# ALBERTA'S NEW ADULT INTERDEPENDENT RELATIONSHIPS ACT

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In recent years, Canadian courts and legislatures have wrestled with the definitions, meanings and associated obligations and benefits of various spouse-like relationships and, more specifically, who should be entitled to be treated as a "spouse". Recent jurisprudence has extended certain benefits normally associated with marriage to both heterosexual and same-sex cohabitants. In response to these judicial pronouncements, legislatures have enacted a flurry of often-controversial legislation. The Alberta Legislature's attempt to address some of these issues is reflected in the new *Adult Interdependent Relationships Act*[1] (the "AIRA"), which received Royal Assent on December 4, 2002. When proclaimed into force,[2] the AIRA will amend several pieces of legislation to extend certain "marriage-like" benefits and obligations to non-married partners involved in committed, interdependent relationships.

The purpose of this article is to present a preliminary analysis of some of the potential ramifications and implications of the AIRA.[3] To do so, however, it is first necessary to discuss some of the juridical underpinnings mandating some of the provisions in the AIRA and the attempts of other provinces to address these issues.

## 1. Judicial Pronouncements

In the now often-discussed decision in *Miron v. Trudel*,[4] the Supreme Court of Canada held that legislation that gives benefits to

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1. S.A. 2002, c. A-4.5 (formerly Bill 30-2). Certain amendments to the AIRA were introduced on November 27, 2002. This article proceeds on the basis that those amendments will be incorporated into the AIRA.
2. As of the date of writing, the AIRA has not been proclaimed in force. It is expected that proclamation will occur in the second quarter of 2003, following the enactment of certain associated regulations and prescribed forms.
3. The information in this article is current to December 31, 2002.
4. (1995), 124 D.L.R. (4th) 693, [1995] 2 S.C.R. 418, 23 O.R. (3d) 160.

married persons and not to unmarried persons in similar relationships may be in violation of s. 15 of the *Canadian Charter of Rights and Freedoms*.

The *Miron v. Trudel* decision was followed by *M. v. H.*,[5] in which the Supreme Court of Canada held that the provisions of Ontario's *Family Law Act* which restricted to legally married spouses the right to seek spousal support upon relationship breakdown violated s. 15 of the Charter and, furthermore, that the opposite-sex definition of "spouse" in that legislation was not justified under s. 1 of the Charter. As well as being a fundamental step in the struggle for equality for same-sex couples, the decision in *M. v. H.* lent credence to the view that family law statutes should be considered unconstitutional if they grant rights to married partners that are withheld from unmarried partners, regardless of sexual orientation.

Following *M. v. H.*, various courts have had the opportunity to address the rights of unmarried cohabitants. While an exhaustive discussion of the many Canadian cases considering such issues is beyond the scope of this article, the following comments are illustrative of the many questions that remain unanswered.

In Alberta, the leading decision is that of the Court of Appeal in *Taylor v. Rossu*,[6] in which the support provisions of Alberta's *Domestic Relations Act* were held to be invalid, as they granted support rights to married partners that were denied to unmarried partners. In that case, Mr. Rossu and Ms. Taylor had lived together with Ms. Taylor's daughter for 29 years, during which time Mr. Rossu assisted with both child care and financial support. While Ms. Taylor and Mr. Rossu had sexual relations for the first 25 years of their relationship, they maintained separate bedrooms. Moreover, Ms. Taylor was not faithful to Mr. Rossu. Mr. Rossu denied any form of commitment or obligation between himself and Ms. Taylor, other than his promise to child welfare authorities that he would provide for Ms. Taylor's daughter. He argued that the imposition of marital obligations would be tantamount to coercive imposition of marital status.

The appellate court commenced its analysis by noting that the issue was whether Ms. Taylor had the right to apply for support under the *Domestic Relations Act*, not whether she had the right to receive it. Applying the ordinary meaning of the word "spouse", the court found that common law spouses were not included as parties

5. (1999), 171 D.L.R. (4th) 577, [1999] 2 S.C.R. 3, 46 R.F.L. (4th) 32.
6. (1998), 161 D.L.R. (4th) 266, [1999] 1 W.W.R. 85, 39 R.F.L. (4th) 242 (Alta. C.A.).

entitled to support under the *Domestic Relations Act*. Marital status having been found by the Supreme Court of Canada to be an analogous prohibited ground of discrimination under s. 15 of the Charter, the appellate court held that the support provisions were discriminatory by excluding from their scope of application partners living in a common law relationship, and that such an exclusion was not a reasonable limit under s. 1 of the Charter. The court struck down the relevant provisions of the *Domestic Relations Act*, but suspended the declaration of invalidity for 12 months to allow the government time to draft replacement legislation.

The court noted that the legislature, not the courts, should determine the appropriate definition of "common law spouse" for these purposes:

> . . . since there is no universally accepted definition of "common law spouse", simply reading in the term without defining it is insufficient . . . the legislature, not the Court, is in the best position to say what would be appropriate in the Alberta context. Of course, we make no comment on whether the selected criteria would meet *Charter* concerns. That of course will depend on the definition adopted. Taylor argues that there should be no minimum period for eligibility since there is no equivalent duration requirement in marriages, and, in any event, dependency can arise after a very short relationship. But either a qualifying time period or other criteria such as a registration scheme may be necessary to retain some form of order in administering the system, and assuring that the parties to the relationship were committed to each other in a way akin to the commitment found in a marriage.[7]

Clearly, the decision in *Taylor v. Rossu* leaves open the question of who qualifies as a common law spouse. Notably, the court did not discuss whether the definition should also include same-sex couples. It is not clear whether the relationship need be a conjugal one

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7. *Supra*, at para. 151. The argument against imposing a qualifying time period during which the couple must live together was recently addressed by the Ontario Court of Appeal in *Brebric v. Niksic* (2002), 215 D.L.R. (4th) 643, 60 O.R. (3d) 630, 27 R.F.L. (5th) 279 (C.A.). The definition of "spouse" in s. 29 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 (revised as a result of *M. v. H.*), included unmarried couples who have cohabited continuously for not less than three years. The appellant Brebric applied for a declaration that the three-year cohabitation requirement unfairly discriminated against her. The appeal was denied, the appellate court holding that the status of a person who cohabited with another person for less than three years is not an analogous ground of discrimination pursuant to s. 15 of the Charter. It was noted that, even if s. 15 had been violated, the definition of "spouse" could be justified under s. 1 of the Charter. A detailed discussion of this decision is found in C. Schmitz, "Ontario Court of Appeal upholds 'spouse' definition for unmarried couples" (August 9, 2002), 22:13 *The Lawyers Weekly*, at p. 1.

at all and, if so, whether there needs to be fidelity (and trust) between the partners. In short, how much of a commitment is necessary?

The court did indicate that there may be a distinction between couples who have deliberately chosen not to marry and those who cannot, and that the legislature could revise support criteria to take such things into account:

> Couples who opted not to marry because they wanted to avoid the legal obligations of marriage are arguably in a different position than couples who were unable to marry because of philosophical, financial, legal or cultural difficulties. Members of the former group may be able to establish that there was no commitment or obligation between the partners. They may be able to avoid support obligations if they have structured their affairs in a way that did not result in economic disadvantage to either party.[8]

Furthermore, whether the parties must cohabit continuously, or at all, to become entitled to marital rights and saddled with obligations was expressly left open by the court:

> We see no reason to limit *Charter* scrutiny of distinctions based on marital status only to those situations in which the couple is living together as an intact family unit. To do so would allow couples to pick and choose those rights and responsibilities which they wished to have attached to their common law marriage . . . Those legally married do not enjoy this freedom to pick and choose what benefits and burdens will apply to them.[9]

In *Re Woycenko Estate*,[10] the Alberta Court of Queen's Bench, relying on the decision and analysis in *Taylor v. Rossu*, extended the right to seek relief under the *Family Relief Act* to "a party to a common law relationship". In *Woycenko*, Jacqueline Rentz and the deceased, Metro Woycenko, had lived together for 18 years until the date of his death. They had two children together, both of whom were minors. Mr. Woycenko's will left nothing to the two minor children, $15,000 to Ms. Rentz and the residue of his $100,000 estate to his three adult children from a previous marriage. Just prior to his death, Mr. Woycenko had also transferred to the minor children certain property worth in excess of $40,000, which he had jointly owned with his ex-wife. Ms. Rentz brought an application pursuant to the *Family Relief Act*, claiming that Mr. Woycenko had

8. *Taylor v. Rossu*, *supra*, at para. 148.
9. *Supra*, at para. 128.
10. [2002] A.J. No. 867 (QL), 2002 ABQB 640 (Q.B.). For a similar result in British Columbia, see *Grigg v. Berg Estate* (2000), 186 D.L.R. (4th) 160, 31 E.T.R. (2d) 214, 71 C.R.R. (2d) 117 (B.C.S.C.).

made inadequate provision for her and their two children and, further, that the failure of the *Family Relief Act* to provide a remedy for common law spouses contravened s. 15 of the Charter. Pursuant to s. 24(1) of the Charter, Ms. Rentz' application asked the court to read in to the definition of "dependent" the italicized portion of the following:

> "dependent" means . . . the spouse *and a party to a common law relationship which is continuous up to the date of the death of the deceased.*

(Emphasis added.)

Counsel for Mr. Woycenko's three adult children did not oppose the read-in, their submissions being limited to the degree of relief Ms. Rentz should receive. Similarly, counsel for the Public Trustee did not oppose the read-in, his submissions being limited to the relief to be provided to Mr. Woycenko's two minor children. More notably, the Province of Alberta did not oppose the constitutional challenge. Rather, the Minister of Justice and Attorney General instructed counsel not to intervene if the requested read-in changed only the definition of "dependent".

The court relied heavily on the analysis of the Alberta Court of Appeal in *Taylor v. Rossu* to determine that Ms. Rentz' s. 15 Charter rights were infringed by the exclusion of common law spouses from the *Family Relief Act*. The court accepted the finding in *Taylor v. Rossu* that the goal or purpose of the Act was "the relief of dependency, not the promotion of marriage by way of excluding or penalizing survivors of common law relationships who failed to formalize their union".[11] The court found that a second goal of the legislation was "the policy of non-interference with testamentary intentions except where testators have formalized their relationships thereby accepting the attendant legal obligations".[12] The distinction between married and unmarried testators in this context was not rational, and consequently was not justified by s. 1 of the Charter. The exclusion of common law spouses was therefore unconstitutional.

The court found that it was appropriate to read in the definition of "dependent" as suggested by Ms. Rentz, to be effective immediately. Noting that Ms. Rentz would be taking care of the two minor children for some time into the future, and taking into account their intention to pursue post-secondary education, the cost of which would use up the entirety of the estate, the court concluded that the whole of Mr. Woycenko's estate should be transferred to Ms. Rentz.

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11. *Re Woycenko Estate, supra*, at para. 25.
12. *Supra*, at para. 27.

The court also pointed out that Ms. Rentz' own claim on the estate was "very strong" in light of her 18 years with Mr. Woycenko and her financial contribution to the relationship which had permitted Mr. Woycenko to acquire a large portion of the assets which now formed his estate.

As a result of the *Woycenko* decision, a person who is able to establish that he or she was a "party to a common law relationship" with the deceased, which relationship was continuous up to the date of the deceased's death, will have standing to bring an application for relief under the *Family Relief Act*. However, the question that remains open is what will constitute a "common law relationship" for this purpose. On the facts before the court in *Woycenko*, this issue did not have to be decided. The court noted that Ms. Rentz' "common law status is not seriously in dispute", as they had lived together for 18 years and had two sons. This decision illustrates one of the difficulties of judge-made law, as it is based only on the facts before the court.[13] In *Woycenko*, this difficulty was exacerbated by the fact that the Government of Alberta chose not to make intervenor submissions.

The courts of other provinces have also had occasion to deal with some of these issues.[14] For example, recently, in *Sturgess v. Shaw*,[15] the Ontario Superior Court of Justice granted the applicant, Ms. Sturgess, permission to appeal the family law motions judge's dismissal of her request for temporary spousal support. Ms. Sturgess had been involved in a 20-year secret affair with the respondent, Mr. Shaw, which produced a daughter, then age 20. Mr. Shaw paid support for the daughter. Interestingly, throughout the 20-year relationship, Mr. Shaw was living (and still lived) with his wife of 29 years, with whom he had two children. To qualify for support, Ms. Sturgess had to demonstrate, pursuant to s. 29 of the Ontario *Family Law Act*, that she and Mr. Shaw, being the natural parents of the child, had "cohabited in a relationship of some permanence". The court followed an earlier decision,[16] stating that the "presence of a

13. For a discussion of this criticism, see J.G. McLeod, "Annotation to Taylor v. Rossu" (1998), 39 R.F.L. (4th) 243-246.
14. See, for example, *W. (C.L.) v. W. (G.C.)* (1999), 182 Sask. R. 237, 67 C.R.R. (2d) 311 (Q.B.); *Hendricks v. Quebec (Procureur General)*, [2002] J.Q. No. 3816 (QL), [2002] R.J.Q. 2506 (S.C.); *EGALE Canada Inc. v. Canada (Attorney General)*, [2001] 11 W.W.R. 685, 95 B.C.L.R. (3d) 94, 19 R.F.L. (5th) 59 (S.C.); and *Halpern v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 223, 60 O.R. (3d) 321, 28 R.F.L. (5th) 41 (S.C.J.).
15. [2002] O.J. No. 3759 (QL) (S.C.J.).
16. *Hazlewood v. Kent*, [2000] O.J. No. 5263 (QL) (S.C.J.).

child born of the relationship combined with ongoing support payments should reduce the amount of residence share necessary to support a finding of cohabitation" and noting that the economic burden placed on parents raising a child "can be a basis in itself for spousal support to be ordered". In concluding that Ms. Sturgess was entitled to appeal the dismissal of her interim support motion, the court stated:

> More fundamentally, I do not see how an after-the-fact focus on economic consequences should play any part in determining at the initial step of standing whether the party applying for temporary spousal support has shown a good arguable case that there existed at the material time a state of cohabitation in a relationship of some permanence.[17]

The *Sturgess* decision thus raises the possibility that a partner could be in a marriage or marriage-like relationship with two or more persons at one time, and consequently be subject to the obligations and benefits of marriage deriving from each of the relationships.

However, while the foregoing jurisprudence shows a growing recognition that common law spouses should be subject to the same, or similar, spousal support regimes as are married spouses, the Supreme Court of Canada has made it clear in *Nova Scotia (Attorney General) v. Walsh*,[18] that this recognition does not extend to a division of matrimonial property. In that case, an unmarried couple lived together for ten years and had two children together. They owned a home and assets together, and separated in 1995. The applicant sought an equal division of the couple's assets pursuant to Nova Scotia's *Matrimonial Property Act*, arguing that the definition of "spouse" in that Act infringed s. 15 of the Charter because it did not include a party to a common law relationship. Interestingly, the parties resolved their claims prior to the case being heard by the Supreme Court.

Overturning the decision of the Nova Scotia Court of Appeal, the majority of the Supreme Court of Canada held that the exclusion of unmarried, cohabiting persons from the matrimonial property division regime is not discriminatory within the meaning of s. 15 of the Charter. The basis of the court's decision was that a reasonable, unmarried cohabiting person, taking into account all of the relevant contextual factors, would not find the failure to include him or her in the ambit of matrimonial property division legislation to have the effect of demeaning his or her dignity.

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17. *Supra*, footnote 15, at para. 9.
18. (2002), 221 D.L.R. (4th) 1, 32 R.F.L. (5th) 81, [2002] S.C.J. No. 84 (QL).

The court noted that the decision whether or not to marry is intensely personal and that a decision to marry must be a positive act. In discussing the applicability of the matrimonial property regime, Bastarache J., giving the majority's reasons, noted:

> 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.
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> . . . . .
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> 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 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.[19]

In a concurring judgment, Gonthier J. noted the differing objectives between the division of matrimonial assets and spousal support:

> The division of matrimonial assets and spousal support have different objectives. 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. 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. 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. Entirely different principles underlie the two regimes. To invoke s. 15(1) of the *Charter* to obtain

19. *Supra*, at paras. 50 and 54.

> spousal assets without regard to need raises the spectre of forcible taking in disguise, even if, in particular circumstances, equitable principles may justify it.[20]

Noting that persons unwilling or unable to marry have alternative choices and remedies available to them, including the ability to apply for support or a declaration of constructive trust, Bastarache J. concluded:

> All of these factors support the conclusion that the extension of the MPA to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected.[21]

## 2. Legislative Responses

Despite initial protests to the Supreme Court of Canada's decision in *M. v. H.*, Parliament, as well as the provincial legislatures, have begun to move towards the implementation of legislation that would extend equal benefits to common law and married spouses. A brief examination of some of these markedly differing approaches is of benefit in understanding the potential ramifications of the AIRA.[22]

### (1) Common Law Partners/Spouses

The Ontario government reluctantly responded to *M. v. H.* by enacting the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*.[23] The statute introduced the concept of "same-sex partner" and amended various provincial statutes which contained provisions concerning the rights and obligations of unmarried opposite-sex partners, extending them to a "spouse or same-sex partner". Notably, unmarried, opposite-sex partners fall within the extended definition of "spouse" in those statutes, the

20. *Supra*, at para. 204.
21. *Supra*, at para. 62.
22. A full discussion of the stance of the various legislatures can be found in J. Murphy, "Dialogic responses to M. v. H.: from compliance to defiance" (Spring 2001), 2 U. of T. Faculty Law Rev. 299, and D.G. Casswell, "Moving Towards Same-sex Marriage" (2001), 80 Can. Bar Rev. 810.
23. S.O. 1999, c. 6.

effect being that the legislation creates a "separate but equal" regime as between opposite-sex couples, on the one hand, and same-sex couples, on the other hand.

In 2000, the federal government enacted the *Modernization of Benefits and Obligations Act*,[24] which implemented the term "common law partner" to refer to both same-sex and opposite-sex couples cohabiting in a conjugal relationship and redefined the term "spouse" to apply only to married couples. Sixty-eight federal statutes (including, for example, the *Canada Pension Plan Act*[25] and the *Income Tax Act*[26]) were amended to extend to same-sex partners the same benefits and obligations — including certain rights previously available only to married spouses — as are available to, or imposed upon, opposite-sex couples. A similar approach has been taken in Manitoba.[27]

### (2) De Facto Spouses/Civil Union

Quebec was the first province to pass legislation following *M. v. H.*, enacting the *De Facto Spouses Act*[28] in 1999. This statute amended numerous provincial statutes to include a party to either a same-sex or opposite-sex relationship within the definition of "de facto spouse". The concept of a "civil union" embodied by such provisions is unique to civil law.

### (3) Common-Law Partners as Spouses

In 1999 and 2000, British Columbia enacted the *Definition of Spouse Amendment Act, 1999*[29] and the *Definition of Spouse Amendment Act, 2000*,[30] which altered various provincial statutes to include a party to either an opposite-sex or same-sex common law relationship under the term "spouse". A similar approach was taken in Saskatchewan.[31]

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24. S.C. 2000, c. 12.
25. R.S.C. 1985, c. C-8.
26. R.S.C. 1985, c. 1 (5th Supp.).
27. *An Act to Comply with the Supreme Court of Canada Decision in M. v. H.*, S.M. 2001, c. 37.
28. *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14.
29. S.B.C. 1999, c. 29.
30. S.B.C. 2000, c. 24.
31. *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, S.S. 2001, c. 50, and *Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, S.S. 2001, c. 51.

### (4) Registered Domestic Partnerships

A different approach was taken in Nova Scotia, which enacted the *Law Reform (2000) Act*,[32] which deems individuals who have cohabited in a conjugal relationship for a specified period of time to be "common law partners" and, more significantly, establishes a "registered domestic partnership" regime, which cohabiting individuals can opt into. Couples who register are entitled to various legal rights, including the equal division of property.

## 3. The Alberta Response: Background to the AIRA

The Alberta government's immediate response to the decision in *M. v. H.* was to suggest that it would use s. 33 of the Charter — the notwithstanding clause — to override any similar decision affecting Alberta. In 2000, the definition of "marriage" pursuant to s. 1(*c*) of the *Marriage Act*[33] was amended to mean "a marriage between a man and a woman", such definition to operate notwithstanding the provisions of ss. 2 and 7 to 15 of the Charter and the provisions of the *Alberta Bill of Rights*.[34]

Alberta has since undertaken detailed studies of some of these issues.[35] In particular, through a public consultation mechanism, two models for the recognition of unmarried relationships were discussed. Under the first, the Conjugal Relationships Model, benefits and obligations provided to married persons would be extended to persons who live together in a committed common law or same-sex relationship, with some indication of a long-term commitment. Under the second model, the Interdependent Relationships Model, common law, same-sex and platonic couples who are economic and emotionally interdependent would be entitled to benefits and obligations similar to those provided to married persons. The Consultation Report indicates that the vast majority of consultation participants supported the Conjugal Relationships Model and that a small majority did not support extending rights and obligations to persons in committed platonic relationships. As will be discussed in

32. S.N.S. 2000, c. 29.
33. R.S.A. 2000, c. M-5.
34. R.S.A. 2000, c. A-14, s. 2.
35. See, for example, Chapter 7, "Unmarried Cohabitants", in Alberta Law Reform Institute Report for Discussion No. 18.2, *Family Law Project: Spousal Support* (October 1998); *Public Workbook Alberta Family Law Reform 2002*; and *Alberta Family Law Reform Stakeholder Consultation Report* (May 2002) (the "Consultation Report").

greater detail in this article, notwithstanding this support for the Conjugal Relationships Model, the AIRA implements the Interdependent Relationships Model.

With respect to the potential implementation of the Interdependent Relationships Model, the Consultation Report indicates most participants agreed that the law should consider two people to be in a committed relationship if:

(a) they have lived together for a minimum of three years;[36]
(b) they live together and have a child (adopted or biological) of the relationship; or
(c) they signify by contract, through registration or in some other written form, that they are in a committed relationship.

The Consultation Report advocated the use of the following factors in determining the existence of such a relationship:

(a) the relationship's purpose, duration, constancy and degree of exclusivity or commitment;
(b) the conduct of the two persons regarding household arrangements;
(c) the degree to which the two persons mix their finances;
(d) the degree to which the persons formalize their legal obligations and responsibilities to one another;
(e) whether the two persons share in co-parenting a child;
(f) the degree to which the two persons demonstrate to others they are emotionally and financially committed to each other on a permanent basis; and
(g) the extent to which contributions have been made by either partner to the other or to their mutual well-being.

With respect to platonic relationships, recognizing there was a risk that individuals might be victimized by an unintended platonic partner, most participants agreed that persons living together in a platonic relationship should be required to take some active step to declare the existence of their relationship. There was overwhelming support for this active step taking the form of "opting in", *i.e.*,

36. The three-year period may have been chosen on the basis of certain research suggesting that the average relationship based on cohabitation lasts less than three years. Thus, a legislative minimum of three years would be more likely to attach benefits and obligations to committed relationships and not to casual, temporary or trial relationships: see, ***Public Workbook, ibid.*** In any event, it is in line with the requirements of the legislation of various other provinces.

requiring two persons to sign an agreement or officially register their interdependent platonic relationship.

## 4. Basic Scheme of the AIRA

As noted, the AIRA reflects the Alberta government's choice of the Interdependent Relationships Model. The AIRA is designed to ensure that Alberta legislation is "consistent with court rulings across the country that have stated that people in committed interdependent relationships must have equal access to the law".[37] While the AIRA confirms that "marriage is a union between a man and a woman to the exclusion of all others"[38] and that "spouse" means the husband or wife of a married person,[39] it also creates the status of "adult interdependent partner" and provides for corresponding rights and obligations.

### (1) Becoming an Adult Interdependent Partner

Consistent with the proposals in the Consultation Report, s. 3 of the AIRA provides that a person will be the adult interdependent partner of another person if any one of the following three criteria is met:

1. The person has lived with the other person in a relationship of interdependence for a continuous period of not less than three years.
2. The person has lived with the other person in a relationship of interdependence of some permanence, if there is a child of the relationship by birth or adoption.
3. The person has entered into an adult interdependent partner agreement with the other person.

Section 3(2) provides that persons who are related to each other by blood or adoption may become adult interdependent partners of each other only by entering into an adult interdependent partner agreement.[40]

A "relationship of interdependence" is defined in s. 1(1)(*f*) of the AIRA as a relationship outside marriage in which any two persons:

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37. Government of Alberta News Release (November 19, 2002).
38. AIRA, Preamble.
39. AIRA, s. 1(1)(*g*).
40. AIRA, s. 4(1), provides that a relationship of interdependence may exist between two related persons, except where one is a minor.

(a) share one another's lives;
(b) are emotionally committed to one another; and
(c) function as an economic and domestic unit.

Section 1(2) provides that all of the circumstances of the relationship must be taken into account in determining whether two persons function as an economic and domestic unit, including:

(a) whether or not the persons have a conjugal relationship;
(b) the degree of exclusivity of the relationship;
(c) the conduct and habits of the persons in respect of household activities and living arrangements;
(d) the degree to which the persons hold themselves out to others as an economic and domestic unit;
(e) the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
(f) the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
(g) the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
(h) the care and support of children; and
(i) the ownership, use and acquisition of property.

The definition of "adult interdependent partner" clearly encompasses same-sex partners, although nowhere in the AIRA is this explicitly stated to be the case.

### (2) Application to Minors

Section 6 provides that a minor can be an adult interdependent partner. However, pursuant to s. 7(2)(*c*), the minor cannot enter into an adult interdependent partner agreement unless he or she is at least 16 years old and his or her guardians have given their prior written consent.

### (3) Application to Platonic Relationships

Notably, the existence of sexual intimacy, while a factor, is not required for an interdependent adult relationship to exist. While it is, of course, possible that the same degree of commitment and interdependence normally associated with conjugal relationships may also be found in platonic relationships, there is a risk that unin-

tended consequences may result. For example, an interdependent relationship could be found to exist between two friends or two room-mates who share each others' lives and are emotionally and economically interdependent.

In contrast to the recommendations of the Consultation Report, the AIRA does not contain any mechanism for parties in interdependent platonic relationships to choose to become adult interdependent partners. Rather, this status is automatic if the criteria of three years' cohabitation and economic and emotional interdependence are met. As such, there is a significant risk that many people will fall within the ambit of the AIRA even where such consequences are unintended and not even contemplated.

### (4) Number of Adult Interdependent Partners

Section 5(1) provides that a person cannot have more than one adult interdependent partner at any one time. Section 5(2) precludes a married person who is living with his or her spouse from becoming the adult interdependent partner of another.

### (5) Termination of Adult Interdependent Relationship

Section 10(1) of the AIRA sets out the circumstances under which an adult interdependent partnership comes to an end. Such a relationship is terminated in one of the four following ways:

1. The adult interdependent partners enter into a written agreement that provides evidence that the adult interdependent partners intend to live separate and apart without the possibility of reconciliation.
2. The adult interdependent partners live separate and apart for more than one year and either of the adult interdependent partners intends that the relationship not continue.
3. The adult interdependent parties marry each other or one of the adult interdependent partners marries a third party.
4. In the case of an adult interdependent partner who is such a partner by reason of a "relationship of interdependence" (rather than because of the entry into an adult interdependent partner agreement), the adult interdependent partner enters into an adult interdependent partner agreement with a third party.

In many circumstances, only the second method may be a viable option. For example, an economically weaker partner may refuse to enter into a written agreement terminating the relationship. The

third option of marriage is likewise unavailable to same-sex couples. Lastly, for a person who is an adult interdependent partner by virtue of having entered into an adult interdependent partner agreement, s. 7(2)(*a*) provides that a person may not enter into any new agreement if the person is a party to an existing adult interdependent partner agreement.

## (6) Proving Adult Interdependent Relationship Status

Section 9.1 of the AIRA provides that the person alleging that the adult interdependent relationship exists has the onus of proving the existence of the relationship. An interesting twist on this onus is contained in s. 8.1, which provides as follows:

> 8.1 A person who alleged an adult interdependent relationship knowing that the relationship does not exist is liable in damages to compensate any person for pecuniary loss and costs incurred in reliance on the existence of the alleged adult interdependent relationship.

It would thus appear that the Alberta legislature has in effect created a new tort, the ramifications of which may be potentially severe. At a minimum, litigation is sure to result as the scope of this provision is judicially determined over time.

## (7) Ability to Opt In or Opt Out: Adult Interdependent Partner Agreement

The definition of "adult interdependent partner" clearly indicates that two persons can opt into the regime by entering into an adult interdependent partner agreement. Pursuant to s. 7, such an agreement can be entered into by two persons who are living together or who intend to live together in a relationship of interdependence. The AIRA does not, however, provide any guidance on what areas such an agreement can cover. Rather, it is to be "in the form provided for by the regulations". However, since no such regulations have yet been released for review by the public, it is unclear what form an adult interdependent partner agreement may take.

The AIRA does not contain any provision explicitly permitting the parties to opt out of the interdependent relationship regime, although it could be argued that the statute should be subordinate to any written agreement between the parties, subject to public policy concerns. As such, any two persons who are contemplating cohabitation should consider outlining their relationship in a legal contract. Indeed, Justice Minister David Hancock has reportedly cautioned

that everyone who moves in with someone else should have "a legal agreement establishing the boundaries of the relationship so they don't have to have the courts figure it out for them". Whether such an agreement will stand up upon judicial review remains an open question.

### 5. Consequences of Adult Interdependent Partner Status

The AIRA amends various other pieces of legislation to ensure that rights and obligations previously restricted to married spouses and common law spouses are now applicable to adult interdependent partners. Some notable effects are as follows:

1. *Domestic Relations Act*[41] — adult interdependent partners are required to support each other financially and a court may order an adult interdependent partner to pay support to the other partner where the adult interdependent partners are living separate and apart and there is no possibility of reconciliation.
2. *Dependants Relief Act*[42] (formerly *Family Relief Act*) — obligation on the estate of a deceased adult interdependent partner to make adequate provision for the surviving adult interdependent partner.
3. *Fatal Accidents Act*[43] — an adult interdependent partner may recover damages for the wrongful death of his or her partner.
4. *Intestate Succession Act*[44] — provides an adult interdependent partner with access to all or a portion of the other adult interdependent partner's estate, should the partner die without a will. Notably, however, the definition of "adult interdependent partner" in this legislation requires cohabitation in a conjugal relationship and does not include persons who enter into adult interdependent partner agreements.[45]
5. *Wills Act*[46] — a will is revoked upon the testator's entry into an adult interdependent partner agreement.

The Alberta government had indicated that it would consider changes to the *Matrimonial Property Act* depending on the Supreme Court of Canada's decision in *Nova Scotia (Attorney General) v.*

41. R.S.A. 2000, c. D-14.
42. R.S.A. 2000, c. D-10.5.
43. R.S.A. 2000, c. F-8.
44. R.S.A. 2000, c. I-10.
45. Section 1(1)(*a*) of the *Intestate Succession Act*, R.S.A. 2000, c. I-10, as amended by the *Intestate Succession Amendment Act, 2002*, S.A. 2002, c. 16.
46. R.S.A. 2000, c. W-12.

*Walsh*.[47] Given the result in that case, it is not expected that any such amendments will be forthcoming.

## 6. Conclusions

While the AIRA provides significant legislative guidance in determining the rights and obligations of parties in marriage-like relationships, including same-sex, opposite-sex, and platonic interdependent relationships, the legislation deviates significantly from the recommendations of the Alberta Law Reform Institute made after consultation with the public, professionals, and special interest groups in Alberta. As a result, it creates a situation where many people may acquire benefits and obligations they did not intend.

Clearly, many of the issues surrounding the meaning of "spouse" and other spouse-like relationships remain to be resolved. Court decisions, legislative enactments and public discussion are ongoing in every jurisdiction.[48] Whether the AIRA will create clarity or further confusion remains to be seen.

47. *Supra*, at footnote 18.
48. For example, on November 7, 2002, the federal Department of Justice released a discussion paper entitled "Marriage and Legal Recognition of Same-Sex Unions" (available online at http://www.canada.justice.gc.ca/en/news).