by ss. 19 and 20 in the 1965 Act and their counterparts in the earlier Acts:
>
> > 19. The estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man dying, the word "husband" being substituted for "widow" . . .
> >
> > 20.(1)If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate.
> >
> > (2)If a husband has left his wife and is living in adultery at the time of her death, she shall take no part of his wife's estate.
>
> The definition of adultery is clear. Only a married person can commit adultery. *Webster's Third New International Dictionary*, for example, defines adultery as follows:
>
> > adul*tery 1: voluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband.

[100] The court explained that, from the outset of intestate succession legislation, the notion of "legitimacy" was of "paramount importance" in legislators' minds (para. 15). Children born to unmarried parents were considered "illegitimate", and could not inherit from their fathers. The court noted that the illegitimacy of children was tied to the illegitimacy of the parents' relationship:

> 16 This notion of "illegitimacy" of the children is directly connected to and springs from the notion of the "illegitimacy" of the parents' union. Only if the "illegitimacy" of the child was superceded or circumvented by a specific statutory provision was the "illegitimate" child entitled to benefit from the estate of the intestate parent. **There is nothing in any of the intestate succession legislation to indicate that this traditional principle requiring an express statutory provision to supercede or circumvent an "illegitimacy" was waived or overlooked in the case of the "illegitimacy" of the cohabiting partners' union**. We were not referred to, nor do I know of any Canadian case enunciating a principle that deviates from this conclusion. …
>
> [*Emphasis added*]

[101] The court found no evidence of legislative intention to change the status of unmarried cohabiting partners in either the 1978 or the 1996 iterations of the *ISA*:

17 In 1978 *The Intestate Succession Act* was amended by deleting all references to a "widow", a "husband" and a "wife" (except for those in s. 15 as noted below) and substituting therefor the term "spouse". Did that amendment in any way, for intestate succession purposes, change the status of unmarried cohabiting partners? In my view, there is nothing in the 1978 statute to suggest that it did. The 1978 statute was part of a general revision of the province's statutes and the change in question was of a "housekeeping" nature. The term "spouse" was not defined. **There is nothing in the statute to suggest that the notion of "illegitimacy" as outlined above was being displaced or treated differently from the way it had been in the past.** On the contrary, the specific statutory provisions (with some "housecleaning") relating to "illegitimate" children were carried forward as were the provisions relating to the disentitlement by reason by reason of adultery on the part of the intestate's spouse. Additional evidence that the legislators intended the term "spouse" to mean a man and a woman who were legally married may be gleaned from s. 15 of the 1978 statute:

> 15. No spouse shall be entitled to dower in the land of her deceased husband dying intestate, and no husband shall be entitled to an estate by the courtesy in the land of his deceased wife so dying.

18 The statute whose provisions are under scrutiny in these proceedings was passed, as noted, in 1996. Apart from increasing the value of the benefits to which a spouse is entitled (occasioned primarily by the change in the value of currency since 1978), making slight changes to some of the wording (to conform to the style of contemporary draftsmanship), and deleting all reference to "illegitimate" children, the 1996 statute is virtually the same as the 1978 statute. (The reference to "illegitimate" children would have been redundant given s. 40 of *The Children's Law Act*, S.S. 1990-91, c.C-8.1, whereby all distinctions between the status of a child born inside marriage and a child born outside marriage were abolished.) **In view of that virtual sameness of the 1996 statute and the 1978 statute there is no reason to believe that the legislators had in mind a different meaning for the term "spouse" in the 1996 Act from the one they had for that term in the 1978 Act. The fact that the *Charter of Rights and Freedoms* was passed in 1982 does not help Ms. Ferguson's argument. On the contrary, if the legislators wanted the term "spouse" to mean something different in 1996, the intervention of the *Charter* in 1982 was all the more reason for the legislators to have explicitly provided for the term "spouse" to include cohabiting partners who were not legally married. This did not happen until 2001, after this appeal was heard. The fact that it did happen in 2001 reinforces the argument that in 1996 the term "spouse" as contained in *The Intestate Succession Act*, 1996 refers only to a man and woman who were legally married.**

[*Emphasis added*]

[102] The court found further support for the narrower interpretation of "spouse" in other statutes also passed in 1996:

> 20 An examination of *The Dependants' Relief Act, 1996* and *The Wills Act, 1996*, both passed in 1996, further reinforces the argument that in 1996 the legislators did not intend the term spouse in *The Intestate Succession Act, 1996* to include cohabiting parties not legally married. A reading of the first two Acts together with *The Intestate Succession Act, 1996* leads one to believe that the legislators made a deliberate distinction between, on the one hand, the duty that a deceased cohabiting partner who was not legally married to his/her partner had to maintain and support his/her partner after the former's death, and on the other hand, the legal entitlement of a surviving partner to benefit from the distribution of the deceased partner's property. **It is not an accident that *The Dependants' Relief Act, 1996,* in essence a maintenance and support statute, makes provision for a deceased's cohabiting partner's maintenance, but the other two statutes, in essence statutes dealing with the distribution of a deceased person' property, do not.**
>
> [*Emphasis added*]

[103] For all of these reasons, the Court of Appeal concluded that Mr. Armbrust and Ms. Ferguson were not spouses for the purposes of *The Intestate Succession Act, 1996* (para. 21). It went on to find that the exclusion of common law spouses from the *ISA* violated the equality provisions contained in s. 15(1) of the *Charter* and could not be justified under s. 1.

[104] Counsel for Mr. Young argues that the court should disregard both the Nova Scotia Court of Appeal's decision in *Re Rideout* and the Saskatchewan Court of Appeal's decision in *Ferguson* with respect to the meaning of "spouse" because both courts failed to properly apply *Charter* values at the statutory interpretation stage. Counsel says the *Ferguson* appeal decision is "incoherent" because the court adopted a narrow interpretation of "spouse" that does not accord with *Charter* values – rather than a more inclusive interpretation that does – while also finding that the definition breached s. 15(1) of the *Charter*. She suggests that this result would not be possible if *Charter* values were properly considered at the statutory interpretation stage. Counsel relies on the statement by McLachlin J. (as she then was), in *R. v. Zundel* [1992] 2 S.C.R. 731 at 771, that was cited by Scheibel J. in the *Ferguson* lower court decision:

> ... These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* (*Salituro*, *supra*, at p. 675), and that where a legislative provision, on a reasonable interpretation of

> its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression ....

[105] As this statement indicates, *Charter* values are only relevant where a legislative provision, based on a reasonable interpretation of its history and a plain reading of its text, is capable of two equally plausible interpretations. In my view, the Nova Scotia Court of Appeal in *Re Rideout* and the Saskatchewan Court of Appeal in *Ferguson* were not satisfied that the term "spouse" in the respective statutes was subject to two equally persuasive interpretations. The Court of Appeal in *Ferguson* reviewed the history of the *ISA* and the wording of its provisions and, based primarily on those factors, concluded that "spouse" was subject to only one reasonable interpretation. An examination of Nova Scotia's legislation yields the same result.

[106] As in Saskatchewan, the term "spouse" was a relatively recent introduction to intestacy legislation in Nova Scotia. All of the predecessor Acts to the *Intestate Succession Act*, R.S.N.S. 1989, c. 236, starting with *An Act Relating to Wills, Legacies and Executors, and for the Distribution of the Estates of Intestates*, S.N.S. 1758, c. 11, through to the *Intestate Succession Act*, R.S.N.S. 1967, c. 153, did not refer to a "spouse", but to a "widow", a "husband" and a "wife". While "widow" and "wife" were not defined in any of these earlier Acts, the words were plainly intended to refer to the legally married wife of the deceased husband. The 1758 Act – the first intestacy legislation adopted in Nova Scotia – provided at s. XII:

> XII. *And be it further enacted*, That when and so often as it shall happen that any Person dies *Intestate*, upon Application of the **Widow** or next of Kin to the Intestate, within *Thirty Days* after the Death of such *Intestate*, the said *Judge of Probate* shall grant *Letters of Administration* to such Widow or next of Kin … And upon due Hearing and Consideration thereof, (Debts, Funeral and just Expences of all Sorts, being first allowed) the said *Judge* shall, and hereby is fully impowered, to order and make a just Distribution of the *Surplusage*, or remaining Goods and Estate, as well *Real* as *Personal*, in Manner following, *That is to say*, ***One Third* Part of the *Personal Estate*, to the Wife of the *Intestate* for ever, besides her *Dower* in the *Houses* and *Lands* during Life, where such Wife shall not be otherwise Endowed before Marriage**; and the said *Judge*, having appointed *Guardians* in Manner as hereafter may or shall be by Law prescribed for all *Minors*, shall then, out of all the Residue of such *Real* and *Personal* Estate, (a) distribute *two* Shares or a *double Portion* to the *Eldest* Son then Surviving, (where there is no Issue of the *First* born, or of any other *Elder* Son) and the Remainder of such Residue equally to and amongst his other Children, and such as shall legally represent them; *Provided* that Children advanced by Settlement or

> Portions not equal to the other Shares, shall have so much of the *Surplusage*, as shall make the Estate of all to be equal, except the *Eldest* Son then Surviving (where there is no Issue of the *First* born, or of any other *Elder* Son) who shall have two shares or a *double Portion* of the whole.
>
> [*Italics in original. Emphasis added*]

[107] At common law, married women were provided succession rights with respect to their husbands' real property in the form of a right of dower. Dower entitled a wife to a life interest in one-third of the real property owned by her husband during the marriage. The reference to the law of dower in the 1758 Act indicates that the words "widow" and "wife" were intended to refer to a woman who was legally married to the intestate. This definition remained consistent through to the *Intestate Succession Act*, S.N.S. 1966, c. 8. It was not until the adoption of that Act that a widow (or widower) was given a preferential share of the intestate's estate in the amount of $25,000. Prior to that time, intestate succession legislation largely favoured the children of the intestate. The comments of Attorney General Richard Donahoe at the second reading of the Intestate Succession Bill confirm that the Act, like its predecessors, was intended to refer only to married spouses:

> This act, respecting the distribution of the Estates of Intestates, will replace the *[Descent] of Property Act*, and it means that the Legislature is providing a new and different distribution of the estate of a person who dies without a will. Thus giving what I believe to be, a more favoured treatment to the surviving spouse. Either the **wife** or the **husband** who survives, will, under this bill I think, be more generously treated than was the case. Certainly that is true in the estate of smaller amounts.
>
> [*Emphasis added*]
>
> [Nova Scotia House of Assembly, *Hansard*, 48th Gen. Ass. (31 March 1966) at 1941 (Hon. Richard Donahoe)]

[108] Further support for that conclusion was found at ss. 16 and 17 of the Act:

> 16 The estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man so dying, the word "husband" being substituted for "widow", the word "her" for "his", the word "she" for "He" and the word "her" for "him" where such words respectively occur in sections 3, 4, 6, 7, 8, 9, and 11.
>
> 17(1) If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate under this Act.

> (2) If a husband has left his wife and is living in adultery at the time of her death, he shall take no part of his wife's estate under this Act.

As the Saskatchewan Court of Appeal noted in *Ferguson*, only a married person can commit adultery.

[109] In 1975, the *Intestate Succession Act* was amended to increase the surviving spouse's preferential share to $50,000, and to permit the surviving spouse to elect to take the intestate's home, even if the home's value exceeded $50,000 (S.N.S. 1975, c. 61). The amendments further provided that if the intestate had no children, the surviving spouse would inherit the entire estate. During second reading, the Premier highlighted the importance of the amendments to wives who, at that time, still had no entitlement to a share of matrimonial property on relationship breakdown or death:

> It is a relatively minor change in relation to what has to be undertaken to combat the longstanding injustices which run through our law, particularly our land law, in not recognizing adequately the contribution towards the accumulation of assets of a man that is made by a wife, through her efforts either as a housewife or in some cases, where she works, actually to financial contribution.
>
> (Nova Scotia House of Assembly, Hansard, 51st Gen Assembly, 28 November 1975, at 2465 (Hon Gerald Regan).

[110] The notion of "legitimacy" was as important to Nova Scotia legislators as to their Saskatchewan counterparts. Pursuant to the *Descent of Real and Personal Property Act*, R.S.N.S. 1900, ch. 140, an intestate's "issue" were defined as including all of his "*lawful* lineal descendants" (s. 1(1)). The same definition appeared in the *Intestate Succession Act*, R.S.N.S. 1967, c. 153. The 1967 Act also provided:

> **Illegitimate child**
>
> 15 For the purposes of this Act, an illegitimate child shall be treated as if the child were the legitimate child of the child's mother.

In other words, an illegitimate child could inherit from its biological mother but not its biological father.

[111] As part of the 1989 revision of statutes, the *Intestate Succession Act* was amended to remove most of the references to a "widow", a "husband", and a "wife" and to substitute "spouse" for each of those terms. There is no evidence, however, that the legislature intended to broaden the definition of the term to include

unmarried cohabiting partners or to otherwise displace the notion that these unions were "illegitimate". On the contrary, the Act continued to define "issue" as "lawful lineal descendants" (s. 2(b)), to prohibit illegitimate children from inheriting from their father's estate (s. 16), and to disentitle adulterous wives and husbands from inheriting under the Act (s. 17). Section 15 further reinforced that "spouse" in the 1989 Act was intended to refer to a married man or woman:

> **Dower and curtesy**
>
> 15 Subject to this Act, no widow is entitled to dower in the land of her deceased husband dying intestate, and no husband is entitled to an estate by curtesy in the land of his deceased wife so dying.

[112] Also in 1989, the Supreme Court of Nova Scotia held that the *Intestate Succession Act*'s stipulation that an illegitimate child could not inherit from its biological father violated s. 15 of the *Charter*: *Surette v. Harris Estate*, (1989), 91 N.S.R. (2d) 418 (S.C.). In 1999, the provision was amended to read:

> For the purposes of this Act, an illegitimate child shall be treated as if the child were the legitimate child of the child's mother or father.

[113] This amendment did not eliminate the distinction between "illegitimate" and "legitimate" children, but merely changed how illegitimate children were to be treated for the purposes of the Act.

[114] Also in 1999, as previously mentioned, the Law Reform Commission released its *Final Report: Probate Reform in Nova Scotia*. In that report, the Commission recommended that "spouse" should be defined in probate legislation to include common law spouses, and that the *Intestate Succession Act* should be amended to include common law spouses. In other words, the Law Reform Commission recognized that the *Intestate Succession Act* did not already apply to common law spouses. Although the legislature adopted new probate legislation the following year, it did not adopt the Commission's recommendations, nor did it amend the *Intestate Succession Act*.

[115] The legislature had a further opportunity to extend the *Intestate Succession Act* to common law couples in 2000, and, again, declined to do so. In *Walsh v. Bona*, (1999), 178 N.S.R. (2d) 151 (S.C.), the exclusion of common law couples from Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, was challenged as a violation of s. 15(1). Justice Haliburton found that the exclusion was not discriminatory. The Court of Appeal reversed the decision, holding that

the exclusion was discriminatory and was not justified under s. 1: 2000 NSCA 53. The Court of Appeal gave the legislature 12 months to remedy the unconstitutional exclusion. The Crown appealed the decision, but, in the meantime, the Nova Scotia government sought to create a method by which unmarried couples could, if they wished, bring themselves within the scheme of matrimonial property. To that end, in November 2000, the government introduced *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, otherwise known as the *Law Reform (2000) Act*.

[116] The *Law Reform (2000) Act* did two things. First, it amended the *Family Maintenance Act*, the *Fatal Injuries Act*, the *Health Act*, the *Hospitals Act*, the *Income Tax Act*, the *Insurance Act*, the *Members' Retiring Allowances Act*, the *Pension Benefits Act*, and the *Provincial Court Act* to apply to a "common law partner". Second, the Act allowed unmarried spouses of the opposite or the same sex to register a domestic partnership pursuant to the *Vital Statistics Act*. Doing so gave common law partners the same rights and obligations as a "spouse" under the statutes mentioned above, but also under the *Matrimonial Property Act*, the *Intestate Succession Act*, and the *Testators' Family Maintenance Act*. It is important that the legislature did not simply amend these three Acts, like the others, to include common law partners. Instead, it extended these Acts, each of which deals with property rights on death or divorce, to common law partners only where both parties to the relationship have made a conscious decision, as evidenced by the registration of a domestic partnership, to bring their relationships within this legislation.

[117] In 2002, the Supreme Court of Canada reversed the Court of Appeal's decision in *Walsh v. Bona*. As a result, registration of a domestic partnership pursuant to the *Vital Statistics Act* remains the only way for common law couples to bring themselves within the *Matrimonial Property Act*, the *Intestate Succession Act*, and the *Testators' Family Maintenance Act.*

[118] Returning to the modern principle of statutory interpretation, and with all of the above information in mind, what is the purpose of the *Intestate Succession Act*? In my view, the purpose of the Act is to provide a standard system of distribution of the estate of a person who dies without a will, based on the presumed intention of the intestate. More specifically, the primary purpose of the surviving spouse's preferential share is to prevent a surviving spouse from being left in poverty following the death of their husband or wife. As to the textual meaning of "spouse", I find that the legislature intended for the word to refer to an individual

who was legally married to the intestate. The legislative history of the Act, a consideration of its other provisions, and the history of related statutes allows for no other conclusion. This interpretation is consistent with the purpose of the Act if one accepts – as the legislature clearly did – that an intention on the part of an intestate for a cohabiting partner to inherit upon the intestate's death is expressed through the conscious act of marriage (or the registration of a domestic partnership). Nothing less will suffice. As a consequence of adopting this interpretation, common law spouses are excluded from inheriting under the *Intestate Succession Act*. I will now consider whether that exclusion violates a common law spouse's right to equality under s. 15(1) of the *Charter*.

Is the exclusion of common law spouses from the *Intestate Succession Act* unconstitutional?

[119] Mr. Young says the exclusion of common law spouses under the *Intestate Succession Act* violates his equality rights under s. 15(1) of the *Charter*, and that the violation is not justified under s. 1. The Estate accepts that the exclusion of common law couples under the Act violates s. 15(1), but says it is justified under s. 1. Both parties rely on *Québec (Attorney General) v. A*, 2013 SCC 5 ("*Québec v. A*"). Mr. Young also relies on the Law Reform Commission's *Final Report – Division of Family Property* (Halifax: LRCNS, 2017), which recommended that common law couples be included in Nova Scotia's matrimonial property regime, and on Barbara Billingsley's *Rights, Recognition, and Rectification: Constitutional Remedies in Johnson v. Sand*, (2002) 12 Const. F. 60.

<u>The s. 15(1) analysis</u>

[120] Section 15(1) of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[121] Section 15(1) is an anti-discrimination provision. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171, McIntyre J. described the purpose of s. 15:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a

> society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.

[122] Justice McIntyre noted that equality is a "comparative concept", and that "every difference in treatment between individuals under the law will not necessarily result in inequality" (p. 164). He explained that distinctions in treatment at law are often necessary to achieve substantive equality:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. …
>
> [pp. 168-169]

[123] The purpose of s. 15(1) is therefore not to eliminate legislative distinctions, but to prevent distinctions that have a discriminatory impact. Justice McIntyre defined discrimination in the following terms:

> … discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
>
> [pp. 174-175]

[124] Accordingly, the perpetuation of disadvantage and stereotyping are the primary indicators of discrimination. McIntyre J. went on to summarize the test under s. 15(1):

> A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory. [p. 182]

[125] Once an infringement of s. 15(1) is established, "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1" (p. 182).

[126] Ten years after *Andrews*, in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada suggested that discrimination should be defined in terms of the impact of the law on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75). The court, *per* Iacobucci J., noted that "[a]n infringement of s. 15(1) of the *Charter* exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity" (para. 75).

[127] The Supreme Court of Canada revisited the s. 15(1) analysis in *R. v. Kapp*, [2008] 2 S.C.R. 483. Writing for the majority, Chief Justice McLachlin and Justice Abella recognized that human dignity is an "essential value underlying the s. 15 equality guarantee", and, in fact, "underlies all *Charter* rights" (para. 21). They acknowledged, however, that "several difficulties have arisen from the attempt in *Law* to employ human dignity as a *legal test*" (para. 21). The majority summarized some of the criticisms levelled at the dignity test:

> [22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; **it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.** Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.
>
> [*Emphasis added*]

[128] The court in *Kapp*, and in *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, abandoned the dignity test from *Law*, and reaffirmed its commitment to the test set out in *Andrews*. The court, per Chief Justice McLachlin and Justice Abella, summarized that two-part test in *Withler*:

> [30] The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.)

[129] The court offered the following guidance on the second part of the test:

> [35] The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1) . Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. …
>
> [36] The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.
>
> [37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.
>
> [38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. …

[130] In *Québec v. A*, Justice Abella and Chief Justice McLachlin, in separate concurring judgments on s. 15(1), emphasized that prejudice and stereotyping are "neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit" (*per* Abella J., at para. 329). As Abella J. stated:

> [327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.

[131] The analysis is "a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group" (para. 331).

Unmarried cohabitants and s. 15(1) – *Walsh* and *Québec v. A*

[132] Although the Supreme Court of Canada has yet to consider whether the exclusion of common law spouses from intestate succession legislation violates s. 15(1), it considered the constitutionality of their exclusion from matrimonial property legislation in *Walsh v. Bona*, and more recently in *Québec v. A*. These decisions are instructive because matrimonial property legislation, like intestacy legislation, deals with the property rights of a former spouse when the relationship comes to an end. Although that end is triggered by relationship breakdown in one case, and by death in the other, the risk that an excluded common law spouse may be left economically vulnerable or disadvantaged is present in both situations.

[133] As discussed earlier, the issue in *Walsh v. Bona* was whether the exclusion of common law spouses of the opposite sex from Nova Scotia's *Matrimonial Property Act* infringed s. 15(1). Walsh and Bona lived together in a conjugal relationship for 10 years, ending in 1995. They had two children together. The couple owned a home as joint tenants. Bona continued to reside in the home after the separation, assuming the debts and expenses associated with the property. In 1983, Bona had received a cottage property from his father as a gift, which was sold after separation for $20,000. Approximately half of that amount was used to pay off the couple's debts. Bona also retained 13 acres of woodland in his own name, valued at $6,500. The total value of the assets retained by Bona at the date of separation including the house, cottage, woodland, vehicle, pensions and RRSPs was $116,000, less "matrimonial" debts of $50,000, for a net value of $66,000. Walsh claimed support for herself and the two children. She also sought a declaration that the *Matrimonial Property Act* was unconstitutional in failing to provide her with the presumption, applicable to married spouses, of an equal division of matrimonial property.

[134] When the case reached the Supreme Court of Canada in 2002, the leading authority on the s. 15(1) analysis was the *Law* decision, which used the "dignity" test for discrimination.

[135] Writing for the majority, Bastarache J. noted that there was little debate that the *Matrimonial Property Act* created a distinction between common law spouses and married spouses, and that marital status is an analogous ground upon which a discrimination claim can be made. The dispute was with respect to whether, having regard to the four factors set out in *Law*, the legislation violated the respondent Walsh's human dignity. The majority held that the exclusion of unmarried cohabitants was not discriminatory because the distinction chosen by the legislature did not affect the dignity of unmarried persons in conjugal relationships and did not deny them access to a benefit or advantage available to married persons. On the contrary, the legislation enhanced the dignity of unmarried persons by respecting their freedom to choose whether to assume the benefits and obligations associated with marriage. On the importance of the individual's freedom of choice, Bastarache J. wrote:

> 43 **Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount.** The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that **many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.** As M. Eichler posited:
>
> > Treating all common-law relationships like legal marriages in terms of support obligations and property division ignores the very different circumstances under which people may enter a common-law union. If they choose to marry, they make a positive choice to live under one type of regime. If they have chosen not to marry, is it the state's task to impose a marriagelike regime on them retroactively?
>
> (M. Eichler, *Family Shifts: Families, Policies, and Gender Equality* (1997), at p. 96)
>
> To ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state.
>
> [*Emphasis added*]

[136] According to Justice Bastarache, the decision to live together, without more, is not sufficient evidence of an intention to create an economic partnership:

> 54 … the *MPA* is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. **It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bear this out. It does not necessarily follow, however, that these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship**. As Eichler, *supra*, points out, at pp. 95-96:
>
> > There is a distinct difference between a young couple living together, having a child together, and then splitting up, and an older couple living together after they have raised children generated with another partner. If a middle-aged couple decide to move in together at the age of fifty-five and to split at age sixty, and if both of them have children in their thirties, the partners may wish to protect their assets for themselves and for their children — with whom they have had a close relationship for over thirty years — rather than with a partner with whom they were associated for five years.
>
> 55 In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. It is true that the benefits that one can be deprived of under a s. 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in *M. v. H.*, *supra*. It has not been established, however, that there is a discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status, this is not a s. 15(1) issue. **The *MPA* only protects persons who have demonstrated their intention to be bound by it and have exercised their right to choose.**
>
> [*Emphasis added*]

[137] The respondent Walsh argued that the choice to marry or to register a domestic partnership fails to address the circumstances of individuals whose unmarried partner refuses to take either of those steps. For those persons, the decision is not entirely within their control. Walsh further argued that maintaining

the *status quo* unduly disadvantages women, who are often the non-title holding partner, as well as children. She submitted that the protection of women and children from the potentially dire economic consequences of marriage breakdown is one of the main purposes of the *MPA*. Excluding unmarried cohabitants, then, constituted a denial of equal protection of women in conjugal relationships and the children of those relationships – the persons whom the legislation was specifically designed to protect. Walsh proposed that the only constitutionally acceptable solution was to extend the *MPA* to all unmarried cohabitants, while giving consenting couples the opportunity to opt out. The majority disagreed:

> 57 … The problem with that proposition, in my view, is that it eliminates an individual's freedom to decide whether to make such a commitment in the first place. **Even if the freedom to marry is sometimes illusory, does it warrant setting aside an individual's freedom of choice and imposing on her a regime that was designed for persons who have made an unequivocal commitment encompassing the equal partnership described in the *MPA*?** While there is no denying that inequities may exist in certain unmarried cohabiting relationships and that those inequities may result in unfairness between the parties on relationship breakdown, there is no constitutional requirement that the state extend the protections of the *MPA* to those persons. The issue here is whether making a meaningful choice matters, and whether unmarried persons are prevented from taking advantage of the benefits of the *MPA* in an unconstitutional way.
>
> [*Emphasis added*]

[138] Justice Bastarache noted that there are alternative choices and remedies available to those persons unwilling or unable to marry. They could choose to own properly jointly or to enter into a domestic contract that is enforceable pursuant to the *Maintenance and Custody Act* and the *Maintenance Enforcement Act*. They could choose to register a domestic partnership under the *Vital Statistics Act*. For those persons who might be unfairly disadvantaged as a result of the termination of a relationship, the *Maintenance and Custody Act* permits an unmarried cohabitant or "common law partner" to apply for an order of maintenance or support. The remedy of constructive trust is also available to address inequities that arise on dissolution of the relationship (paras. 58-61).

[139] The legislation's respect for individual autonomy, coupled with the availability of other options and remedies for common law spouses, led the majority to find that there was no breach of s. 15(1):

> 62 All of these factors support the conclusion that the extension of the *MPA* to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected.
>
> 63 Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336; *Oakes, supra*; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 117. Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

[140] Eleven years after *Walsh*, in *Québec v. A*, the Supreme Court of Canada revisited the distinction between married and unmarried couples. In that case, the court considered whether the exclusion of unmarried couples from the patrimonial and support rights granted to married and civil union spouses in the *Civil Code of Québec*, S.Q. 1991, c. 64, was constitutional. A and B met in A's home country in 1992. A was 17 years old at the time, living with her parents and attending school. B was 32 and owned a lucrative business. For the next two years, the pair took several trips around the world. B provided financial support to A so that she could continue her schooling.

[141] In early 1995, the couple agreed that A would move to Québec where B lived. After a brief break-up, A became pregnant with their first child. She gave birth to two other children with B, in 1999 and 2001. During the time they lived together, A generally did not work outside the home and often accompanied B on his travels. B provided for A's needs and those of the children. A wanted to get married, but B told her that he did not believe in the institution of marriage. He said he could possibly envision getting married after living with her for 25 years.

[142] A and B separated in 2002 after living together for seven years. In February 2002, A filed a motion in court seeking custody of the children. She also filed a notice to the Attorney General of Québec stating that she intended to challenge the constitutionality of several provisions of the *Civil Code of Québec* in order to

obtain the same legal regime for *de facto* (common law) spouses that existed for married spouses.

[143] A's position was that the theory of freedom of choice or individual autonomy relied on by the Attorney General and B, and by the majority in *Walsh*, is based on a stereotype and does not correspond to reality. In other words, she said the freedom of *de facto* spouses to choose to marry is illusory. A argued that the exclusion of *de facto* spouses from the division of property and support provisions of the *Civil Code* disregards their actual situation and needs.

[144] The Attorney General argued that, "with regard to both the obligation of support and the patrimony of the spouses, the Québec legislature's objective is the same one the Nova Scotia legislature was pursuing in *Walsh*: to respect individual autonomy" (para. 41). In other words, the exclusion of *de facto* spouses from the obligation of spousal support and for patrimonial property is intended to respect the freedom of every individual to choose whether to participate in the statutory scheme applicable to marriage and to accept the specific legal consequences flowing from that scheme.

[145] B adopted the Attorney General's submissions on the validity of the legislation. He further argued that the legislative distinctions between *de facto* unions and marriage or civil unions are not discriminatory because they do not perpetuate prejudice and do not result from stereotyping. According to B, the principles from *Walsh* were directly applicable to their situation.

[146] The Supreme Court's 269-page decision consisted of four separate judgments. Four judges (Lebel, Fish, Rothstein and Moldaver J.J.) applied *Walsh* and concluded that there was no breach of s. 15(1). Justice Lebel wrote for himself and his three colleagues. He began by noting that, in determining whether the provisions in question were discriminatory, it was necessary to consider them in their relevant historical and legislative context. To that end, he conducted an extensive review of the framework applicable to legal relationships between spouses in Québec, Québec legislative policy with respect to the distinction between *de facto* spouses and married or civil union spouses, and the development of the *de facto* union in Québec society. In the course of this review, Lebel J. noted that *de facto* unions are far more popular in Québec than in any other province in Canada. According to the 2011 census data, "20% of Canadian couples live in *de facto* unions", while "[i]n Québec, the proportion rises to 37.8%" (para. 125).

[147] Justice Lebel went on to trace the evolution of the s. 15(1) analysis from *Andrews* through to *Kapp* and *Withler*. He noted that the Supreme Court of Canada has consistently pointed out that the value of substantive equality at the heart of s. 15 is closely tied to the concept of human dignity (para. 138). Lebel J. added that individual autonomy is essential to human dignity:

> [139] The principle of personal autonomy or self‑determination, to which self‑worth, self‑confidence and self‑respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee: *Law*, at para. 53; *Gosselin*, at para. 65. Safeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices … [*citations omitted*]

[148] After reviewing the reasons in *Walsh*, Lebel J. concluded that the majority in that case would have reached the same conclusion if its analysis had been based on the reworked analytical framework from *Kapp* and *Withler*. As such, he held that, subject to the differences between the *MPA* and the Québec scheme, Bastarache J.'s analysis in *Walsh* could properly serve as a precedent on the s. 15(1) issue.

[149] The first part of the s. 15(1) test was easily met -- the *Civil Code* provisions clearly drew a distinction based on the analogous ground of marital status. Justice Lebel concluded that this distinction may result in disadvantages for *de facto* spouses, one of whom would likely end up in a more precarious patrimonial situation on dissolution of the relationship than if the couple had been married or in a civil union. He was not satisfied, however, that the exclusion of *de facto* spouses from the framework applicable to marriage and civil unions perpetuated prejudice against *de facto* spouses or was based on a stereotype.

[150] Although Lebel J. accepted that *de facto* spouses in Québec historically experienced disadvantageous treatment based on intentional prejudice, he concluded that "the *de facto* union has become a respected type of conjugality and is not judged unfavourably by Québec society as a whole" (para. 249). Nor was it still judged unfavourably by the legislature:

> [250] Moreover, the legislature's traditional hostility generally seems to have changed into acceptance of the *de facto* union. As I mentioned above, Québec social legislation no longer draws distinctions between the various types of conjugality: see, *inter alia*, *An Act respecting financial assistance for education expenses*; *An Act respecting legal aid and the provision of certain other legal*

> *services*; *Automobile Insurance Act*. Rather, it applies uniformly to *de facto*, married and civil union spouses both in granting benefits and in imposing obligations where their relations with government institutions are concerned. As we have seen, the distinction continues to exist in the context of relations between the spouses themselves, within their conjugal relationship, where there is still a will to preserve the possibility of choosing between various types of conjugality.

[151] Justice Lebel explained, however, that the recent social and legislative acceptance of *de facto* unions did not necessarily mean that the impugned law did not discriminate by expressing prejudice (para. 251). He elaborated on that point at para. 251:

> Prejudice does not have to be intentional for s. 15(1) of the *Charter* to be violated. If a law has the effect of favouring certain individuals at the expense of others by treating the latter as less worthy, or if it creates a hierarchy between them, even inadvertently, it will be considered to discriminate by expressing prejudice.

[152] Through the impugned provisions, the Québec legislature imposed mandatory support and division of property regimes on only those persons who, by agreement with another person in marriage or a civil union, demonstrated that they wished to be bound by them. In Lebel J.'s view, by making consent the key to changing the spouse's mutual patrimonial relationship, the Québec legislature had not expressed a preference for marriage and civil unions at the expense of *de facto* unions. Nor had it created a hierarchy between the various forms of conjugality. Instead, the legislature had "preserved the freedom of those who wish to organize their patrimonial relationships outside the mandatory statutory framework" (para. 256). Returning to the *Walsh* decision, Lebel J. concluded:

> [265] To paraphrase Bastarache J. in *Walsh*, I believe that this requirement that a consensus between the spouses exist before any significant change is made to their rights of ownership "enhances rather than diminishes respect for the autonomy and self‑determination of unmarried cohabitants and their ability to live in relationships of their own design": para. 50.

[153] Justice Lebel was likewise unconvinced that the disadvantage imposed by the legislation was based on a stereotype that did not correspond to the actual circumstances or characteristics of *de facto* spouses. He noted that the focus of that inquiry was on whether autonomy of the will truly exists in matrimonial matters or is merely wishful thinking (para. 271). In other words, does the choice not to marry reflect an autonomous decision by a *de facto* spouse to avoid the legal regimes applicable to marriage and civil unions, or is that merely a fiction? Justice

Lebel held that there was no evidence that the distinction made by the legislature did not correspond to the actual circumstances and characteristics of *de facto* spouses:

> [275] In the case at bar, A has not established that it is stereotypical to believe that couples in a *de facto* union have chosen not to be bound by the regimes applicable to marriage and civil unions. The Québec scheme, the effect of which is to respect each person's freedom of choice to establish his or her own form of conjugality, and thus to participate or not to participate in the legislative regime of marriage or civil union with its distinct legal consequences, is not based on a stereotype.
>
> [276] In this sense, recognition of the principle of autonomy of the will, which is one of the values underlying the equality guarantee in s. 15 of the *Charter*, means that the courts must respect choices made by individuals in the exercise of that autonomy. In this context, it will be up to the legislature to intervene if it believes that the consequences of such autonomous choices give rise to social problems that need to be remedied.

Accordingly, Lebel J. ruled that the *Civil Code* provisions did not violate s. 15(1). As a result, it was unnecessary to consider s. 1.

[154] Justice Abella, on the other hand, held that the provisions did violate s. 15 of the *Charter* and that the violation was not justified under s. 1. Abella J. declined to follow *Walsh* for two key reasons. First, the majority in *Walsh* considered the role of freedom of choice at the s. 15(1) stage, rather than at the s. 1 justificatory stage. Justice Abella pointed out that marital status was designated as an analogous ground in *Miron v. Trudel*, [1995] 2 S.C.R. 418, on the basis that marital status is not a real choice. The court in that case accepted that the choice to marry is constrained by a number of factors. In Abella J.'s view, the majority's approach in *Walsh* was completely inconsistent with *Miron*:

> [335] Any discussion of the reasonableness of distinctions based on this ground, or justifications for such distinctions, must take place under s. 1. **To focus on the "choice" to marry at the s. 15(1) stage is not only contrary to the approach in *Andrews*, it is completely inconsistent with *Miron* and undermines the recognition of marital status as an analogous ground.** By definition, analogous grounds are "personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity" *(Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13). This Court has firmly rejected the context-dependency of analogous grounds: they are not deemed immutable in some legislative contexts and a matter of choice in others. Rather, they stand as "constant marker[s] of potential legislative discrimination"

> (*Corbiere*, at para. 10). **Having accepted marital status as an analogous ground, it is contradictory to find not only that *de facto* spouses do have a choice about their marital status, but that it is that very choice that excludes them from the protection of s. 15(1) to which *Miron* said they were entitled.**
>
> [*Emphasis added*]

[155] By considering freedom of choice at the s. 15(1) stage, the majority in *Walsh* "collapsed the justification into the s. 15 analysis, leaving the claimants to justify what should analytically be part of the government's burden" (para. 340).

[156] Justice Abella also declined to follow *Walsh* because the equality analysis under s. 15(1) had evolved substantially since that case was decided and aspects of the majority's decision (including the dignity test) were "at odds with the substantive equality analysis of *Kapp* and *Withler*" (para. 344).

[157] Unconstrained by *Walsh*, Abella J. proceeded to the s. 15(1) analysis. She held that the exclusion of *de facto* spouses from the economic protections for formal spousal unions was a distinction based on the analogous ground of marital status. That distinction, in her view, was discriminatory:

> [349] We must then consider whether the distinction is discriminatory. That it imposes a disadvantage is clear, in my view: the law excludes economically vulnerable and dependent *de facto* spouses from protections considered so fundamental to the welfare of vulnerable married or civil union spouses that one of those protections is presumptive, and the rest are of public order, explicitly overriding the couple's freedom of contract or choice. The disadvantage this exclusion perpetuates is an historic one: it continues to deny *de facto* spouses access to economic remedies they have always been deprived of, remedies the National Assembly considered indispensable for the protection of married and civil union spouses.

[158] Justice Abella noted that "[t]here is little doubt that some *de facto* couples are in relationships that are functionally similar to formally recognized spousal relationships" (para. 350). The fact that there is a range of need or vulnerability among *de facto* spouses is not an answer to a claim of discrimination (para. 354). Abella J. concluded the s. 15(1) analysis as follows:

> [356] The National Assembly enacted economic safeguards for spouses in formal unions based on the need to protect them from the economic consequences of their assumed roles. Since many spouses in *de facto* couples exhibit the same functional characteristics as those in formal unions, with the same potential for one partner to be left economically vulnerable or disadvantaged when the

> relationship ends, their exclusion from similar protections perpetuates historic disadvantage against them based on their marital status.

[159] Moving on to the test under s. 1, Justice Abella held that the exclusion of *de facto* spouses from the legal regimes governing marriage and civil unions failed at the minimal impairment stage:

> In my view, an outright exclusion of *de facto* spouses cannot be said to be minimally impairing of their equality rights. A presumptively protective scheme, on the other hand, with a right on the part of *de facto* spouses to opt out, is an example of an alternative that would provide economically vulnerable spouses with the protection they need, without in any way interfering with the legislative objective of giving freedom of choice to those *de facto* spouses who want to exercise it. [para. 360]

[160] Justice Abella rejected the argument that *de facto* spouses had other remedies available to them if they were left economically vulnerable upon dissolution of their relationship:

> [365] The argument was made that *de facto* spouses have other mechanisms available to them that compensate for their exclusion from the support and division of property regimes, specifically the ability to sign a cohabitation agreement and the possibility of claiming for unjust enrichment. However, these contractual and statutory protections available to *de facto* spouses in Québec fall far short of what married and civil union spouses obtain presumptively, both in their content and in their realistic availability to the most vulnerable *de facto* spouses. …

[161] Abella J. therefore concluded that the impugned provisions of the *Civil Code* were unconstitutional, and allowed A's appeal.

[162] Three judges (Deschamps, Cromwell, and Karakatsanis J.J.) agreed with Abella J. that the impugned provisions violated s. 15(1) of the *Charter*. For the purposes of s. 1, however, they made a distinction between the measures related to property and those related to support. Deschamps J. explained the reasons for that distinction:

> [392] Because of the diversity of legislative sources and the variety of objectives being pursued and means that have been adopted by the Québec legislature, it is impossible to place the majority of the measures at issue under a single umbrella, that of the "protection of vulnerable persons", or to conclude that these measures should form an inflexible unit described as a "primary" regime, which, I should add, is a concept to which the legislature did not refer. **Moreover, the measures**

> **that protect the patrimony of spouses are not, like support, focused on the basic needs of the vulnerable spouse. Their purpose is to ensure autonomy and fairness for couples who have been able to, or wanted to, accumulate property.**
>
> [393] There is another reason, a pragmatic one, why a distinction must be drawn between the measures related to property and those related to support. **Whereas a plan to live together takes shape gradually and can result in the creation of a relationship of interdependence over which one of the parties has little or no control, property such as the family residence or pension plans can be acquired only as a result of a conscious act. The process that leads to the acquisition of a right of ownership is different from the one that causes a spouse to become economically dependent**. In short, I find that the Court of Appeal was correct to distinguish the right to support from the patrimonial rights.
>
> [*Emphasis added*]

[163] At the s. 1 justification stage, Justice Deschamps commented as follows with regard to the objective and rational connection considerations:

> [400] In my opinion, I must accept, as in the case of support, that the objective of promoting the autonomy of the parties is pressing and substantial and that a rational connection has been established.

[164] Justice Deschamps held that the exclusion of *de facto* spouses from the measures related to property satisfied the minimal impairment test:

> [405] **In light of the objective of promoting the autonomy of the parties, the positive actions the parties must take to acquire family property** and the flexibility the courts have in assessing the resources available for the payment of support, I find that the exclusion of *de facto* spouses from the protection of the family patrimony satisfies the minimal impairment requirement.
>
> [*Emphasis added*]

[165] Justice Deschamps went on to find that the exclusion of *de facto* spouses from the measures related to property, but not to support, were justified under s. 1.

[166] Chief Justice McLachlin concurred with Abella, Deschamps, Cromwell, and Karakatsanis J.J. that the impugned provisions violated s. 15(1):

> [423] In my view, the Québec dual regime approach makes discriminatory distinctions that limit the s. 15 equality right of *de facto* spouses. All the elements of a s. 15 violation are present. The law denies *de facto* spouses protections available to married and civil union spouses. These distinctions are made on the basis of the analogous ground of marital status: *Miron*. The distinctions create a

> disadvantage: *de facto* spouses do not automatically benefit from a series of provisions that ensure an equitable division of property and continued financial support at the end of a relationship characterized by financial interdependence (*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 401 et seq., 414 et seq., 427 et seq., 432 and 585). Finally, the disadvantage is discriminatory from the point of view of a reasonable person placed in circumstances similar to those of A. The law in fact shows less concern for people in A's position than for married and civil union spouses on break-up of the relationship. As it applies to people in A's situation, it perpetuates the effects of historical disadvantage rooted in prejudice and rests on a false stereotype of choice rather than on the reality of the claimant's situation.

[167] Moving on to s. 1, McLachlin C.J. succinctly summarized the relevant test:

> [434] The state bears the burden of establishing justification on a balance of probabilities. The state must demonstrate (1) a sufficiently important objective to justify an infringement of a *Charter* right, (2) a rational connection between that objective and the means chosen by the state, (3) that the means are minimally impairing of the right at issue, and (4) that the measure's effects on the *Charter* - protected right are proportionate to the state objective: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[168] Chief Justice McLachlin held that the objective of the law – to promote choice and autonomy for all Québec spouses with respect to property division and support – was sufficiently important to justify an infringement of s. 15(1) (paras. 435-437).

[169] McLachlin C.J. was likewise satisfied that there was a rational connection between that objective and the means chosen by the Québec legislature:

> [438] The distinction made by the law between married, civil union and *de facto* spouses is rationally connected to the state objective of preserving the autonomy and freedom of choice of Québec spouses. Without this distinction, the clear choice between a regime of division of property and support on the one hand, and a regime of full autonomy on the other hand, would be absent. **The Québec approach only imposes state-mandated obligations on spouses who have made a conscious and active choice to accept those obligations. The requirement of an active choice to undertake obligations is consistent with the objective of enhancing autonomy.**
>
> [*Emphasis added*]

[170] At the minimal impairment stage, McLachlin C.J. acknowledged that there were alternative schemes available to the Québec legislature that would impair the

equality right of *de facto* spouses to a lesser degree. Those approaches, however, "would be less effective in promoting the goals of the Québec scheme of maximizing choice and autonomy for couples in Québec" (para. 442).

[171] At the final stage – proportionality – McLachlin C.J. stated:

> [449] The impact of the Québec scheme on the exercise and enjoyment of the equality right is significant. However, the discriminatory effects of the exclusion of *de facto* spouses from the mandatory regime are attenuated in the modern era, as compared to earlier points in Québec's history. The impugned provisions do not appear to perpetuate animus against *de facto* spouses. All parties to this appeal agreed that the *de facto* spousal relationship is a popular form of relationship in Québec. There is no longer any stigma attached to *de facto* spousal relationships. Many spouses in Québec appreciate and take advantage of the ability to structure their relationship outside the traditional strictures of marriage. **The impugned provisions enhance the freedom of choice and autonomy of many spouses as well as their ability to give personal meaning to their relationship. Against this must be weighed the cost of infringing the equality right of people like A, who have not been able to make a meaningful choice. Critics can say and have said that the situation of women like A suggests that the legislation achieves only a formalistic autonomy and an illusory freedom. However, the question for this Court is whether the unfortunate dilemma faced by women such as A is disproportionate to the overall benefits of the legislation, so as to make it unconstitutional. Having regard to the need to allow legislatures a margin of appreciation on difficult social issues and the need to be sensitive to the constitutional responsibility of each province to legislate for its population, the answer to this question is no.**
>
> [*Emphasis added*]

[172] To summarize, a five-to-four majority held that the exclusion of *de facto* spouses from the property division and support regimes applicable to married and civil union spouses violated s. 15(1). However, with respect to the property division measures, four of those judges held that the violation was justified under s. 1, and joined the four who concluded that there was no violation of s. 15(1) in upholding the exclusion. In effect, the court in *Québec v. A* upheld *Walsh*: the exclusion of common law couples from a statutory regime of equal sharing upon relationship breakdown is not a violation of the *Charter*.

Applying *Québec v. A* to the instant case

[173] The parties agree that, on the basis of *Québec v. A*, the exclusion of common law spouses from the definition of "spouse" under the *Intestate Succession Act*

violates s. 15(1) of the *Charter*. The Act denies unmarried spouses the right to inherit from a spouse who dies intestate – a right that is available to married spouses. The law therefore creates a distinction based on the analogous ground of marital status. That distinction perpetuates the effects of an historical disadvantage rooted in prejudice. It is also based on the false stereotype that common law spouses have chosen not to assume the rights and obligations of an intestate succession regime that applies to married spouses by default. Having found a violation of s. 15(1), it is necessary to determine whether that violation is justified under s. 1 of the *Charter*.

[174] An unusual feature of this case is the Attorney General's decision to take no position on the constitutionality of the *Intestate Succession Act*. Having taken no position, the government has not filed evidence or made submissions on whether any violation of s. 15(1) is justified under s. 1. The impact of such a decision by the state on the s. 1 analysis was considered in *Rossu v. Taylor*, [1998] A.J. No. 648 (C.A.). In that case, the Alberta Department of Justice declined to participate in a constitutional challenge to the *Domestic Relations Act*, R.S.A. 1980, c. D-37. The Alberta Court of Appeal stated that it was therefore left to the litigants and the court to determine the justification for the legislation:

> 12 The provincial Department of Justice has had notice of these proceedings but has declined to appear. The government's decision not to take a position on this challenge to their legislation warrants comment. **It is exceedingly difficult for this Court to properly conduct a *Charter* analysis, particularly at the s. 1 stage, without submissions from government about the objectives and rationale of the legislation.** Submissions on the broad and important public policy aspects of this issue would also have been invaluable. **By choosing not to assist the Court on this important issue, the government has left it to the litigants and to the Court to determine the justification for the legislation.** While Counsel have presented well-constructed arguments, they are clearly not in the best position to defend the legislation.
>
> …
>
> 130 The test to be applied under s. 1 was set out in the Oakes decision and remains good law. **In a s. 1 analysis, the onus is on the defender (usually the government, but in this case a private litigant) to show that the infringement is a reasonable limitation, demonstrably justified in a free and democratic society.**
>
> [*Emphasis added*]

[175] The Court of Appeal specifically rejected the argument that the government's decision not to participate meant that the legislation could not be justified:

> 13 Taylor argues that we should infer from the government's absence that it cannot defend its legislation. She suggests that the support provisions of the DRA are unjustifiable. While this argument has some attraction, it is not compelling. Other explanations for the government's absence are conceivable. …

[176] In *Johnson v. Sand*, 2001 ABQB 253, [2001] A.J. No. 390, the court conducted a s. 1 analysis without the benefit of submissions from either the government or the litigants:

> 38 The justification called for under s. 1 of the *Charter* casts the burden on the legislature or government or, at the very least, the respondent litigants. In this case neither the government nor the respondent litigants offered any material or submissions under s. 1 to justify the legislation; rather, they took no position.
>
> 39 As observed by the Alberta Court of Appeal in *Rossu v. Taylor*, (1998), 216 A.R. 348, at para 12. "It is exceedingly difficult for this Court to properly conduct a *Charter* analysis, particularly at the s. 1 stage, without submissions from the government about the objectives and rationale of the legislation. "In *Rossu* (*supra*) the court at least had submissions from the respondent concerning both the s. 15(1) analysis and the s. 1 justification.

[177] Mr. Young accepts that either the government or the other party seeking to uphold the law can submit evidence at the justification stage. He says, however, that the Estate has not offered any evidence to justify the s. 15(1) infringement and, as such, the *Oakes* test must fail and a remedy must be provided. He says that, in contrast, he has offered evidence from the Law Reform Commission's *Final Report – Division of Family Property* (2017) indicating that the policy goal of the *Intestate Succession Act* is to prevent poverty among widows and widowers.

[178] The Estate says it has presented sufficient evidence and argument for the purposes of the s. 1 analysis. Its submissions analyze the Supreme Court of Canada precedents and the legislative regime governing estates in Nova Scotia. That regime prioritizes an individual's freedom to structure their relationship with a significant other, and to establish their testamentary wishes, as they see fit. The Estate says the thrust of its evidence and argument is that the legislature has considered and addressed the rights of common law spouses by making it possible for them to gain rights under the *Intestate Succession Act* by registering a domestic-partner declaration. Common law spouses can also ensure that their

partner inherits from their estate by drafting a will that complies with the *Wills Act*, R.S.N.S. 1989, c. 505. There are also additional options like owning property jointly. The Estate's position is that the infringement of s. 15(1) is saved under s. 1.

[179] In *Constitutional Law of Canada*, 5th ed., vol. 2 (Toronto: Thomson Reuters, loose-leaf updated to 2019), Peter Hogg discusses the nature of the evidence required at the s. 1 justification stage:

> In order to satisfy the burden of proving justification under s. 1, Dickson C.J. [in *R. v. Oakes* [1986] 1 S.C.R. 103] said that evidence would "generally" be required, although he added that "there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.". It is risky for a government not to adduce evidence of justification in defence of a *Charter* challenge, but in several cases the Supreme Court of Canada has been prepared to make justificatory findings of a factual nature without evidence, or with very little evidence, relying on the "obvious" or "self-evident" character of the findings. …

[180] In *The Law of the Canadian Constitution*, 1st ed. (Markham: LexisNexis Canada, 2013), Guy Régimbald and Dwight Newman highlight the variety of tools available to the court regarding the evidence under s. 1:

> Once the party challenging a law establishes an infringement of a *Charter* right, the Crown is subject to a burden to establish a justification under section 1 for any limitation of the right. The adducing of evidence at trial will generally be required to establish such a justification. However, the section 1 context is a special context in which it is not always possible, realistic, or necessary to offer definitive proof. Although there may be instances where a justification is rendered invalid for lack of evidence adduced at trial, a number of tools regarding evidence are appropriately applied in a manner responsive to the context.
>
> In addition, a court deciding a section 1 matter can take judicial notice, according to the usual rule, of facts that are notorious and not reasonably contested, with sensitivity to the special considerations of the context. Although the context implies a potentially greater readiness to use judicial notice, its use must nonetheless be examined in terms of how a reasonable person would approach matters given the significance of the facts in issue to the litigation. Somewhat uniquely, a court deciding a section 1 matter may take judicial notice of social science or legislative facts from previous justification cases, partly in order to maintain consistency in constitutional jurisprudence. A court deciding a section 1 matter may also use logical reasoning in testing factual conclusions or may use "common sense" in some contexts. [pp. 566-567]

[181] In my view, I have sufficient material before me, when coupled with logical reasoning and common sense, to determine whether the infringement of Mr.

Young's s. 15(1) right to equality under the *Intestate Succession Act* is justified under s. 1.

[182] At the first stage of the *Oakes* test, the party seeking to uphold the law must demonstrate a sufficiently important objective to justify an infringement of a *Charter* right. In relation to identifying legislative objective, Peter Hogg writes:

> The identification of the objective of a challenged law is a task of considerable practical and theoretical difficulty. At the practical level, the objective of the legislators in enacting the challenged law may be unknown. To be sure, the court will now willingly receive the legislative history of the law, but this is often silent or unclear with respect to the provision under attack. Courts have not been troubled by this difficulty as much as one might expect. They usually assume that the statute itself reveals its objective, and they may pronounce confidently on the point even if there is no supporting evidence.
>
> [*Constitutional Law of Canada*, *supra*, at p. 38-19]

[183] It is not difficult to identify the objective in this case. The Estate submits, and I agree, that the objective here is the same as in *Walsh* and in *Québec v. A* – preserving choice and individual autonomy. The Supreme Court of Canada in *Québec v. A* recognized that this objective is sufficiently important to justify an infringement of s. 15(1).

[184] At the next stage of the test, I find that the distinction made by the *Intestate Succession Act* between married and common law spouses is rationally connected to the objective of preserving the autonomy and freedom of choice of spouses in this province. Like the Nova Scotia *Matrimonial Property Act* and the Québec *Civil Code* property provisions, the *Intestate Succession Act* "only imposes state mandated obligations on spouses who have made a conscious and active choice to accept those obligations. The requirement of an active choice to undertake obligations is consistent with the objective of enhancing autonomy" (*Québec v. A*, at para. 438).

[185] As to minimal impairment, I am mindful of McLachlin C.J.'s comments in *Québec v. A*:

> [442] There is no doubt that schemes can be conceived — and indeed have been adopted in other provinces — that impair the equality right of *de facto* spouses to a lesser degree than the Québec scheme. However — and this is the important point — such approaches would be less effective in promoting the goals of the

> Québec scheme of maximizing choice and autonomy for couples in Québec. **The question at the minimum impairment stage is whether the limit imposed by the law goes too far *in relation to the goal the legislature seeks to achieve*. "Less drastic means which do not actually achieve the government's objective are not considered at this stage"**: *Hutterian Brethren*, at para. 54.
>
> [*Emphasis added*]

[186] In light of the objective of the legislature's goal of promoting choice and autonomy, the limit imposed by law in this case is reasonable. Although there are conceivable alternatives that would impair the s. 15(1) right to equality to a lesser degree, they would not be as effective in promoting the goals of maximizing choice and autonomy. Furthermore, while common law spouses are excluded under the *Intestate Succession Act*, they can bring themselves within the Act by registering their domestic partnership under the *Vital Statistics Act*. Alternatively, rights to property can be granted to common law partners absent any formal change in relationship structure by naming them in a will, or by means of *inter vivos* gift or conveyance of title. The numerous options the legislature has left open to grant property rights to common law partners support the conclusion that the distinction made by the *Intestate Succession Act* between married and common law spouses satisfies the minimal impairment requirement.

[187] The final stage of the test is proportionality. I must determine whether the law has a disproportionately severe impact on common law spouses like Mr. Young who may be left economically vulnerable or disadvantaged following the death of their partner. I accept that the exclusion of common law spouses from the *Intestate Succession Act* has a significant impact on the exercise of equality rights by those individuals. In light of the Supreme Court of Canada's findings in *Québec v. A*, however, I cannot conclude that the impact is disproportionate to the overall benefits of the legislation. As the court noted in that decision, the legislature of this province is entitled to a margin of appreciation on difficult social issues. Accordingly, I find that the violation of s. 15(1) is justified under s. 1.

[188] Before moving on, I acknowledge that the Law Reform Commission has recommended that the *Matrimonial Property Act*, the *Probate Act* and the *Intestate Succession Act* be amended to include common law couples. The Commission has not, however, suggested that the exclusion of common law couples is unconstitutional. In its *Final Report – Division of Family Property* (2017), after reviewing the Supreme Court of Canada rulings in *Walsh* and *Quebec v. A*, the Commission stated:

> Absent a constitutional obligation to include common law couples, it remains up to provincial legislatures to decide whether or not to extend their matrimonial property regimes.

[189] Having found that the *Intestate Succession Act* is constitutional, I will now consider whether Mr. Young has an equitable interest in the property at 327 Craig Road under the doctrine of unjust enrichment or proprietary estoppel.

Unjust enrichment and proprietary estoppel

[190] Mr. Young submits that the Estate has been unjustly enriched by his contributions to the property over the course of his relationship with Ms. Jackson, and that he has suffered a corresponding deprivation. More specifically, he says that he lived with Ms. Jackson as her common law partner for over a decade and contributed to the bills and upkeep of the home. He submits that those contributions may not, in and of themselves, constitute the kind of deprivation contemplated by the doctrine of unjust enrichment, but his actions exceeded those expected of a common law spouse. Mr. Young says that he was the exclusive source of income and sole bill payer for the years that Ms. Jackson had no income, and he forfeited his retirement savings to support himself and Ms. Jackson. He submits that there is no juristic reason for the Estate to benefit from this deprivation and asks the court for a proprietary remedy.

[191] Mr. Young acknowledges that he received the benefit of having a place to stay, but says his contributions exceed the value of that benefit.

[192] The Estate denies that it has been unjustly enriched at Mr. Young's expense. It says that any possible benefit Ms. Jackson experienced during her lifetime from maintenance or improvements alleged by Mr. Young has been negated by his failure to maintain and repair the property. That failure has, among other things, allowed for the continued spread of mould throughout the home. As to Mr. Young's retirement savings, the Estate points out that there is no evidence as to how that money was spent. In addition, in 2015, Ms. Jackson received $32,378.94, which greatly exceeded her income in any previous year. Her highest income prior to 2015 was $16,325, which she earned in 2008. Mr. Young then "took the foot off the gas in terms of contributions" (according to the Estate) with his income in 2015 dropping down to $7,420. The Estate also notes that while the court has evidence of Ms. Jackson's income for every year from 2008 to 2016, it has no evidence of Mr. Young's income for 2010 and 2011. It is therefore not clear the

degree, if any, to which he contributed to the household during those years. In sum, the Estate says the evidence is insufficient to establish a benefit and a corresponding deprivation.

[193] Unjust enrichment remains the primary vehicle to address claims of inequitable distribution of assets when a domestic relationship ends, whether due to relationship breakdown or death. A claim in unjust enrichment has three elements:

(1) An enrichment of the defendant;

(2) A corresponding deprivation of the plaintiff; and

(3) An absence of juristic reason for the enrichment.

[*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30]

[194] In *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, Cromwell J., for the court, said the following about the first two elements:

> 38 For the first requirement - enrichment - the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
>
> 39 Turning to the second element - a corresponding deprivation - the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

[195] The third element is an absence of a juristic reason for the enrichment. Cromwell J. succinctly summarized the two-step juristic reason analysis initially set out in *Garland*:

> [43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to

> ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:
>
> > First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
> >
> > The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
> >
> > As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]
>
> [44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

[196] Remedies for unjust enrichment are intended to "…require the defendant to repay or reverse the unjustified enrichment" (para. 46). While a plaintiff may be entitled to a monetary or proprietary remedy, a monetary award will be sufficient in most cases and should be considered first (para. 47). Where a monetary award is inappropriate or insufficient, however, a proprietary award may be required. The court reviewed the kind of evidence that could justify a proprietary award:

> 50 **The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required.** *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). **Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour** (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).
>
> 51 **As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust** (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (Peter, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). **Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property** (*Sorochan*, at p. 50; *Pettkus*, at p. 852).
>
> 52 **The plaintiff must also establish that a monetary award would be insufficient in the circumstances** (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, per La Forest J.).
>
> 53 **The extent of the constructive trust interest should be proportionate to the claimant's contributions.** Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, **"The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions"** (p. 454).
>
> [*Emphasis added*]

[197] Where a monetary award is appropriate, the question then becomes how to quantify that award. To do so, the court must first characterize the nature of the

unjust enrichment claim. Where the basis of the unjust enrichment is "the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the plaintiff's contributions to the joint family venture and the accumulation of wealth", the monetary award "should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth" (para. 81). Otherwise, the monetary award may be assessed on a *quantum meruit*, "value received" or "fee-for-services" basis.

[198] Cromwell J. noted that, in domestic relationship cases, mutual conferral of benefits often complicates the unjust enrichment analysis:

> … the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other … Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her … The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?
>
> [*Citations omitted*]

[199] The court clarified that, where the claim is to be quantified on a q*uantum meruit* or fee-for-service basis, mutual conferral of benefits should generally be considered at the defence/remedy stage:

> [103] Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.
>
> [104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. **Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits**

> **constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment** (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

[200] Mr. Young has not suggested that he and Ms. Jackson were in a joint family venture. There is no evidence that they comingled their finances or intended to have their lives be economically intertwined. They kept their finances separate, but each contributed to their expenses. Mr. Young's claim relates to a single asset – the house at 327 Craig Road. His position, essentially, is that he has a constructive trust in the property as a result of his contributions to the upkeep of the house and his payment of the mortgage and other expenses during the period that Ms. Jackson was not earning an income.

[201] In my view, I am not satisfied that the value of the property has been enhanced in any way by the minor renovations and other maintenance Mr. Young performed over the years. As I stated earlier, I agree with the Estate that any benefit that Ms. Jackson might have received as a result of Mr. Young's (and Mr. Hape's) work on the house has been lost due to Mr. Young's failure to maintain and repair the property. The house has deteriorated significantly since Judy Jackson was alive. In other words, with respect to maintenance and renovations, Mr. Young has failed to establish that the Estate has received a benefit.

[202] Turning to the retirement funds, as I noted earlier, there are serious deficiencies with the evidence regarding Mr. Young's financial contributions to household expenses during his relationship with Ms. Jackson. While I accept that he contributed to some degree, I do not have enough evidence to find that it was on an equal basis. Nor do I have sufficient evidence to conclude that Ms. Jackson had no other sources of funds – including what she borrowed in 2010 – to contribute to expenses during the period that she was not earning an income. Further complicating matters, the Estate is far less able than Ms. Jackson herself would have been to respond to Mr. Young's claim with evidence of mutual conferral of benefits. The Estate cannot speak to who paid for what during the relationship. Fortunately, I am able to dispose of the claim notwithstanding these issues.

[203] Even if I accept Mr. Young's evidence that he contributed equally during his relationship with Ms. Jackson, and that he paid Ms. Jackson's half of the mortgage and other expenses from 2013 until April 2015 when she received her disability

backpay, I find that Mr. Young has received mutual benefits from the Estate of equal or greater value than those amounts since Ms. Jackson's death. I will explain.

[204] Ms. Jackson's bi-weekly mortgage payment was $165.64, for a total monthly payment of $358.88. If Mr. Young paid Ms. Jackson's half of the mortgage ($179.44) for a period of 28 months, that results in a total of $5,024.32. However, in 2010, Ms. Jackson named Mr. Young as beneficiary under her life insurance policy. As of May 23, 2017, the total death benefit under the policy was $6,424.00. Mr. Young confirmed that he received a payout under the policy, and that he has not paid any of Ms. Jackson's funeral expenses (despite his best efforts). This left Mr. Young with a surplus of $1,399.68. In addition, Mr. Young has lived rent-free in Ms. Jackson's home since August 2017 – a period of approximately 28 months. I find that these benefits set off any deprivation that Mr. Young claims to have suffered. I therefore dismiss the unjust enrichment claim.

[205] With respect to proprietary estoppel, Mr. Young conceded in argument that this doctrine is only relevant if I accepted that Ms. Jackson intended for him to inherit her home. As I noted earlier, I find that it is not possible on the evidence to determine what Ms. Jackson's intentions were for her property. This claim must fail.

Should Mr. Young be ordered to vacate the home at 327 Craig Road?

[206] Having found that Mr. Young has no legal or equitable interest in the home at 327 Craig Road, I order that he must vacate the home within 90 days of the release of this decision.

Occupation rent

[207] The Estate seeks occupation rent from Mr. Young for the period from August 2017 to the date of judgment. Occupation rent is an equitable remedy which may be claimed in circumstances where a person is in occupation of another's land (*Rossiter v. Swartz*, 2013 ONSC 159, at paras. 40-41). Even if I had not factored this period of time into the unjust enrichment analysis, I would not have ordered occupation rent. It would not, in my view, be equitable to saddle Mr. Young with an order that he pay 28 months' worth of occupation rent when he must now incur the expense associated with finding and paying for a new place to

live. It will be difficult enough for him to find suitable accommodations with his limited income. I dismiss the Estate's claim for occupation rent.

Conclusion

[208] In Nova Scotia, common law spouses are excluded from inheriting under the *Intestate Succession Act*. Although that exclusion infringes s. 15(1) of the *Charter*, the infringement is justified under s. 1.

[209] As of the time of this judgment, the Nova Scotia legislature has seen fit to impose rights and obligations under the *Matrimonial Property Act* and the *Intestate Succession Act* on only those spouses who have made a conscious and deliberate choice to accept those rights and obligations. Absent a finding that the exclusion of common law couples is unconstitutional, this court will not second guess the wisdom of the legislature's decision.

[210] I find that Mr. Young has no legal or equitable interest in the property at 327 Craig Road. I dismiss his claims against the Estate and I order that he vacate the property within 90 days of the release of this decision. I also dismiss the Estate's claim for occupation rent.

[211] The parties agree that the issues in this proceeding mirror those raised by Mr. Young in his notice of claim before the Probate Court. I therefore dismiss that notice of claim.

[212] I leave it to the parties to attempt to agree on costs. If they are unsuccessful, I will accept brief written submissions within 30 days of this decision.

McDougall, J.