SOQUIJ | Intelligence juridique

Unofficial English Translation

Droit de la famille — 102866 **2010 QCCA 1978**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-019939-099
(500-04-028504-026)

DATE: November 3, 2010

CORAM: THE HONOURABLE MARC BEAUREGARD J.A.
JULIE DUTIL J.A.
LORNE GIROUX J.A.

A
APPELLANT – Applicant
v.

B
RESPONDENT – Respondent
and
ATTORNEY GENERAL OF QUEBEC
and
ATTORNEY GENERAL OF CANADA
MIS EN CAUSE – Mis en cause
and
FÉDÉRATION DES ASSOCIATIONS DE FAMILLES MONOPARENTALES ET RECOMPOSÉES DU QUÉBEC
MIS EN CAUSE - Intervener

JUDGMENT

---

[1] The appellant appeals from a decision rendered on July 16, 2009, by the Superior Court, District of Montreal (the Honourable Madam Justice Carole Hallée), rejecting her constitutional claims submitted in a *Motion for custody of children, support, lump sum, use of the family residence, interim costs, and interim order*.

[2] For the reasons of Dutil J.A., with which Giroux J.A agrees, **THE COURT**:

[3] **ALLOWS** the appeal in part;

[4] **SETS ASIDE** the trial judgment;

[5] **DECLARES** article 585 *C.C.Q.* to be constitutionally invalid and of no force or effect;

[6] **SUSPENDS** the declaration of constitutional invalidity for a period of twelve months as of the date of this judgment;

[7] **REITERATES** that, under article 815.4 *C.C.P.*, no information that would allow the identification of a party or a child may be published or broadcast;

[8] **WITH COSTS** against the Attorney General of Quebec and the respondent, both in first instance and in appeal, including $25,000 in expert fees.

[9] For his part, Beauregard J.A. would have allowed the appeal in part, set aside the Superior Court judgment with costs for a class II-B action both in first instance and in appeal, declared articles 585 and 511 *C.C.Q.* to be unlawful as drafted and order that, as of the date of this judgment, they read as follows:

> **585.**
>
> Spouses and relatives in the direct line in the first degree owe each other support.
>
> **511.**
>
> The court, when granting a separation from bed and board or noting the break-down of a *de facto* union or subsequently, may order either spouse or *de facto* spouse to pay support to the other

[10] Beauregard J.A. also would have referred the file back to the Superior Court so that it may resume consideration of the motion and make a ruling on judicial fees as though this consideration had not been interrupted by the debate on the constitutional issue.

MARC BEAUREGARD J.A.

JULIE DUTIL J.A.

LORNE GIROUX J.A.

Mtre Anne-France Goldwater
Mtre Marie-Hélène Dubé
Goldwater, Dubé
Counsel for the appellant

Mtre Guy Pratte
Mtre Marc Phillips
Borden Ladner Gervais
Co-counsel for the appellant

Mtre Pierre Bienvenu
Mtre Azimuddin Hussain
Mtre Andres Garin
Ogilvy Renault
Counsel for the respondent

Mtre Suzanne H. Pringle
Mtre Johane Thibodeau
Mtre Suzanne H. Pringle, attorney
Co-counsel for the respondent

Mtre Benoît Belleau
Mtre Hugo Jean
Bernard Roy(Justice Québec)
Counsel for the mis en cause Attorney General of Quebec

Mtre Pascale-Catherine Guay
Mtre Sébastien Gagné
Joyal Leblanc (Justice Canada)
Counsel for the mis en cause Attorney General of Canada

Mtre Jocelyn Verdon
Mtre Mireille Pélissier-Simard
Garneau Verdon Michaud Samson
Counsel for the mis en cause Fédération des associations de familles monoparentales et recomposées du Québec

Date of hearing: May 19, 2010

REASONS OF DUTIL J.A.

[11] Are *de facto* spouses in Quebec discriminated against within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") because the *Civil Code of Québec* ("*C.C.Q.*") does not grant them the right to support, to the division of the family patrimony, to the protection of the family residence, to the partnership of acquests, and to the compensatory allowance?[1]

[12] The question is an important one. In 2006, 34.6% of couples in Quebec–that is, 1.2 million people–were *de facto* spouses, while in the rest of Canada, only 18.4% of couples lived in *de facto* unions.[2] What is more, in 2002, 60% of children were born out of wedlock.[3]

I - THE FACTS

[13] The parties met in the appellant's home country in 1992. At the time, she was seventeen years old, living with her parents, and attending high school. The respondent was thirty-two and the head of a lucrative business.

[14] From 1992 to 1994, the parties travelled around the world together several times a year, and the respondent supported the appellant financially as she pursued her studies. In early 1995, they agreed that the appellant would come to live in City A. In late July 1995, however, they broke up for the first time.

[15] The parties saw each other during the holidays that year and then once again in February 1996. The appellant became pregnant with their first child. In all, three children were born of their union in 1996, 1999, and 2001.

---

1 Articles 585, 401-413, 414-426, 427-430, 432, 433, 448-484 *C.C.Q.*

2 Zheng Wu, *Cohabitation*: *A Socially Protected iIstitution*, (Department of Sociology, University of Victoria, February 28, 2008) at 9; Statistics Canada, *Family portrait: Continuity and Change in Canadian Families and Households in 2006*, 2006, Census, Families and Households, No. 97-553-XIF in the online catalogue: www.statcan.gc.ca.

3 Céline Le Bourdais & Évelyne Lapierre-Adamcyk, with the collaboration of Philippe Pacaut, "Changes in Conjugal Life in Canada: Is Cohabitation Progressively Replacing Marriage?" (2004) 66 *Journal of Marriage and Family* 929 at 934; Hélène Belleau, *Report drafted for Goldwater, Dubé*, *Updated version* (Montreal: Institut national de la recherche scientifique*,* Urbanization, Culture and Society, March 2008) at 1 (The update is from a report dated October 31, 2007, by the same author); Institut de la Statistique du Québec, *La diffusion des naissances hors mariage, 1950-2003*, La situation démographique au Québec, Bilan 2004.

[16] While the parties lived together, the appellant never held employment, despite a few attempts at launching a career in modelling. She regularly accompanied the respondent on his trips around the world. The respondent provided for all of her needs and for those of their children.

[17] The appellant wanted to get married but the respondent answered that he did not believe in this institution, though he might consider marriage after being with the person for twenty-five years.

[18] In 2002, a few months after their third child was born, the parties separated. In total, their cohabitation lasted seven years.

[19] The appellant commenced proceedings in February 2002. After various safeguard orders, a Superior Court judgment dated May 16, 2006, awarded the parties shared custody of the children and ordered child support for the appellant in the amount of $34,260.24 a month (for a total of $411,122.88 a year), indexed every year on January 1. The Superior Court also made the following orders:

> [TRANSLATION]
>
> ...
>
> ORDERS the defendant to continue to pay the plaintiff, upon presentation of receipts, the cost of return economy-class airplane tickets for the three children and their nannies for two trips a year, of a maximum duration of fourteen days each, with a per diem allowance of up to $1000 per day of vacation, except for trips to [Country A] and other trips where the defendant will pay for accommodation himself.
>
> ...
>
> ORDERS the defendant to continue making the following specific payments:
>
> 1) All expenses related to tuition, uniforms, books, and supplies required by the children's school, as well as extracurricular activities organized by the school;
>
> 2) All expenses related to the children's special recreational or extracurricular activities, such as horseback riding lessons;
>
> 3) All fees for health care professionals and others, including the mediator Ms. Lillo, the tutor, and any psychologist required by the children, as well as fees and expenses for a psychologist or psychotherapist specifically hired by the parties to improve communication between themselves and their parenting skills;

> 4) The salaries of the two nannies, including D, and the salary of the driver E, the salary of a cook to work for the plaintiff, and the transportation of the children that will continue to be provided by the driver at the plaintiff's residence when custody shifts;
>
> ORDERS the plaintiff to send the defendant the employment contract of the cook that works for her;
>
> ORDERS the defendant to continue to pay all costs, school and municipal taxes, home insurance, and the general home maintenance and renovation costs required at the residence of the applicant and the children in City A;
>
> ORDERS the defendant to make the Lexus vehicle used to transport the children available to the plaintiff during each of her periods of custody;
>
> ORDERS the defendant to pay the plaintiff interim costs of $250,000 within thirty (30) days of this judgment; …

[20] The respondent also provided the appellant with a house worth $2.5 million, although he remained the owner.[4]

II - TRIAL JUDGMENT

[21] At trial, the issues in dispute concerned two main aspects: the shared jurisdiction over marriage and the equality rights of *de facto* spouses under section 15 of the *Charter*.

[22] Before addressing the legal issues, the trial judge considered the expert reports filed by the parties. The appellant filed six reports, while the Attorney General of Quebec ("AGQ") filed two. In the trial judge's view, some passages of these reports resembled legal opinions, and she stated that she was not bound by them.

[23] The judge did accept, however, the compelling submission that the proportion of couples living in *de facto* unions increased from 7.9% in 1981 to 34.6% in 2006[5] and that more than 60% of children in Quebec are born of such unions.[6]

[24] She also noted that experts differ on what the legislature should do on this question. While some urge the creation of a legal framework for such unions, others believe that further study is required before conclusions can be drawn.

---

4 The appellant also had a budget of $500,000 at her disposal for renovations to this house.
5 Statistics Canada, *supra* note 2.
6 Institut de la Statistique du Québec, *supra* note 3.

[25] The trial judge then proceeded with her analysis of the issues in dispute.

[26] First, she considered whether the relationship between the parties may be included within the definition in the *Civil Marriage Act*,[7] which Parliament enacted in 2005, and if not, whether that definition is discriminatory within the meaning of section 15 of the *Charter*.

[27] The judge rejected the appellant's claims. She found that she could not accept the argument whereby mere compliance with the definition of marriage in the federal statute is sufficient for spouses to be married. Indeed, under section 92(12) of the *Constitution Act, 1867*,[8] only provinces have the jurisdiction to regulate the manner in which marriages are to be performed.[9] Consequently, failure to comply with the *C.C.Q.* provisions on the solemnization of marriage is fatal. She also found that the definition of marriage in the *Civil Marriage Act*[10] does not contravene section 15 of the *Charter*.

[28] The judge then considered whether the *C.C.Q.* provisions on the family residence, the family patrimony, child support, the partnership of acquests, and spousal support discriminate against *de facto* spouses under section 15 of the *Charter*.

[29] After an overview of *Andrews v. Law Society of British Columbia,*[11] *Law v. Canada (Minister of Employment and Immigration)*,[12] and *R. v. Kapp*,[13] the Supreme Court judgments setting out the appropriate framework for a section 15 analysis, the trial judge began by finding that the appellant had not shown that the distinction between *de facto* spouses and married spouses had any actual impact. Her action, therefore, was doomed to failure.

[30] Nevertheless, the trial judge proceeded with her analysis in light of *Nova Scotia (Attorney General) v. Walsh*,[14] a Supreme Court ruling on the issue of discrimination between *de facto* spouses and married spouses. In her opinion, that judgment determined the outcome of the present matter.

[31] The trial judge found that, in *Walsh*, the Supreme Court clearly established that "a uniform and universal protective regime independent of choice of matrimonial status" could not be instituted under section 15.[15] The Supreme Court expressed the view that

---

7 *Civil Marriage Act*, S.C. 2005, ch. 33.
8 *Constitution Act, 186*7 (U.K.) 30 & 31 Vict., c. 3,
9 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 at paras. 17, 18 and 33.
10 *Civil Marriage Act*, *supra* note 7.
11 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164-169 ("*Andrews*").
12 *Law v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 497 ("*Law*").
13 *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 ("*Kapp*").
14 *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83 ("*Walsh*").
15 *Ibid.* at para. 55.

the freedom to choose whether or not to marry must be respected. This freedom is fundamental, since the decision is an intensely personal one that "engages a complex interplay of social, political, religious, and financial considerations".[16]

[32] The judge also found that *Walsh* applies in Quebec, though there is an obligation of support between *de facto* spouses in Nova Scotia. In her view, this issue was not the cornerstone of the majority reasons in *Walsh*. Bastarache J. refers to the action for support merely to [TRANSLATION] "point out that Nova Scotia law has evolved to offer a certain protection to *de facto* spouses".[17] The Supreme Court's opinion is fundamentally based on freedom of choice, and this factor is just as applicable in Quebec as it is in Nova Scotia.[18]

[33] The trial judge considered that the differential treatment between married spouses and *de facto* spouses is in keeping with section 15 of the *Charter*, since the purpose of the distinction is to safeguard the freedom to choose. Indeed, the legislative history of the *C.C.Q.* reveals that this is the purpose sought by the Quebec legislature.

[34] Finally, the trial judge noted that, though Quebec is first among Canadian provinces in terms of the number of couples living in *de facto* unions and of children born out of wedlock (60%), and though it is the only Canadian province not to have enacted a statute to govern the obligation of support between *de facto* spouses, it is not for the courts to legislate.

[35] The judge also rejected the appellant's claims for extrajudicial and expert fees.

III - THE GROUNDS OF APPEAL

[36] Before this Court, the appellant has abandoned her arguments concerning the shared constitutional jurisdiction over the definition of marriage.

[37] The appellant raises four issues. In addition to challenging the trial judge's rulings on two objections to the evidence, her main grounds of appeal concern the constitutional validity of several *C.C.Q.* provisions that apply only to couples joined in marriage or civil union. Finally, she contends that she is entitled to extrajudicial fees, including expert fees.

[38] I will first deal with the ground concerning the objections to the evidence, after which I will address the constitutional issues.

---

16 *Ibid.* at para. 43.
17 Trial judgement at para. 262.
18 *Ibid.* at para. 263.

IV - ANALYSIS

ISSUE 1

DID THE JUDGE ERR IN DISMISSING THE APPELLANT'S OBJECTION TO THE ADMISSIBILITY OF THE EXPERT OPINION OF MTRE ALAIN ROY?

[39] The AGQ filed an expert report by Professor Alain Roy entitled "L'évolution de la politique législative de l'union de fait au Québec – Analyse de l'approche autonomiste du législateur québécois sous l'éclairage du droit comparé".[19] Professor Roy had been mandated to describe the recent legislative and socio-legal context of the Quebec legislative policy regarding *de facto* spouses.

[40] The appellant contends that this report should have been declared inadmissible because he states his opinion on the intention of the Quebec legislature, something that falls to the judge to determine. Moreover, the factual issue of the evolution of Quebec legislative policy is not a technical matter requiring an expert opinion.

[41] As the AGQ points out, the facts in dispute must be distinguished from the historical and legislative facts that establish the purpose and history of the statute. Although, in many cases, the courts simply take judicial notice of historical and legislative facts—for example, through the filing of parliamentary debates—that does not mean that evidence cannot be adduced on this issue.[20]

[42] In my view, Professor Roy's report was admissible and, as the trial judge pointed out, complementary to Professor Benoît Moore's report, which dealt with the legislative history before 1980.

[43] While it is true that Professor Roy discusses the intention of the Quebec legislature, the trial judge found that the objective of the report was to demonstrate the purpose sought by the legislature and the context in which the impugned measures were enacted. She was also aware that some of the reports come close to expressing legal opinions and declared that she was not bound by them.

[44] Therefore, the trial judge did not commit a reviewable error on this point.

---

19 Alain Roy, *L'évolution de la politique législative de l'union de fait au Québec – Analyse de l'approche autonomiste du législateur québécois sous l'éclairage du droit comparé*. Report submitted to Mtre Benoît Belleau, Faculty of *Law* of the Université de Montréal, on June 30, 2008.

20 *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71 ("*Spence*") at paras. 68-69.

ISSUE 2

DID THE JUDGE ERR IN SUSTAINING THE OBJECTION TO THE FILING OF THE SURVEY BY THE CHAMBRE DES NOTAIRES?

[45] The applicant criticizes the trial judge for not allowing a survey prepared by the Chambre des notaires entitled "Sondage sur l'union libre – rapport de recherche, octobre 2007" to be adduced. She argues that it was carried out in a neutral context and should have been admitted as extrinsic evidence.

[46] In my view, the trial judge did not err in refusing to admit the survey into evidence. This document was not announced, and its author, who interprets the data in the report, could not be cross-examined.

ISSUE 3

DID THE JUDGE ERR IN DECLARING THAT THE PROVISIONS OF THE *CIVIL CODE OF QUÉBEC* PERTAINING TO THE RIGHT TO SUPPORT, THE DIVISION OF THE FAMILY PATRIMONY, THE PROTECTION OF THE FAMILY RESIDENCE, THE PARTNERSHIP OF ACQUESTS, AND THE COMPENSATORY ALLOWANCE DO NOT DISCRIMINATE AGAINST *DE FACTO* SPOUSES WITHIN THE MEANING OF SECTION 15 OF THE *CHARTER*?

[47] The main issues raised by the appeal concern the support obligation between *de facto* spouses on the one hand and the division of property in the event of a breakdown of the relationship on the other.

[48] I will address these issues separately because, in my view, distinctions must be drawn including with respect to the scope of the judgment in *Walsh*.

1. THE DIVISION OF PROPERTY (THE FAMILY RESIDENCE, THE FAMILY PATRIMONY, THE COMPENSATORY ALLOWANCE, AND THE PARTNERSHIP OF ACQUESTS[21])

[49] The judge's analysis of *Walsh* was thorough.[22] She noted that the dispute in that case concerned whether the differential treatment in question was substantively discriminatory.

[50] The facts can be summarized as follows. Susan Walsh and Wayne Bona lived together as *de facto* spouses for ten years, and two children were born of their union. Ms. Walsh quit both of her jobs to follow Mr. Bona when he received a job transfer. They purchased a home together as joint owners.

---

[21] Articles 401-413, 414-426, 427-430, 432, 433, 448-484 *C.C.Q.*

[22] *Walsh*, *supra* note 14.

[51] Subsequently, Ms. Walsh did not hold employment and stayed at home to take care of the two children, who were five and seven years old when the couple separated. She obtained support payments for both herself and the children, since the Nova Scotia *Maintenance and Custody Act*[23] empowers the court to make an order for support in favour of a *de facto* spouse. The origin of the dispute, however, was the rejection of her claim for the division of matrimonial property because the *Matrimonial Property Act*[24] ("*MPA*"), which creates a presumption of equal division of matrimonial assets, applied only to married spouses.

[52] The trial judge first referred to the reasons of Batarache J., who stated that the factual analysis of the differential treatment in question must involve a comparison of *de facto* spouses with married spouses not when the relationship breaks down, but at the time the union is formed.[25]

[53] She went on to note the following comment by Bastarache J., where he emphasized that the parties' decision to marry or not to marry, a choice that has legal consequences, is paramount:[26]

> 50 The MPA, then, can be viewed as creating a shared property regime that is tailored to persons who have taken a mutual positive step to invoke it. Conversely, it excludes from its ambit those persons who have not taken such a step. This requirement of consensus, be it through marriage or registration of a domestic partnership, enhances rather than diminishes respect for the autonomy and self-determination of unmarried cohabitants and their ability to live in relationships of their own design. As Iacobucci J. phrased it in *Law*, at para. 102, "[t]he law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects."
>
> ...
>
> 54 In the present case, however, the MPA is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, *must be presumed to have a mutual intention to enter into an economic partnership*. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bear this out. It does not necessarily follow, however, that

---

23 *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160.
24 *Matrimonial Property Act,* R.S.N.S. 1989, c. 275.
25 Trial judgment at para. 240; *Walsh*, *supra* note 14 at para. 35.
26 *Walsh*, *ibid*. at paras. 50 and 54.

> these same persons would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship. As *Eichler*, *supra*, points out, at pp. 95-96:
>
> > There is a distinct difference between a young couple living together, having a child together, and then splitting up, and an older couple living together after they have raised children generated with another partner. If a middle-aged couple decide to move in together at the age of fifty-five and to split at age sixty, and if both of them have children in their thirties, the partners may wish to protect their assets for themselves and for their children — with whom they have had a close relationship for over thirty years — rather than with a partner with whom they were associated for five years

[54] The trial judge remarked that, in Quebec, *de facto* spouses may gain access to a regime governing the division of family property by entering into a cohabitation contract or by registering a civil union. In her view, this choice is in keeping with the fundamental purpose of section 15 of the *Charter*. As the Supreme Court noted, if a change is to be made to the regime, the task falls to the legislature, not the courts:[27]

> 55 In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. It is true that the benefits that one can be deprived of under a s. 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in *M. v. H.*, *supra*. It has not been established, however, that there is a discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status, this is not a s. 15(1) issue. The *MPA* only protects persons who have demonstrated their intention to be bound by it and have exercised their right to choose.

[55] The trial judge concluded that there was no reason to find that the majority decision in *Walsh* did not apply to both the division of property and the obligation of support, since the Quebec legislature had simply chosen not to become involved in the relationship between *de facto* spouses. Legislative history shows clearly that it chose to favour freedom of choice.

[56] The appellant argues that the trial judge erred in deciding that *Walsh* settled the issue for Quebec as well. She argues that this judgment should be distinguished and that it has no precedential value in Quebec, for the following reasons: the property to be

---

[27] *Walsh*, *supra* note 14 at para. 55.

shared is not the same as that contemplated in the *MPA*, the nature of the remedy is different, and the Quebec regime is of public order, whereas the Nova Scotia statute allows individuals to opt out.

[57] The respondent, the AGQ and the Attorney General of Canada contend that this judgment has value as a constitutional precedent and is binding on this Court.

[58] With respect to the division of property between *de facto* spouses in the event of a separation, I share the trial judge's opinion that *Walsh* cannot be set aside in this case.

[59] In the case before us, the impugned *C.C.Q.* provisions pertaining to the division of property govern patrimonial relations between married spouses. On this issue, the Supreme Court has spoken clearly, stating that the freedom to choose whether to marry or not is paramount. Although in Quebec the legislature has stipulated that the *C.C.Q.* provisions governing the effects of marriage are of public order (article 391 *C.C.Q.*), while in Nova Scotia married spouses can choose not to be subject to the *MPA*, this does not in my opinion permit *Walsh* to be distinguished from the present case on this point.

[60] The Quebec legislature has addressed the issue of conjugal status and *de facto* unions on a number of occasions (1980, 1989, 1991, 1999, 2002)[28] and has deliberately decided to allow spouses the freedom to choose the type of relationship they wish. If the issue is to be revisited from the perspective of the division of assets, this should be done by the legislature in light of the changes that have taken place in society, since the Supreme Court has determined that the legislative choice already made on this issue does not contravene section 15 of the *Charter*.

2. THE OBLIGATION OF SUPPORT

[61] In the trial judge's opinion, *Walsh* also settles the question of the obligation of support between *de facto* spouses. She wrote the following:

> [TRANSLATION]
>
> [256] The applicant seeks to distinguish *Walsh* because there is an obligation of support between *de facto* spouses in Nova Scotia but not in Quebec.
>
> [257] She argues that her claim for support is supported by case law of the Supreme Court, particularly *Miron v. Trudel,* where the Court declared that in matters involving support, it was not appropriate to draw a distinction based on whether or not a couple is legally married. This principle, she submits, was not challenged in *Walsh*.

[28] Alain Roy, *supra* note 19.

> [258] It should be noted here that the issue in dispute in *Morin* was essentially the exclusion of unmarried partners from benefits received by married partners under the *Ontario Insurance Act* in the event of an automobile accident. A majority of the Court found that the distinction created by the Ontario *Insurance Act* infringed the right to equality.
>
> [259] The differential treatment in *Miron* in no way targeted the legal relationship between *de facto* spouses as between themselves but rather their rights and obligations with respect to a third party. By contrast, in the present case, the issue is the legal relationship between two unmarried persons.
>
> [260] Although *Miron* deals with the relationship between the couple and third parties and not the rights and obligations of the spouses as between themselves, some decisions from common law provinces have interpreted the judgment as requiring that certain rights and obligations arising from marriage be extended to *de facto* spouses. The Supreme Court corrected this interpretation in 2002, however, in the judgment in *Walsh*.
>
> [261] Bastarache J. distinguishes *Miron*, pointing out that it concerned the couple's relationship as a unit with a third party, an insurer, and adding that when the case involves the regulation of the relationship between the members of the couple, the choices and decisions they make are determinative.
>
> [262] Moreover, the existence of a support obligation between *de facto* spouses in Nova Scotia is not the cornerstone of the majority reasons in *Walsh*. Bastarache J. refers to the action for support merely to point out that Nova Scotia law has evolved to offer a certain protection to *de facto* spouses.
>
> [263] Thus, the majority opinion in *Walsh* is based essentially on the fundamental importance of freedom of choice, and this factor is just as applicable in Quebec as it is in Nova Scotia.
>
> [264] As for the purpose of the differential treatment, namely, the preservation of the freedom to choose of *de facto* spouses, it is consistent with s. 15 of the *Charter*. It is a purpose that respects the dignity and autonomy of *de facto* spouses by recognizing their freedom to choose the way in which to structure their reciprocal support obligations in their most intimate and important personal relationships. In no way did the legislature intend to promote the message that *de facto* spouses are less worthy of respect or that their relationships have less value than those of married persons.
>
> [CITATIONS OMITTED.]

[62] According to the trial judge, the legislative objective is consistent with section 15 of the *Charter*: In her view, a consideration of the relevant contextual factors leads to

the conclusion that there is no discrimination within the meaning of section 15 of the *Charter*. The trial judge found that, as with the division of patrimonial rights, here too the freedom to choose whether or not to marry is paramount.

[63] She also pointed out that, since 2002, *de facto* spouses may take on the same rights and obligations as those associated with marriage by entering into a civil union pursuant to articles 521.1 *C.C.Q.* and following. They are also free to [TRANSLATION] "tailor a legal regime" in a cohabitation agreement.[29]

[64] With great respect for the trial judge, I find that *Walsh* does not have precedential value with respect to the obligation of spousal support.

[65] In *Walsh*, the Supreme Court considers the constitutional validity of the *MPA* in a legislative context where *de facto* spouses have the right to support in the event of separation. Bastarache J. explains that no constitutional rule obliges the State to extend the scope of the *MPA* to protect *de facto* spouses. He does note, however, that *de facto* spouses have other options and that, in addition, the law has evolved to permit *de facto* spouses–in Nova Scotia–to apply to a court for an order of support. He states the following:[30]

> 58 Persons unwilling or unable to marry have alternative choices and remedies available to them. The couple may choose to own property jointly and/or to enter into a domestic contract that may be enforced pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 52(1), and the *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6, s. 2(e). These couples are also capable of accessing all of the benefits of the *MPA* through the joint registration of a domestic partnership under the *LRA*.
>
> 59 It is true that certain unmarried couples may also choose to organize their relationship as an economic partnership for the period of their cohabitation. Similarly, some couples, without making a public and legally binding commitment, may simply live out their lives together in a manner akin to marriage. In these cases, the law has evolved to protect those persons who may be unfairly disadvantaged as a result of the termination of their relationship.
>
> 60 Firstly, provincial legislation provides that an unmarried cohabitant or "common-law partner" may apply to a court for an order of maintenance or support: *Maintenance and Custody Act*, s. 3. The court is empowered to take into consideration a host of factors pertaining to the manner in which the parties organized their relationship as well as the particular needs and circumstances of both of the parties.

---

29 Trial judgement at para. 270.

30 *Walsh*, *supra* note 14 at paras. 58-60.

[EMPHASIS ADDED.]

[66] The Supreme Court analyzed the constitutional validity of the *MPA* in the legislative context of Nova Scotia, which expressly gives *de facto* spouses the right to apply to a court for an order of support. We cannot assume that its conclusion would have been the same if the dispute had concerned the obligation of support between *de facto* spouses, as it does in the present case.

[67] Moreover, Gonthier J. draws a clear distinction between the division of patrimonial property and support. The objectives are different: While the first aims to divide property according to a contractual or legal regime, the second has a social objective:[31]

> 203 It is true that in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 177, I recognized that there is "a growing political recognition that cohabiting opposite-sex couples should be subject to the spousal support regime that applies to married couples because they have come to fill a similar social role". However, I want to underline the fundamental difference between spousal support, based on the needs of the applicant, and the division of matrimonial assets. While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need. ...
>
> 204 The division of matrimonial assets and spousal support have different objectives. <u>One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children.</u> This Court also recognized in *M. v. H.*, *supra*, at para. 93, that one of the objectives of spousal support is to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those spouses who have the capacity to support them. <u>The support obligation responds to social concerns with respect to situations of dependency that may occur in common law relationships. However, that obligation, unlike the division of matrimonial property, is not of a contractual nature.</u> Entirely different principles underlie the two regimes. To invoke s. 15(1) of the *Charter* to obtain spousal assets without regard to need raises the spectre of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.
>
> [EMPHASIS ADDED.]

[68] This is an important distinction. Support payments exist to meet basic needs and represent an aspect of social solidarity, whereas the division of property is contractual in origin. Therefore, it must be determined whether article 585 *C.C.Q.*, which concerns the obligation of support, breaches subsection 15(1) of the *Charter*.

---

[31] *Walsh*, *supra* note 14 at paras. 203-204.

2.1 Does article 585 *C.C.Q.* breach subsection 15(1) of the *Charter*?

[69] The legislative provisions at the heart of this dispute are the following:

> *C.C.Q.*
>
> **585** Married or civil union spouses, and relatives in the direct line in the first degree, owe each other support.
>
> **CHARTER**
>
> **15** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[70] In *Kapp*, the Supreme Court reviewed the three-part test established in *Law* to determine whether there is discrimination within the meaning of section 15(1) of the *Charter*:[32]

> [17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[71] In *Kapp*, the Supreme Court notes that *Law* does not employ "human dignity" as a distinct legal test but instead affirms the approach to substantive equality under section 15 of the *Charter*:[33]

> [22] As critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.
>
> [23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in Andrews of

---

[32] *Kapp*, *supra* note 13 at para. 17.
[33] *Kapp*, *supra* note 13 at paras. 22-24.

> perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)
>
> [24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in Andrews and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in Andrews — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.
>
> [CITATIONS OMITTED.]

[72] As Cory J. notes in *M. v. H.*,[34] the main guidelines formulated by the Supreme Court for an analysis under section 15(1) of the *Charter* should not be seen as a strict test but rather as points of reference for a court to determine whether the right to equality within the meaning of the *Charter* has been infringed.

[73] The first stage of the analysis presents no problems, as the trial judge found. Indeed, in *Miron v. Trudel*[35] the Supreme Court recognized marital status as an analogous ground under section 15(1) of the *Charter*. Moreover, the law creates a distinction by not including *de facto* spouses in article 585 *C.C.Q.*

[74] Therefore, the dispute centres on the second stage of the test: Does the distinction create a disadvantage by perpetuating a prejudice or stereotype?

[75] At this stage of the analysis, the four contextual factors laid down in *Law* are helpful in identifying substantively discriminatory distinctions: (1) a pre-existing disadvantage; (2) the degree of correspondence between the differential treatment and the actual situation of the claimant group; (3) the existence of an ameliorative purpose or effect; and (4) the nature of the interest affected.

[76] Our analysis of the alleged discrimination requires that we first identify the comparator group. The appellant proposes married spouses as the comparator group to

---

[34] *M. v. H.*, [1999] 2 S.C.R. 3 at para. 46.
[35] *Miron v. Trudel* [1995] 2 S.C.R. 418 ("*Miron"*).

be compared with *de facto* spouses who have lived together for three years or one year if a child has been born of their union.

[77] In *Law*, the Supreme Court discussed the role of the court in identifying a comparator group:[36]

> 58 When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes*, supra, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.

[78] In *Hodge v. Canada (Minister of Human Resources and Development*,[37] however, the Supreme Court notes that identifying the correct comparator group is a matter of law for the court to determine.

[79] In *Walsh*, Bastarache J. describes the comparator group as follows:[38]

> 39 As this Court has stated on numerous occasions, the equality guarantee is a comparative concept. It requires the location of an appropriate comparator group from which to assess the discrimination claim. The two comparator groups in this case are married heterosexual cohabitants, to which the MPA applies, and unmarried heterosexual cohabitants, to which the MPA does not apply. ...

[80] Therefore, in light of *Walsh*, I accept the following comparator group: married or civilly united spouses, to whom article 585 *C.C.Q.* applies, and *de facto* spouses, to whom it does not.

[81] It is not necessary at this stage to specify the number of years the couple must live together for their status to be recognized. For the purpose of our analysis, it is sufficient that the *de facto* spouses considered be those with relatively stable unions.

[82] Of the four factors set out in *Law* to identify substantively discriminatory distinctions, only the first, second, and fourth are applicable here, as the third is used to

---

[36] *Law*, *supra* note 12 at para. 58.

[37] *Hodge v. Canada (Minister of Human Resources and Development),* [2004] 3 S.C.R. 357, 2004 SCC 65, at para. 21.

[38] *Walsh*, *supra* note 14 at para. 39.

determine whether a measure targeting disadvantaged individuals has an ameliorative effect within the meaning of section 15(2) of the *Charter*.

2.1.1 A pre-existing disadvantage

[83] The trial judge found that there is no pre-existing disadvantage for *de facto* spouses. She wrote:

> [TRANSLATION]
>
> In Quebec, *de facto* spouses are in no way marginalized. They bear no stigma and suffer no prejudice. In our society, *de facto* unions represent a way of life that is as legitimate and accepted as marriage. There is no pre-existing disadvantage in the present case.

[84] I agree with the trial judge that *de facto* unions are accepted in today's society. As for her finding, however, I conclude that disadvantages based on stereotyping persist in the statute. The situation of *de facto* spouses can be compared to that of women with regard to work remuneration. Although no longer stigmatized on the job market, the effects of the discrimination women have historically suffered persist when it comes to pay equity.

[85] The Supreme Court has acknowledged the historical disadvantages suffered by *de facto* spouses. In *Walsh*, Bastarache J., referring to comments by McLachlin C.J., wrote the following:[39]

> 41 This Court has recognized both the historical disadvantage suffered by unmarried cohabiting couples as well as the recent social acceptance of this family form. As McLachlin J. noted in *Miron*, *supra*, at para. 152:
>
> > There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

[86] Historically, spouses living in *de facto* unions have constituted a disadvantaged group. In Quebec, before the 1980 reform, *de facto* unions, at the time known as

---

[39] *Walsh*, *supra* note 14 at para. 41.

"concubinage", were considered a reprehensible lifestyle choice. Professors Edith Deleury and Marlène Cano write:[40]

> [TRANSLATION]
>
> Concubinage, a morally disgraceful relationship in a deeply Catholic society, was considered to be a reprehensible state because it was contrary to public order and good morals. Some authors therefore defined concubinage as a social relationship that lacked any legal aspects. Indeed, the only reference to this type of union in the *Civil Code* was in article 768. As Serge Allard writes, this provision prohibited gifts between concubinaries and provided a theoretical basis for those who argued that contracts between *de facto* spouses were prohibited by law.
>
> [CITATIONS OMITTED.]

[87] In his report, Professor Alain Roy also explains that, before the 1980 family law reform, *de facto* unions were considered to be contrary to public order and good morals:[41]

> [TRANSLATION]
>
> Although today, the *de facto* union is a socially and legally acceptable way to experience a conjugal relationship, it has not always been so. Before the 1980 family law reform, *de facto* unions—known at the time as "concubinage"—were considered to be nothing less than contrary to public order and good morals. In a society dominated by the clergy, as Quebec was, couples and families could be legitimate only if sanctioned by marriage.
>
> The provisions of the former *Civil Code of Lower Canada* on the family clearly express the moral perspective from which extramarital relationships were seen. Believing that *de facto* unions were a threat to the stability of the family and public morals, the State recognized the rights of spouses only. Far from being ignored by the civil law, concubinaries were objects of suspicion, to say the least. As Professor Jean Pineau pointed out, the legislature distinguished [TRANSLATION] "...marriage—'a social ceremony'—from cohabitational relationships, the worthy from the less worthy". Thus, concubinaries were denied the right to make gifts *inter vivos*, thereby depriving them of a form of contractual organization that could have been used to consolidate their relationship and ensure relative stability.

---

40 Edith Deleury & Marlène Cano, "Le concubinage au Québec et dans l'ensemble du Canada. Deux systèmes juridiques, deux approches" in Jacqueline Rubellin-Devichi (ed.), *Des concubinages dans le monde* (Paris: Éditions du C.N.R.S., 1990) 85 at 88-89.

41 Alain Roy, *supra* note 19 at 7-9.

> The legislature was also harshly dismissive of children born of cohabitational unions. "Illegitimate children", as they were called, were deprived of a significant number of legal prerogatives. Unless legitimized by the subsequent marriage of their parents, illegitimate children could not count on the duty to maintain and educate children that is normally binding upon parents. Illegitimate children were also barred from intestate succession from their ascendants, since the devolution of successions was still based on legitimacy. As the fruit of conjugal relationships deemed to be socially reprehensible, illegitimate children were nothing more than [TRANSLATION] "legal outcasts". As Professor Jean-Louis Baudouin, as he then was, wrote:
>
> > [TRANSLATION]
> >
> > The legal reasons relied on to justify ignoring the illegitimate family unit are clearly apparent from a reading of our Code ...: the desire to protect the rights of the legitimate family, the refusal to approve conduct contrary to good morals, the refusal to encourage the proliferation of cohabitational unions, and so on.
> >
> > [CITATIONS OMITTED.]

[88] In 1991, during the parliamentary committee study of Bill 125 on the *C.C.Q.*, the Minister of Justice made the following remark:

> [TRANSLATION]
>
> September 5, 1991:
>
> Without a doubt, in the Code, we side with marriage, in the sense that we promote the institution of marriage through certain requirements and, as a result, people who choose marriage are choosing an institution that includes these requirements, and stability for the family.
>
> November 19, 1991:
>
> ... my conclusion is very clear: marriage is, to me, an institution that is fundamental, formal, I would even say sacred in our society.

[89] Thus, it is clear that, at the time the new *C.C.Q.* was enacted, the legislature deliberately omitted *de facto* unions from the provisions on the family because, in its eyes, they were not as stable as marriage.

[90] Despite the many recommendations made by an interdepartmental committee charged in 1996 to consider the situation of *de facto* spouses,[42] the Quebec legislature has tabled no bill providing a framework to govern their mutual relationships. In contrast,

---

[42] *Rapport du Comité interministériel sur les unions de fait* (Quebec, June 1996).

all other Canadian provinces as well as the territories have enacted statutes that create, at the very least, an obligation of support between *de facto* spouses. Indeed, in some cases, the legal framework goes so far as to confer the same rights on *de facto* spouses as married spouses gain through the effects of marriage.[43]

[91] In Quebec, the legislator's concern with *de facto* spouses is apparent in the context of social or tax legislation, which awards them the same rights as married or civil union spouses. Under the *C.C.Q.*, however, the rights of spouses—and in particular, the right to seek support from a former spouse if in need after a separation—are recognized only if there is some formal aspect to the union, whatever the form chosen.

[92] Although *de facto* unions discretely emerged in the *C.C.Q.*,[44] because of the enduring stereotypes, the legislature has never recognized them in its codification of the rights and obligations flowing from conjugal relationships, the very heart of family law. Nevertheless, a *de facto* union can function in a manner identical to a marriage or a civil union. Living together can give rise to the same dependence and vulnerability, regardless of the type of union.

[93] The *C.C.Q.* contains other traces of the disadvantages suffered by *de facto* spouses. For example, as author Michel Tétrault points out,[45] while spouses may inherit from each other even in the absence of a will (article 666 ff. *C.C.Q.*), *de facto* spouses may do so only if there is a will to that effect. *De facto* spouses also may not make gifts *mortis causa* (articles 1818 and 1819 *C.C.Q.*).

[94] In *M. v. H.*,[46] the Supreme Court explains that one of the factors demonstrating that the distinction infringes on dignity is the vulnerability suffered by a group or a person in question. In that case, the issue was whether section 29 of the Ontario *Family Law Act*[47] created a discriminatory distinction because it did not permit same-sex *de facto* spouses to apply for support following the breakdown of their relationship, yet permitted heterosexual *de facto* spouses and married spouses to do so. Cory J. writes:

> 69 In this case, there is significant pre-existing disadvantage and vulnerability, and these circumstances are exacerbated by the impugned legislation. The legislative provision in question draws a distinction that prevents persons in a

---

43 *Family Law Act*, R.S.O. 1990, c. F-3 (Ontario); *Family Services Act*, S.N.B. 1980, c. F-2.2 (New Brunswick); *Family Maintenance Act*, R.S.M. 1987, c. F-20 (Manitoba); *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160 (Nova Scotia); *Family Relations Act*, R.S.B.C. 1996, c. 128 (British Columbia); *Family Law Act*, R.S.N.L. 1990, c. F-2 (Newfoundland and Labrador); *Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2 (Saskatchewan); *Domestic Relations Act*, R.S.A. 2000, c. D-14 (Alberta); *Family Law Act*, S.P.E.I. 1995, c. 12 (Prince Edward Island); *Family Law Act*, S.N.W.T. 1997, c. 18 (Northwest Territories); *Family Property and Support Act,* R.S.Y, 2002 c. 83 (Yukon).

44 See, for example, articles 15, 555, and 1938 *C.C.Q.*

45 Michel Tétrault, *Droit de la famille*, *volume 1* : *Le mariage, l'union civile et les conjoints de fait* (Cowansville: Yvon Blais, 2010) at . 853.

46 *M. v. H., supra* note 34 at para. 69.

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

> same-sex relationship from gaining access to the court-enforced and -protected support system. This system clearly provides a benefit to unmarried heterosexual persons who come within the definition set out in s. 29, and thereby provides a measure of protection for their economic interests. This protection is denied to persons in a same-sex relationship who would otherwise meet the statute's requirements, and as a result, a person in the position of the claimant is denied a benefit regarding an important aspect of life in today's society. Neither common law nor equity provides the remedy of maintenance that is made available by the FLA. The denial of that potential benefit, which may impose a financial burden on persons in the position of the claimant, contributes to the general vulnerability experienced by individuals in same-sex relationships.

[95] The same vulnerability can be observed in the case before us.

[96] What is more, the failure to include *de facto* spouses in article 585 *C.C.Q.* reflects the stereotype whereby these unions are not sufficiently stable or serious to warrant the legal protection of the right of these spouses to have their basic needs met in the event of a breakdown of the relationship, even though these types of unions can bear the same characteristics of financial dependence as marriages or civil unions.[48] The obligation of support between spouses in article 585 *C.C.Q.* indicates that the legislature recognizes the interdependence that can arise in conjugal relationships (articles 392 and 521.6 *C.C.Q.*). By not including *de facto* spouses in this provision, the legislature deems them less worthy of protection than married spouses and civil union spouses, even though *de facto* unions present many similarities with those other types of unions.

[97] In an article entitled "L'union de fait entre noir et blanc",[49] Professor Benoît Moore explains the historical background of the formalities surrounding marriage. While at one time the objective was to protect the institution of marriage, the law eventually became a way to protect spouses from the vulnerability that can result from economic interdependence. He states the following:[50]

> [TRANSLATION]
>
> It means that, as soon as the law no longer seeks to protect the institution of marriage for the purposes of social stability and preservation of filial lines, but instead to protect married individuals from the economic vulnerability that can arise from economic interdependence, the formalist construct loses all meaning. The formalization of the union was the very essence of the role of the law with

---

48 *M. v. H., supra* note 34 at para. 54.

49 Benoît Moore, "Variations chromatiques : l'union de fait entre noir et blanc" in Générosa Bras Miranda & Benoît Moore (eds.), *Mélanges Adrian Popovici : Les couleurs du droit* (Montreal: Thémis, 2010) 97 at 101 et seq.

50 *Ibid*. at 117.

> regard to marriage and the family; it defined it, incarnated it. Drawing a distinction between marriage and other types of conjugal relationships was the ontological consequence of the objective of protecting marriage in the name of the family. But now this formality is nothing more than an artifact with a role that is at best neutral and at worst counterproductive. Today, the basis of policy on the family can be found in the effects of the union and the protection of the members of the family as opposed to the family as a whole. The test for applying the law must take this into consideration. If it does not, the law has missed its target by protecting only an increasingly marginal portion of family members, thereby affecting its consistency and, especially, its efficacy.
>
> [CITATION OMITTED.] [EMPHASIS ADDED.]

[98] To conclude on this point, although the legislative disadvantages for *de facto* spouses are now less significant and these types of unions have become socially acceptable, the fact remains that the legislature's failure to include them within the protection afforded by article 585 *C.C.Q.* perpetuates the stereotype that these types of unions are less durable and serious than marriage and civil unions, which are recognized by means of a formal act.

2.1.2 The degree of correspondence between the differential treatment and the actual circumstances of the group

[99] In *Law*, the Supreme Court explains this contextual factor as follows:[51]

> 88 …
>
> (9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:
>
> ...
>
> B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.

---

[51] *Law*, *supra* note 12 at para. 88(9)(B).

[100] As noted by Gonthier J. in *Walsh,*[52] the obligation of support has an important social objective that differs from that of the division of assets. Elsewhere in Canada, the legislatures acknowledge that this obligation responds to circumstances of financial dependence that can arise in *de facto* unions.[53]

[101] The Quebec legislature has also recognized that the obligation of support is distinct. Article 585 *C.C.Q.* contemplates not only married and civil union spouses; it also stipulates that relatives in the direct line in the first degree owe each other support. Thus, the obligation of support is not solely the consequence of a contractual agreement; rather, it is a social obligation toward members of the immediate family unit.

[102] The obligation of support between family members has long existed, and its scope has varied with the evolution of society and changes in social organization. In the *Civil Code of Lower Canada*, this obligation, also present in the *Code Napoléon*, bound not only spouses and children but also other ascendants, as well as sons- and daughters-in-law towards their father- or mother-in-law. It was not automatic, however, and was based on the well-known concepts of the needs of the creditor and the financial means of the debtor, as it still is today.

[103] Professors Jean Pineau and Marie Pratte define the obligation of support as follows:[54]

> [TRANSLATION]
>
> 486. — Definitions — the so-called obligation of support is defined as what is incumbent upon a person to provide the means necessary to meet another's essential needs, said obligation being based, as we have seen, on the notion of the solidarity between family members.

[104] Thus, the objective of the obligation of support has always been to ensure that other members of the family unit have the resources necessary to fulfil their needs.

[105] The Civil Code Revision Office also noted that the obligation of support includes members of the family unit, not only spouses. It proposed that the reform reflect the evolution of society[55] by enacting article 336:[56]

---

52 *Walsh*, *supra* note 14 at para. 204, *per* Gonthier J.

53 *Supra* note 43.

54 Jean Pineau & Marie Pratte, *La famille* (Montreal: Thémis, 2006) at 773.

55 Civil Code Revision Office, *Report on the Quebec Civil Code – Volume II : Commentaires, vol. 1, Books 1-4* (Quebec: Éditeur officiel, 1978) at 205.

56 "Article 336: An obligation of support exists between: 1. Consorts; 2. Relatives in the direct line." Civil Code Code Revision Office, *Report on the Quebec Civil Code – Volume II: Draft Civil Code* (Quebec: Éditeur officiel, 1978) at 119.

> The proposed article represents a substantial change to the present rules. In effect, it seemed wise to restrict the number of persons who benefit from the obligation of support. Such a reform reflects the evolution of society, and more particularly that of the family which has undergone a transition from a family within its widest meaning to a "nuclear family". Social legislation is also tending to alter interaction between individuals, since social assistance ensures needy persons a minimum amount.

[106] The legislature accepted this proposal in 1980 when it enacted the Book concerning the family.[57] The provision went through subsequent amendments restricting the obligation of support to first degree ascendants or descendants in the first degree (1991)[58] and adding civil union spouses (2002).[59]

[107] Thus, the obligation of support has always been intended for the family unit, which has evolved through the years. As noted above, in 2006, 34.6% of couples in Quebec were in *de facto* relationships in 2006, while in the rest of Canada, only 18.4% of couples were. Moreover, as early as 2002, 60% of children in Quebec were born of *de facto* unions. These facts alone demonstrate that, in Quebec, the family unit includes families formed by *de facto* spouses and that the majority of children are now born of these types of unions. To ignore these facts, as the legislature has done, is to exclude over one-third of couples in Quebec from a measure that in fact exists precisely to protect this family unit.

[108] By requiring marriage or civil union as a precondition to the right to claim support, the legislature fails to consider social realities. The purpose of an obligation of support between former spouses is to enable a person unable to meet his or her basic needs after a separation (because of the situation of economic dependence that developed during the relationship, for example) to obtain support from a former spouse who can afford to provide it. The nature of a couple's relationship, a *de facto* union, a civil union, or a marriage in no way changes whether one of the partners needs support after the relationship breaks down.

[109] Indeed, as the Supreme Court noted in *Miron v. Trudel,*[60] there is a similarity between *de facto* partners and married or civil union spouses:

> 155 Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the *amicus curiae* has pointed out, 63 Ontario statutes currently make no distinction

---

57 Art. 633 *C.C.Q.* (1980).

58 *Bill 125 enacting the new Civil Code of Québec: Civil Code of Québec*, S.Q. 1991, c. 64.

59 *Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6.

60 *Miron*, *supra* note 35 at para. 155; see also *Peter v. Beblow*, [1993] 1 R.C.S. 980 at para. 74; *Walsh*, *supra* note 14 at para. 203-204.

> between married partners and unmarried partners who have cohabited in a conjugal relationship. For example, the right to spousal maintenance is not conditioned on marriage: see Part III, Family *Law* Act, R.S.O. 1990, c. F.3, which establishes a right to spousal support for those who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence and who have a child. Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.
>
> [EMPHASIS ADDED.]

[110] *De facto* spouses are equated with married spouses in several statutes in Quebec as well. Professor Brigitte Lefebvre makes the following point on the issue:[61]

> [TRANSLATION]
>
> In many respects, the legislature recognizes that *de facto* spouses constitute a family. Just as in the traditional family, they may be dependent on each other. Thus, a part of the debtor's salary is exempt from seizure if that individual provides for the needs of his or her spouse. Like married spouses, *de facto* spouses who purchase an immovable together may repossess a dwelling to use as their residence. Moreover, the legislature now treats *de facto* spouses the same as married spouses for tax purposes. Despite there being no obligation of support between *de facto* spouses, the legislature considers that they are economically interdependent and that they contribute directly or indirectly to household responsibilities, just as they would if they were married. In some statutes, the legislature systematically takes into account the income of the *de facto* spouse in determining eligibility for certain government programs or benefits.
>
> [CITATION OMITTED.] [EMPHASIS ADDED.]

[111] Professor Zheng Wu, discussing the stability of *de facto* unions as compared to marriage, states that all unions tend to be unstable in their early years and that half of *de facto* unions remain stable, long-term relationships:[62]

> … First, all unions, including marriages, tend to be quite unstable during their first 3-5 years of existence, but stabilize after crossing this threshold. The highest risk

---

61 Brigitte Lefebvre, "L'évolution de la notion de conjoint en droit québécois" in *L'union civile : Nouveaux modèles de conjugalité et de parentalité au 21e siècle*, Actes du colloque du Groupe de réflexion en droit privé, (Cowansville: Yvon Blais, 2003) 3 at 19-20.

62 Zheng Wu, *supra* note 2 at 19-20.

> of divorce occurs in marriages less than 4 years old (Statistics Canada, 2005). To illustrate, almost one-quarter of all marriages formed in 1990-95 ended in marital separation or divorce by 4 years (Wu & Hart, 2003). Duration-specific divorce statistics show that 40 percent of annual divorces (2004 data) are of marriages under a decade old (Statistics Canada, 2008).
>
> Second, an increasing proportion of cohabitations cannot be treated as short-term or unstable unions. For over a decade, throughout Canada, at least one-half of common-law unions have been stable long-term relationships or variants of marriage, and cohabitations representing trial marriages or unstable unions thus form a *smaller* proportion of non-marital unions (Dumas & Bélanger, 2006). This implies that a minority proportion (one-fifth) of unstable cohabitations are distorting aggregate trends, giving a false general impression that all cohabitation is an uncommitted form of union – the ideological basis for treating cohabitation as subordinate to marriage and considering cohabitants ineligible for legal protection. But one-fifth of cohabitations are durable (lasting 5+ years) unions across Canada; in Québec, more than one-third of cohabitations last at least 5 years and almost one-fifth last 10 years or longer (Le Bourdais & Marcil-Gratton, 1996. ...

[112] Though she did not reject the report, the trial judge noted that some of Professor Wu's comments reveal his opinion with regard to legislative change in favour of *de facto* spouses. For my part, I find that the passage quoted is neutral and based on statistical data.

[113] Thus, *de facto* unions that last a certain amount of time, and particularly those into which children are born, are very similar to marriages.

[114] Moreover, the right at issue here is the right to claim support, not the right to obtain it solely by virtue of having been in a *de facto* relationship. Because it is not a statutory right to the division of assets (as is the case with family patrimony, for example), the court is required to determine on the facts whether support should be awarded, just as it would in the context of a separation of married spouses or a divorce. Article 587 *C.C.Q.* sets out the criteria for awarding support:

> ***587.*** In awarding support, account is taken of the needs and means of the parties, their circumstances and, as the case may be, the time needed by the creditor of support to acquire sufficient autonomy.

[115] In *Rossu v. Taylor*,[63] the Court of Appeal of Alberta clearly states that it is the inability of a *de facto* spouse to even advance a claim for support that infringes

---

[63] *Rossu v. Taylor,* 1998 ABCA 193, 161 D.L.R. (4th) 266, [1999] 1 W.W.R. 85, 39 R.F.L. (4th) 242, at paras. 121-124 (Alta. C.A.).

subsection 15(1) of the *Charter*. Given the nature of the right claimed, the homogeneity of the couples in *de facto* unions is not essential:

> 121 The composition of the affected group is also in issue in this case. Rossu argues that since not all unmarried spouses are disadvantaged by the *DRA* [*Domestic Relations Act*], the relevant group is not unmarried spouses, and the ground of distinction is not marital status.
>
> 122 We do not accept Rossu's arguments for several reasons. In our view, these arguments misunderstand the nature of the benefit at issue here. The *DRA* does not confer a right to support since not every applicant for support will receive support. Rather, the *DRA* confers a right to apply for support. It is the right to apply that is the benefit married partners are given, and from which unmarried partners are excluded. Entitlement to support, and the quantum of that support, is determined at a later stage after an examination of the nature of the relationship and the parties' economic positions. It is only at the entitlement stage that the relative economic positions of the parties becomes relevant, and Rossu's argument about dependent versus independent partners arises. It may well be that a law which limits support claims to dependent common law spouses would survive *Charter* scrutiny. We need not address the full dimensions of that issue since it is clear that all unmarried partners have been deprived of the right to even apply for support.
>
> 123 It is not necessary to establish that every individual member of the group would exercise the entitlement to claim support. If it were, it would be akin to finding that a law prohibiting maternity leave is not discrimination on the basis of gender because only pregnant employed women are actually disadvantaged by it.
>
> 124 A better approach would be to examine whether a member of a group has access to a benefit regardless of whether he or she actually intends to claim the benefit, or would be entitled to receive it if he or she did so. In this case, unmarried spouses lack access to the benefit of a legislated right to apply for spousal support. We reiterate that the benefit provided by the *DRA* is the right to apply for support, and not a right to receive support. In other words, it does not confer an automatic entitlement to support. Whether any given individual were entitled to support could only be determined by the Court on a case by case basis after an application were made. We are only concerned here with the right to apply to have a court make that determination, and it is clear that all unmarried partners are excluded from that benefit. It is not necessary to fully examine the concept of dependency put forward by Taylor in this case since the nature of the relationship and the economic consequences of the relationship are not relevant until the later, entitlement stage of the analysis. This does not mean that the content of the substantive support rights granted to those living common law

> would be irrelevant to a s. 15 analysis. It only means that in this context it is enough that we have concluded that the inability to even advance the claim is by itself a breach of s. 15 equality rights.
>
> [EMPHASIS ADDED.]

[116] The trial judge also criticized the appellant for failing to prove the actual impact of the distinction the legislature makes between *de facto* spouses and married spouses. She specifically noted that the submitted expert reports do not compare the post-breakdown situation of families where the spouses were married with those of families where the spouses were not. She wrote:

> [TRANSLATION]
>
> [222] The lack of evidence of the concrete effects of the distinction between *de facto* and married spouses is fatal to the applicant's action. In fact, the evidence reveals the following:
>
> - *De facto* spouses in Quebec are not subject to any stereotypical disadvantages or prejudice;
> - The legislature's purpose in preserving a distinction between marriage and *de facto* unions is to safeguard freedom of choice and to respect the dignity and autonomy of *de facto* spouses;
> - No concrete effect of the distinction between *de facto* spouses and married spouses at the time of separation has been shown to exist;

[117] In my view, the trial judge should have taken judicial notice of the actual impact of the distinction made by the legislature between *de facto* spouses and married spouses.

[118] In *Law*, the Supreme Court points out that, in many cases, it will be evident on the basis of judicial notice and logic that the distinction is discriminatory within the meaning of section 15(1) of the *Charter*:[64]

> 88 …
>
> ...
>
> (10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of

[64] *Law*, *supra* note 12 at para. 88(10).

> human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision.

[119] In *Moge v. Moge*, L'Heureux-Dubé J. notes that, in the case of a divorce, the economic impact on women cannot reasonably be questioned and should be amenable to judicial notice:[65]

> Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice ...

[120] In *Miron*, L'Heureux-Dubé J., this time addressing the issue of *de facto* spouses, referred to the injustices suffered by dependent spouses upon separation, whether or not they were married:[66]

> 97 Both the courts and the legislatures have, in recent years, acknowledged and responded to the injustices that often flow from power imbalances of this type and have thereby given increasing recognition to non-traditional forms of relationships. Why else did the Ontario legislature in 1986 extend benefits from married persons to cohabiting partners in over 30 Ontario statutes, several of which raised issues of financial interdependence that are analogous to the impugned provisions of the *Insurance Act*? Why else has the Ontario *Family Law Act,* R.S.O. 1990, c. F.3, imposed an obligation of mutual support on common law spouses since 1978? Why else has the common law doctrine of constructive trust intervened to provide relief to unmarried persons in instances where one partner is unjustly enriched by the relationship? *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38. Finally, why else has this Court rejected the hegemony of the "clean break" model of spousal support in both married and common law relationships of demonstrated duration and interdependence? *Moge v. Moge*, [1992] 3 S.C.R. 813. In all of these cases, although the language has generally employed gender-neutral references to "spouses", it is indisputable that much of the impetus for these changes stemmed from courts' and legislatures' increasing recognition of the disadvantage endured by dependent spouses, most often women, within the context of those relationships.
>
> 98 If the continuing individual autonomy of the parties were the only assumption governing the formation of family units, then none of these protections would be deemed necessary. ...

---

65 *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 91 ("*Moge*").
66 *Miron*, *supra* note 35 at paras. 97-98

[121] In *M. v. H*., the Supreme Court, in an opinion written by Cory J., also observes the financial dependence that can result from a *de facto* union:[67]

> 54 It is true that women in common law relationships often tended to become financially dependent on their male partners because they raised their children and because of their unequal earning power. But the legislature drafted s. 29 to allow either a man or a woman to apply for support, thereby recognizing that financial dependence can arise in an intimate relationship in a context entirely unrelated either to child rearing or to any gender-based discrimination existing in our society. See discussion of s. 1 of the *Charter*, below. Indeed, the special situation of financial dependence potentially created by procreation is specifically addressed in s. 29(b). This appeal is concerned only with s. 29(*a*). That section is aimed at remedying situations of dependence in intimate relationships without imposing any limitation relating to the circumstances that may give rise to that dependence.

[122] In a number of Quebec statutes, the legislature has extended the rights and obligations once reserved for married persons to *de facto* spouses. This clearly demonstrates the similarity between these two types of union. It is therefore logical to believe that the breakdown of a *de facto* relationship can lead to economic consequences comparable to those experienced by married or civil union couples, particularly with respect to the need for support.

[123] In my view, the differential treatment the Quebec legislature imposes between *de facto* spouses, on the one hand, and married or civil union spouses, on the other, with respect to the obligation of support (article 585 *C.C.Q.*) has an actual impact on *de facto* spouses.

2.1.3 The nature of the right affected

[124] The fourth factor set out by Iacobucci J. in *Law*[68] is the nature of the interest affected. In the present case, the difference in treatment between *de facto* spouses and married or civil union spouses that results from article 585 *C.C.Q.* is significant. As Cory J. writes in *M. v. H*., the ability to meet basic needs "following the breakdown of a relationship characterized by intimacy and economic dependence" is a fundamental right:[69]

> 72 A fourth contextual factor specifically adverted to by Iacobucci J. in *Law*, at para. 74, was the nature of the interest affected by the impugned legislation. Drawing upon the reasons of L'Heureux-Dubé J. in *Egan*, supra, Iacobucci J. stated that the discriminatory calibre of differential treatment cannot be fully

---

67 *M. v. H., supra* note 34 at para. 54.
68 *Law*, *supra* note 12 at para. 74.
69 *M. v. H., supra* note 34 at paras. 72-73.

> appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group. In the present case, the interest protected by s. 29 of the *FLA* is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence. Members of same-sex couples are entirely ignored by the statute, notwithstanding the undeniable importance to them of the benefits accorded by the statute.
>
> 73 The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the *FLA* promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. ...
>
> [EMPHASIS ADDED.]

[125] In today's Quebec society, more than one-third of cohabiting couples live in *de facto* unions. In 2006, that represented 1.2 million individuals. Therefore, the effect of article 585 *C.C.Q.*, as currently drafted, is to deprive these individuals of a fundamental right, namely, the "ability to meet basic financial needs following the breakdown of a relationship"[70] because they cannot claim support from a former spouse after a separation regardless of the length of the union, whether children were born of their union, or whether a situation of economic dependence was created.

[126] In my view, determining the discriminatory nature of this *C.C.Q.* provision also requires consideration of the fact that the negation of this right has consequences for children born of *de facto* unions. If one of the parents is in a position of need after a separation, the children suffer the consequences, though they had nothing to do with the type of union their parents chose. The children of parents who were married or in a civil union enjoy a better material environment after a separation or divorce than do children whose parents lived in a *de facto* union. As I explain in greater detail in paragraph [145], to protect both the impoverished spouse and the children born of such a union, the right to apply for support must extend to the family unit as it is now understood, which includes *de facto* unions.

2.1.4 Conclusion

[127] In light of the contextual factors referred to in *Law*, I am of the view that the Quebec legislature's failure to include *de facto* spouses in article 585 *C.C.Q.* creates a

---

[70] *Ibid.* at para. 72.

substantively discriminatory distinction between them and married or civil union spouses. It is reasonable to conclude that this distinction perpetuates the notion that *de facto* spouses are less worthy than married or civil union spouses of benefiting from article 585 *C.C.Q.*, which protects the fundamental right to have one's basic needs met after the breakdown of a relationship. For these reasons, I find that this distinction contravenes subsection 15(1) of the *Charter*.

3. IS THE EXCLUSION OF *de facto* SPOUSES FROM THE APPLICATION OF ARTICLE 585 *C.C.Q.* JUSTIFIED UNDER SECTION 1 OF THE *Charter?*

[128] In *R. v. Oakes*,[71] the Supreme Court formulates the test to be applied when determining whether *Charter* violations are reasonable and justifiable in a free and democratic society. In *Egan v. Canada*, the Supreme Court provides the following explanation:[72]

> 182 Section 1 allows *Charter* violations to be upheld if these violations are reasonably justifiable in a free and democratic society. The test to establish whether a statutory provision constitutes a "reasonable limit" was first advanced by former Chief Justice Dickson in *R. v. Oakes*, *supra*, at pp. 138-39. A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

[129] It is therefore incumbent upon the AGQ to prove that the violation of the *Charter* right is justified.

3.1 A pressing and substantial objective

[130] The respondent and the AGQ argue that the objective of the distinction between *de facto* unions and marriage created by the Quebec legislature is to give couples the freedom to choose how to legally structure their relationship. Promoting freedom of choice in such matters is a pressing and substantial objective, based on the values enshrined in the *Charter*.

---

[71] *R. v. Oakes*, [1986] 1 S.C.R. 103 ["*Oakes*"].
[72] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182.

[131] The appellant, for her part, contends that two factors must be considered when determining whether there is a pressing and substantial objective: (1) the objective of the legislation as a whole and that of the impugned provisions; (2) the objective of the omission.[73]

[132] According to the appellant, the failure to include *de facto* spouses is the very antithesis of the principle of the protection of family embodied in general in Book II of the *C.C.Q.*.[74] The objective sought by the legislature cannot be pressing and substantial.

[133] Article 585 *C.C.Q.* is found in Title Three of the *Civil Code*, entitled "Obligation of Support". This obligation affects not only married or civil union spouses but also ascendants and descendants. These provisions, when taken together, have a social objective. They seek to respond to financial dependence as it exists in families. Moreover, as noted above, it can be seen that the legislature has modified this obligation to keep pace with the evolution of the Quebec family.[75]

[134] In my view, when taken alone—that is to say, solely from the perspective of the obligation of support—the objective of giving couples the freedom to choose whether or not to be subject to an obligation of support is contrary to the objective of the legislation on this issue. The Quebec legislature's omission is "on its face the very antithesis of the principles embodied in the legislation as a whole".[76]

[135] In the circumstances, therefore, the objective of freedom of choice cannot be qualified as pressing and substantial with regard to the obligation of support.

[136] Moreover, we may also wonder as to the freedom of choice actually exercised by *de facto* spouses when they decide to live in *de facto* unions. In a number of statutes, the Quebec legislator sends the message that after one, two, or three years of cohabitation, *de facto* spouses have the same rights and obligations as married spouses. This was observed by Professor Hélène Belleau in a study involving thirty married couples and thirty *de facto* spouses:[77]

> [TRANSLATION]

---

73 *M. v. H., supra* note 34 at para. 100.
74 *Vriend v. Alberta*, [1998] 1 R.C.S. 493 at para. 116 ["*Vriend*"].
75 *Civil Code Revision Office*, *supra* note 55.
76 *Vriend*, *supra* note 74 at para. 116; *M. v. H.*, *supra* note 34 at para. 101.
77 Hélène Belleau, *Rapport rédigé pour Goldwater, Dubé*, *Enquête qualitative sur les représentations de la conjugalité au Québec*, Institut national de la recherche scientifique, Urbanisation, Culture et Société (March 10, 2008) at 9.

- Most *de facto* spouses and married spouses believe that couples who have lived in *de facto* unions for a few years or who have a child have the same rights and obligations in the event of a breakdown of the relationship. The confusion surrounding the rights and obligations of married spouses and *de facto* spouses seems to originate from the contradictory signals sent by the government (*de facto* unions are recognized in income tax returns and various social programs).

[137] In addition, while marriages and civil unions are not "contracts" as such, they nevertheless constitute juridical acts based on the consent of both parties. In contrast, the choice not to marry may be exercised by only one of the partners. Refusal by one of the parties brings the plan to marry or enter into a civil union to an end, as indeed was the case here. Unlike marriage, it is often difficult to establish the precise moment a *de facto* union begins. The commitment strengthens over time, as the relationship and family evolve. The argument that a *de facto* spouse who gives up a career to take care of the family freely chooses to end up without financial resources if the relationship breaks down appears difficult to justify. Thus, a comparison of *de facto* unions with marriage and civil unions does not support the conclusion that the freedom to choose is the same.

[138] Even if I were to find that the objective of the freedom of couples to choose "relate[s] to concerns which are pressing and substantial in a free and democratic society",[78] I would conclude that the omission of *de facto* spouses does not constitute a reasonable and demonstrably justifiable limit.

3.2 Proportionality analysis

[139] The respondent and the AGQ must prove that the method chosen to achieve the objective is reasonable and justifiable. In *Oakes*, the Supreme Court stated that this requires [TRANSLATION] "a form of proportionality test"[79] of which there are three important components: a rational connection, minimal infringement, and proportionality between the effects of the measure and the objective.

3.2.1 The rational connection

[140] At this stage of the analysis, the respondent and the AGQ must establish a rational connection between the objective of article 585 *C.C.Q.* and the measure enacted, namely, the omission of *de facto* spouses from this provision.[80] As we have

---

78 *Oakes*, *supra* note 71 at para. 69.
79 *Ibid.* at para. 70.
80 *Vriend*, *supra* note 74 at para. 118.

seen, the objective of this provision concerns more than the effects of marriage and civil unions. The legislature cannot claim that giving couples the freedom to choose the legal regime to which they will subject themselves requires excluding *de facto* spouses from the social protection article 585 *C.C.Q.* provides to members of the family unit. Freedom of choice is not a contractual obligation but one based on family solidarity. It is therefore not a determinative argument.

[141] I therefore find that there is no rational connection between the omission of *de facto* spouses from article 585 *C.C.Q.* and the legislative objective.

3.2.2 Minimal infringement

[142] Since article 585 *C.C.Q.* violates an equality right enshrined in the *Charter*, the AGQ must prove that the statutory provision constitutes a minimal infringement of this right.

[143] Considering that the objective of the Quebec legislature is to preserve the freedom of couples to choose the legal regime they want to govern their relationship, it is my opinion that the omission of *de facto* spouses from article 585 *C.C.Q.* is not a minimal infringement.

[144] Indeed, the obligation of support seeks to fulfil the basic needs of family members. Article 585 *C.C.Q.* guarantees that, in view of the social solidarity that must exist within a family, a family member may bring a claim for support before a court pursuant to article 587 *C.C.Q.* In my view, making it necessary for *de facto* spouses to enter into a civil union or draw up a cohabitation contract to obtain support in the event of the breakdown of their relationship ignores the social realities of conjugal relationships in Quebec. The legislature cannot deprive one-third of the couples in Quebec of the right to make a claim for support by requiring that *de facto* spouses enter into a contract if they wish to enjoy the fundamental protection afforded by article 585 *C.C.Q.* Such a burden is contrary to the very nature and source of this protection.

[145] Moreover, in my view, it must be pointed out that the children born of these unions are also likely to suffer from this discrimination toward their parents. As the intervener argues, when *de facto* spouses separate, one of the parents (for example, the mother who remained home to take care of the children) may end up in a precarious financial situation, with no income. If she obtains custody of the children, she will have only child support payments from the father to meet both her needs and those of her children. If, for example, the family income is $75,000 and is earned by the father, the mother will receive support for two children in the amount of $12,300 a year if she has sole custody and $6,150 a year if custody is shared. The situation would be completely different for a married couple since, in addition to the sharing of assets, the mother would also obtain spousal support.

[146] This example makes it clear that discrimination against *de facto* spouses is unfair not only to the financially dependent spouse but also to the children, whose standard of living is greatly affected when they are in the mother's custody. The infringement is therefore not minimal.[81]

3.2.3 Proportionality between the effect of the measure and the objective

[147] In *Dagenais v. Société Radio-Canada*, the Supreme Court states that "there must be a proportionality between the deleterious and the salutary effects of the measures".[82] In this case, the deleterious effects of the measure are significant. They affect not only the more vulnerable *de facto* spouse upon separation, but also the children. Moreover, the prejudice suffered is contrary to the objective of the *C.C.Q.* with respect to support, which is to ensure the protection of the family and its members.

[148] Furthermore, since the right at issue here is the right to claim support from the other spouse, not the right to obtain support merely because the *de facto* union existed, the protection afforded by article 585 *C.C.Q.* will have no effect on partners who are in fact economic equals. Only *de facto* unions where one partner is economically vulnerable or dependent will be affected by the application of this provision.

4. CONCLUSION REGARDING SECTION 1 OF THE *Charter*

[149] I therefore find that the omission of *de facto* spouses from article 585 *C.C.Q.* is not justified under section 1 of the *Charter*.

5. REMEDY

[150] The appellant argues that section 24 of the *Charter* and section 52 of the *Constitution Act*, *1982*[83] must be given a liberal interpretation so that complete, adapted and effective remedies may be awarded.

[151] According to the appellant, a broad interpretation of article 585 *C.C.Q.* (reading in) is the appropriate remedy in this case. The effect of such an interpretation would be to deem article 585 *C.C.Q.* to include *de facto* spouses, without the intervention of the legislature. In the alternative, she proposes that the provision be declared invalid and that the declaration be suspended for a short period of time. In such a case, she asks to be exempted from the suspension and claims an immediate remedy.

---

81 See B. Moore, *supra* note 49 at 112 on the issue of the direct and indirect effects on children.

82 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 95; *M. v. H.*, *supra* note 34 at para. 133.

83 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[152] The respondent and the AGQ argue that the only possible remedy is a declaration of invalidity with a suspension of the effects, without giving the appellant the right to an exemption. The appellant is also not entitled a remedy under section 24 of the *Charter*.

[153] Generally, when the scope of a statute is found to be too restrictive under section 15(1) of the *Charter*, the appropriate remedy under section 52 of the *Constitution Act, 1982* is to declare the provision to be constitutionally invalid and strike it down. Because no right endures after the provision is struck down, however, the declaration is generally suspended in practice to give the legislature time to arrive at a constitutional solution and to avoid a situation where individuals lose their rights. In my opinion, this is the appropriate remedy in the circumstances. It is up to the legislature to determine how to safeguard the right to equality of *de facto* spouses with regard to the obligation of support. This was the solution adopted by the Supreme Court in *M. v. H.*[84] Article 585 *C.C.Q.*, which is declared constitutionally invalid, is a very important family law provision, one applied by the Quebec courts daily. It is up to the legislature, with the benefit of the public debates that will undoubtedly take place on this issue, to define the expression "*de facto* spouses" and to harmonize the other *C.C.Q.* provisions as needed. It could also choose to take this opportunity to review all of the rights and obligations of *de facto* spouses.

[154] Moreover, it is not appropriate to grant a remedy under section 24 of the *Charter,* which would allow the appellant to make a claim for support while the declaration of invalidity is suspended. This would in fact give the declaration retroactive effect, since I propose that the declaration of validity be temporarily suspended. The Supreme Court has written the following on this issue:[85]

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

[155] In conclusion, I find that that the appropriate remedy is to declare article 585 *C.C.Q.* to be invalid, but to suspend this declaration of invalidity for twelve months, without exemption in favour of the appellant.

---

[84] *M. v. H., supra* note 34.

[85] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at para. 89; see also *Ravndahl v. Saskatchewan*, [2009] 1 S.C.R. 181, 2009 SCC 7 at para. 27.

ISSUE 4

IS THE APPELLANT ENTITLED TO REIMBURSEMENT FOR THE EXPERT FEES INCURRED TO ARGUE HER CONSTITUTIONAL RIGHTS AS A REMEDY WITHIN THE MEANING OF SECTION 24 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*?

[156] The appellant invokes section 24 of the *Charter* to argue that an order for costs is a form of remedy.

[157] At trial, she asked the judge to award her $1,498,490.58, which breaks down to $1,153,793.50 for extrajudicial fees incurred up to January 8, 2009, plus $344,697.08 for the costs of the expert reports filed.

[158] The trial judge refused her application, finding that articles 477 and 480 *C.C.P.* do not permit awarding costs other than those in the *Tariff of judicial fees of advocates*[86] (the "*Tariff*") in force. Moreover, only an abuse of the right of litigation may be sanctioned by awarding damages corresponding to the extrajudicial costs incurred by a party to a suit.

[159] As for section 24 of the *Charter*, the trial judge was of the view that it did not constitute a source of substantive law and that the remedy must be provided in the legislation.[87]

[160] The judge added that the appellant cannot claim fees paid by a third party, which is the case here. The moral obligation to reimburse the person who paid the costs and fees, which the appellant invokes here, is not sanctioned in law.

[161] Without it being necessary to rule on this final point, I find that the appellant is not entitled to the reimbursement of her extrajudicial fees.

[162] As the trial judge observed, in Quebec, articles 477 and 480 *C.C.P*. constitute the source of the court's power to award costs pursuant to the *Tariff*. Furthermore, since the abuse of the right to litigate is not an issue here, the exception referred to by this Court in *Viel v. Entreprises immobilières du terroir ltée*[88] is not applicable.

[163] As for the expert fees, the appellant should be awarded $25,000, since certain reports were helpful in the resolution of the dispute.

V - CONCLUSION

---

[86] R.S.Q., c. B-1, r. 13; *Fédération des producteurs acéricoles du Québec v. R.C.P.É.*, [2006] 2 S.C.R. 591, 2006 SCC 50 at para. 42; *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591 at paras. 76-80.

[87] *R. v. 974649 Ontario Inc*., [2001] 3 S.C.R. 575, 2001 SCC 81 at para. 26.

[88] *Viel v. Entreprises Immobilières du terroir ltée,* [2002] R.J.Q. 1262 (Que. C.A.).

[164] I would therefore allow the appeal in part, set aside the trial judgement, declare article 585 *C.C.Q.* to be of no force or effect because constitutionally invalid since it violates subsection 15(1) of the *Charter*, and suspend the declaration of invalidity for twelve months, with costs against the respondent and the AGQ in both first instance and in appeal, including $25,000 for expert fees.

JULIE DUTIL J.A.

REASONS OF BEAUREGARD J.

[165] I agree with my colleague Dutil J.A. on the main issue, but I would humbly suggest another way of resolving the problem.

[166] In Quebec, when two spouses cease cohabitation, they have rights and obligations with respect to support: the former spouse in need has a right to support from the other who has the means to provide it.

[167] On the other hand, when two *de facto* spouses cease cohabitation, there is no such right, even though the couple lived as though married and had children, even though one of the spouses sacrificed a career for the children and consequently suffers impoverishment after the breakdown of the relationship, and even though the other spouse has, as a result, been enriched monetarily or otherwise.[1]

[168] Some would say that this is not surprising. In the first case, the spouses were married and were therefore granted rights they could not waive and imposed obligations they could not avoid. In the second case, they were not married. As a result, because the law is silent with regard to the rights and obligations of *de facto* spouses, they are not treated like married persons and are not governed by public order provisions. Simply refraining from making a *de facto* union official is sufficient to circumvent the obligation to provide support to one's spouse if he or she is in need.

[169] With respect for those who hold this opinion, I am of the view that, at least with regard to the right to support, *de facto* spouses suffer discrimination under section 15 of the C*anadian Charter of Rights and Freedoms* that is not justifiable under section 1. This opinion is not a new one; already in *Rossu*,[2] a judgment rendered in 1998, the Court of Appeal of Alberta came to the same conclusion as ours in the present case.

[170] Section 15(1) provides that a person may not be deprived of the benefit provided by a law due to distinctions based on, in particular*,* race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[171] As the words "in particular" indicate, this list is not exhaustive.

[172] It is clear that a distinction made for no reason whatsoever constitutes discrimination. Therefore, if a law states that the benefit it offers generally will not be accorded to a certain person and provides no reason for this exclusion, or that the

---

1 Throughout my reasons, I refer to fictional spouses and not to the parties to the present case.

2 *Rossu v. Taylor*, 1998 ABCA 193, 161 D.L.R. (4th) 266, [1999] 1 W.W.R. 85, 39 R.F.L. (4th) 242.

benefit will or will not be accorded at the pleasure of a civil servant, the law is discriminatory. That is obviously not the case here.

[173] A distinction made for an artificial reason—that is, a reason that does not rationally justify the distinction—is also discriminatory. For example, a law that states that a social benefit is offered only to persons born in months with thirty-one days or that only persons born in even-numbered years can own homes is clearly discriminatory.

[174] In my opinion, it is an artificial distinction to offer or deny the right to support to a person who has lived with another person and suffered prejudice because of the relationship and its breakdown based on whether that person is a former spouse or a former *de facto* spouse.

[175] The distinction is artificial because, in actual fact, the fundamental reason for the obligation of those who have the means to provide support to their former spouses in need does not arise from the fact that the former spouses made their union official but rather from the fact that, after having lived together and experienced the breakdown of the relationship, one of the former spouses, who made sacrifices for the benefit of the other, is now in need. Fundamentally, the obligation of support is not merely a way to ensure fairness toward the impoverished former spouse, but a social measure that contributes to public order and is a rule of public order. Consequently, individuals cannot contract out of this obligation. The measure is of public order because, oddly enough, the legislature wishes to prevent former spouses, impoverished due to the failure of a marriage, from becoming the responsibility of the State rather than that of their former spouse, who has the resources to provide support.

[176] Clearly, if the institution of marriage had never existed in Quebec and all spouses lived in *de facto* unions, the legislature would have enacted a support regime to correct inequities suffered by spouses impoverished by the failure of a relationship and to avoid social disorder. Similarly, in the future, if the number of couples living in *de facto* unions exceeds the number of married couples, the legislature will undoubtedly enact a support regime to meet the needs of impoverished *de facto* spouses following the breakdown of a relationship, and to avoid social disorder.

[177] In short, former spouses are not entitled to support because they were once married but because they are impoverished due to their dependence on another person.

[178] Consequently, when the legislature insists that marriage or civil union is a condition precedent to the right to claim support, it makes a distinction that is contrary to the rationale behind the right to support and violates the equality rights of persons who are, in fact if not in law, in the same situation.

[179] The appellant argues that this distinction stems from the fact that, historically, it was rare for two people to cohabit without marriage and the fact that the legislature has so far been unwilling to recognize that a significant proportion of couples today live in *de*

facto unions. The exception might also be due to a bias against *de facto* unions; it is even more likely due to a bias in favour of marriage. Even though it is a fundamental right for people to choose to live together without marrying, and even though in some cases *de facto* spouses are as dependent as their married counterparts, the legislature has failed to remove the condition whereby the union must be made official for the right to support to exist. The legislature has so far refused to distance itself from this stereotype in favour of marriage and against *de facto* unions without recognizing that, in so doing, it has unintentionally encouraged people not to marry in order to sidestep their moral obligations. It has also failed to recognize that, in so doing, it has in large part destroyed the effects of the public order measures it enacted to ensure that former spouses in need receive support without resorting to the State.

[180] The Attorney General objects to the submission that the legislature is biased in favour of marriage, contending that, on the contrary, the distinction between the rights and obligations of married spouses and those of *de facto* spouses has a noble objective: to grant couples the freedom to choose whether or not to be bound by the obligations of marriage.

[181] In my view, while some may have had this objective in mind, the desire to offer the freedom to choose and the freedom to choose itself do not make the distinction any less discriminatory or justify it under section 1 of the *Charter*.

[182] If my colleagues and I are correct in saying that, in cases involving support, the *Charter* requires that *de facto* spouses have the same rights and obligations as married spouses, then the legislature's wish that it be otherwise merely demonstrates that the discriminatory distinction is not only an undesirable effect of the law, but an expressly intentional one.

[183] Moreover, the fact that the legislature offers the choice of whether or not to make a union official does not mean that the specific legal consequences of each regime are not discriminatory. In this matter, the legal consequences are discriminatory because, as I have already stated, the fact that a couple has or has not made their union official is an artificial factor when the issue is whether one spouse has the right to claim support from the other. The important factor is the fact that, for all sorts of reasons (such as bearing children, for example), the spouse claiming support is economically dependent on the other. The statement that our conclusion is erroneous because it impairs the freedom to choose between two options the law offers with regard to support does nothing to further the debate, since the issue is precisely whether this freedom of choice violates subsection 15(1) of the *Charter*.

[184] In any event, unless there is a bias in favour of marriage, offering future couples the freedom to choose, as the Attorney General argues the legislature is doing, is illogical. On the one hand, it wishes to avoid the harm that results not from the breakdown of the marriage itself but from the fact that one of the married spouses is impoverished after the breakdown. On the other hand, however, and in the same

breath, it wishes to offer immunity to the *de facto* spouse whose partner is impoverished after the relationship breaks down. According to the freedom of choice argument, the legislature wants to give spouses prior exemptions from the moral obligations they will incur by enjoying the benefits of a life in a conjugal relationship and at the expense of a partner. It fails to take into account the fact that, while the right to support admittedly benefits the impoverished spouse, it is also a public order institution that cannot be contracted out of.

[185] Therefore, it cannot be found that it is without a bias in favour of marriage that the legislature intended for the right to support, which is a social and public order institution, not to exist for a significant number of couples and that it intended for *de facto* couples (especially women) to be wronged and for an unfair ex-*de facto* spouse to benefit.

[186] If the legislature really wanted to give people the freedom to choose whether or not to take on the obligation to pay support, why did it not also offer this choice to people who want to have a marriage ceremony?

[187] If the legislature can exempt *de facto* spouses, but not married spouses, from the obligation to provide support, the latter, who will soon be the minority, could in turn argue that they are victims of discrimination.

[188] Some claim that our conclusion is paternalistic. This statement does nothing to further the debate, however, as it does not respond to the argument that claims, rightly or wrongly, that under section 15 of the *Charter*, *de facto* spouses should have the same rights and obligations when it comes to support as married spouses. This is because, as I have already stated, the fundamental reason the obligation of support exists is not the fact that the former spouses made their union official, but the fact that one of the former spouses made sacrifices for the benefit of the other and now, after having lived with that person and experienced the breakdown of the relationship, is in need. The argument put forward by some that this judgment will have so-called harmful effects also does nothing to further the debate.

[189] It cannot be argued that, since everyone has the right to get married or enter into a civil union, *de facto* spouses who become impoverished after a separation and who do not have the right to claim support cannot claim to be victims of discriminatory treatment because all they had to do was make their union official. Since the right to live in a *de facto* union is fundamental, saying that you have to make the relationship official to gain the right to support flouts that right. Moreover, getting married or entering into a civil union requires the consent of both *de facto* spouses. Must the law deprive people of a benefit if they are unable to convince their partners to make the relationship official and offer immunity to the spouse who wishes to live in a conjugal relationship without assuming the moral obligations that flow from this choice?

[190] It also cannot be said that, if the appellant's argument is correct, the law marries people against their will. This is a hard-hitting statement, but it is not at all the case: everyone is free to remain single, get married, enter into a civil union, or live in a *de facto* union. If a person chooses not to marry but decides nevertheless to live in a conjugal relationship, the legislature should not exempt that person from the obligation of support, which arises not from marriage but from having lived together as a couple. Otherwise, the treatment is discriminatory. The freedom must reside in the choice to live conjugally or not, and not in the choice to assume the consequences or to avoid them artificially.

[191] By analogy (although an imperfect one), in requiring that a person who signs a lease to occupy a building to pay rent, the law does not fail to add that the person who occupies a building without signing a lease must also pay the value of the occupation. Similarly, if two persons who never declared themselves to be partners conduct themselves as partners, they cannot claim that they do not have the obligations that the civil law imposes on members of a partnership.

[192] If the argument that I have humbly defended is well founded, it can be claimed with a certain amount of confidence that denying *de facto* spouses the right, *inter alia*, to the division of the family patrimony is also discriminatory.

[193] In commercial matters, everyone is free to organize their affairs as they see fit, provided it causes no prejudice to others (for example, choosing to receive the dividends of a corporation rather than a salary). Similarly, in human relations, given section 15(1) of the *Charter*, the law cannot permit a person who chooses to live in a conjugal relationship to avoid the other pecuniary obligations that married people have, which are of public order.

[194] According to Supreme Court judgment in Nova *Scotia (A.G.) v. Walsh*, [2002] 4 S.C.R. 325, however, this claim is unfounded. The appellant points out that, under Nova Scotia law, "matrimonial patrimony" includes property not included in what constitutes the family patrimony in Quebec, that each of the former spouses has a property right in the "matrimonial property" while here the former spouse who does not own the property in the family patrimony is entitled to only a portion of its value, and finally that future spouses in Nova Scotia have the right to opt out of the "matrimonial property" regime[3] but future spouses in Quebec do not. I am not persuaded, however, that these reasons are sufficient to depart from *Walsh*.

---

[3] Despite paragraph [57] of *Walsh*, to which the appellant refers to make her assertion, the issue of whether this exclusion is possible in Nova Scotia law has not yet been resolved to my satisfaction. If it were established that the appellant's assertion is correct, her argument that *Walsh* is not applicable in Quebec would have more value.

[195] My colleague Dutil J.A., who agrees with my conclusion that *de facto* spouses suffer discrimination with regard to support, has declared article 585 *C.C.Q.* to be invalid but suspends the effect of this declaration for twelve months.

[196] For my part, considering that during those twelve months a number of *de facto* spouses will suffer from a lack of support, that the measure I propose will cost the public nothing and cause no prejudice to married spouses, and that there can be no other remedy than to give *de facto* spouses the same right to support as married spouses, I would simply suggest that, until the legislature intervenes, article 585 CC.Q. and, for the purposes of harmonization, article 511 *C.C.Q.* should be interpreted as follows:

> **585.**
>
> Spouses and relatives in the direct line in the first degree owe each other support.
>
> **511.**
>
> The court, when granting a separation from bed and board or notes the break-down of a *de facto* union or subsequently, may order either spouse or *de facto* spouse to pay support to the other.

[197] I do not refer the matter back to the legislature for resolution because, in my view, there is no debate to be had on the definition of *de facto* spouses, as this is a question of fact to be determined by the court with the assistance, as needed, of the presumptions in section 61.1 of the *Interpretation Act*, R.S.Q., c.I-16, which reads in part as follows:

> **61.1.** ...
>
> Two persons of opposite sex or the same sex who live together and represent themselves publicly as a couple are *de facto* spouses regardless, except where otherwise provided, of how long they have been living together. If, in the absence of a legal criterion for the recognition of a *de facto* union, a controversy arises as to whether persons are living together, that fact is presumed when they have been cohabiting for at least one year or from the time they together become the parents of a child.

[198] To say that a *de facto* union exists only after one, two, or three years of cohabitation is already discriminatory, since a court could very well find that two spouses living in a *de facto* union for only a few months have lived for a sufficient amount of time in a conjugal relationship for one spouse to have the right to obtain support from the other.

[199] I would suggest reading articles 585 and 511 *C.C.Q.* as suggested only as of the date of this judgment.

[200] The appellant cannot be reimbursed for extrajudicial fees, not because someone has so far paid them all for her but because the enactment of a constitutionally invalid law does not give rise to any form of damages against the public treasury.

[201] I also would not order reimbursement of the expert fees because the dispute, as circumscribed before us, centred on a question of law that did not require evidence to be adduced.

[202] The appellant is entitled to judicial fees in both Superior Court and here, against the Attorney General of Quebec only. Without ruling on the appellant's right to claim special fees under section 15 of the *Tariff of judicial fees of advocates*, I note that the fees are those specified for class II-B actions.

[203] I would refer the case back to the Superior Court for a resumption of the consideration of the appellant's motion and a ruling on the judicial fees as though the appellant's proceeding had not been interrupted by the debate on the constitutional issue.

MARC BEAUREGARD J.A.