**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *LeBlanc v. Cushing Estate*, 2020 NSSC 162

**Date:** 20200515
**Docket:** Yarmouth No. 484289
**Registry:** Yarmouth

**Between:**

Sarah LeBlanc

Applicant

v.

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

Respondent

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**Judge:** The Honourable Justice Pierre L. Muise

**Heard:** January 20, 2020 in Yarmouth, Nova Scotia

**Summary:** Ms. LeBlanc was in a common law relationship with Mr. Cushing. They were not registered as domestic partners. Mr. Cushing died leaving a will under which Ms. LeBlanc was not a beneficiary. She brought an application seeking, among other things, dependants' relief under the *Testators' Family Maintenance Act* (the "TFMA"). In a preliminary motion, it was determined that the reference to "widow", in the TFMA definition of "dependant", does not include the surviving female in a common law couple, which has not registered a domestic-partner declaration under the *Vital Statistics Act*. As a result of that exclusion, Ms. LeBlanc does not fit in the definition of "dependant", which denies her standing to make a TFMA application. She makes the within motion seeking a declaration that the scheme of the TFMA, which creates that exclusion, is unconstitutional, and reading common law spouses into the definition of "widow", with retroactive effect.

**Issues:** (1) Does the exclusion of common law couples, who have not registered as domestic partners, from the TFMA definition of

"dependant", infringe Ms. LeBlanc's right to equality under s. 15 of the Charter?

(2) If so, is the infringement a reasonable limit on equality that can be demonstrably justified in a free and democratic society under s. 1 of the Charter?

a) Is the objective behind the limit pressing and substantial?

b) Is the limit proportional to the objective?

i. Is the limit rationally connected to the objective?

ii. Does the limit minimally impair the right?

iii. Do the beneficial effects of the limit outweigh the detrimental effects?

(3) If there is a s. 15 breach that is not justified under s. 1, what is the most appropriate Charter remedy in the circumstances.

**Result:**

1. The exclusion of common law couples, who have not registered as domestic partners, from the TFMA definition of "dependant", infringes Ms. LeBlanc's right to equality under s. 15 of the Charter. It denies persons in her situation the benefit of standing under the TFMA that is available to married and registered couples, simply because they are married or registered, irrespective of what other steps they have taken to provide for mutual rights and obligations on death. It does so in a manner that has the effect of perpetuating arbitrary disadvantage on them. A common law couple cannot choose to register while one of them is married, but marriage automatically terminates a domestic partner registration, thus creating a marital status hierarchy in which marriage takes precedence. Limiting testamentary autonomy in a marriage situation, but not a common law situation, prioritizes marriage.

2. The infringement is justified under s. 1.

(a) The objectives are sufficiently important. They are interconnected and include: ensuring the TFMA only applies to those couples who have deliberately chosen and consented to acquiring the rights and obligations of

legally married spouses, i.e. preserving choice and autonomy; certainty as to who qualifies to make a TFMA application; and, providing a one-spouse limit on qualifying as widow or widower for the purposes of the TFMA.

(b) The limit on s. 15 rights is proportional to the objectives.

i) Marriage and registration require a deliberate and consensual act, that is recorded, making them rationally connected to the objectives of choice, autonomy and certainty. Excluding a common law spouse from being able to register, and from qualifying as a widow or widower, when their spouse is already married to someone else, is the only way the ensure the one-spouse goal is met and satisfies the rational connection test.

ii) Registration is quicker, easier and cheaper than marriage. It is available immediately upon cohabitation. In that way, it impairs s. 15 rights less than a requirement for a minimum period of cohabitation, which is the measure suggested by Ms. LeBlanc. Even when one member of the common law couple is married, a divorce can be obtained as of right before the minimum period of cohabitation required to apply for *inter vivos* support (except where there is a child of the common law relationship). Thus, the registration option can permit faster access to the TFMA even where a divorce must be finalized first. In addition, there are alternate means of protection which common law spouses, who are unable to register, can use. For these reasons, the means selected to achieve the objectives minimally impair the right.

iii) The balance of convenience test is satisfied. The fast and inexpensive registration scheme attenuates the detrimental impact on equality rights, compared to the scheme in Quebec, which the Supreme Court of Canada found to be

constitutional despite complete exclusion of *de facto* spouses from the property division and spousal support regimes. Alternative means of protection further attenuate that impact. The negative impact arising from having to wait for one person in the common law couple to divorce before registering is due to that person's choice to remain married. The general objective of testamentary autonomy informs assessment of the benefits to be gained from the measures taken to advance the three interconnected objectives. The benefits of the interconnected measures include: promoting and preserving the choice and autonomy of common law couples; providing certainty to ensure procedural fairness in TFMA applications and to facilitate estate planning and administration; limiting the risk that a survivor will access the benefits of the TFMA without having agreed to accept the corresponding obligations; and, prohibiting a second spouse to limit interference with testamentary autonomy, to facilitate a testator prioritizing support of children, and to avoid providing special benefits only for unregistered common law spouses.

3. As a result of the conclusion that the s. 15 infringement is justified under s. 1, the impugned legislation is not unconstitutional and it is unnecessary to address the question of remedy.

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| **Judge:** | The Honourable Justice Pierre L. Muise |
| **Heard:** | January 20, 2020, in Yarmouth, Nova Scotia |
| **Counsel:** | Sarah Shiels, Richard Norman and Kilian Schlemmer for the Applicant<br>Rubin Dexter, Jane O'Neil, Q.C., Benjamin Carver and Dan VanClieaf for the Respondents<br>Jeff Waugh and Jeremy Smith for the Attorney General<br>Brian Casey, Q.C. making submissions, with leave, on behalf of Russell Cushing's daughter, Ms. Cushing, represented by her Litigation Guardian, Wendy Cushing |

## INTRODUCTION

[1] Subsection 2(b) of the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 (the "TFMA") defines "dependant" as meaning, among other things, the "widow" of a testator. In *LeBlanc v. Estate of Russell Cushing*, 2019 NSSC 360, I concluded that "widow" in that definition "does not include a surviving female who was in a common law relationship with the testator at the time of the testator's death, unless, at the time of the testator's death, they were registered as a domestic partnership" under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494 (the "VSA").

[2] Only a "dependant" has standing to apply for relief under the TFMA.

[3] It is conceded that Sarah LeBlanc was in a common law relationship with Russell Cushing when he passed away suddenly and unexpectedly. In addition, she is not named as a beneficiary under his will. However, since they were not registered as a domestic partnership, the definition of "widow" prevents her from seeking relief under the TFMA.

[4] Therefore, she brings the within motion under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") challenging the constitutionality of a TFMA definition of "dependant" that excludes common law couples who have not registered as domestic partners. She asks that it be declared unconstitutional and

that common law spouses be read into the definition of "widow", with retroactive effect, at least for her.

**ISSUES**

1) Does the exclusion of common law couples, who have not registered as domestic partners, from the TFMA definition of "dependant", infringe Ms. LeBlanc's right to equality under s. 15 of the *Charter*?

2) If so, is the infringement a reasonable limit on equality that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

    a. Is the objective behind the limit pressing and substantial?

    b. Is the limit proportional to the objective?

        i. Is the limit rationally connected to the objective?

        ii. Does the limit minimally impair the right?

        iii. Do the beneficial effects of the limit outweigh the detrimental effects?

3) If there is a s. 15 breach that is not justified under s. 1, what is the most appropriate Charter remedy in the circumstances?

## LAW AND ANALYSIS

### ISSUE 1: DOES THE EXCLUSION OF COMMON LAW COUPLES, WHO HAVE NOT REGISTERED AS DOMESTIC PARTNERS, FROM THE TFMA DEFINITION OF "DEPENDANT", INFRINGE MS. LEBLANC'S RIGHT TO EQUALITY UNDER S. 15 OF THE CHARTER?

[5] Subs. 15(1) of the *Charter* provides that:

> "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."

[6] S. 15 provides protection against discrimination based on the enumerated grounds and analogous grounds. There is no dispute that marital status is an analogous ground: **Miron v. Trudel**, [1995] 2 S.C.R. 418.

### Ms. LeBlanc's Position

[7] Ms. LeBlanc's argument that the TFMA's exclusion of common law spouses that have not registered breaches s. 15 of the *Charter* is as follows.

[8] In **Quebec (Attorney General) v. A.**, 2013 SCC 5, five of the nine judges concluded that the exclusion of *de facto* spouses from the *inter vivos* property division and spousal support regime in Quebec infringed s. 15. In doing so they noted that the s. 15 analysis has changed since **Nova Scotia (Attorney General) v. Walsh**, 2002 SCC 83, where the majority concluded that exclusion of "unmarried cohabiting opposite sex couples" from the definition of "spouse" in the

*Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (the "MPA") did not infringe s. 15. Therefore, the conclusion on s. 15 in **Walsh** is no longer binding. Even if it was still binding, the TFMA deals with support following death. As such, it is distinguishable from property division following separation.

[9] **Miron** and **Quebec v. A.** bind this court to find a violation of s. 15.

[10] "[L]aws that on their face exclude unmarried spouses to the preference of married spouses are inconsistent with the equality guarantees enshrined in the *Charter*": **R v. Legge**, 2014 ABCA 213, para 34. Other courts in Canada have found the law is settled on that point. For example, **R v. Hall**, 2013 ONSC 834, and **Coates v. Watson**, 2017 ONCJ 454.

[11] Similar dependants' relief legislation in other provinces has been found to violate s. 15 because it excludes common law couples: **Grigg v. Berg Estate**, 2000 BCSC 36, and **Woycenko Estate, Re**, 2002 ABQB 640.

[12] The TFMA allowing only married spouses and registered domestic partners to advance a claim, and excluding common law spouses from doing so, creates a distinction based on an analogous ground.

[13] It denies a benefit "in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage", making the distinction discriminatory, for the following reasons.

[14] "A claimant is not obligated to prove that the legislature acted on or perpetuated prejudice or stereotypes. Nor is the claimant required to prove an unquantifiable abstraction about human dignity."

[15] "A substantive equality analysis focusses on the impact of the law on the claimants".

[16] Initially, "common law spouses were excluded based on societal disapproval of unmarried spouses". That same historical disapproval was exhibited against Ms. LeBlanc by "locking her out of the shared residence, denying her access to [Ms. Cushing, Mr. Cushing's daughter], and labelling her a 'girlfriend'". Excluding a common law spouse from being able to apply for support from their deceased spouse's estate, at a time when they are most vulnerable, is detrimental to her "sense of autonomy and dignity".

[17] She could have applied for support on separation while Mr. Cushing was still alive under Nova Scotia's *Parenting and Support Act*. She provided evidence of financial and other hardships she has suffered since his passing and the

consequences of her lack of standing as a dependant under the TFMA. She argues it conveys that her common law relationship with Mr. Cushing, of over three years, is not worthy of protection.

[18] Marriage and registration of a domestic partnership are virtually the same because they require the express consent of both persons in the couple. However, a relationship of dependency can arise without such express consent. Common law spouses are denied standing without regard for the nature of their relationship or the dependency of the survivor.

[19] The amendments made in 2000, and subsequently, to the VSA, provide that two people who are cohabiting, or intending to do so, can, subject to specified exceptions, register as domestic partners, and thereby acquire the same rights and obligations as "a widow or widower" under the TFMA. However, that does nothing to diminish the "perpetuation of historic disadvantage suffered by common law spouses" for: "a vulnerable, economically dependent common law spouse whose partner refused to marry or enter into a domestic partnership"; and, those who cannot marry or register a domestic partnership, such as where one of them is still married (one of the specified exceptions). That illustrates the reality that some individuals in common law relationships do not have an opt-in choice, as discussed by McLachlin, J., as she then was, in **Miron**, at paragraph 163.

[20] The "exclusion relies on a false stereotype, namely, the assumption that common law spouses have voluntarily chosen their relationship status in order to avoid a mandatory legal regime imposed on married and civil union spouses". That argument is extracted from the comments of Chief Justice McLachlin in **Quebec v. A**.

[21] The question of choice is "irrelevant to the question of discrimination" and is to be considered as part of the s. 1 analysis: **Lubianesky v. Gazdag**, 2018 ABQB 290, paras 40 to 44, citing Abella, J. in **Quebec v. A**.

[22] Ms. LeBlanc responded to the argument advanced by Ms. Cushing that there was no distinction between Ms. LeBlanc and any other person because, with Mr. Cushing being still married, no one could acquire a marital status that would bring them within the meaning of "widow" in the TFMA. She referred to **Linder v. Regina (City)**, 2006 SKQB 68, where the legislation prevented a surviving common law spouse, named as a beneficiary of the deceased's pension plan and group insurance benefits, from receiving the survivor benefits under the pension plan, because the deceased had a surviving married spouse. The court in **Linder** concluded that infringed s. 15 and directed a trial of the s. 1 issue. Ms. LeBlanc also referred to other legislation in Nova Scotia, and cases from other provinces dealing with their own legislation, where both common law and married spouses

were able to make claims at the same time, including for dependants' relief. The cases included: **AXA Insurance Company of Canada v. Prince**, 1998 CarswellOnt 1584 (C.A.); **Austin v. Goerz**, 2007 BCCA 586; and **Prelorentzos v. Havaris**, 2015 ONSC 2844. The Nova Scotia legislation included the *Parenting and Support Act*, *Hospitals Act* and *Pension Benefits Act* of Nova Scotia.

**The Estate's Position**

[23] The Estate concedes that the TFMA definition of "dependant" makes a distinction based on marital status "between the surviving spouse of a legal marriage and the surviving spouse of a common law relationship". However, it argues that Ms. LeBlanc has not proven that the TFMA distinction "has the effect of perpetuating disadvantage", for the following reasons.

[24] Couples can access rights and obligations under the TFMA through a simple registration process. Ms. LeBlanc and Mr. Cushing did not [and could not] register because Mr. Cushing remained married to his wife until the time of his death. The evidence does not show that the differential treatment was due to the TFMA as opposed to the decisions of Mr. Cushing and his wife not to get divorced.

[25] Mr. Cushing met with his lawyer slightly over one week before his death. He did not express a desire to provide for Ms. LeBlanc in his will. He left his

daughter, Ms. Cushing, as the main beneficiary. He chose to advance a cohabitation agreement as part of estate planning.

[26] Competing *Charter* rights must be "reconciled" under s. 15 with an appreciation for the context. That means they must be "defined so that they do not conflict with each other". It differs from the "balancing" of rights under s. 1, where the court is tasked with prioritizing one right or interest over another: Iacobucci, J., " 'Reconciling Rights' the Supreme Court of Canada's Approach To Competing Charter Rights" (2003), 20 S.C.L.R. (2d) 137. In **Lawen Estate v. Nova Scotia (Attorney General)**, 2019 NSSC 162, the court concluded that testamentary autonomy is a fundamental right under s. 7 of the *Charter* that was violated by the TFMA to the extent that it was "undermined by being subject to a purely 'moral' claim by an independent adult child". The domestic partnership registration process reconciles the right of a surviving partner to standing under the TFMA "equal to that of married spouses" and the right to testamentary autonomy.

[27] The court in **Jackson Estate v. Young**, 2020 NSSC 5, dealt with the constitutionality of the exclusion of common law spouses, not registered as domestic partners, from the definition of spouse in the **Intestate Succession Act**, R.S.N.S. 1989, c. 236 (the "ISA"). In that case, the s. 15 violation was conceded, and the court found that it was established. However, the same result need not

obtain in the case at hand because the need to reconcile the right to testamentary autonomy does not arise with the ISA.

**The Attorney General's Position**

[28] The Attorney General takes no position on the s. 15 infringement issue.

**Ms. Cushing's Position**

[29] Ms. Cushing advances multiple reasons why the court should find that there is no s. 15 violation. As signalled by her comment that some of the s. 15 analysis is useful even if there is a need to proceed to the s. 1 analysis, some of her arguments are more geared to the question of justification. Her s. 15 arguments are as follows.

[30] Ms. LeBlanc has not shown that the scheme of the TFMA creates a distinction. Mr. Cushing was married, so no one could acquire spousal status with him, either through a marriage ceremony or registration of a domestic partnership. The legislation limits each person to having one spouse at a time for the purposes of standing under the TFMA. So, the legislation treats Ms. LeBlanc the same as everyone else. She is asking for a special rule and more favourable treatment that will afford standing, as a second spouse, to the survivor of a common law couple which has not registered a domestic partnership.

[31] The Supreme Court of Canada has recently presented differing formulations of the test to determine when different treatment is discriminatory, including in **Quebec v. A.**, **Kahkewistahaw First Nation v. Taypotat**, 2015 SCC 30, and **Centrale des syndicats du Québec v. Attorney General of Quebec**, 2018 SCC 18. Those formulations can be summarized in the following questions geared to the circumstances of the case at hand:

> Does the distinction 'widen the gap' between common law couples who do not register, and couples (married or domestic partners) who do register for the purposes of the TFMA?
>
> Are unregistered common law couples at a historical disadvantage compared to registered couples?
>
> Does it violate the norm of substantive equality?
>
> Is the disadvantage discriminatory because it is as a result of prejudice or stereotypes or does it perpetuate prejudice or stereotypes?

[32] Any different treatment in the case at hand is not discriminatory for the reasons which follow.

[33] The registration scheme does not widen the gap, it narrows it from what existed previously. The domestic partner registration process is quicker, easier and cheaper than marriage and marriage registration. It can be accessed immediately upon cohabitation. There is no minimum cohabitation period to qualify.

[34] The "civil union" process in Quebec is akin to a civil marriage in Nova Scotia. Thus, the domestic partner registration process in Nova Scotia distinguishes

the scheme of the TFMA from the support and property division schemes in Quebec. The gap between registered and unregistered common law couples in Nova Scotia is much narrower than that between civil unions and *de facto* spouses in Quebec. That makes it such that the majority s. 15 result in **Quebec v. A.** need not obtain in the case at hand. Though the s. 15 conclusion in **Walsh** was overruled in **Quebec v. A.**, the new regime put in place since **Walsh,** which narrows the gap, makes it such that **Walsh** could pass the newly modified s. 15 test.

[35] The **Jackson Estate** case, where the parties agreed, and the court found, that there was a s. 15 infringement, is distinguishable on the basis that neither the deceased nor the survivor were married to someone else. Therefore, it was possible for someone to have become a spouse of the deceased while he was still living, through marriage or registration of a domestic partnership. **Grigg** and **Woycenko** are distinguishable on the same basis, and on the basis that Nova Scotia has a way, other than marriage, to acquire standing under the TFMA.

[36] Ms. Cushing advances that, as noted in **Canadian Foundation for Children, Youth and the Law v. Canada**, [2004] 1 S.C.R. 76, at paragraph 53, "whether discrimination exists is assessed from the point of view of a reasonable couple who have the attributes of LeBlanc's relationship with Russell Cushing". Mr. Cushing was a lawyer who had just received estate planning advice. He

understood the legal significance of his relationship with Ms. LeBlanc. Since he was still married, they could not achieve spousal status. Absent registration through mutual consent there are alternative ways of providing for their mutual rights and obligations. Mr. Cushing was pursuing the option of a cohabitation agreement and Ms. LeBlanc had life insurance on Mr. Cushing. "It is not discriminatory to treat people who have expressly consented and are free to marry differently from those who have not and are not."

[37] "Recognizing the choice of some common law couples not to register does not 'widen the gap' between common law and married couples." Unless every couple of any nature is included there will always be a gap. Registration is available immediately and easily. Making the registration requirement the gap, instead of an arbitrary period of cohabitation, is not discriminatory.

[38] There is no indication of stereotyping of, or prejudice against, unregistered common law couples to be perpetuated. The difference in treatment simply reflects their choice. Ms. LeBlanc has not provided evidence "to show that the different treatment has the effect of 'widening the gap', perpetuating prejudice against couples that do not register, or is based on a stereotype about couples who do not register". The court cannot take judicial notice of it.

[39] Treating couples who choose to register different from those who do not is not discriminatory, if there is a good reason for it. A good reason which obtains in the circumstances of the case at hand is the preservation of the testator's ability to provide for the child of a prior relationship, especially considering the law requires prioritization of such support obligations over spousal and other support obligations arising from subsequent relationships.

[40] It is also not discriminatory that Ms. LeBlanc qualifies as a spouse under some legislation but not as a widow under the TFMA. Different legislation has different purposes. The question is whether married, domestic partner and common law relationships "are so similar for the purposes of a claim to someone's estate that it is discriminatory to treat them differently". "If the couples are different, it is not a breach of equality rights to treat them differently."

[41] In addition, for some legislation, such as the *Fatal Accidents Act*, "there is no adversity in interest between the common law 'spouses'".

[42] The court is required to consider testamentary autonomy. The registration requirement gives testators certainty regarding their obligations, when they are making testamentary decisions.

[43] After death, when the testators are no longer available to testify, it removes uncertainty regarding who qualifies as a widow or widower.

## Preliminary Comments on Arguments Advanced

## S. 15 Test

[44] The s. 15 test is most often expressed as a two-step test.

[45] The Supreme Court of Canada has, in **Quebec v. A.** and subsequent cases, articulated the first step in the following ways:

> Do "the provisions in question create an adverse distinction based on an enumerated or analogous ground'? [LeBel J., in **Quebec v. A**, at para 236]
>
> "Does the law create a distinction based on an enumerated or analogous ground?" [Abella J. and McLachlin C.J.C., in **Quebec v. A**, at paras 324 and 418; Côté J., for 4 of the 9 judges in **Centrale des syndicats du Québec**, at para 117]
>
> "[W]hether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground." [Abella J., for a unanimous court, in **Taypotat**, at para 19]
>
> "Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground"? [Abella J., for 4 of the 9 judges in **Centrale des syndicats du Québec**, at para 22]

[46] Whether the distinction is adverse might more properly be considered in the second step of the test. However, the following first step test incorporates the elements expressed in these various formulations:

> Does the challenged law, on its face or in its impact, create or draw an adverse distinction based on an enumerated or analogous ground?

[47] Justices of the Supreme Court of Canada in those same cases articulated the second step of the test in the following ways:

> Is the resulting disadvantage "discriminatory because it perpetuates prejudice or stereotypes"? [LeBel J., in **Quebec v. A**, at para 236]
>
> Is the resulting disadvantage "discriminatory from the point of view of a reasonable person placed in circumstances similar to those of" the claimant? [McLachlin C.J.C., in **Quebec v. A**, at para 423]
>
> "[W]hether the distinction is discriminatory". [Abella J., in **Quebec v. A**, at para 349]
>
> Whether a "flexible and contextual inquiry" reveals "a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*". [Abella J., for a unanimous court, in **Taypotat**, at para 16]
>
> "Does the challenged law … impose 'burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating … disadvantage', including 'historical' disadvantage?" [Abella J., for 4 of the 9 judges in **Centrale des syndicats du Québec**, at para 22]
>
> "Does the distinction create a discriminatory disadvantage by, among other things, perpetuating prejudice or stereotyping" considering mainly "the impact of the law"? [Côté J., for 4 of the 9 judges in **Centrale des syndicats du Québec**, at para 117]

[48] The evolution of the test for discriminatory effect from a simple statement of whether it "perpetuates prejudice or stereotypes" appears to have been prompted by the statement in **Withler v. Canada**, 2011 SCC 12, at paragraph 2, that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" That statement was made in the course of comments introducing a case turning on "comparison" and "'mirror' comparator groups". Paragraph 2, with case reference omitted, states:

> [2] … In our view, the central issue in this and other s. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality … . To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[49] Abella J., in **Quebec v. A.**, at paragraph 325, explained that "[p]rejudice and stereotyping are two of the indicia that may help answer that question; they are not discreet elements of the test which the claimant is obliged to demonstrate".

[50] Similarly, McLachlin C.J.C., in **Quebec v. A.**, at paragraph 418, stated:

> While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected … .

[51] Then, at paragraphs 419 and 420, she added the following points:

> [419] … First, the issue of whether the law is discriminatory must be considered from the point of view of "the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" … .
>
> [420] Second, a legal distinction can be discriminatory *either* in purpose or in effect. As a practical matter, legislatures seldom set out to discriminate on purpose; discrimination when it occurs is usually a matter of unintended effect.

[52] Their approach differed from that of LeBel J., in **Quebec v. A.**, which he explained, at paragraph 169, as follows:

> Once a distinction is found to exist, therefore, the main question must always be the same: does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, if there is a distinction, is it discriminatory? The Court [referring to the Court in **Withler** and **R. v. Kapp**, 2008 SCC 41] therefore stressed the importance of the factors of perpetuation of prejudice and stereotyping. While it did not make them the only factors, it determined that they were crucial to the identification of discrimination and to the application of the analytical framework for s. 15.

[53] In **Quebec v. A.**, Decshamps J., Cromwell J. and Karakatsanis J. agreed with Abella J. that s. 15 had been infringed, and, McLachlin C.J.C., conducting her own analysis, came to the same conclusion. Therefore, a majority of the Court in **Quebec v. A.** approved of the Abella/McLachlin approach. Abella J. also used a test which did not require perpetuation of prejudice or false stereotypes, for a unanimous court, in **Taypotat**, *supra*.

[54] Later, she did the same for four of nine judges in **Centrale des syndicats du Québec**, *supra*. In that case, Côté J., for 4 of the 9 judges, used a test which referred to perpetuation of prejudice or stereotyping, and found that there was no s. 15(1) infringement as the distinction was not based on an enumerated ground and was not discriminatory. However, at paragraph 134, she stated: "The claimant must … prove that the law creating a distinction has a discriminatory impact in that it perpetuates a disadvantage faced by the group in question." That indicates she referred to perpetuation of prejudice or stereotyping as examples of what might "create a discriminatory disadvantage", not as a requisite element.

[55] McLachlin C.J.C., agreed with Abella J. that there was a breach of s. 15(1). Thus, again, at least a majority of the Court, and it appears the Court as a whole, approved a test for discrimination which did not require proof of perpetuation of prejudice or false stereotypes.

[56] Abella J., in **Taypotat**, at paragraphs 20 and 21, provided the following expanded explanation of the test and its application:

> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]
>
> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[57] Therefore, a formulation of the second step of the s. 15(1) test which appears to reflect the current approach of a majority of the Supreme Court of Canada is as follows:

> Does the distinction created or drawn by the challenged law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or

> exacerbating arbitrary disadvantage on the claimant, including historical disadvantage?

[58] The question must be assessed "from the point of view of" a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant", considering mainly "the impact of the law". Answering the question involves considering whether the law "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it".

## Application of S. 15 Test

### First Step

[59] Does the challenged law, on its face or in its impact, create or draw an adverse distinction based on an enumerated or analogous ground?

[60] Ms. Cushing says that, in the circumstances of the case at hand, it does not because no one could have acquired the status of widow under the TFMA, as Mr. Cushing was married, meaning that he could not enter into a valid marriage or registered domestic partnership with anyone. Allowing Ms. LeBlanc to acquire that status would be creating an exception to the one-spouse rule only for the benefit of common law couples that have not registered as a domestic partnership.

[61] The court in **Linder**, *supra*, dealt with a similar situation, in a different context, as described above while outlining Ms. LeBlanc's position. The circumstances were similar to those in the case at hand. The legislation prevented a common law spouse from receiving survivor benefits, despite being the named beneficiary, because the deceased was still married to someone else at the time of his death. At paragraph 51, the court stated that the fact the deceased and his wife "chose not to determine their respective property rights … does not affect the differential treatment now experienced by Marilyn Linder who was not in a position to effect a determination of those property rights".

[62] This comment was made in the context of legislation dealing with the relationship between the common law couple as a unit and a third party, as opposed to the relationship of those in a common law couple as between themselves. In that way, it is distinguishable from the case at hand and other cases where the rights and obligations of common law spouses between themselves are at issue. Also, the "choice" referenced is the choice made by the side of the common law couple that was still married, not the couple's choice of marital or cohabitation arrangement. In that way, it is distinguishable from **Quebec v. A.**, in which the majority ruled that the question of choice was to be dealt with as part of the s. 1 justification analysis.

[63] Therefore, Mr. Cushing's choice to remain married can be considered in the s. 15(1) analysis. However, it is more properly considered as part of the second step.

[64] For the purposes of this first step, I agree with the positions of Ms. LeBlanc and the Estate in that, on its face, the scheme of the TFMA does create an adverse distinction between married spouses and registered domestic partners, on the one hand, and unregistered common law spouses, on the other hand. The adverse distinction is that it only allows the married spouse or registered domestic partner to pursue a claim under the TFMA. In arriving at this conclusion, I leave the impact of Mr. Cushing's choice to remain married to the second step of the s. 15 analysis.

**Second Step**

[65] Does the distinction created or drawn by the challenged law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating arbitrary disadvantage on the claimant, including historical disadvantage?

[66] The question must be assessed "from the point of view of" a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar

attributes to, and under similar circumstances as, the claimant", considering mainly "the impact of the law". Answering the question involves considering whether the law "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it".

[67] The court in **Linder**, *supra*, found an infringement of s. 15(1), stating, at paragraph 53:

> In *Miron, supra*, in excluding the common law spouse from benefits, the legal distinction was imposed on the common law couple by legislation without regard to their own wishes or their own view of the relationship. The same can be said for *The Pension Benefits Act, 1992* in that the common law spouse is excluded from the receipt of benefits by the legislation by virtue of there being a surviving married spouse, without consideration for the views of the common law couple, or indeed the deceased member who had named his common law spouse as his designated beneficiary.

[68] The case at hand is distinguishable on the following bases:

- The legislation challenged in **Linder** was the Saskatchewan *Pension Benefits Act, 1992*, which addressed the rights of the surviving common law spouse against a third party. The TFMA addresses the rights and obligations of couples as between themselves.

- In **Linder**, the legislation prevented the surviving common law spouse from receiving the survivor benefits even though the deceased had named her as beneficiary, thus ignoring his views. The scheme of the

> TFMA does not prevent a common law spouse from being a beneficiary of her deceased common law spouse's will, even if the deceased testator was still married at the time of his death. It merely allows that married spouse to make a claim under the TFMA. In that way, it considers the views of the testator and allows them to provide for their common law spouse.

[69] Similarly, **Miron**, *supra*, is distinguishable because it dealt with the surviving common law spouse's rights as against a third party, in that case an automobile insurer.

[70] The case at hand is also distinguishable from **Quebec v. A.**, **Grigg**, **Woycenko,** *supra*, and all other cases in which the reciprocal rights and obligations of the couple as between themselves were at play, but neither person in the couple was married to someone else. The fact that Mr. Cushing was still married to someone else brings into consideration the one-spouse rule, which I will discuss further later.

[71] The issue in **Legge**, *supra*, was whether the common law spousal immunity rule, which made it such that the Crown could not compel the spouse of an accused to testify, applied as between common law spouses. Though it considered *Charter* values, it did not involve a *Charter* application to declare a law unconstitutional.

**Hall**, *supra*, dealt with the common law rule preventing the Crown from compelling an accused's spouse to testify, as well as s. 4 of the *Canada Evidence Act*, which had the same effect. It did find an unjustified infringement of s. 15(1) of the *Charter*. However, in both of those cases, as in **Linder**, the rights and obligations at play were in relation to third parties, i.e. the Crown, who wanted the accused's common law spouse to testify, and the court in which the accused's trial was unfolding.

[72] The significance of the rights and obligations at play being in relation to third parties is that: the interests of the couple are not adverse to each other; and, the law has effect irrespective of the wishes or expectations of the persons in the conjugal relationship. Where, as in the case at hand, the equality rights of the claimant must be reconciled with the rights to testamentary autonomy, the wishes and expectations of the testator take on greater significance.

[73] **Coates**, *supra*, dealt with the child's right to support, not a spouse's right to support or to share in assets. In addition, the laws in question, one provincial, the other federal, created a distinction related to the marital status of the parents based on whether the child was disabled or not. Neither of the parents, who had lived common law, was married to someone else. However, that would not be a relevant distinguishing feature in a child support case.

[74] The distinguishing features discussed make it such that the s. 15(1) result in the cases noted need not obtain in the case at hand.

**[75]** The fact that other legislation in Nova Scotia, and legislation from other provinces, including dependants' relief legislation, allows both married and common law spouses to make a claim at the same time, does not make the differing effect of the TFMA scheme discriminatory. I also note the following in relation to the cases provided by Ms. LeBlanc on that point and referred to above. **AXA Insurance v. Prince** dealt with no-fault automobile accident death benefits, thus relations with third parties. **Austin v. Goerz** and **Prelorentzos v. Havaris** dealt with estates where the deceased did not have a will. Therefore, testamentary autonomy was not a relevant factor. I note the following. The Ontario *Succession Law Reform Act*, dealt with in **Prelorentzos v. Havaris**, only allowed married spouses to claim a preferential share of an intestate's estate. However, both a married spouse and an unmarried spouse who had "cohabited continuously for a period of not less than three years" could make a dependants' relief claim. That differing standing rule was not challenged. However, it is an example of how legislatures can provide for different standing rules related to marital status for different purposes, even within the same statute.

[76] The majority in **Walsh**, *supra*, found that the exclusion of common law spouses from the *Matrimonial Property Act* did not infringe s. 15(1), largely because it respected their freedom to choose their own marital arrangement, and, if they wished, to provide for the same mutual benefits and responsibilities imposed on married spouses under the MPA in other ways. It also found that the distinction in that case did not perpetuate prejudice or stereotyping. However, the majority in **Quebec v. A.** ruled that the question of respecting the choice and autonomy of common law couples was a legislative objective to be considered at the s. 1 justification stage, not the s. 15 stage. In addition, it ruled that, although perpetuation of prejudice or stereotyping is relevant to the s. 15 inquiry, it is not a necessary element. Therefore, the s. 15 result in **Walsh** need not obtain in the case at hand either.

[77] I agree that the s. 15 result in **Jackson Estate** need not obtain in the case at hand because that case dealt with intestate succession such that testamentary autonomy was not a relevant consideration, and neither common law spouse was legally married to anyone.

[78] I also agree that a further reason to find that the s. 15 result in **Quebec v. A.** is not binding in the case at hand is that the "civil union" process in Quebec is akin to a civil marriage in Nova Scotia, and the gap between registered and unregistered

Nova Scotia common law couples is much narrower than that between civil unions and *de facto* spouses in Quebec.

[79] These distinguishing features have a policy element which makes them also applicable to a s. 1 analysis.

[80] I do not agree that the availability of alternate means for common law spouses to provide for their mutual rights and obligations makes it such that the exclusion of common law spouse from the TFMA regime is non-discriminatory. That is because common law couples are still denied the benefit of standing that the legislation affords married spouses or registered domestic partners. That benefit is the right to apply for relief *post-mortem* irrespective of what steps have been taken, beyond marrying or registering, to provide for mutual rights and obligations on death.

[81] As agreed by all participants in this motion, and recognized even by the four judges in **Quebec v. A.** who found there was no s. 15 violation, common law couples have suffered historical disadvantage initially rooted in prejudice, and common law relationships have traditionally been treated as less deserving of protection, and even "immoral". However, over time, the negative attitudes towards common law spouses have dissipated. They are no longer subject to the opprobrium of the public that they once were. Many statutes which traditionally

only extended protections or benefits to legally married spouses now extend them also to common law spouses.

[82] The TFMA, from its inception in 1956, until the coming into force of the *Law Reform (2000) Act*, S.N.S. 2000, c. 29, did not provide standing to any common law spouses to apply for relief. The amendments the *Law Reform (2000) Act* brought to the VSA allowed common law spouses, and others, to register as domestic partners and thereby acquire the rights and obligations of a "widow or widower" under the TFMA.

[83] That had the effect of narrowing the gap that previously existed between married and common law spouses, except where, as in the case at hand, it is not possible for common law spouses to register, because, among other disqualifying situations, one person in the common law couple is still married to someone else. In those circumstances, for the purpose of the TFMA, the historical gap remains. The question of the couple's choice to register, even if it was part of the s. 15 analysis, could not remove discriminatory effect where that choice is not available.

[84] Ms. LeBlanc submits her evidence reveals perpetuation of prejudice and stereotyping because: some of Ms. Cushing's extended family blocked her from having access to the house where she lived with Mr. Cushing and to Ms. Cushing;

and, referred to her as his girlfriend. However, the evidence falls short of revealing prejudice and stereotyping.

[85] Her own affidavit evidence says the following. She was allowed to stay in the home. She moved in with her parents for awhile, planning to move back in. However, after she was told, by Ms. Cushing's maternal aunt, that they thought it was best they cut her out of Ms. Cushing's life, she, herself, changed her plans to move back in and decided instead to renovate her own house. The comment regarding cutting Ms. Cushing out of her life was prefaced by an acknowledgement that she had "been an excellent influence, and role model, and … a godsend into that family" but that they believed it was in Ms. Cushing's "best interest" because the "back and forth", and seeing her, kept reminding Ms. Cushing of "what she lost". It does not reveal any prejudice towards a common law relationship, only concern for Ms. Cushing. At that point, only Ms. Cushing's mother was responsible for her care.

[86] The affidavit of Deborah Henderson, Mr. Cushing's sister, states that Mr. Cushing introduced Ms. LeBlanc to her as his "girlfriend". The affidavit of his other sister, Susan Berry, simply states that Ms. LeBlanc was Mr. Cushing's "girlfriend". Those affidavits were prepared and filed before the Estate conceded that Mr. Cushing and Ms. LeBlanc had been in a common law relationship. In

those circumstances, it is understandable that they would not refer to them as living common law to protect the Estate's case in response to Ms. LeBlanc's application. That evidence does not show prejudice against common law relationships either, it is merely the way the relationship was described to at least one of them and articulated by the other. Ms. Berry went on to comment that Mr. Cushing and Ms. LeBlanc lived together and looked happy together.

[87] However, it is not necessary to show perpetuation of prejudice or stereotype to establish s. 15 has been infringed.

[88] The Estate and Ms. Cushing argue that the distinction is created, not by the TFMA, but by the fact Mr. Cushing was married and chose not to get divorced, leaving the one-spouse rule to govern the situation, and making it such that allowing Ms. LeBlanc to gain the status of a "widow" would be giving her more favourable treatment. Ms. Cushing further argues that Ms. LeBlanc has not challenged the constitutionality of the one-spouse rule.

[89] The one-spouse rule is created by the scheme of the TFMA. Subs. 55(1)(c) of the VSA provides that a registered domestic partnership terminates, among other things, when "one of the domestic partners marries another person". Subs. 55(3) preserves, for such former domestic partners, "the same rights and obligations under the statutes referred to in subsection 54(2) that accrue to spouses

by separation, separation agreement, court order or death". Subs. 54(2) creates, for registered domestic partners, the same rights and obligations as a "spouse" on death of the other partner, for multiple statutes, including the *Intestate Succession Act*. Subs. 54(2) creates for them the rights and obligations of a "widow or widower" for the TFMA. Thus, the subs. 55(3) preservation of rights and obligations for former domestic partners does not encompass the TFMA, leaving the one-spouse rule to apply. Even if the preservation of the rights of a "spouse" on death is interpreted to include those of a "widow or widower" under the TFMA, subs. 53(5) prohibits a person who is married from making a domestic partner declaration. Therefore, in the circumstances of this case, the VSA creates a rule that no one else could acquire the status of Mr. Cushing's "widow or widower" for the purposes of the TFMA.

[90] It is the creation of the one-spouse rule by the scheme of the TFMA that made it such that Ms. LeBlanc could not qualify as Mr. Cushing's "widow", irrespective of how long she cohabited with him or how dependant she was on him, because she and Mr. Cushing could not register a domestic partnership. In contrast, if Ms. LeBlanc had been in a registered domestic partnership with Mr. Cushing, it would have been terminated immediately by Mr. Cushing marrying someone else. That differing effect prioritizes marriage over common law relationships, whether

registered as domestic partnerships or not, thus creating a marital status hierarchy in which legal marriage takes precedence over common law relationships, irrespective of registration.

[91] Ms. Cushing implied that the inability to register is not what created the disadvantageous distinction for Ms. LeBlanc because the evidence is that she and Mr. Cushing did not "ever discuss the possibility of having a registered domestic partnership". The reasoning is that, even if they could have, they would not have because they did not even discuss it. However, Mr. Cushing, being a lawyer, would likely know it was not an option, and that would explain why it was not discussed. Plus, the lack of opportunity to register, in itself, is a distinction which inevitably results in lack of standing in the circumstances of the case at hand.

[92] Such a one-spouse rule and prioritization are not a necessary part of dependants' relief legislation. In Ontario, for instance, dependants' relief can be sought by both married and common law couples at the same time. Ultimately, the distinction was only created by Mr. Cushing being married because the scheme of the TFMA made it so.

[93] As noted in **Linder**, *supra*, the fact Mr. Cushing remained married "does not affect the differential treatment now experienced by" Ms. LeBlanc and it was beyond her control. However, since this court must strive to reconcile testamentary

autonomy with equality rights, any choice Mr. Cushing made to remain married informs that reconciliation exercise.

[94] A previously noted, the court in **Lawen Estate**, *supra*, concluded that testamentary autonomy is a fundamental right under s. 7 of the *Charter*. As noted by Iacobucci, J., in "'Reconciling Rights' the Supreme Court of Canada's Approach To Competing Charter Rights", a reconciliation exercise in relation to competing *Charter* rights is part of the s. 15 analysis. Even if testamentary autonomy is not a s. 7 right, it is still to be considered in the reconciliation process as a "social purpose": Iacobucci, J., in "'Reconciling Rights' the Supreme Court of Canada's Approach To Competing Charter Rights", pp. 160 and 161.

[95] The TFMA curtailed Mr. Cushing's right to testamentary autonomy if he remained married. Divorcing and choosing not to register as a domestic partnership would have given him the most testamentary autonomy. Therefore, his "choice" to remain married, even if it was a deliberate choice, as opposed to one that was the product of procrastination or delay in resolving or determining corollary relief issues, could not have been for the purpose of preserving testamentary autonomy.

[96] The TFMA already limits testamentary autonomy where the testator dies with a spouse to whom he was married. A common law spouse can be as dependant as a married spouse. Limiting testamentary autonomy in a marriage

situation, but not a common law relationship situation, prioritizes marriage. It creates a hierarchy of marital status. It results in "arbitrary – or discriminatory – disadvantage" for the surviving common law spouse. Therefore, the right to testamentary autonomy cannot be reconciled with a common law widow's right to equal benefit of the scheme of the TFMA, for the purposes of the s. 15 analysis.

**Conclusion Regarding Whether S. 15 Rights Infringed**

[97] For the reasons discussed, a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" would conclude that the distinction created or drawn by the scheme of the TFMA denies common law spouses the benefit of standing to apply for dependants' relief in a manner that has the effect of reinforcing, perpetuating or exacerbating arbitrary disadvantage on them. Therefore, it infringes s. 15 of the *Charter*.

## ISSUE 2: IF SO, IS THE INFRINGEMENT A REASONABLE LIMIT ON EQUALITY THAT CAN BE DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY UNDER S. 1 OF THE CHARTER?

[98] S. 1 of the *Charter* states:

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

[99] All participants agree that the criteria to be satisfied to establish that such a limit is reasonable and demonstrably justifiable in a free and democratic society are those set out in **R. v. Oakes**, [1986] 1 S.C.R. 103, at pages 138 to 140, as follows:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s.1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the

> first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.
>
> [Emphasis by underlining in the original]

**Ms. LeBlanc's Position**

[100] Ms. LeBlanc submits that which follows in relation to the s. 1 justification issue.

[101] The conclusion in **Walsh**, *supra*, that the exclusion of common law spouses from the application of the *Matrimonial Property Act* has no bearing on the result in the case at hand for the following reasons. An MPA application on death precedes any TFMA application: **Casavechia v. Casavechia Estate**, 2015 NSSC 119. "[T]he two statutes deal with different kinds of relief. The MPA deals with a married spouse's entitlement to property; the TFMA is open to a wide-range of dependents, including children of common law couples, and offers no entitlement or forced share whatsoever."

[102] The distinguishing features between the *Intestate Succession Act* and the TFMA make it such that the s. 1 conclusion in **Jackson Estate**, *supra*, does not apply in this matter. Those distinguishing features include the following. "The length or nature of the relationship, and similar factors, play no role in the

distribution of the estate assets." Intestate succession legislation deals with division of assets, while dependants' relief legislation essentially deals with maintenance and support: **Ferguson v. Armbrust**, 2001 SKCA 122.

[103] In addition, the court in **Jackson Estate**, erred in relying on the s. 1 analysis in **Quebec v. A**., which is distinguishable for the following reasons.

[104] The objective of promoting choice and autonomy was unique to Quebec. In **Quebec v. A.** there were eight expert reports filed dealing with "Quebec and its culture, with a focus on the socio-legal evolution regarding unmarried couples". In Quebec, many couples deliberately chose the *de facto* spouse arrangement to avoid the support and property division regime that applied to married persons and civil unions, and it was popular. There is no evidence that Nova Scotia couples make that deliberate choice to avoid the rights and responsibilities associated with the TFMA or that exclusion of common law spouses from the TFMA is popular.

[105] The Quebec regime "governs how money and property will be divided". The TFMA makes it possible to seek relief and provides guiding factors.

[106] Also, Quebec does not allow *de facto* spouses to claim *inter vivos* support, while Nova Scotia does. If the objective is to preserve freedom of choice, why not

do so in relation to *inter vivos* support as well. It is arbitrary to allow choice for one statute but not the other.

[107] Lastly, the TFMA includes moral duties, while the Quebec legislation at play (as well as the MPA and ISA) only deal with legal duties.

[108] Marriage and registration are "not purely a matter of choice" and are often "outside of a person's control".

[109] No evidence has been presented to support a s. 1 justification. Unless the basis for the legislation is obvious, the party seeking to justify it under s. 1 must bring evidence to demonstrate it and cannot rely on speculation, intuition or a mere assertion: **Carter v. Canada (Attorney General)**, 2015 SCC 5, para 119; and, **Irwin Toy Ltd. v. Quebec (Attorney General)**, [1989] 1 S.C.R. 927, at para 67.

[110] The Courts in **Grigg** and **Woycenko Estate**, *supra*, dealing with dependants' relief legislation in British Columbia and Alberta respectively, concluded that the exclusion of common law spouses was not justified.

[111] No pressing and substantial objective can be demonstrated. "[T]he pressing and substantial objective must 'clearly reveal the harm that the government hopes to remedy'": **Sauvé v. Canada (Chief Electoral Officer)**, 2002 SCC 68, para 23.

No harm arises from a common law spouse being permitted to seek dependants' relief, considering they can seek *inter vivos* support.

[112] "[T]he relevant objective is the purpose of the specific infringing measure, not the purpose of the legislation as a whole": **R. v. J.(K.R.)**, 2016 SCC 31, para 62.

[113] The purpose of the TFMA is "to enforce a testator's moral obligation to make adequate provision … for the support of dependents": **David v. Beals Estate**, 2015 NSSC 288, para 29. "[I]ncorporation of common law spouses would better serve the legislative aim of dependents' relief".

[114] "There is no rational connection between the pressing and substantial objective of dependents' relief … and the infringing measure of excluding common law spouses." If the goal of the TFMA is to relieve dependency, it should "capture as many intimate relationships as possible": **Taylor v. Rossu**, 1998 ABCA 193, at para 143.

[115] The minimal impairment question is whether "there are alternative, less harmful means of achieving the government's objective 'in a real and substantial manner'": **R. v. J.(K.R.)**, *supra*, para 70. The right must be infringed "no more than reasonably necessary": **R. v. Sharpe**, 2001 SCC 2, para 96. "An absolute

exclusion of all common couples from the right to even apply for spousal support is not a minimal impairment": **Taylor**, *supra*, at para 144.

[116] A less harmful measure would be to put in place qualifications, such as minimum cohabitation requirements, which common law spouses must meet before they qualify to apply under the TFMA.

[117] The benefits of the infringement must be for the "greater public good": **Carter**, *supra*, para 122. "Marginal and speculative" benefits are insufficient: **R. v. J.(K.R.)**, *supra*, para 92. There is no evidence of the benefits to Nova Scotians.

[118] The deleterious effects are significant and severe. Common law spouses are denied the ability to apply for relief irrespective of the extent of their relationship with the deceased, "against a backdrop of historical disadvantage and prejudice". That occurs when they are most vulnerable because of the passing of their spouse. "[T]he more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society": **Oakes**, *supra*, para 71.

[119] If there is a significant benefit it makes no sense to pursue it only upon death. Preserving freedom of choice is a speculative benefit as there is no evidence that common law spouses consider the TFMA.

**The Estate's Position**

[120] The Estate presents the following submissions in relation to the s. 1 justification issue.

[121] Even if no social science or other evidence has been led to support a s. 1 justification, and the Attorney General has provided no submissions on the question, the court can apply logical reasoning and common sense to determine the issue: **Jackson Estate**, *supra*, paras 174-181; **Oakes**, *supra*, page 138; and, **R. v. Jones**, [1986] 2 S.C.R. 284, para 29. "[T]he first stage of the s. 1 analysis is not an evidentiary contest" and a pressing and substantial objective, even a theoretical one, need only be asserted; and, the proportionality determination, though it requires more than an assertion, can be made using logic and reason, without the need for direct evidence: **R. v. Bryan**, 2007 SCC 12, paras 32, 38 to 42, and 48. The object of a law is often apparent on its face and may be gleaned from the legislative history and the context in which it was enacted: **Reference re Firearms Act (Canada)**, 2000 SCC 31, para 17; **R. v. J.(K.R.)**, *supra*, para 64; and, **M. v. H.**, [1999] 2 S.C.R. 3, paras 87 to 90.

[122] The legislature deliberately excluded common law spouses to: "1) preserve the autonomy of individuals to choose how their property is to be distributed and 2) to ensure that all couples, regardless of sex/gender or cohabitation period, can

choose to be subject to the obligations of and access to the rights available under all statutes dealing with the division of property and support."

[123] **Walsh**, **Quebec v. A.**, and **Jackson Estate**, *supra*, "are determinative of the section 1 issue". **Quebec v. A.** does not make any distinction between support and division of property.

[124] The objective is "preservation of choice and autonomy" in dealing with property, which is sufficiently important to justify an infringement: **Quebec v. A.**, per McLachlin C.J.C., paras 435 to 437; and, **Jackson Estate**, para 183. It is particularly important where individuals choose, as between themselves, to arrange their relationship differently from a traditional marriage, and the legislation in question dramatically alters their legal obligations, as between themselves: **Walsh**, per Bastarache J, para 43.

[125] The TFMA brings in the added consideration of testamentary autonomy, which was found to be a s. 7 Charter right in **Lawen Estate**, *supra*. That provides even greater reason to find a s. 1 justification in the case at hand than in **Jackson Estate**.

[126] As long as "it is reasonable to suppose the limit may further the goal" there is a rational connection: **Alberta v. Hutterian Brethren of Wilson Colony**, 2009

SCC 37, para 48. Excluding unregistered common law spouses is rationally connected to preservation of choice and autonomy: **Quebec v. A.**, per McLachlin C.J.C., para 438; and, **Jackson Estate**, para 184.

[127] The ease and speed of registration makes the infringement minimally impairing, and actually more advantageous than having to wait out a prescribed period of cohabitation. The availability of other measures which impair the right less does not prevent a finding of minimal impairment if those measures are less effective in pursuing the objective: **Quebec v. A.**, per McLachlin C.J.C., para 442.

[128] The detrimental impact on common law spouses is not disproportionate to the benefits of promoting personal autonomy: **Jackson Estate**, para 187.

[129] Any infringement on Ms. LeBlanc's s. 15 rights is justified under s. 1.

**The Attorney General's Position**

[130] The Attorney General agrees with the points made by the Estate regarding the evidence required for a s. 1 justification. It notes that the object of the TFMA was argued during the statutory interpretation motion and discussed at paragraphs 77 to 114 of my reported decision on that motion, which I referenced in the Introduction to this decision. Also, the wording of the scheme of the TFMA makes the objective of the limitation clear. It is to balance testamentary freedom against

the ability of married persons and persons who register as domestic partners to make a claim.

[131] Otherwise, the Attorney General takes no position on the s. 1 justification issue.

**Ms. Cushing's Position**

[132] Ms. Cushing notes that the arguments she made in relation to the s. 15 analysis apply to the s. 1 analysis to the extent the court concludes they are part of the legislative justification for the law. She also submits that which follows.

[133] In **Quebec v. A.**, McLachlin C.J.C. concluded the support and property division regimes were saved by s. 1, and Deschamps J., writing for herself and three other justices, concluded the property division regime was saved by s. 1. The same analysis should be followed in the case at hand.

[134] The objectives of advancing autonomy and testamentary autonomy and preserving procedural fairness in TFMA applications are pressing and substantial and sufficiently important to justify distinguishing between registered and unregistered common law couples.

[135] “Requiring express consent (by registration) respects the express choice of the couple.” “The only way to guarantee the autonomy of the couple is to provide choice” to be governed by the TFMA or not. Registration provides certainty and allows the parties to know their rights and obligations before they acquire or dispose of assets. So, as found by four of the five judges in **Quebec v. A.**, [h]aving different rules for those who opt in is rationally connected to the goal of protecting testamentary autonomy.”

[136] Ms. LeBlanc has not provided evidence that she, or anyone else, wanted to register, but couldn’t. The evidence from her discovery is that she and Mr. Cushing did not discuss registering as a domestic partnership or even that they were in a common law relationship.

[137] The registration requirement minimally impairs the equality right for the following reasons. The group than can register as domestic partners “is larger than those who would qualify to marry and larger than those who would qualify as a common law couple after the passage of an arbitrary period of time”. It is easier to register than to marry or acquire common law status. Registration gives the couple instant access to choice. “Any system which impaired less the equality right would be less effective at preserving the autonomy of the couple. Four of the five judges

in *Québec* who addressed the issue accepted that the requirement to register for property rights was a minimal impairment."

[138] The "opt-out" alternative suggested by Abella J. in **Quebec v. A.** impairs equality rights just as much as an opt-in system. Either way the couple chooses. Abella J.'s dissent is also distinguishable on the basis that it is much easier to register as domestic partners in Nova Scotia than to enter a civil union in Quebec (which requires a formal ceremony much like a civil marriage in Nova Scotia).

[139] Deschamps J., in **Quebec v. A.**, at paragraphs 401 to 406, writing for herself and four other judges, noted the points which supported their finding that the minimal impairment and balance of convenience components of the proportionality analysis were satisfied. Those points, which are applicable to the case at hand, include the following.

(a) The alternative ways vulnerable *de facto* spouses can protect themselves, such as through an unjust enrichment claim, makes it such that the disadvantages of the impugned measure do not outweigh its advantages, and the government is not obliged to "impose measures of patrimonial protection" on everyone. Similarly, common law spouses in Nova Scotia can make unjust enrichment claims. Ms. LeBlanc has made such a claim and had insurance on Mr. Cushing's life.

(b) While "interdependence … sometimes steals into conjugal life, over which the parties have no real control, the acquisition of patrimonial property results from [conscious] decisions regarding which the government is justified in respecting the autonomy of the parties." Similarly, Mr. Cushing's Estate is property he acquired and maintained through his conscious decisions.

[140] Any concern over people in common law relationships being unaware of the ability to register can be addressed by public education.

[141] Ms. LeBlanc does not point to any way to maintain testamentary autonomy and the couple's autonomy which would impair the right to equality any less. Making "*all* common law couples subject to the TFMA regardless of their wishes is a greater impairment of testamentary autonomy".

[142] Plus, less than 6.25% of Nova Scotians, 15 years of age or more, live common law. So, a small number of people are affected: Access to Justice & Law Reform Institute of Nova Scotia, "Intestate Succession Act Discussion Paper" (June 2019), p. 80.

**S. 1 Analysis**

[143] The onus of demonstrating a s. 1 justification is on the party defending the legislation, in this case, the Estate.

[144] However, as indicated in **Jackson Estate**, *supra*, at paragraphs 174 to 181, and the authorities cited therein, that can be done with little or no evidence because the court can base its assessment on: what is "obvious or self-evident"; "judicial notice of legislative or scientific facts from previous justification cases"; and, using "logical reasoning and common sense". "[T]he first stage of the s. 1 analysis is not an evidentiary contest", a pressing and substantial objective need only be asserted, and a "theoretical objective" will suffice: **R. v. Bryan**, *supra*, para 32. Though the proportionality inquiry requires more than "assertions", "logic and reason may play a large role" in it, such that direct proof is not always necessary: **R. v. Bryan**, paras 38 to 49.

**Arguments Distinguishing Walsh, Jackson Estate and Quebec v. A.**

[145] Ms. LeBlanc seeks to distinguish **Walsh** and **Jackson Estate** on the basis that the TFMA deals with maintenance and support, while the ISA and MPA deal with entitlement to property.

[146] The TFMA expressly states that a judge may order that provision "be made out of the estate of the testator for the proper maintenance and support of the

dependant". The "estate" is necessarily comprised of the testator's assets which remain *post-mortem*. Therefore, an order under the TFMA necessarily deals with entitlement to property even though the entitlement criteria relate to maintenance and support.

[147] The ISA provides a formula for distribution of the estate of a person who dies without a will, or for distribution of that portion of a person's estate that is not dealt with under their will. It does not expressly make need an entitlement criterion. In **Ferguson v. Armbrust**, 2001 SKCA 122, at paragraph 20, the court commented that the Saskatchewan 1996 *Wills* and *Intestate Succession* Acts were "in essence statutes dealing with the distribution of a deceased person's property", and the 1996 *Dependants' Relief Act* was "in essence a maintenance and support statute".

[148] However, in **Austin v, Goerz**, *supra*, at paragraph 53, the court stated that "for nearly 100 years, intestacy legislation did require a person claiming as a marital-equivalent partner to have been financially dependent on the deceased". That requirement remained until about 2000. Therefore, in British Columbia, at least for unmarried partners, for much of the life of the intestate succession legislation, maintenance and support was an express purpose.

[149] Here in Nova Scotia, it is noteworthy that the ISA gives priority, first to the surviving spouse, then to the children, of the deceased. The TFMA limits standing to the deceased's widow or widower and children, the same persons who are given priority under the ISA. The surviving spouse and children are the most likely to require maintenance and support. It makes sense that part of the consideration for giving them priority under the ISA was to provide for such maintenance and support. The June 2019 "Intestate Succession Act Discussion Paper", at page 34, states, in relation to the ISA which was passed in 1966: "The preferential share for the surviving spouse indicated a growing recognition of the needs of the surviving, untitled spouse – usually, the wife." At page 35, it states: "Reform of intestacy laws since 1758 has been concerned in large part with addressing inequalities in the social order, including providing for the welfare of widows … ." Therefore, part of the purpose of the ISA is to help ensure the maintenance and support of those persons who are most likely to have been dependent on the deceased.

[150] The MPA deals with entitlement to property. However, when property is divided *inter vivos*, the property received by a spouse can impact that spouse's need for spousal support and the ultimate support order. In addition, s. 11 of the MPA provides that a spouse may be ordered to pay liabilities related to matrimonial home irrespective of whether the other spouse has exclusive

possession. That is often considered as equivalent to spousal support and impacts a spousal support order accordingly. So, the MPA also impacts support, and indirectly addresses support.

[151] In these ways, the TFMA, ISA and MPA all share elements of both property and support entitlement.

[152] Further, s. 12 of the MPA allows a spouse to make an application for division of assets on the death of the other spouse. That, like the TFMA, affects testamentary autonomy by excluding, from the estate, the surviving spouse's matrimonial share, which is to be determined first so that the estate assets remaining will be known. The surviving spouse can then still make an application under the TFMA for a share of the estate assets, further limiting testamentary autonomy.

[153] These overlapping purposes and effects make it such that the distinguishing features advanced by Ms. LeBlanc do not render the result in **Walsh** and **Jackson Estate** improper or inapplicable in the case at hand.

[154] The ISA only comes into play if a person dies intestate. There is no need to consider testamentary autonomy. There is no need to add entitlement factors such as the "length or nature of the relationship" to further protect testamentary

autonomy. Thus, the addition of such factors is not a distinguishing feature which militates in favour of a result in the case at hand that is different from that in **Jackson Estate**. Rather, given the lack of need to consider testamentary autonomy in the s. 1 balancing related to the ISA, there is more reason to find the TFMA exclusion of unregistered common law spouses constitutional than that in the ISA.

[155] Under the MPA, factors such as the length of the relationship, do play a role in rebutting the presumption of equal sharing. In that way it shares some similarities with the TFMA.

[156] The fact the MPA deals with entitlement of a spouse, while the TFMA also deals with entitlement of children, including those of common law couples, is not a distinguishing feature which impacts the constitutionality questions in the case at hand, as we are only dealing with the question of the exclusion of common law spouses. Obligations towards children, who had no choice in their parents' marital decisions, does not render exclusion of their parents from the application of the TFMA, based on the choice they made, unconstitutional.

[157] The distribution schemes in the MPA, ISA and Quebec property and support regime are based on presumptions or formulae, while entitlement under the TFMA is determined in a more flexible manner. However, the choice in question is the choice to be subject to the legislation at all. So, the difference in the manner of

determining entitlement does not militate in favour of a different answer to the constitutional question for the TFMA. Further, as noted, the additional consideration of testamentary autonomy that applies to the TFMA is an explanation for the difference in approach to entitlement, and provides additional support for a finding of constitutionality.

[158] The TFMA imposes duties that have been recognized as moral duties: **Tartaryn v. Tartaryn Estate**, [1994] 2 S.C.R. 807, pp. 820-823. Ms. LeBlanc argues that the MPA, ISA and Quebec property and support regime are distinguishable because they impose only legal duties. **Lawen Estate** concluded that, to extent the TFMA undermined testamentary autonomy by imposing a moral obligation in relation to independent adult children to which no legal duty was owed, it was unconstitutional. That conclusion removes the distinguishing feature argued. It also highlights the importance of testamentary autonomy. Further, as found in **Lawen Estate**, the presence of a moral claim component justifies narrowing the group of eligible dependants, not expanding it.

[159] I agree with Ms. LeBlanc's submission that, unlike the case at hand, in **Quebec v. A.** there was substantial social science evidence led. However, I disagree that the objective of promoting choice and autonomy is unique to Quebec.

It is not necessary to present the extent of evidence presented in **Quebec v. A.** to establish such objectives.

[160] The ability to choose need not be "popular" amongst common law spouses to be an important objective.

[161] In Quebec, there were large portions of *de facto* spouses who did not make a deliberate choice to avoid the rights and responsibilities associated with the property and support regime in place. Many did not know the ramifications of not marrying or entering a civil union. Abella J., at paragraph 373, noted that "beyond this group who have had some personal or professional experience with law, most spouses rarely consider, or are ignorant of, the law surrounding *de facto* unions". She referred to the report of Professor Belleau, which stated: "The majority of *de facto* spouses and of married spouses think that couples who have been living together in *de facto* unions for several years, or where they have children, have the same rights and obligations in the case of a breakdown." She also referred to Nicholas Bala's commentary that, "while it is doubtless true that 'some' cohabitants live together because they have consciously chosen not to assume the obligations of marriage, many cohabitants give little thought to their rights and obligations, or are ill-informed or understandably confused about exactly what rights common-law partners have".

[162] Similarly, in **Walsh**, L'Heureux-Dubé J., in her dissenting judgment, at paragraph 144, referred to a law reform commission report highlighting that the percentage of cohabitants who deliberately chose not to marry "to avoid the responsibilities of marriage" was low.

[163] It is likely that many Nova Scotians living common law do not know the legal ramifications of living common law and give little thought to them.

[164] In Nova Scotia, about 6.25% percent of persons 15 and over live "common law" (with no minimum cohabitation period used). However, in Law Reform Commission of Nova Scotia, "Division of Family Property – Final Report" (September 2017), at page 93, it indicates that an average of only 59 couples per year, from 2008 to 2014, made the deliberate choice to take on the rights and responsibilities of legislation applying to married spouses, by registering as domestic partners. It adds: "The reasons include lack of public legal education, lack of motivation, and refusal on behalf of one partner to register."

[165] At page 100, it stated:

> "While the majority of respondents to the Commission's Discussion Paper [and online survey] were in favour of including common law couples in Nova Scotia's matrimonial property regime [i.e. 71% (page 93)], those that were opposed to the proposal largely cited lack of consent as the primary reason for their continued exclusion. Most people who were against the proposal felt that these couples had actively made the choice not to marry and should not be forced into the matrimonial property regime."

[166] These survey responses, though not specifically related to the TFMA, more likely than not, demonstrate that some couples in Nova Scotia do deliberately choose to live common law to avoid the system of rights and obligations that apply to married couples or registered domestic partnerships, including that under the TFMA.

[167] There are multiple other points related to married spouses, civil unions and *de facto* spouses discussed in **Quebec v. A.** which also apply to married spouses, registered domestic partnerships and common law spouses in Nova Scotia, and support a finding that the objective of promoting choice and autonomy is not unique to Quebec. They include the following.

- When the family patrimony legislation was first enacted, spouses could opt out: para. 73. (The MPA also allowed opting out.)
- A court may order that a spouse with custody of the children have use of the family residence: para 89. (The MPA provides for exclusive possession orders and makes being in the best interests of a child one of the circumstances in which it can be ordered.)
- A civil union can be dissolved without a court order: para 95. (A registered domestic partnership can be terminated by, among other

things, filing "an executed statement of termination" with the Registrar.)

- Those entering civil unions are subject to the "same rules as are applicable to matrimonial regimes and marriage contracts": para. 99. (Registered domestic partners in Nova Scotia are as well.)

- Historically, the legislation treated *de facto* spouses and their children negatively and with disapproval: paras. 100 – 104. (It was the same for common law spouses in Nova Scotia.)

- "A *de facto* spouse who is the sole owner of the residence can … sell it or lease it without the other spouse's consent: para. 112. (It is the same for common law spouses in Nova Scotia.)

- *De facto* spouses can, by agreement, provide for division of family patrimony and support on breakdown of the relationship: paras: 114-115. (It is the same for common law spouses in Nova Scotia.)

- *De facto* spouses can make an unjust enrichment claim following breakdown of the relationship: paras. 117-120. (It is the same for common law spouses in Nova Scotia.)

- "For the dealings that couples have with third parties, and more particularly, with the government, there are a number of social

statutes in which a distinction is no longer drawn between marriage, civil union and *de facto* union": para. 121. (It is the same in Nova Scotia.)

- "Because of the methodological limitations of the studies, their small sample sizes and the general lack of quantitative data on which to base hypotheses, it seems impossible in the context of this case to draw any definitive conclusions about several aspects of this social phenomenon [of *de facto* spouses], including why this type of relationship is chosen and how it functions from an economic standpoint": paras. 127-128. (The same can be said for Nova Scotia.)

[168] The points noted in **Quebec v. A.** which differ the most from the situation in Nova Scotia are the following:

- The question of freedom of choice was part of extensive and repeated parliamentary debate in Quebec: paras 107-109. (That was not the case in Nova Scotia.)
- A much higher percentage of couples in Quebec live in *de facto* unions than in common law relationships in Nova Scotia and the rest of Canada (in 2011, 37.8% vs. 20%): para. 125.

[169] The lack of debate over the question of freedom of choice in Nova Scotia does not eliminate it as an objective of the legislation.

[170] The higher percentage of *de facto* spouses in Quebec cuts both ways. On the one hand, it demonstrates the popularity of *de facto* unions. On the other hand, that, accompanied by a lack of knowledge of the associated legal ramifications, increases the number of people who may be unknowingly left unprotected following the breakdown the relationship. Arguably, that would provide greater reason to legislate automatic protection.

[171] In **Quebec v. A.**, seven justices (all but Abella, J.) concluded the property division regime was constitutional. Five judges concluded both the property division and spousal support regimes were constitutional. LeBel J., writing for himself and three other judges, found no section 15 violation because the distinction was based on the couple's choice to live as *de facto* spouses, which needed to be respected. However, if they had, instead, considered the couple's choice and autonomy at the s. 1 stage, as the remaining judges held should be the case, they would necessarily have found that the need to respect the couple's choice and autonomy justified the exclusion of *de facto* spouses.

[172] As previously indicated, the fact that Nova Scotia legislation provides for common law spouses to apply for spousal support *inter vivos*, and the Quebec Civil

Code does not, does not make exclusion of common law spouses from the TFMA unconstitutional. In a federalist state, there can be different schemes across jurisdictions that are all constitutional. Within the same jurisdiction, common law spouses can be included for one purpose and excluded for another, without making the legislation excluding them unconstitutional.

[173] For these reasons, the points argued by Ms. LeBlanc, to distinguish **Walsh**, **Jackson Estate** and **Quebec v. A.**, do not make the conclusions in those cases on the s. 1 justification inapplicable to the case at hand.

### a. Is the Objective Behind the Limit Pressing and Substantial?

[174] The general objective of the TFMA balances "adequate, just and equitable provision for the spouses and children of testators" following death, on the one hand, with protecting testamentary autonomy, on the other hand: **Tartaryn**, *supra*, at page 815. It did away with absolute testamentary autonomy, but only in relation to specified dependants, not all dependants. Initially, one goal of the TFMA was to ensure dependants "did not become a charge on the state": **LeBlanc v. Estate of Russell Cushing**, *supra*, para 81. Given the social evolution that has occurred since then, and the greater proportion of women who are financially independent, the importance of that goal has waned significantly.

[175] However, it is the objectives which limit the s. 15 rights which must be sufficiently important to justify the infringement. One such objective emanates from the general purpose of the legislation, i.e. respect for testamentary autonomy. However, given that the TFMA already abrogates the right to testamentary autonomy for married spouses and registered domestic partnerships, additional sufficiently important objectives are required to fully justify the infringement. Whether they do is informed by the need to also consider the objective of respecting testamentary autonomy.

[176] The VSA completes the scheme of the TFMA by limiting the application of the TFMA to those common law spouses who register as domestic partners and excluding those who do not.

[177] The domestic partnership registration scheme, in addition to creating a registration requirement, sets out obstacles to registration, events that terminate registration, and the effects of termination.

[178] S. 53 of the VSA allows any "two individuals who are cohabiting or intend to cohabit in a conjugal relationship" to "make a domestic-partner declaration". Both parties must sign and have their signature witnessed. However, "a person may not make a domestic-partner declaration if", among other things, they are

married or “a party to a subsisting declaration while the other party to that declaration is still alive”.

[179] S. 54 of the VSA allows them to register the domestic-partner declaration as soon as they start “cohabiting in a conjugal relationship”. Upon registration, they acquire “the same rights and obligations as … a spouse under” various pieces of legislation, including the ISA, and “a widow or widower under the” TFMA.

[180] Subs. 55(1) provides that “a domestic partner becomes the former domestic partner of another person after”, among other things, “one of the domestic partners marries another person”.

[181] Subs. 55(3) states that, upon such termination of a domestic partnership, “each of the former domestic partners has the same rights and obligations under the statutes referred to in subsection 54(2) that accrue to spouses by separation, separation agreement, court order or death”. As discussed above, the lack of reference to “widow or widower” in subs. 55(3) suggests that it does not apply to the TFMA, such that only one person can make application. Arguably, a reference to rights and obligations accruing to a spouse by death could, by implication, encompass those expressly stated as accruing to a widow or widower. However, such an interpretation would provide an advantage to a registered domestic partner that does not exist for a legally married spouse. In some cases that distinction

might be justified, such as where the testator dies very quickly after marrying. However, those circumstances would be limited. In most cases, there would be a significant intervening period. In those circumstances, it would be unfair: to the testator to have their testamentary autonomy curtailed by a distant former registration; and, to the legally married spouse, who would have to share standing to make a TFMA claim with the former domestic partner, when a former legally married spouse, whom the testator has divorced, would not share standing.

[182] Irrespective of the proper interpretation of the reach of subs. 55(3), in the circumstances of the case at hand, s. 53 imposes a one-spouse rule. That, similarly, may appear to create unfairness in situations where a married person has cohabited in a common law relationship with someone else for a long period of time. However, in Nova Scotia, acquiring common law status requires at least a one-year period of cohabitation. It is noteworthy that the **Parenting and Suppport Act**, R.S.N.S. 1989, c. 160, which allows a separated common law spouse to make a claim for *inter-vivos* support, requires at least a two-year period of cohabitation in a conjugal relationship (where there are no children of that relationship). After one year of living separate and apart, a spouse can obtain a divorce if they wish, even if that means reserving the right to deal with property division later. Consequently, s. 53 provides little impediment to common law spouses being able to access the

same rights as legally married spouses, if both common law spouses want that to happen. After that one year has expired, the prohibition against registration is only maintained because of the testator's choice to remain married.

[183] Obvious TFMA-related objectives, of the registration requirement, obstacles to registration and marriage to another person terminating registration, include the following:

1) ensuring the TFMA only applies to those couples who have deliberately chosen and consented to acquiring the rights and obligations of legally married spouses, i.e. preserving choice and autonomy;
2) certainty as to who qualifies to make a TFMA application; and,
3) providing a one-spouse limit on qualifying as widow or widower for the purposes of the TFMA.

[184] The majority in **Walsh**, *supra*, did not base its decision on the registration scheme which had been enacted after the decision of the Nova Scotia Court of Appeal in that matter. It nevertheless found that the importance of maintaining common law spouses' liberty to choose made the exclusion of common law spouses from the MPA constitutional. It did so despite the lack of social context evidence regarding common law couples, relying only on jurisprudence, academic

writing and anecdote. It added, at paragraph 49, that the registration process in the VSA provided an alternate way for cohabitants to "consent to be bound legally to the same regime" as married persons even if they choose not to marry.

[185] Similarly, in **Jackson Estate**, *supra*, the estate, which was the party seeking to uphold the exclusion of common law spouses from the ISA, provided jurisprudence and "the legislative regime governing estates in Nova Scotia". Mr. Young, the surviving common law spouse of the deceased, submitted the Law Reform Commission's "Division of Family Property – Final Report"(2017). At paragraph 183, the court concluded:

> 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.

[186] As stated by Bastarache J., albeit in the course of the s. 15 analysis, in **Walsh**, *supra*, at paragraph 43: "Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount." In **Walsh**, at paragraph 48, the MPA was found to impose "a significant alteration to the *status quo* of an individual's proprietary rights and obligations". Similarly, the TFMA significantly altered testamentary autonomy, which had previously been absolute.

[187] In **Quebec v. A.**, four judges concluded choice and autonomy were so important that it made it such that exclusion of common law spouses was not discriminatory. The remaining five judges accepted they constituted a pressing and substantial or sufficiently important objective for the purposes of the first stage of the s. 1 inquiry.

[188] The requirements for registration, review by the Registrar, and the termination mechanisms, provide certainty as to who qualifies as a widow or widower for the purposes of the TFMA. Without such a requirement, there is uncertainty, and an accompanying strong likelihood of a difference of view between parties, as to when a relationship has attained common law status and when such relationship has been terminated. What one party may see as cohabitation, the other may see as staying over. That is especially so in circumstances where, as in the case at hand, both partners have their own home. An alternate scheme, such as a written agreement between the parties, without registration, would risk couples relying on ineffective agreements, and multiple agreements being outstanding at once, with no clarity as to which is effective.

[189] Certainty is an important objective because the TFMA application is made following the death of the testator. As such, they cannot testify as to their version of the nature and length of the relationship, making it difficult for the estate to

contest standing, and risking standing being granted to persons who were not in a common law relationship with the testator. A counter-argument is that objective evidence can be gleaned from documents such as income tax returns, banking records and property registrations. However, in the case at hand, Ms. LeBlanc and Mr. Cushing: did not file their tax returns as a common law couple; did not share bank accounts; and, each owned their own home. Yet, there has been agreement that they lived common law. That concession was, more likely than not, based on information beyond the objective documentary evidence. Such additional information may not be known to anyone but the claimant and their supporters, leaving the decision to be based on their credibility and reliability, with the estate having limited ability to challenge those witnesses.

[190] Even in the absence of a TFMA application, the lack of certainty provided by registration can hamper intermediate estate administration steps. For example, s. 9 of the TFMA, subject to certain exceptions, postpones the executor's ability to distribute assets of the estate for six months unless they have "the consent of all the dependants of the testator or unless authorized" by court order. The executor is personally liable for any distribution in violation of those restrictions. Without the certainty provided by registration, the executor will not know whether they have obtained the consent of all "dependants" and, if seeking authorization by court

order, will not know whether they have given notice to all “dependants”. They may not even know whether the testator was cohabiting with anyone. For example, the executor in the case at hand deposed that he knew “little of Russell’s personal relationship with Sarah LeBlanc”.

[191] Such lack of certainty would tend to cause executors to err on the side of caution and wait for the six months to expire before distributing any of the estate, including to, or for, minor children of the testator, who may be in need of continued support and maintenance immediately.

[192] Further, uncertainty as to when a relationship has developed into a common law relationship, or if it will, leaves testators unable to properly plan their affairs and prepare their wills. If it is only determined after death, it is too late for the deceased to adjust their testamentary directions accordingly.

[193] Prohibiting a second person from qualifying as a widow or widower for the purposes of the TFMA limits interference with testamentary autonomy. Estate planning need only allow for the ability of at most one widow or widower to challenge testamentary provisions.

[194] The circumstances, in the case at hand, are that Mr. Cushing was already married. Until divorced no one could become his “spouse”. That meant he only had

to be concerned about providing for his wife of over 20 years, who has not made a TFMA application, and his teenage daughter from that relationship. He chose, in his will, to ensure his daughter was generously provided for. Giving priority to support of children is a recognized principle of family law for *inter vivos* support. There is even more reason to prioritize it when the effect of not doing so would further infringe upon testamentary autonomy. Prohibiting a second "spouse", while still married, reduces dilution of the estate and gives the testator more freedom to provide for his children of any relationship.

[195] Allowing a person to acquire rights under the TFMA as a common law spouse, while the testator is legally married to someone else, would provide benefit to at least one side of that couple that is not available to those who would only choose to cohabit while legally married or in a registered domestic partnership. It would be giving them special treatment for no reason. It would do so irrespective of whether they consented to the obligations that accompany the benefits.

[196] Since a TFMA application is only made following death, the claimant seeks to obtain the benefits of the TFMA, as against the deceased's estate, without any risk of incurring obligations to the deceased's estate. The absence of such downside naturally creates a tendency to, after-the-fact, characterize the relationship in a way favourable to them. If they had to confirm, while both

partners are alive, that they take on both the rights and obligations under the TFMA, they could easily have a different view. For instance, they may be disinclined to want the benefits gained from their estate under the TFMA, by their partner, who is still married to someone else, to be used or considered in paying spousal support to their partner's legal spouse.

[197] This is an example of the interplay and interconnectedness amongst the three objectives noted.

[198] An objective need not be consistent with that in similar legislation in another jurisdiction, or with other legislation that has a different purpose within the same jurisdiction. The policy choices made by legislatures can be constitutional despite such inconsistency.

[199] However, the one-spouse rule for the TFMA is consistent with succession legislation in the following common law provinces: New Brunswick, Prince Edward Island, and Newfoundland: Paul L. Coxworthy, "Succession and Property Rights of Surviving Spouses (Legal and Common Law) in Atlantic Canada (2018)" (2019) Volume 38 Estates Trusts and Pensions Journal 191.

[200] Paul Coxworthy, at pages 191 and 192, wrote:

> Succession rights in the Atlantic provinces are only conferred, as a matter of course, to legally married spouses. With respect to common law spouses in Atlantic Canada, statutory succession rights have not been extended to them and can only be secured by cohabitation agreement (or in the case of Nova Scotia, by registration as a domestic partner).

[201] In relation to dependants' relief legislation specifically, it is consistent with that in Prince Edward Island and Newfoundland: *Dependants of a Deceased Person's Relief Act*, R.S.P.E.I. 1988, c. D-7; and, *Family Relief Act*, R.S.N.L. 1990, c. F-3. However, those provinces do not have a registration option through which common law spouses can qualify.

[202] The statement at paragraph 23 of **Sauvé v. Canada** that "the objective must clearly reveal the harm that the government hopes to remedy" is to be read in the context of the rest of paragraph 23, surrounding paragraphs and the subject matter of the case. Paragraphs 21 to 26 reveal that the stated objectives were: vague; abstract; susceptible to distortion and manipulation; lacked context; and, found little support in the record. The law in question was one which removed the right to vote from inmates serving sentences of two years or more.

[203] In contrast, the legislation in the case at hand did not remove anything from spouses or common law spouses. Before it was enacted, testators had complete testamentary autonomy. It created an exception for the support and maintenance of specified dependants. It gave only widows, widowers and children, as

"dependants", the right to challenge the will of their deceased spouse. That was extended to registered domestic partners. The stated objectives are clear and in keeping with the original intention of the TFMA to restrict the "dependants" who could challenge a will to a narrow group, and to limit infringement of testamentary autonomy. They are not to remedy a harm, but to prevent: the harm or potential harm discussed in the course of outlining the objectives; and, further infringement of testamentary autonomy.

[204] In addition, the court in **Sauvé** did not dismiss the government's objectives, despite their shortcomings. It proceeded to the proportionality stage.

[205] For these reasons, the objectives noted are sufficiently important to warrant overriding a common law spouse's equality rights.

**a. Is the Limit Proportional to the Objective?**

**i. Is the Limit Rationally Connected to the Objective?**

[206] As stated in **Alberta v. Hutterian Brethren**, *supra*, at paragraph 48, the party seeking to establish a rational connection "must show a show a causal connection between the infringement and the benefit sought on the basis of reason or logic". It need not show that the infringement "will" "further the goal". It need only show "that it is reasonable to suppose that [it] may" do so.

[207] Ms. LeBlanc argued lack of a rational connection on the basis that excluding common law spouses is not rationally connected to the "pressing and substantial objective of dependants' relief". She adds, relying on **Taylor v. Rossu**, *supra*, that, "[i]f the goal of the TFMA is to relieve dependency, it should 'capture as many intimate relationships as possible'". That argument ignores the point that it is the "connection between the infringement and the benefit sought" by the infringement that is to be determined, not the connection between the infringement and the general overall purpose of the legislation.

[208] In **Quebec v. A.**, at paragraph 438, McLachlin C.J.C., found a rational connection between the "objective of preserving the autonomy and freedom of choice of Quebec spouses" and the "distinction made by the law between married, civil union and *de facto* spouses". She explained that: "[t]he Quebec approach only imposes state-mandated obligations on spouses who have made a conscious and active choice to accept those obligations"; and, "[t]he requirement of an active choice to undertake obligations is consistent with the objective of enhancing autonomy". That same reasoning was followed in **Jackson Estate**, at paragraph 184, to 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".

[209] For the same reasons, the exclusion of common law spouses from the application of the TFMA, unless they register as domestic partners, is rationally connected to the objective of preserving the common law couple's autonomy and ability to choose whether the rights and obligations arising from the TFMA apply to them. The active choice they would have to make to confirm their consent to taking on the obligations arising from the TFMA is to marry or simply register as domestic partners.

[210] The registration requirement, which includes the need to submit a domestic-partner declaration in the prescribed form, bearing the witnessed signature of both parties, also makes it clear who qualifies as a widow or widower under the TFMA. Leaving the question of standing to be determined based on the evidence of the surviving partner who is challenging the deceased partner's will, with the deceased partner being unable to present their perspective of the relationship, would create uncertainty and corresponding procedural unfairness in the TFMA application, in addition to unfairness at the estate planning and administration stages, as discussed above. In that way, the exclusion of common law spouses from the application of the TFMA, unless they register as domestic partners, is rationally connected to the objective of ensuring certainty as to who has standing to make a TFMA application. It provides a registered record of the agreement between the parties.

The registration requirement allows both parties to know, when they are planning their will, what obligations each has to the other. It allows the personal representatives of their estates to know whose consent they must obtain for early distribution of part of the estate, or who they must give notice to when seeking judicial approval for early distribution.

[211] Excluding a common law spouse from being able to register a domestic-partnership declaration, and from qualifying as a widow or widower under the TFMA, when their spouse is married to someone else, is the only way, in those circumstances, to ensure that only one spouse can qualify as a widow or widower under the TFMA. As such, there is a rational connection between such exclusion and the goal of establishing a one spouse limit on who can so qualify. If someone becomes the common law spouse of a person already in a registered domestic partnership, that will be a terminating event under s. 55 of the VSA, because the domestic partners will have lived "separate and apart for more than one year and one or both parties [will have had] the intention that the relationship not continue". However, for the termination to be noted in the register, an affidavit, as described in s. 57 of the VSA, will have to be filed. Only then will the new common law spouse be able to register as the domestic partner of that person. That ensures the

one-spouse rule, and certainty, in those circumstances, and shows the requisite rational connection.

### ii. Does the Limit Minimally Impair the Right?

[212] McLachlin C.J.C., at paragraphs 439 to 442 of **Quebec v. A.**, outlined principles which help guide the minimal impairment analysis. They include that:

- "[T]he state must have a margin of appreciation in selecting the means to achieve its objective."
- "The question is whether the impugned provisions fall within a range of reasonable alternatives."
- "This is particularly the case where the impugned measures 'attempt to strike a balance between the claims of legitimate but competing social values'".
- The "values of federalism" are to be respected so as to: allow differences between provinces; and, avoid the minimal impairment step from becoming a search for "the Canadian province that has adopted the 'preferable' approach to a social issue and requiring that all other provinces follow suit".

- The availability of other schemes that impair the right less, but "would be less effective in promoting the [legislative] goals" does not prevent a finding of minimal impairment.

- The question is "whether the limit imposed by 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."

[213] She found that: an opt-out scheme would narrow the "state-free zone" created by requiring "agreement and positive action on the part of *de facto* spouses", and would not impair the right to equality less than the opt-in scheme (i.e. entering marriage or a civil union); and, schemes in other provinces and permitting "judicial recourse" would be "less effective in promoting the goals of the Quebec scheme of maximizing choice and autonomy for couples". She concluded the law fell "within a range of reasonable alternatives for maximizing choice and autonomy in the matter of family assets and support", as they "are intertwined and cannot be readily separated": paras. 443 – 447.

[214] The scheme of the TFMA has a domestic partner registration option which allows common law spouses to opt in immediately on commencement of cohabitation. It is quicker, cheaper and easier than the opt-in options in Quebec and

the marriage / marriage registration process in Nova Scotia. The domestic-partner declaration is one page and can be filed immediately. The registration fee is only $24.95. A marriage licence in Nova Scotia costs $132.70. The officiant cannot solemnize the marriage unless they have received three days' notice of "the names, places of residence, occupation, age and marital status of the parties to the intended marriage, except upon the production of evidence satisfactory to [them] that there exist exceptional and urgent circumstances, sufficient in [their] discretion to justify the earlier solemnization of such marriage": *Marriage Act*, R.S.N.S. 1989, c. 436, s. 22.

[215] It is difficult to conceive a more minimally impairing measure that would still be as effective in preserving the choice and autonomy of common law couples, and in promoting the goal of certainty. Ms. LeBlanc's request to allow unregistered common law spouses standing under the TFMA does nothing to advance those objectives. She suggests requiring a minimum period of cohabitation. That would impair the equality rights of couples more than the registration process as they would be required to wait a specified period of cohabitation to qualify, instead of being able to register immediately. The registration measure impairs the right much less than that in **Quebec v. A.** Therefore, there is greater reason in the case at hand to conclude it falls "within the range of reasonable alternatives" and I so find.

[216] A collateral effect of the object of limiting standing under the TFMA to one widow or widower, where one person in the common law couple is still married to someone else, is that it delays that couple's ability to choose to opt in until that person is divorced. That temporarily counters the objective of preserving and respecting the common law couple's choice.

[217] However, in Nova Scotia, the minimum cohabitation period to acquire common law status is one year and is two years for the *Parenting and Support Act* (the *inter vivos* support legislation), unless the cohabiting couple have a child together, in which case there is no minimum period of cohabitation. A married person can get a divorce as of right after being separated one year. Even if that person commenced cohabiting in a conjugal relationship with someone else the day they separated from their spouse, they can still get a divorce before the partner they are cohabiting with acquires the ability to claim *inter vivos* spousal support (unless they have a child together). Following that divorce, the cohabiting couple can register a domestic partnership, if they choose, and import the rights and obligations of the TFMA, without altering the form of personal relationship they have chosen. In that way, even for circumstances, such as those in the case at hand, where one common law partner is married to someone else, the infringing impact

of the law itself is minimal. Any negative impact at that point arises from the choice of the married partner to remain married.

[218] Arguably, the legislature could allow registration by a common law couple, after a specified period of cohabitation, irrespective of whether one of them is still married. However, to maintain the one-spouse objective, it would have to remove the right of standing from the married spouse. That would remove the benefits and obligations attached to the choice the married spouses had consciously made, through an unequivocal consensual act, and be even more destructive to the objective of promoting and preserving choice and autonomy.

[219] The common law partners, who ought to be aware that one of them is married, can take steps to protect themselves in the event of the death of one of them. For instance, as Ms. LeBlanc did, they can purchase insurance on the life of the other. Deschamps J., in **Quebec v. A.**, at paragraphs 401 to 406, noted that such alternative means of protection, along with the ability to make an unjust enrichment claim, were "sufficient to meet the minimal impairment and balance of convenience tests" in relation to property rights.

[220] Deschamps J. based her conclusion in part on the premise that *de facto* spouses would still have the protection of the support provisions. She distinguished the support regime from the property division regime on the basis that "the

acquisition of patrimonial property results from [conscious] decisions" while "interdependence … sometimes steals into conjugal life". As indicated above, the TFMA imports elements of both support and property division. However, the assets that will be used to satisfy a TFMA claim will have been acquired and maintained as a result of conscious decisions. For example, if Mr. Cushing had decided to transfer all his assets to a trust for Ms. Cushing before he died, there would have been nothing in the Estate against which to claim under the TFMA. In addition, five of the nine justices in **Quebec v. A.** concluded that both the support and property regimes were constitutional, despite the exclusion of *de facto* spouses.

[221] In **Quebec v. A.** the exclusion of *de facto* spouses was permanent. In Nova Scotia, it is only temporary (i.e. until the married partner divorces and the common law couple can register), and common law couples can also make an unjust enrichment claim. Therefore, there is more reason in Nova Scotia to find the minimal impairment test has been met.

[222] As with the other two objectives, there has been no more minimally impairing measure advanced that would preserve the one-spouse objective. The measures chosen by the legislature are "within a range of reasonable alternatives".

[223] For these reasons, I conclude that the means selected by the legislature to achieve these objectives satisfy the minimal impairment test.

### iii. Do the Beneficial Effects of the Limit Outweigh the Detrimental Effects?

[224] "[T]he infringement of a protected right must be proportionate to the benefits of pursuing the state objective, having regard to the impact of the law on the exercise of the right and the broader public benefits it seeks to achieve": **Quebec v. A.**, *supra*, per McLachlin C.J.C., para 448.

[225] In **Quebec v. A.**, the state objective was articulated, at paragraph 435, as being "to promote choice and autonomy for all Quebec spouses with respect to property division and support". That was the only objective at play because there was an absolute exclusion of all *de facto* spouses. Unlike in Nova Scotia, there was no means by which they could register a simple declaration to express their choice to be bound by the property division and support regime. They had to marry or enter a civil union. A civil union is much more involved than registering a domestic partnership in Nova Scotia. It is more like entering a civil marriage in Nova Scotia. McLachlin C.J.C., at paragraph 449, found the impact on "the exercise and enjoyment of the equality right [was] significant".

[226] She also acknowledged that *de facto* spouses in the position of the claimant, A, "have not been able to make a meaningful choice". However, she stated and concluded:

> [T]he 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.

[227] The registration scheme in Nova Scotia greatly attenuates the impact on equality rights. There is no absolute and complete exclusion of all common law spouses, only those that do not or cannot register as domestic partners are excluded.

[228] Some of the attenuating points noted at paragraph 449 of **Quebec v. A.** also apply in Nova Scotia. They include that: "[t]he impugned provisions do not appear to perpetuate animus against *de facto* spouses"; and, "[t]here is no longer any stigma attached to *de facto* spousal relationships". Further, though common law relationships in Nova Scotia have not yet reached the popularity of *de facto* relationships in Quebec, "the number of common law couples in Nova Scotia as a proportion of all family forms is increasing over time": "Division of Family Property – Final Report" (September 2017), page 91.

[229] As noted under the minimal impairment analysis, the minimum cohabitation periods required in Nova Scotia to achieve common law status, combined with the fact that a married person can obtain a divorce order, as of right, after one-year separation, make it such that, even where one party is married, the ability to choose

to register, and thus import the rights and obligations of the TFMA, is only delayed if the partner that is married to someone else chooses to remain married. Therefore, at that point, it is the choice of the married partner which causes any negative impact.

[230] Further, as also noted in the minimal impairment analysis, the fact that the common law couple can take steps to protect themselves in the event of the death of one of them, such as by purchasing insurance, and can make an unjust enrichment application, is to be considered in this balance of convenience stage of the proportionality analysis.

[231] It has been argued, and accepted in some cases, that requiring a common law couple to broach the subject of providing protection for each other in the event of separation may be detrimental to the relationship because it signals doubt as to whether the relationship will last. However, that reasoning is inapplicable in the case at hand because we are dealing with rights that arise upon death, not separation. The discussion would not raise concerns about the strength of the relationship. It would merely be planning for the inevitable. As such, it is not a deleterious effect of a registration requirement.

[232] The domestic partner registration process is fast and inexpensive, again attenuating any detrimental effect.

[233] The TFMA scheme, which includes registration, promotes the same relationship choice and autonomy objective as in **Quebec v. A.**, the benefits of which were found to be proportionate to the infringement. For reasons already outlined, the deleterious impact of the infringement in **Quebec v. A.** was greater than that in the case at hand. Therefore, there is greater reason in the case at hand to find that proportionality has been shown.

[234] The TFMA scheme also brings in the additional objectives I have noted, and the associated benefits, without importing any detrimental impacts to equality rights beyond those already discussed.

[235] As I indicated, all three objectives are interconnected. In addition, the general objective of testamentary autonomy informs assessment of the benefits to be gained from pursuing all three objectives: **R. v. J.(K.R.)**, *supra*, at para. 62. It augments those benefits because all the objectives help preserve testamentary autonomy.

[236] Testamentary autonomy is to be considered in the s. 1 balancing exercise irrespective of whether it is a *Charter* right: Iacobucci, "'Reconciling Rights' the Supreme Court of Canada's Approach to Competing Charter Rights", page 143. I note this point because of Ms. LeBlanc's suggestion that the court in **Lawen**

**Estate**, *supra*, may have erred in finding that testamentary autonomy is a s. 7 *Charter* right.

[237] The associated benefit of preserving testamentary autonomy is a distinguishing feature which addresses Ms. LeBlanc's argument that, if there is a benefit from excluding unregistered common law spouses to preserve choice and autonomy, it makes no sense to pursue it only upon death. In relation to *inter vivos* support, testamentary autonomy is not a consideration. Further, legislatures are to be given leeway in pursuing different objectives in different legislation, that are for different purposes.

[238] As I noted while outlining the objectives, certainty as to who has standing to make a TFMA application provides the following benefits: procedural fairness in the process of determining standing, given that the testator cannot testify; and, facilitating estate planning and administration.

[239] In the case at hand, Mr. Cushing, who was a lawyer himself, consulted another lawyer, Andrew Kimball, who is also the executor, for the purpose of estate planning, nine days before he died. Mr. Cushing expressed that he only considered providing for Ms. LeBlanc in his will as part of an "alternative distribution" if his daughter, Ms. Cushing, was already deceased. There was no discussion that Ms. LeBlanc may be able to make a TFMA claim against his estate.

Quite to the contrary, Mr. Kimball deposed that "Russell did not express that he felt he was under any obligation whatsoever to provide for Sarah in his Estate plan." Now after his death, Ms. LeBlanc is seeking to re-write his will. That is an example of how lack of certainty can rob a testator of the ability to address obligations to a widow or widower in their will according to their own decisions, including by giving reasons for their decisions, which are part of the considerations under s. 5 of the TFMA. After death it is too late to do so. That is unfair to a testator. The requirement for registration helps remedy such unfairness.

[240] Also, as I have already indicated, prohibiting a second person from qualifying as a widow or widower for the purposes of the TFMA, interconnected with the other objectives, and the means chosen to advance them, produces beneficial effects in that it: limits interference with testamentary autonomy; buttresses the objective of certainty; facilitates prioritizing support of children, including children of a prior relationship; avoids providing for special benefits to unregistered common law spouses that cannot be obtained by those who would only choose to enter a legal marriage or registered domestic partnership; and, eliminates the risk of a survivor accessing the benefits of legislation without having agreed to accept the corresponding obligations.

[241] For these reasons, the benefits of pursuing these interconnected objectives, outweighs the detrimental effect on the equality rights of common law spouses, making it such that the infringement is proportionate to the objectives.

**Conclusion on Section 1 Justification Issue**

[242] The courts in **Grigg** and **Woycenko**, *supra*, concluded that exclusion of common law spouses from the dependants' relief legislation in British Columbia and Alberta was not justified under s. 1. However, unlike the situation in Nova Scotia, both of those cases involved legislation which excluded all common law spouses. Neither case involved a claimant whose deceased common law spouse was still married to someone else, nor a registration system for common law spouse to clearly record their consent to be bound by the legislation. Therefore, the deleterious effects were greater, and the beneficial effects were lesser, than those in the case at hand.

[243] Given my conclusion in relation to each step in the s. 1 justification analysis herein, I find that the s. 15(1) violation is justified under s. 1.

**ISSUE 3: IF THERE IS A S. 15 BREACH THAT IS NOT JUSTIFIED UNDER S. 1, WHAT IS THE MOST APPROPRIATE CHARTER REMEDY IN THE CIRCUMSTANCES?**

[244] Given my conclusion on the s. 1 justification issue, it is unnecessary to answer this question.

## CONCLUSION

[245] For the reasons outlined, though the exclusion, from the application of the *Testators' Family Maintenance Act*, of common law couples who have not registered as domestic partners under the *Vital Statistics Act*, infringes Ms. LeBlanc's rights to equality under s. 15 of the *Charter*, it is saved by s. 1. Therefore, the scheme of the TFMA is constitutional, and her motion to have it declared unconstitutional is dismissed.

## ORDER

[246] I ask counsel for the Estate to prepare the order.

## COSTS

[247] If the parties are unable to agree on the costs of this motion, I ask them to provide written submissions on the question.

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Pierre L. Muise, J.