S.C.C. FILE NO. 33749

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE QUEBEC COURT OF APPEAL)

BETWEEN:

L.M.P.

APPELLANT
(APPELLANT/INCIDENTAL RESPONDENT)

and

L.S.

RESPONDENT
(RESPONDENT/INCIDENTAL APPELLANT)

FACTUM OF THE INTERVENER
WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)
DISABLED WOMEN'S NETWORK CANADA (DAWN)

GOLDWATER, DUBÉ INC.
3500 De Maisonneuve Blvd. W., Suite 2310
Montreal, QC H3Z 3C1

ANNE-FRANCE GOLDWATER
Tel: (514) 861-4367
Fax: (514) 861-7601
Email: afg@goldwaterdube.com

ROBERT LECKEY
Faculty of Law
McGill University
3644 Peel St.
Montreal, QC H3A 1W9
Tel: (514) 398-4148
Fax: (514) 398-4659
Email: robert.leckey@mcgill.ca

Co-Counsel for the Intervener,
Women's Legal Education & Action Fund
and DisAbled Women's Network Canada

BORDEN LADNER GERVAIS LLP
Suite 1100, 100 Queen Street
Ottawa, ON K1P 1J9

NADIA EFFENDI
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agents for the Intervener,
Women's Legal Education & Action Fund
and DisAbled Women's Network Canada

TO: **REGISTRAR OF THE SUPREME COURT OF CANADA**

AND TO:

GRASSBY & ASSOCIÉS
Suite 200,
1350 Sherbrooke Street West
Montréal, QC H3G 1J1

Ms. Miriam Grassby
Tel: (514) 844-1550 ext. 1
Fax: (514) 844-5826
Email: mgrassby@grassbyassocies.com

Counsel for the Appellant

MCMILLAN LLP
Suite 300
50 O'Connor Street
Ottawa, ON K1P 6L2

Ms. Marie-France Major
Tel: (613) 232-7171 ext. 131
Fax: (613) 231-3191
Email: marie-france.major@mcmillan.ca

Ottawa Agent for the Appellant

DEVINE SCHACHTER POLAK
Suite 920, 1310 Greene Avenue
Westmount, QC H3Z 2B2

Donald Devine
Tel: (514) 939-2199
Fax: (514) 937-6245
Email: ddevine@familylaw.ca

Counsel for the Respondent

NOËL ET ASSOCIÉS
111 Champlain Street
Gatineau, QC J8X 3R1

Mr. Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Ottawa Agent for the Respondent

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PART I – STATEMENT OF FACTS

1. LEAF-DAWN adopts the facts as set out in the Appellant's Factum.

PART II – POINTS IN ISSUE

2. LEAF-DAWN advances three principal points: (1) the proper contextual approach; (2) the inappropriateness of enlarging "material change," the threshold for the lower courts to have varied spousal support; and (3) the lower courts' serious departure from this Court's jurisprudence in the variation, including errors relating to compensation, contract, and disabled recipients. This appeal also offers the opportunity to affirm substantive equality within Quebec family law.

PART III – ARGUMENT

3. LEAF-DAWN respectfully contends that the lower courts made serious errors of law. They departed substantially and unjustifiably from this Court's approach to family law developed over the last twenty years. If followed, their reasoning would lead to an acceptance of termination of spousal support almost as of right, without regard for compensation or for agreements favouring long-term support, and without regard for women with disabilities' contributions to their families and their particular needs.

The Necessary Contextual Approach

4. This appeal involves issues relating to spousal support under the *Divorce Act*. Given this Court's leadership in developing family law, principles flowing from this appeal will also condition courts' approaches to provincial laws addressing spousal support.

5. The approach in this appeal should accord with this Court's recognition of marriage and other spousal relationships as a joint venture, the economic consequences of which should be shared. That recognition derives from family legislation passed by the Parliament of Canada and every provincial legislature in recent decades. In *Moge v. Moge*,[1] this Court recognized the "goal of equitably dealing with the economic consequences of marital breakdown" as "lying at the

[1] [1992] 3 S.C.R. 813 [*Moge*].

heart of the *Divorce Act*."[2] Such recognition is manifest in this Court's elaboration of unjust enrichment in the family setting.[3]

6. Following *Moge*, sensitivity to the social context in which family law is applied and its effects experienced should condition the resolution of this appeal. The appropriate interpretive lens reflects values of substantive equality and alertness to the systemic disadvantage experienced by women and by persons with disabilities. This Court in *Moge* underscored women's economic disadvantage post-divorce. Nearly twenty years later, women in Canada still experience significant economic disadvantage relative to men,[4] one compounded for single mothers and for racialized, aboriginal, and disabled women.[5] Women's poverty arises from a complex interplay of disadvantage in the work force, in the division of household labour (before and after separation), and in their habitual role as children's primary caregivers.[6] For women to achieve substantive equality, this Court must continue to weight significantly the persistent realities of labour market discrimination and gendered roles in the family.

7. The wife's disability belongs in the social context of discrimination suffered by women with disabilities, particularly disabilities such as multiple sclerosis that are often invisible. Women with invisible disabilities, especially those who advocate for themselves or their children, often suffer intense prejudice. They are accused of lying, malingering, overstating their disability, being psychosomatic rather than truly disabled, or otherwise disbelieved about the reality of their limitations and challenges.[7] Many disabilities, like the wife's multiple sclerosis,

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[2] *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 48 [*Bracklow*]. See also *Rick v. Brandsema*, [2009] 1 S.C.R. 295; *Stein v. Stein*, [2008] 2 S.C.R. 263 at paras. 25-26, Abella J., dissenting; *M.T. v. J.-Y.T.*, [2008] 2 S.C.R. 781.

[3] *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Kerr v. Baranow*, 2011 SCC 10.

[4] Statistics Canada, *Women in Canada 6th Edition, A Gender Based Statistical Report "Economic Well Being"* (Ottawa: Social and Aboriginal Statistics Division, December 2010) at 8; Statistics Canada, *Women in Canada 5th Edition, A Gender Based Statistical Report* (Ottawa: Social and Aboriginal Statistics Division, March 2006) at 144; Monica Townson, *A Report Card on Women's Poverty* (Canadian Centre for Policy Alternatives, April 2000) at 1.

[5] Monica Townson, *Women's Poverty and the Recession* (Canadian Centre for Policy Alternatives, September 2009) at 5, 17.

[6] *Ibid.* at 15-17; Statistics Canada, *Women in Canada 6th Edition, A Gender Based Statistical Report, "Paid Work"* (Ottawa: Social and Aboriginal Statistics Division, December 2010) at 15, 21-22; Townson (2000), *supra* note 4 at 5-6.

[7] See e.g. L. Jongbloed, "Disability Income: The Experiences of Women with Multiple Sclerosis" (1998) 65 Canadian Journal of Occupational Therapy 193, esp. at 198; C.N. Davis, "Invisible Disability" (2005) 116 Ethics 153 at 154-55; Ernie Lightman et al., "Not Disabled Enough: Episodic Disabilities and the Ontario Disability Support Program" (2009) 29(3) Disability Studies Quarterly (online: http://www.dsq-sds.org/article/view/932/1108);

are episodic. Individuals may have good and bad days or weeks. They may marshal their energy and resources for limited periods, then experience setbacks as a result.[8] Determinations based on the appearance of a person with an invisible disability risk discounting the extent of disability. When such erroneous determinations reduce benefits or increase obligations, they effectively penalize the person with a disability for having presented well.

Unjust Enlargement of "Material Change," Sole Basis for Varying Spousal Support

8. A court may vary spousal support under the *Divorce Act* only when satisfied, as per s. 17(4.1), of "a change in the condition, means, needs or other circumstances of either former spouse." *Willick v. Willick* remains the leading authority on "material change," and absent one, the lower courts had no basis for variation.[9] The agreement here did not identify any issue for review, as would allow a review application without proof of a material change.[10] The lower courts found authority to vary spousal support only by extending what counts as a "material change."

9. This Court should reject the lower courts' pernicious innovation and clarify that circumstances such as the wife's furnish no material change. Nothing suggests a change regarding her ability to work. Her health has not improved. The husband's income has increased. The sole change found by the Court of Appeal arose from the trial judge's acceptance of the husband's argument and contradicted medical evidence that the wife "could" work part-time and that her failure to seek work given the passage of time was blameworthy. These were not "changes" in her circumstances (or his) sufficient to trigger a reduction of spousal support.

10. Serious discriminatory, systemic implications would result from enlarging "material change" to encompass the passage of time combined with a spouse's failure to seek employment where doing so was never contemplated. Depending on circumstances, factors militating against

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S. Stone, "Reactions to Invisible Disability: The Experiences of Young Women Survivors of Haemorrhagic Stroke" (2005) 27 Disability and Rehabilitation 293 at 295; C.P. White *et al.*, "Invisible and Visible Symptoms of Multiple Sclerosis: Which Are More Predictive of Health Distress?" (2008) 40 Journal of Neuroscience Nursing 85; Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (November 2000) at 7, 8.

[8] See e.g. Lightman et al., *ibid.*

[9] [1994] 1 S.C.R. 670.

[10] *Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 37.

the expectation that a spouse seek work might include age, a traditional role in the home, illness, and disability. The Court of Appeal's innovation would burden the recipients of spousal support, overwhelmingly women, without considering their ongoing roles as caregivers after relationship breakdown and the systemic inequalities impeding their attaining self-sufficiency.

11. Beyond rejecting an undue enlargement of "material change," the Court should reiterate its disapproval of vindictive conduct in retaliation to efforts to enforce children's right to support. The wife had sought an increase in child support by virtue of the husband's increased income, consistent with her obligations under *D.B.S. v. S.R.G.*[11] The majority in that judgment had enjoined courts to be sensitive to the "practical concerns" accompanying applications for child support. A recipient parent might justifiably fear "that the payer parent would react vindictively to the application."[12] An attack on the entitlement to spousal support in response to an effort to increase child support, where ability to pay is not in issue, exemplifies conduct that would deter recipient parents from seeking to increase support.

Lower Courts' Approach to Support Inconsistent with Precedents of this Court

12. The variation by the courts below was inconsistent with this Court's interpretation of the *Divorce Act* in *Moge* and *Bracklow*. The facts establish distinct compensatory and contractual bases for the wife's entitlement to support (the contours of non-compensatory support are not in issue). The variation focused unduly on the legislative objective of promoting a spouse's economic self-sufficiency, a legal error exacerbated by the context noted above.

Termination at Odds with Compensatory Support

13. Without regard for the wife's disability, the lower courts' termination of spousal support after seven years on the basis that she should be working was wrong on the law. The lower courts prioritized the legislative objective of promoting each former spouse's economic self-sufficiency within a reasonable time. The Court of Appeal dismissed argument as to the compensatory basis for support, the trial judge's sole reason for reducing support having been

[11] [2006] 2 S.C.R. 231.
[12] *Ibid.* at para. 101.

the wife's failure to seek work.[13] But the gist of *Moge* is that self-sufficiency cannot be the sole objective, particularly where, as here, compensatory factors are present. As the majority reaffirmed in *Miglin v. Miglin*: "no single objective in s. 15.2(6) is paramount"; the "economic self-sufficiency" objective for spousal support is "only one of those objectives and an attenuated one at that."[14]

14. The lower courts' emphasis on self-sufficiency exemplifies an increased, and unjustifiable, judicial comfort with term-limited orders. Indeed, in provinces where the *Spousal Support Advisory Guidelines* receive considerable weight, judges risk rigidly taking them as authorizing termination dates simply because a claimant's age and the years of marriage fall short of the "rule of 65."[15] Such an approach is irreconcilable with the recognition in *Moge* of the compensatory support due to a spouse having performed a full-time homemaking and parenting role. It is inconsistent with courts' "overriding discretion" on each case's "particular facts."[16]

15. The lower courts' erasure of the wife's entitlement to compensatory support aligns with systemic prejudice against women with disabilities. The trial judge quoted *Bracklow* on the obligation to pay support to a "sick or disabled spouse...over and above what is required to compensate the spouse for loss incurred as a result of the marriage and its breakdown."[17] Then she stated: "Evidence shows that L.P.'s condition and her financial dependence do not arise from the marriage or from its breakdown."[18] Neither the marriage nor its breakdown caused the multiple sclerosis. But it is utterly at odds with *Moge* to affirm that the financial dependence of a wife who during a fourteen-year marriage was a full-time homemaker and mother, and never worked or acquired training, in no way arises from the marriage or its breakdown. The trial judge appears to have assumed, stereotypically, that a wife may be "sick or disabled" or an equal contributor to the "joint enterprise" of marriage entitled to compensation, but not both. Such an approach negates women with disabilities' contributions to their families. In the Civil Code's words, they, like any other spouses, may "make their respective contributions by their activities

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[13] Court of Appeal at para. 20.
[14] [2003] 1 S.C.R. 303 at para. 40 [*Miglin*], citing *Bracklow*, *supra* note 2 at para. 35; *Moge*, *supra* note 1 at 852; and *Miglin, ibid.* at para. 35.
[15] See e.g. *Fisher v. Fisher*, 2008 ONCA 11, 88 O.R. (3d) 241.
[16] *Moge*, *supra* note 1 at 866.
[17] *Bracklow*, *supra* note 2 at para. 13 [emphasis added].
[18] Trial Judgment at para. 94 [emphasis added].

within the home."[19] That the Bracklows' particular marriage led to only non-compensatory support cannot preempt other disabled spouses' entitlement to compensatory support, such as this wife's. In short, the wife finds herself in a double bind, viewed as able enough to be working, but too disabled to deserve compensation for past contributions and losses.

16. Alternatively, an individual, such as the wife, who obtains long-term disability benefits (LTD) has taken the steps required by law so as to access all available resources. Parliament's objective of promoting self-sufficiency has no further work to do.

The Effect of the Husband's Agreement to Pay Support

17. The lower courts also underweighted the contractual basis for the wife's entitlement to support.[20] The judgments below undermine agreements to pay support. Where parties have negotiated support and consented to an arrangement, their consent indicates that they have considered the statutory factors in the light of their marriage. They have reached "an agreement they consider to comply substantially with the objectives of the Act."[21] In agreeing to support without a term or other condition, the husband had already taken Parliament's objective of promoting self-sufficiency into account.

18. It is appropriate to situate the present appeal vis-à-vis *Miglin*. That appeal concerned a fresh application under s. 15.2 by a potential creditor to receive spousal support despite a prior agreement waiving entitlement. This case is different. It concerns a support debtor's effort under s. 17 to reduce and terminate support despite a judicially approved Consent to Judgment in which he had recognized the wife's entitlement to support and his corollary obligation. As argued in the Appellant's Factum at para. 51, it is unjust for courts to apply a double standard, invoking *Miglin* so as to hold creditors of support—the majority of whom are women—to their waivers of support, while applying a more lax standard so as to allow debtors of support—the majority of whom are men—to reduce or cancel obligations to which they consented.

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[19] Art. 396, para. 2 *C.C.Q.* Similarly, the Court of Appeal focused on the wife's potential incapacity, not her entitlement to compensatory support: paras. 16-19.
[20] *Bracklow*, *supra* note 2 at para. 15.
[21] *Miglin*, *supra* note 14 at para. 55.

Termination Subject to Further Litigation Unjust

19. Even had a variation of spousal support been warranted, the variation crafted so as to promote the wife's economic self-sufficiency was incompatible with Parliament's qualifier "in so far as practicable."[22] The lower courts were wrong to reduce and then terminate support on the faint hope of the wife's finding work. They failed to consider the enormous barriers to obtaining remunerative and secure employment confronting women who have contributed to the household full-time for over a decade, have little or no work experience or education, and have been out of the workforce for most of their adult lives.

20. Where a wife's return to work and generation of employment income are uncertain or dubious at best, the kind of order made in the case at bar exacerbates women's systemic disadvantage. It was inappropriate to specify a stop date for support, subject to the wife's returning to court to establish her further entitlement. The costs and stress of litigation make encumbering the economically disadvantaged wife with such an obligation regressive and inconsistent with this Court's approach to family law. It would have been more appropriate to state a term for review and assess the wife's progress.

Invidious Approach to Disabled Support Recipients

21. The lower courts' approaches to disability were inconsistent with this Court's guidance in *Nova Scotia (Workers' Compensation Board) v. Martin*.[23] That appeal concerned a *Charter* challenge to a workers' compensation scheme for its treatment of persons with chronic pain, but the present circumstances appropriately engage the Court's general approach. The Court showed sensitivity to the "invidious social stereotype" disadvantaging persons with disabilities, particularly the assumption that people with invisible disabilities might "malinger[]...with a view to financial benefits."[24] Gonthier J. noted that denying economic benefits on the basis of invidious stereotypes might "be symptomatic of widely held negative attitudes towards the claimants" and "reinforce the assault on their dignity."[25]

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[22] *Divorce Act*, s. 17(7)(d).
[23] [2003] 2 S.C.R. 504 [*Martin*].
[24] *Ibid.* at para. 86; see also at para. 90.
[25] *Ibid.* at para. 103.

22. In the wife's situation, her attaining economic self-sufficiency is, to use Parliament's language, neither "practicable" nor "reasonable." Women with disabilities face severe barriers in seeking employment. Employers discriminate. It is difficult to find part-time work flexible enough to accommodate the fluctuating capacity of someone living with multiple sclerosis.[26] While one of three medical experts suggested that she "might" be capable of doing some part-time work, the trial judge reduced and terminated support based on the wife's perceived capacity, not her probability of finding employment. The trial judge had no evidence as to the income that the wife might earn.[27] Nor was there discussion of the gap between any standard of living she might reasonably achieve and that enjoyed by the spouses during their relatively long marriage.

23. This Court's caution in *Martin* about terminating benefits in order to incentivize a disabled person's return to paid work applies here. Gonthier J. rejected the claim that the challenged provisions were tailored to the specific needs of persons with disabilities insofar as terminating benefits induced an early return to work. He recognized that a return to work might have positive effects for a person with a disability. But the effort to return to work might fail, leaving permanently impaired workers with "nothing: no medical aid, no permanent impairment or income replacement benefits, and no capacity to earn a living on their own."[28] Such a result was incompatible with legislative intent and with essential human dignity.[29]

24. That consideration applies to the termination of the wife's support. In the case of a person living with an episodic, progressive, and degenerative disease, a snapshot of capacity cannot set expectations for the future. The trial judge's acceptance that the wife might work 20-25 hours per week—however questionable—was at best a determination for the short term. It failed to address the impact of the multiple sclerosis on her capacity to work in the mid-term and longer term. The judge should have borne in mind the impact of short-term, unstable, and low-paying work on the wife's LTD benefits. Given the uncertainty of the wife's capacity to work, and the certainty of

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[26] Jongbloed, *supra* note 7 at 197. See further discussion of barriers to employment of people with disabilities in Statistics Canada, *Participation and Activity Limitation Survey 2006: Labour Force Experience of People with Disabilities in Canada* (Ottawa: Social and Aboriginal Statistics Division, July 2008) at 21-22; Ontario Human Rights Commission, *supra* note 7.
[27] Jongbloed, *ibid.*
[28] *Martin*, *supra* note 24 at para. 97.
[29] *Ibid.*

her disease's eventual progress, it would be wholly unjust to direct her to precarious work in the short term if doing so would entail the loss of LTD benefits for the long term when she would be unable to work.

Affirming Substantive Equality within Family Law in Quebec

25. The present appeal is the third to this Court in three years from judgments in which the Quebec Court of Appeal has balked at the onerousness—from the perspective of economically advantaged husbands—of allocative measures consistent with marriage as a joint economic endeavour.[30] This Court should affirm that family law—under both *Civil Code of Québec* and *Divorce Act*—should be applied as "consistent with a general trend in Canada to protect vulnerable spouses."[31]

26. Undermining consent as a basis for support would be especially harmful in Quebec. Unlike legislation in every other province, its Civil Code attaches no duty of support to unmarried cohabitants.[32] While agreements by which *de facto* spouses undertake to support one another were once null as contrary to public order, they are now valid.[33] Where legislative silence leaves a large role for private ordering, judges must not be quick to doubt the appropriateness of a former spouse's having agreed to support the other.

27. Loosening the standard for reduction and cancellation of spousal support would most acutely disadvantage wives in Quebec. Compared with the *Federal Child Support Guidelines*, the *Quebec Child Support Guidelines* substantially deprive custodial mothers of adequate funds to support their children. In many cases the quantum of spousal support redresses that harm only partially. In the case at bar, child support was fixed at $1,614.18 per month based on the wife's custody and the husband's access, the husband's 2008 income of $255,613, and the wife's

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[30] *M.T. v. J.-Y.T.*, *supra* note 2; *Droit de la famille—10565*, [2010] R.D.F. 229 (Qc. C.A.), on appeal as *R.P. v. R.C.*, S.C.C. File No. 33698, scheduled for 20 April 2011. But for careful attention to compensatory support, see *Droit de la famille—10829*, [2010] R.D.F. 201 (Qc. C.A.), Kasirer J.C.A.

[31] *M.T. v. J.-Y.T.*, *ibid.* at para. 16.

[32] Art. 585 C.C.Q. *a contrario*. See *Droit de la famille—102866*, [2010] R.J.Q. 2259, leave to appeal to S.C.C. granted, 24 March 2011, File No. 33990.

[33] Jean Pineau & Marie Pratte, *La famille* (Montreal: Thémis, 2006) at para. 380.

income as equivalent to $22,936 gross.[34] Had the *Federal Guidelines* applied, child support would have been $3,028.00 per month. For joint custody in the parties' circumstances, the *Quebec Guidelines* would have prescribed child support to the wife of $830.30.

Conclusion

28. While the Supreme Court of Canada has recently addressed child support, waivers of spousal support, and property allocation on relationship breakdown, this appeal is the first in many years addressing the variation of spousal support. Alert to the many payers who might seek to vary or end their support obligations on the mere basis of the passage of time, this Court should reject the Court of Appeal's enlargement of "material change." Distinct from that threshold, and consistent with *Moge*, this Court should affirm spousal support's robust compensatory mission, particularly for women who have contributed to the family by full-time homemaking and parenting. Consistent with *Bracklow*, this Court should uphold the spouses' consent as a freestanding basis for support. The legislative objective of promoting self-sufficiency, one among others, must not trump compensation or contract. Moreover, the statute's qualified language dictates that even orders promoting self-sufficiency must consider a spouse's realistic chances of finding viable work. Last, this Court should direct lower-court judges to apply family law in every jurisdiction alive to women's socio-economic disadvantage, specifically the interaction, patent here, of inequalities from sex and disability.

PARTS IV AND V – COSTS AND RELIEF SOUGHT

29. Costs were ordered pursuant to this Court's order dated March 30, 2011. Pursuant to Rule 59(2) of the *Rules of the Supreme Court of Canada*, LEAF-DAWN asks to present oral argument at the hearing of this appeal. LEAF-DAWN submits that the questions of law should be resolved in accordance with para. 28.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of April, 2011.

Anne-France Goldwater

Robert Leckey
per: AFGoldwater

[34] Trial Judgment at paras. 58-60.

PART VI – AUTHORITIES

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PART VII – LEGISLATION

Legislation	Paragraph Nos.
Divorce Act, R.S.C. 1985, 2d Supp. (c. 3), ss. 15.2, 17.....	4, 8, 12, 13, 17, 18, 19, 25
Civil Code of Québec, S.Q. 1991, c. 64, arts. 396, 585.....	15, 25, 26