DE FACTO UNION IN QUEBEC

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In Quebec, both heterosexual and homosexual couples can choose to live together in marriage, civil union or *de facto* union. Many people choose *de facto* union, also called "common-law union" or "cohabitation."[1] In 1995, close to 60% of the population between 25 and 39 were living or had lived in a common-law relationship.[2] And the numbers continue to grow: in 1996, 798,785 people were living together maritally with another person to whom they were not married or joined in civil union, whereas in 2001, 1,011,930 did so.[3]

Since *de facto* union is the more common marital model, especially at the beginning of a couple's life together, a growing number of children are born from such unions. Since 1995, over 50% of registered births in Quebec have been out of wedlock, and this rate even reached 59.2% in 2003.[4]

Over the past 30 years, *de facto* union has become a social phenomenon that the government could no longer ignore. Its actions, which we will review in greater detail here, revolve around three ideas. First, in the name of respecting free will, it was found not to be appropriate to grant *de facto* spouses the same rights as married couples or subject them to the same obligations. The principle that applies must still be the freedom to manage the personal effects of a shared life. This means that when *de facto* spouses separate, their family property is governed by any valid contracts signed between themselves and by recourse in ordinary law. Secondly, to ensure equality for children born to and raised in families created by *de facto* spouses, it must be recognised that all parents have the same rights and must have the same obligations regarding their children. This rule applies equally during the parents' life together, during their separation and after. Thirdly, since relationships between spouses are a private issue, the state should not make access to public benefits and services dependent upon the legal form of their union. Social laws should not establish any distinctions between *de facto* spouses, married spouses and civil-union spouses, whether these couples are made up of two people of the same sex or two people of the opposite sex.

1 THE LEGAL SITUATION OF *DE FACTO* SPOUSES

The legal situation of *de facto* spouses is not the same in civil law and in social law. Quebec's civil law grants almost no value to *de facto* union, whereas social law treats married spouses, *de facto* spouses and civil-union spouses in the same way. As parents, the individuals' status has little relevance: all parents, whether married, part of a *de facto* union or joined by civil union, have the same duties towards their children.

Strangers under civil law

The *Civil Code of Lower Canada* of 1866 did not imagine a shared life outside marriage. Cohabitation was then considered immoral. Although the freedom to make wills allowed *de facto* spouses to provide benefits to each other in a will,[5] cohabitation contracts were themselves deemed illegal.[6] Moreover, section 768 of the *Civil Code of Lower Canada* specifically forbade gifts *inter vivos* between *de facto* spouses.[7]

In the 1970s, the Civil Code Revision Office, an organisation responsible for reviewing private law, recommended that *de facto* spouses be subject to some of the obligations to which married spouses are subject.[8] However, many social groups, especially those devoted to recognising women's rights, demanded that the government respect the choice made by those who wished to avoid the legal constraints of marriage and the legal procedures of dissolution.[9] In 1980, the National Assembly therefore proceeded with its reform of family law without creating any specific rules for *de facto* spouses.

Since a *de facto* union is not a legally recognised union in Quebec's civil law, cohabitants have no specific legal obligations towards each other; their relationship is only governed by the contracts they might have had drawn up to deal with the effects of their shared life. Therefore, only a cohabitation contract can lead to support payments for one of the spouses in case of a break up or provide for some sharing of each person's assets.

This choice, made in 1980, not to establish a particular system for *de facto* spouses could have been questioned afterwards. However, every time the question of a legal framework for *de facto* union has been raised since then – for example, in 1991 when the new Civil Code was adopted[10] and in 2002 during a review of the draft bill that led to the institution of civil

unions[11] – the government restated that it did not intend to impose legal constraints on *de facto* unions.[12] On specific points, however, it did ensure that the Civil Code would treat *de facto* spouses, civil-union spouses, and married spouses the same way.[13] Thus, it recently recognised the right for *de facto* spouses to consent to care for a partner who is unfit.[14] The government had also intervened a little earlier in adoption and housing issues.[15]

Although this method for addressing the *de facto* union issue has received support from the Barreau du Québec and the Chambre des notaires du Québec, among others,[16] it also has its critics. Saying that the economically weaker partner – who otherwise is not guaranteed property division or the right to support payments, unlike a married spouse – should be protected in case of a break up, certain authors propose that *de facto* union should be considered as equivalent to marriage in terms of financial and property consequences. They also cite the interest of the children, who are subject to the financial consequences of the separation even though they did not participate in their parents' choices regarding the personal effects of the union. Another argument used is the respect of equal rights through non-discrimination based on civil status or marital status.[17]

Obviously we cannot know if these arguments will one day lead the government to change its position. But one thing for certain is that the highest court in the country has recently confirmed in part the legal validity of such an approach. The Supreme Court of Canada stated in the *Walsh* case that legislative provisions that do not subject *de facto* spouses in Nova Scotia to the same rules for property division as spouses did not constitute discrimination based on civil status, precisely because the provisions respected the parties' right to not marry.[18] With this decision, the Supreme Court has slowed the trend in provincial courts to treat *de facto* partners as spouses, except in Quebec. The importance of this decision favouring the principles of Quebec's approach deserves to be noted. It must also be noted that the situation of *de facto* spouses in Quebec differs from that in other Canadian provinces, where, for example, they have mutual support obligations.[19] In the end, all signs seem to indicate that the political and legal debate on the legal effects of *de facto* unions, and in particular on the question of mutual support obligations, is far from over.

Parents regardless of status

The *Civil Code of Lower Canada* of 1866 divided children into two categories: legitimate children, that is, those conceived or born inside a marriage, and illegitimate children, those conceived or born out of wedlock (natural, adulterine or incestuous children). Children of cohabitants fell in the category of illegitimate children and, as a result, were subjected to the moral and legal consequences of their condition. For example, they could not inherit from their parents even when the parents recognised them, and the parents were not required to see to their education or to support them.[20]

During the family law reform in 1980, the Quebec government wanted to institute the equality of all children regardless of the marital status of their parents. It adopted provisions that specifically stated: "All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth."[21] Children of *de facto* spouses therefore have the same rights as children of married spouses, and *de facto* spouses have exactly the same rights and obligations regarding their children as married spouses. Therefore, all parents, regardless of their marital status, have parental authority, which means they have duties towards their children, including the obligation of support.[22]

As for establishing filiation, the situation for *de facto* spouses is different than for married and civil-union spouses. While the husband of a married woman is assumed to be the father of the child to whom she gives birth, the *de facto* spouse does not have this presumption of paternity, contrary to the rule that prevails in all the other Canadian provinces.[23] Although the *de facto* spouse does not benefit from this method of establishing filiation, he can still voluntarily recognise the child or have the filiation recognised in court if it is contested.[24] Moreover, to compensate for this lack of assumed paternity, the government has provided that the *de facto* spouse who agrees to his spouse's medically assisted conception but then refuses to recognise the child is responsible to the mother and the child.[25]

The other distinction regarding filiation has to do with adoption. Before 1991, parents could not give special consent for their child to be adopted by their *de facto* spouses, while it was possible for married spouses to do so. This could only be done through more complicated procedures.[26] This distinction disappeared with the adoption of the *Civil Code of Québec*

in 1991. Henceforth, parents could give special consent for their child to be adopted by their *de facto* spouse. However, unlike married spouses, who are not subject to any other conditions, *de facto* spouses must cohabitate as such for at least three years.[27]

Couples recognised by social law

In 1965, when adopting the *Act respecting the Québec Pension Plan*,[28] the Quebec legislature considered for the first time the situation of *de facto* spouses by allowing "non-married widows" to receive life annuities.[29] The movement in favour of recognising *de facto* unions in social legislation grew after this, especially after the 1975 adoption of the *Charter of Human Rights and Freedoms*, which banned discrimination based on civil status.[30] Today, all social legislation in Quebec that involves couples treats married spouses, civil-union spouses and *de facto* spouses equally.[31] This legislation includes, among other things, social assistance laws such as the *Act respecting financial assistance for education expenses*,[32] economic laws such as the *Act respecting the Québec Pension Plan*[33] and tax laws such as the *Taxation Act*.[34]

This legislative movement in favour of recognising all couples regardless of the legal form of their union took another direction in the 1990s. In the name of equal rights regardless of sexual orientation, the recognition of homosexual *de facto* spouses was now being claimed.

At that time, most legislation had a strictly heterosexual definition for *de facto* union, and the courts were starting to examine the validity of these definitions in light of the Charter of Rights.[35] Also, in 1999, the legislature adopted an act amending 28 acts and 11 regulations so that their definitions of *de facto* union included both homosexual and heterosexual couples.[36]

All these acts that place *de facto* spouses on equal ground with married spouses on the basis that the state must respect diversity in types of unions do not, however, give uniform definitions of a *de facto* union. The requirements of a shared life, marital behaviour and the lack of matrimonial ties generally constitute the common denominators. The duration of the shared life required for recognition of a *de facto* union varies from one act to another. When there are children, the required duration of cohabitation is usually reduced.[37] For a long time, a uniform definition has been

requested,[38] especially to avoid differences in the economic effects of the legislation.[39] Although one has often been promised, the fact is that this standardisation still has not come. In the meantime, the legislature adopted a complementary definition of *de facto* union in its *Interpretation Act*[40] and committed itself to assessing its impact by 30 June 2005.[41]

2 CONSEQUENCES OF THE END OF A DE FACTO UNION

While the dissolution of a marriage leads to the courts' intervention, there are no formalities for *de facto* spouses when they separate, since cohabitation is not recognised by civil law.

Cohabitants with children must, nonetheless, settle issues of custody and support payments. *De facto* spouses who are parents are subject to the same rules as married parents in this regard.

While the dissolution of a marriage automatically produces a number of personal and property effects, the end of a *de facto* union does not, in itself, create any. As a result, resolving the economic and material issues of the break up is dependent on the cohabitation contract, when the cohabitants have one. Otherwise, the *de facto* spouse who feels wronged can sometimes turn to the ordinary law remedies of the action *pro socio* and the action *de in rem verso*.

Preserving parental obligations

As parents, *de facto* spouses who separate are in the same situation as married couples. They must agree on the time the child will spend with each of them. If there is no agreement, the courts will make a decision on the issue based on the child's best interest.[42]

To help provide for the child's needs, one of the parents might have the right to support payments. In Quebec, deciding the amount of these payments is governed by a scale.[43] If there is disagreement on the amount of the payments, the court will be the one to decide.

Although parental obligations are the same for all parents regardless of their marital status, it must be pointed out that children of married couples sometimes have greater protection.[44] For example, the Civil Code's rules for protection of the family residence only apply to married

spouses. They state that when there is physical separation or divorce, the spouse who is granted custody of the child may also be awarded use of the family residence, for example until the child reaches the age of majority.[45] Since these rules are considered effects of marriage, the courts first refused to grant the right to use the family residence to the parent with custody who lived in a *de facto* relationship and did not have this right stated in a cohabitation contract. But case law has since evolved. In the name of the child's better interest, the courts sometimes agree to grant such housing rights on a temporary basis.[46]

Resolving property rights

De facto spouses have the contractual freedom to enter into any contract that does not go against public order. They can therefore create a cohabitation contract in which, for example, they include rules regarding property acquired by each before and during their life together,[47] shared financial and household responsibilities, the right of one or the other to "support payments"[48] and the way they are to be established, the right of one or the other to exclusive use of the family residence,[49] or the option of buying back their spouse's undivided share of the residence. Aside from the cohabitation contract, *de facto* spouses can also protect themselves by drawing up specific contracts, by signing a proxy, by writing a will, or by buying important property as co-owners.[50] It is therefore in light of the cohabitation contract that property is settled when *de facto* spouses separate, either amicably or before the courts.

De facto spouses with no cohabitation contract or other contract that could lead to the resolution of the financial aspects of their union can sometimes benefit from recourse in ordinary law, namely the action *pro socio* and the action *de in rem verso*, based on unjust enrichment.

Through the action *pro socio*, *de facto* spouses can seek the liquidation of a partnership created with their spouse and claim their share. This is an ordinary-law recourse available to all people who have tacitly agreed to create a partnership. This recourse exists because Quebec civil law recognises that a partnership can be created by an express agreement, whether written, verbal or tacit.[51] Living together and contributing to expenses is not enough to prove that a tacit partnership exists. As the country's highest court decided in a 1984 case where cohabitants together operated a farm owned solely by the man, three elements must be

proved. Each spouse must have contributed to the common fund, in goods, money or services; there has to have been shared losses and benefits; and the spouses' behaviour must have shown the intent to create a partnership.[52]

Since the majority of *de facto* spouses do not enter into such relationships with the intent to create a partnership, few cohabitants have succeeded in receiving the economic compensation sought when they claimed a tacit partnership was created.[53]

For the *de facto* spouses who, over the course of their shared life, contributed to their spouse's company or to the acquisition, maintenance or improvement of property belonging to the spouse, or who feel aggrieved by the economic role they played during their life together, the action *de in rem verso* is the best recourse.

This action originated from case law and is now established in the Civil Code, which states: "A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for his correlative impoverishment, if there is no justification for the enrichment or the impoverishment."[54]

To be successful, *de facto* spouses who claim unjust enrichment must therefore show their spouse's enrichment, their own impoverishment and the lack of justification for this enrichment. Although in the early 1980s the courts tended to feel that love or the hope of marriage could be considered justification for the spouse's enrichment, this is no longer the case. In 1993, the Supreme Court of Canada recognised that domestic duties and child care could lead to compensation because they allowed the spouse who was free of these tasks to become richer. It also stated that a long-term *de facto* union could lead to the presumption of a link between one spouse's enrichment and the impoverishment of the other.[55] Since then, Quebec's courts have been allowing more claims made by *de facto* spouses.[56]

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[1] Over the past 25 years, Quebec has seen a genuine decline in marriage. It is now estimated that only one third of Quebecers will marry in their lifetime. See: Louis Duchesne, "Les premiers conjoints en union civile de 2002", Bulletin de l'Institut de la statistique du Québec, volume 7, number 2, February 2003, pages 4-5, at page 4. (All the statistical documents to which we refer in this text are available on the Institut de la statistique du Québec Web site at: www.stat.gouv.qc.ca)

[2] In 1997, researchers used the 1995 General Social Survey to calculate the number of people who were living or had lived in a *de facto* union. They represented 64% of 25-to-34-year-olds, 60% of 35-to-39-year-olds, and 45% of 40-to-44-year-olds. Institut de la statistique du Québec, *La situation démographique au Québec, bilan 2003. Les ménages au tournant du XXIe siècle*, page 102.

[3] Of these, an estimated 6,350 are couples made up of two men, and 4,015 are made up of two women. Institut de la statistique du Québec, *La situation démographique au Québec, bilan 2003. Les ménages au tournant du XXIe siècle*, pages 100 and 106.

[4] In 1951, 3.1% of births were out of wedlock. This proportion was 3.7% in 1961, 8.2% in 1971, 15.6% in 1981, 40.8% in 1991, and 58.5% in 2001. It was therefore in the 80s that the greatest increase in births out of wedlock occurred. Institut de la statistique du Québec, table entitled: "Naissances selon l'état matrimonial des parents, Québec, 1951-2003".

The proportion of births out of wedlock is even higher when considering only first-born children. In fact, since 1991, more than half of first-born children were born out of wedlock, and this number reached 66.4% in 2003. This shows that *de facto* unions are especially favoured at the beginning of a couple's life. Institut de la statistique du Québec, table entitled, "Répartition des naissances hors mariage selon le rang de naissance, Québec, 1976-2003".

[5] [Translation] "Given the complete freedom to make out wills in this province, nothing prevents a man from disinheriting his wife and his family for his cohabitant, as unfortunate as this decision might be." *Archambault* v. *Guérin*, Court of Queen's Bench, Montreal, 28 April 1948, No. 2974, cited by André Cossette, "Le concubinage au Québec", La Revue du Notariat, volume 88, 1985-1986, pages 42-60, at page 45.

[6] It was mainly because section 768 of the *Civil Code of Lower Canada* prohibited gifts *inter vivos* between *de facto* spouses that the tendency was to consider cohabitation contracts illegal and against public order and proper morals.
Civil Code of Lower Canada, Statutes of the Province of Canada, 1865, chapter 41.

[7] Section 768 of the *Civil Code of Lower Canada* stated: "Gifts *inter vivos* made in favor of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance.

This restriction does not apply to gifts made in a contract of marriage entered into between the concubinaries.

Other illegitimate children may receive by gift *inter vivos* like all other persons."

This provision was repealed on 2 April 1981, by the *Act to establish a new Civil Code and to reform family law,* Statutes of Québec, 1980, chapter 39, section 35. One author, however, pointed out that the courts were hesitant to dismiss requests for cancelling gifts in favour of a cohabitant: André Cossette, "Le concubinage au Québec", La Revue du Notariat, volume 88, 1985-1986, pages 42-60, at pages 45-47.

[8] The proposed obligations were: common responsibility for debts incurred for the family's everyday needs, proportional contribution to the household expenses, mutual support obligations, mutual inheritance rights, and the presumption of paternity. Civil Code Revision Office, *Report on the Québec Civil Code,* volume 1, Montreal, Éditeur officiel du Québec, 1977.

[9] [Translation] "During the Parliamentary Commission of justice on the family law reform in March 1979, most of the memorandums that were submitted asked legislators to respect non-married couples' desire to keep their choice of lifestyle distinct from marriage. We therefore found it appropriate to not take action in terms of this lifestyle, which was chosen freely: it will therefore not be institutionalized or regulated. Marc-André Bédard, Minister of Justice, National Assembly of Québec, *Journal des débats*, 31st Legislature, 6th Session, 4 December 1980, volume 23, number 15, page 608.

[10] For example, in 1991, the Council on the Status of Women issued the following notice: [Translation] "In its notices, memorandums and interventions, the Council has made statements on the status of common-law spouses and on the rights and obligations that should, in its opinion, result. Consistently, it has been tied to the principle of freedom of choice for couples. As a result, the Council has been in favour of the State's non-intervention in the private relations between common-law spouses, except for their right to enter into contracts should they so desire. (…)

This notice is also in keeping with this line of thinking. (…)

The Council's advice is based on the main principle of – *Preserving genuine freedom of choice for spouses.*

As a result, it is important the *de facto* unions are not assimilated to marriage in the Civil Code."

The final recommendation was: [Translation] "The Civil Code must refrain from governing, through specific and automatic rules, private relations between partners in common-law unions, as their relations should continue to be subject to the general rules of the Civil Code."

Conseil du statut de la femme, "Les partenaires en union libre et l'État", *Avis du Conseil du statut de la femme*, June 1991, pages 7, 8 and 13.

[11] In particular, this was the position of the Barreau du Québec and the Chambre des notaires during public hearings on the draft bill, *An Act instituting same-sex civil unions and amending the Civil Code and other legislative provisions*. See: National Assembly of Québec, *Journal des débats*, 36th Legislature, 2nd Session, Standing Committee on Institutions, 7 and 21 February 2002 (available on the National Assembly of Québec's Web site: www.assnat.qc.ca).

The president of the Chambre des notaires defended this position by stating: [Translation] "We are also satisfied to note that the system proposed by the bill does not affect the independence of those who live as spouses outside the formal legal order. The Chambre des notaires strongly believes in individuals' freedom to handle their own affairs and would show its opposition to any legislative reform that would lead to the State's retaining the right to dictate, either directly or indirectly, completely or partially, the obligations of a *de facto* union, whatever the sexual orientation of the spouses may be."

[12] See the unequivocal comments of Paul Bégin, then Minister of Justice, during public hearings on the draft bill to institute civil union, National Assembly of Québec, *Journal des débats*, 36th Legislature, 2nd Session, Standing Committee on Institutions, 7 and 21 February 2002.

[13] National Assembly of Québec, *Journal des débats*, 36th Legislature, 2nd Session, Standing Committee on Institutions, 7 February 2002.

[14] Section 15 of the *Civil Code of Québec*, amended in 2002 by the *Act instituting civil unions and establishing new rules of filiation*, Statutes of Québec, 2002, chapter 6, section 1. It now states: "Where it is ascertained that a person of full age is incapable of giving consent to care required by his or her state of health, consent is given by his or her mandatary, tutor or curator. If the person of full age is not so represented, consent is given by his or her married, civil union or *de facto* spouse or, if the person has no spouse or his or her spouse is prevented from giving consent, it is given by a close relative or a person who shows a special interest in the person of full age."

[15] Sections 555 and 1938 of the *Civil Code of Québec*. Note that in 2002, the National Assembly replaced the expression "concubinary" by "*de facto* spouse" in the *Civil Code of Québec.* It also adopted section 61.1 in the *Interpretation Act* (Revised Statutes of Québec, chapter I-16), which states: "The word "spouse" means a married or civil union spouse. The word "spouse" includes a *de facto* spouse unless the context indicates otherwise. 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."

[16] See note 11.

[17] See for example: Michel Tétrault, "L'union civile : j'me marie, j'me marie pas", in Pierre-Claude Lafond and Brigitte Lefebvre (editors), *L'union civile : nouveaux modèles de conjugalité et de parentalité au 21e siècle*, Cowansville, Éditions Yvon Blais, 2003, pages 101-149, at pages 146-147; Dominique Goubau, Ghislain Otis, David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", Les Cahiers de droit, volume 44, number 1, March 2003, pages 3-51, and Dominique Goubau, "La conjugalité en droit privé : comment concilier « autonomie » et « protection »", in Pierre-Claude

Lafond and Brigitte Lefebvre (editors), *L'union civile : nouveaux modèles de conjugalité et de parentalité au 21e siècle*, Cowansville, Éditions Yvon Blais, 2003, pages 153-163. For an opposing opinion, see: Claudia P. Prémont and Michèle Bernier, "Un engagement distinct qui engendre des conséquences distinctes", in Service de la formation permanente du Barreau du Québec, *Développements récents sur l'union de fait*, Cowansville, Éditions Yvon Blais, 2000, pages 1-30. Note that this movement in favour of including *de facto* spouses with married spouses in terms of the financial effects of a union seems to be the strongest in the Canadian provinces other than Quebec. It has also gained importance before the highest court of the country that found that certain provisions applicable only to spouses were discriminatory. See, among others, *Miron* v. *Trudel*, decision of the Supreme Court of Canada, 25 May 1995, [1995] Supreme Court Reports, volume 2, pages 418-511 and *M.* v. *H*., decision of the Supreme Court of Canada, 20 May 1999, [1999] Supreme Court Reports, volume 2, pages 3-202 and the impact they had on eliminating the distinctions between *de facto* spouses and married spouses in terms of support obligations, inheritance rights and family patrimony: Dominique Goubau, Ghislain Otis, David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", Les Cahiers de droit, volume 44, number 1, March 2003, pages 3-51, at pages 21-24.

[18] *Nova Scotia (Attorney General)* v. *Walsh*, decision of the Supreme Court of Canada, 19 December 2002, [2002] Supreme Court Reports, volume 4, pages 325-428. For an extensive analysis of this decision and its impact on Quebec law, see: Dominique Goubau, Ghislain Otis, David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", Les Cahiers de droit, volume 44, number 1, March 2003, pages 3-51.

[19] See the list established in: Dominique Goubau, Ghislain Otis, David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", Les Cahiers de droit, volume 44, number 1, March 2003, pages 3-51, at page 18, note 49.

[20] For an extensive discussion on the situation of illegitimate children under the *Civil Code of Lower Canada*, see, among others: Jean Pineau, "La situation juridique des enfants nés hors mariage", Revue juridique Thémis, volume 8, number 2, 1973, pages 209-222; Jean-Louis Baudouin, "Examen critique de la situation juridique de l'enfant naturel", McGill Law Journal, volume 12, number 2, 1996, pages 157-182.

[21] This provision became the current section 522 of the *Civil Code of Québec.*

[22] The main provisions regarding parents' obligations are in sections 597 to 612 of the *Civil Code of Québec*.

[23] For a list of relevant provincial legislation, see: Dominique Goubau, Ghislain Otis, David Robitaille, "La spécificité patrimoniale de l'union de fait : le libre choix et ses « dommages collatéraux »", Les Cahiers de droit, volume 44, number 1, March 2003, pages 3-51, at page 13, note 29.

[24] To recognise a child and establish filiation, the father and mother must fill in and sign a declaration of birth before a witness. If they are married or joined in civil union, one of the two

may declare filiation, which is not possible for *de facto* spouses. This document is then transmitted to the Registrar of Civil Status with the attestation of birth provided by the doctor. Based on these two documents, the Registrar of Civil Status produces a birth certificate, which proves the child's existence and filiation ties: sections 111 to 117 of the *Civil Code of Québec*.

[25] Section 540 of the *Civil Code of Québec*.

[26] The parent would give his or her general consent to the adoption. The Director of Youth Protection would intervene in the case and the child's parent was required to be a co-applicant to the adoption to avoid severing the filiation ties: Mireille D.-Castelli, *Précis du droit de la famille*, Second Edition, Québec, Les Presses de l'Université Laval, 1990, page 185.

[27] Section 555 of the *Civil Code of Québec*.

[28] *An Act respecting the Québec Pension Plan*, Revised Statutes of Québec, chapter R-9.

[29] These annuities were discretionary, however: Brigitte Lefebvre, "L'évolution de la notion de conjoint en droit québécois", in Pierre-Claude Lafond and Brigitte Lefebvre (editors), *L'union civile : nouveaux modèles de conjugalité et de parentalité au 21e siècle*, Cowansville, Éditions Yvon Blais, 2003, pages 3-25, at page 12.

[30] *Charter of Human Rights and Freedoms,* Revised Statutes of Québec, chapter C-12. Section 10 states: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap."

[31] For a list of Quebec's 26 social acts, see the publication "De facto union" on the Ministère de la Justice du Québec Web site: www.justice.gouv.qc.ca

[32] *An Act respecting financial assistance for education purposes*, Revised Statutes of Québec, chapter A-13.3.

[33] *An Act respecting the Québec Pension Plan*, Revised Statutes of Québec, chapter R-9.

[34] *Taxation Act*, Revised Statutes of Québec, chapter I-3. The categories of social laws are from Jacques Beaulne, "Aperçu de la situation juridique des conjoints de fait au Québec : aspects civils, sociaux et fiscaux", in Jacques Beaulne and Michel Verwilghen (editors), *Points de droit familial/Rencontres universitaires notariales belgo-québécoises*, Collection bleue, Montréal, Wilson et Lafleur, 1997, pages 223-237, at pages 234-236.

[35] In particular, see the Supreme Court decision *Egan* v. *Canada*, decision of the Supreme Court of Canada, 25 May 1995, [1995] Supreme Court Reports, volume 2, pages 513-626.

[36] *An Act to amend various legislative provisions concerning de facto spouses*, Statutes of Québec, 1999, chapter 14. Note that one year later, Canadian parliament adopted a similar Act for the common-law spouse concept in federal legislation to include both same-sex couples and those made up of persons of the opposite sex: *Modernization of Benefits and Obligations Act*, Statutes of Canada, 2000, chapter 12.

[37] For the criteria used in legislation to define a *de facto* union, see, among others: Brigitte Lefebvre, "Le traitement juridique des conjoints de fait : deux poids, deux mesures!", Cours de perfectionnement du notariat, 2001, number 1, pages 223-262, at pages 239-252.

[38] See, for example: Suzanne P. Boivin, "To Marry or Not to Marry? A Study of the Legal Situation of Common-Law Spouses in Canadian Law", in Elizabeth Sloss, *Family Law in Canada: New Directions,* Ottawa, Canadian Advisory Council on the Status of Women, 1985, pages 169-194, at page 187; Conseil du statut de la femme, "Les partenaires en union libre et l'État", *Avis du Conseil du statut de la femme*, June 1991, pages 7-8.

[39] When determining access to an assistance program for example, the State may be at an advantage if its decision is based on family income rather than individual income, and to do so, defines *de facto* union more broadly. This concern is expressed in: Suzanne P. Boivin, "To Marry or Not to Marry? A Study of the Legal Situation of Common-Law Spouses in Canadian Law", in Elizabeth Sloss, *Family Law in Canada: New Directions,* Ottawa, Canadian Advisory Council on the Status of Women, 1985, pages 169-194, at page 170.

[40] See note 15.

[41] Section 244 of the *Act instituting civil unions and establishing new rules of filiation*, Statutes of Québec, 2002, chapter 6.

[42] On required family mediation, see sections 814.3 and following of the *Code of Civil Procedure*. On the fact that the interest of the child is the final decision-making criteria for all issues concerning a child, see section 33 of the *Civil Code of Québec.*

[43] See sections 587.1 and following of the *Civil Code of Québec*.

[44] Some authors discuss in greater depth the impact of the parents' marital status on children. See note 17.

[45] Paragraphs 410(1) and (2) of the *Civil Code of Québec* states: "In the event of separation from bed and board, or the dissolution or nullity of a marriage, the court may award, to either spouse or to the surviving spouse, the ownership or use of the movable property of the other which serves for the use of the household.

It may also award the right to use of the family residence to the spouse to whom it awards custody of a child."

[46] On this issue, see: Raymonde LaSalle, "Les conjoints de fait et la résidence familiale" in Service de la formation permanente du Barreau du Québec, *Développements récents sur l'union de fait*, Cowansville, Éditions Yvon Blais, 2000, pages 99-124.

[47] An agreement that specifically refers to provisions on marriage would not necessarily be valid. Some authors prefer a calculation of benefits based on the respective patrimony of the spouses rather than on the contractual constitution of a patrimony: Brigitte Lefebvre, "Le traitement juridique des conjoints de fait : deux poids, deux mesures!", Cours de perfectionnement du notariat, 2001, number 1, pages 223-262, at pages 232-234.

[48] The courts have recognised that the requirement to pay support obligations can be validly contracted. However, despite the terminology used, it can only be contractual support within the meaning of the legislation because there is no support obligation between *de facto* spouses in the legislation. Moreover, unless there is a specific provision in the cohabitation contract, it will not be established based on the needs/means rule that applies to married spouses, nor is it liable to be cancelled because the creditor of the payment becomes financially independent: *Droit de la famille-2760*, decision of the Superior Court of Québec, [1997] Recueil de droit de la famille, pages 720-729.

[49] The validity of such a clause was recognised: *Droit de la famille-2760*, decision of the Superior Court of Québec, [1997] Recueil de droit de la famille, pages 720-729. Please note that if the contract does not specify the duration of the right of occupation, it is considered an interest for life.

[50] For the clauses generally set out in cohabitation contracts and for examples of such contracts, see: Denis Lapierre, "Les contrats de la vie commune", in Service de la formation permanente du Barreau du Québec, *Développements récents sur l'union de fait*, Cowansville, Éditions Yvon Blais, 2000, pages 31-49. Note that the Ministère de la Justice du Québec published a guide called *Cohabitation Contract* to help people who want to draw up their own cohabitation contracts.

[51] Sections 2186 and following of the *Civil Code of Québec*.

[52] *Beaudoin-Daigneault* v. *Richard*, decision of the Supreme Court of Canada, 2 February 1984, [1984] Supreme Court Reports, volume 1, pages 2-18.

[53] Jocelyn Verdon, "L'union de fait...de quel droit, au fait?", in Service de la formation professionnelle du Barreau du Québec, *Développements récents en droit familial,* Cowansville, Éditions Yvon Blais, 1998, pages 59-111.

[54] Section 1493 of the *Civil Code of Québec*. On the development of this recourse, see: Violaine Belzile, "Recours entre conjoints de fait : enrichissement injustifié et action *de in rem verso",* in Service de la formation professionnelle du Barreau du Québec, *Développements récents sur l'union de fait*, Cowansville, Éditions Yvon Blais, 2000, pages 125-173; Jean Pierre Senécal, *Droit de la famille québécois*, Publications CCH Ltée, Éditions FM, 2004, pages 1,289 and following.

[55] *Peter* v. *Beblow*, decision of the Supreme Court of Canada, 25 March 1993, [1993] Supreme Court Reports, volume 1, pages 980-1026. On the fact that this decision applies in

civil law even though it comes from another province, see: Jean-Pierre Senécal, *Droit de la famille québécois*, Publications CCH Ltée, Éditions FM, 2004, pages 1,293 and following.

[56] For an overview of decisions rendered following this decision: Violaine Belzile, "Recours entre conjoints de fait : enrichissement injustifié et action *de in rem verso*", in Service de la formation professionnelle du Barreau du Québec, *Développements récents sur l'union de fait*, Cowansville, Éditions Yvon Blais, 2000, pages 125-173.