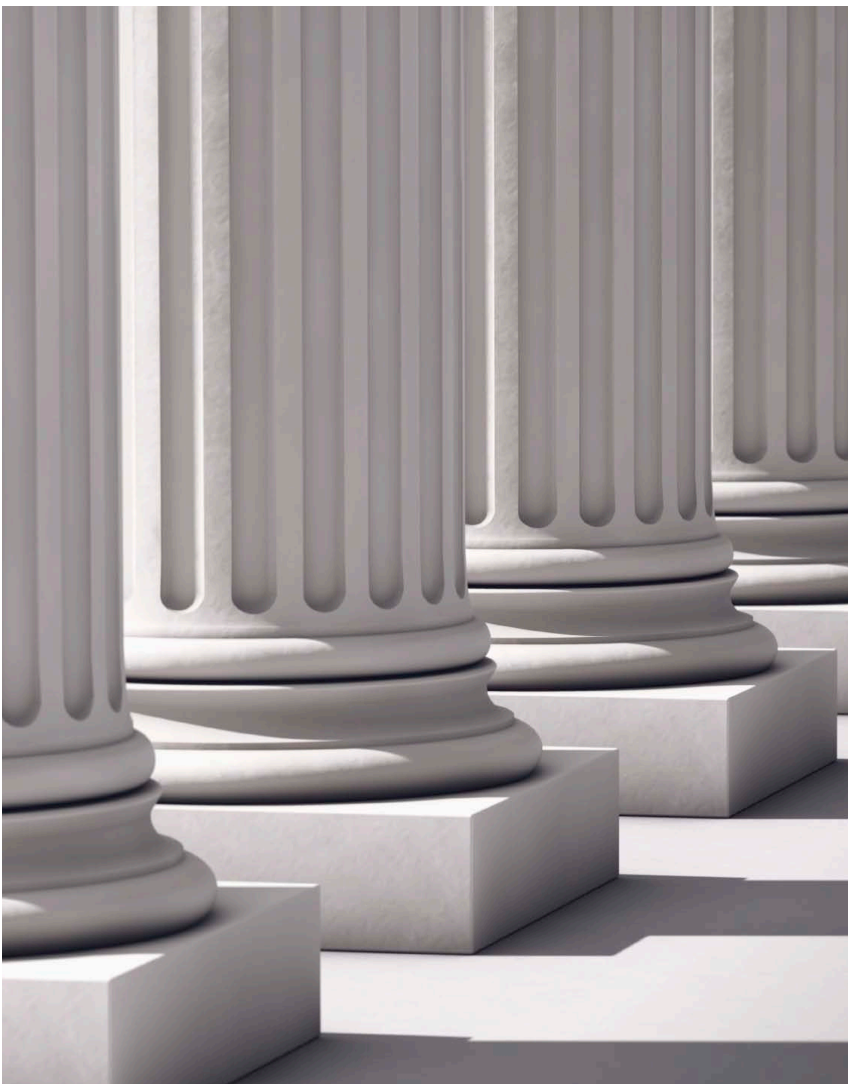
PROPERTY DIVISION: COMMON LAW COUPLES AND ADULT INTERDEPENDENT PARTNERS



REPORT FOR DISCUSSION

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Invitation to Comment

Deadline for comments on the issues raised in this document is **November 20, 2017**

This Report for Discussion by the Alberta Law Reform Institute (ALRI) proposes legislated rules for division of property upon the breakdown of a relationship between common-law partners. These proposals are intended to make the law clearer and more predictable, promote settlement, and improve access to justice.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

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Law reform is a public process. **ALRI assumes that comments on this Report for Discussion are not confidential.** ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or you may submit comments anonymously.

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Acknowledgments

This project has benefitted greatly from the involvement of many individuals and organisations.

There have been many suggestions for a project along these lines over the years. Most recently ALRI received a written request from Ronald Foster QC. This topic also features on the CBA Alberta Branch Agenda for Justice and has been championed by Wayne Barkauskas, Past Alberta Branch President. Requests for ALRI to take on this project were also received from the CBA Alberta Branch and the CBA Family Law Sections.

ALRI was fortunate to partner with the Population Research Lab at the University of Alberta to carry out a survey of Albertans' attitudes and expectations towards cohabitation and property division. We appreciate the assistance of Donna Fong, Rosanna Shih, Dr Gillian Stevens and many others who helped to design and carry out the survey and collect the data. Dr Stevens also connected us with Aleena Amjad Hafeez and supervised Ms Hafeez's report that analysed the survey results. Their expertise in data analysis has brought the opinions of 1,200 Albertans prominently into the framework of this report.

ALRI also appreciates the work of the Canadian Research Institute for Law and the Family in preparing a survey proposal.

Dr Laura Wright (then a post-doctoral fellow at the University of Alberta, Department of Sociology, now an assistant professor in the University of Saskatchewan Department of Sociology) kindly provided information about research on unmarried couples and shared her work and knowledge on the demographics of common-law couples in Canada.

ALRI held two round table discussions with family law practitioners as part of the pre-consultation on this project. Those who attended brought to light many issues that arise in practice but which are not well-reflected in the relevant literature.

Internally, we appreciate the work of the ALRI Board for their thoughtful discussion of the issues that arose during this project. Geneviève Tremblay-McCaig, legal counsel, carried out the preliminary assessment for both this project and related topics. Ms Tremblay-McCaig also completed significant research and analysis on this project. As lead counsel, Laura Buckingham, legal counsel, wrote the Report for Discussion and carried out additional research and analysis as this topic evolved. Ashley Hathorn, summer student, checked the footnotes and drafted the summary for this report. Additional editing and analytic assistance were provided by Ms Tremblay-McCaig and by

Sandra Petersson, Executive Director. Barry Chung, communications associate, was responsible for preparing the report for publication.

Finally, we would like to thank “Melissa” (a pseudonym) for sharing her experience with us regarding a difficult property division litigation when her common-law relationship ended. Her story has helped us to understand and explain the challenges that former partners face when dividing property using constructive trust principles.

Summary

In recent decades, it has become increasingly common for couples to live together without being legally married. Couples who live together in a marriage-like relationship without being legally married are often said to be living in a common-law relationship.

In Alberta, there are no legislated rules for property division upon the breakdown of a common-law relationship. The *Matrimonial Property Act* applies only to married spouses. Property division for common-law partners is based on legal ownership and the law of unjust enrichment, which is judge-made law. When common-law partners separate, there are no presumptions or formulas about how they should divide property. If they cannot agree, they face litigation which can be time-consuming, expensive, and risky.

In this Report for Discussion, ALRI proposes legislated rules for division of property upon the breakdown of a relationship between common-law partners. These proposals are intended to make the law clearer and more predictable, promote settlement, and improve access to justice.

Property Division by Agreement

In Alberta, there are no legislated rules about agreements about division of property for common-law partners. ALRI's preliminary recommendation is that there should be legislation that expressly states common-law partners may make an agreement about ownership and division of property. Legislation should include formal requirements based on the requirements in the *Matrimonial Property Act*. In particular, legislation should require that an agreement be in writing and that each partner obtain independent legal advice. That being said, an agreement about the date a common-law relationship began should not require that each partner obtain independent legal advice. ALRI's preliminary recommendation is that an agreement should continue in effect if common-law partners later marry, unless the partners agree otherwise.

The Need for Legislated Rules

ALRI considered opt-in approaches, which require common-law partners to take a formal step to be bound by property division rules. Opt-in approaches have several shortcomings and have shown to be ineffective at reducing the number of people who must rely on claims for unjust enrichment to divide property. ALRI's view is that legislated rules are required to replace the law of unjust enrichment for common-law partners.

Legislated Rules

ALRI's preliminary recommendation is that the definition of adult interdependent partners in the *Adult Interdependent Relationships Act* be used as eligibility criteria for property division rules. This definition includes conjugal and non-conjugal relationships. ALRI's view is that there is no principled reason to exclude those in non-conjugal relationships of interdependence.

A further preliminary recommendation is that property division rules for adult interdependent partners should be based on the rules in the *Matrimonial Property Act*. These rules will need some adjustments to apply to adult interdependent partners. ALRI has identified three areas where adjustments would be required.

The date of cohabitation can be less clear than the date of marriage. ALRI's preliminary recommendation is to follow the approach used in British Columbia and other jurisdictions. The default date that an adult interdependent relationship begins should be the date that the partners began living together in a relationship of interdependence.

Overlapping claims to property are possible if an individual has both a spouse and an adult interdependent partner. To address overlapping claims, ALRI's preliminary recommendation is that the default valuation date be the date on which the parties began to live separate and apart. If the default valuation date remains the date of trial, there should be a priority rule to address overlapping claims in which the parties to the relationship that is first in time should value and divide property first.

With respect to rules about time to make a claim, ALRI's preliminary recommendation is that property division legislation state a property division order may be made if adult interdependent partners have become former adult interdependent partners in accordance with the *Adult Interdependent Relationships Act*, unless the reason they became former adult interdependent partners was that they married each other.

The report concludes by considering key issues about transition to new legislation. ALRI proposes that new property division legislation should apply only to couples who separate after it comes into force.

Issues and Recommendations

ISSUE 1
How can legislation promote agreements about ownership and division of property? 16

> **RECOMMENDATION 1**
> Legislation should expressly provide that partners may make an agreement about ownership and division of property

ISSUE 2
Should the formal requirements for agreements about ownership and division of property be based on the requirements in the *Matrimonial Property Act*? 17

> **RECOMMENDATION 2**
> Legislation should include formal requirements for agreements about ownership and division of property based on the requirements in the *Matrimonial Property Act*. In particular, legislation should require that an agreement be in writing and that each partner obtain independent legal advice.

ISSUE 3
Should the requirement for independent legal advice apply to an agreement about the date the relationship began? 18

> **RECOMMENDATION 3**
> An agreement about the date a relationship began should not require that each partner obtain independent legal advice.

ISSUE 4
Should an agreement about ownership and division of property continue in effect if the partners marry? 20

> **RECOMMENDATION 4**
> An agreement about ownership and division of property should continue in effect if the partners marry, unless the partners agree otherwise.

ISSUE 5
Should the definition of adult interdependent partners in the *Adult Interdependent Relationships Act* be used as eligibility criteria for property division rules? 32

> **RECOMMENDATION 5**
> Property division rules should apply to couples who are adult interdependent partners, as defined in the *Adult Interdependent Relationships Act*.

ISSUE 6
Should property division rules be based on the *Matrimonial Property Act*? 51

RECOMMENDATION 6
Property division rules should be based on the *Matrimonial Property Act*.

ISSUE 7
For purposes of property division, how should rules determine when an adult interdependent relationship began? 54

RECOMMENDATION 7
For purposes of property division, an adult interdependent relationship began on the date that the partners began living together in a relationship of interdependence, unless the partners agree otherwise.

ISSUE 8
How should property division legislation address overlapping claims, where both a spouse and an adult interdependent partner have claims to the same property? 61

RECOMMENDATION 8A
The default valuation date should be the date on which the parties began to live separate and apart.

RECOMMENDATION 8B
If the default valuation date remains the date of trial, the parties to the relationship that is first in time should value and divide property first.

ISSUE 9
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RECOMMENDATION 9
Property division legislation should state that a property division order may be made if adult interdependent partners have become former adult interdependent partners in accordance with the *Adult Interdependent Relationships Act*, unless the reason they became former adult interdependent partners was that they married each other.

ISSUE 10
What transition rule should apply to new property division legislation? 68

RECOMMENDATION 10
New property division legislation should only apply to couples who separate after the legislation comes into force.

Table of Abbreviations

LEGISLATION

AIRA	*Adult Interdependent Relationships Act*, SA 2002
MPA	*Matrimonial Property Act*, RSA 2000, c M-8

LAW REFORM PUBLICATIONS

Valuation Date Report	Alberta Law Reform Institute, *Matrimonial Property Act: Valuation Date*, Final Report 107 (2015), online: <https://www.alri.ualberta.ca/docs/FR107.pdf>
Case Law Review	Jonnette Watson Hamilton and Annie Voss-Altman, *The Matrimonial Property Act: A Case Law Review*, Research Paper (2010), online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/docs/OP MPA Case Law.pdf >

SURVEYS

Alberta Survey Report	Aleena Amjad Hafeez, *Albertans' Perceptions and Attitudes Regarding Common-law Property Division Laws: Exploring Evidence from the Alberta Survey 2016, Research Paper* (2017), online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/images/stories/docs/AB_cohab_survey_results.pdf >
2002 Consultation Report	Marcomm Works, *Alberta Family Law Reform Stakeholder Consultation Report*, Consultation Report (2002)

CHAPTER 1
Introduction

A. Introduction

[1] In recent decades, it has become increasingly common for couples to live together without being legally married. Couples who live together in a marriage-like relationship without being legally married are often said to be living in a common-law relationship. We use "common-law partners" throughout this report to refer to such couples and "married spouses" to refer to couples who are legally married.

[2] Common-law partners now have many rights, benefits, and obligations in Alberta law. Under the *Adult Interdependent Relationships Act* [AIRA],[1] common-law partners who meet certain criteria are recognized as adult interdependent partners. Adult interdependent partners have many of the same rights, benefits and obligations as married spouses under Alberta legislation.[2]

[3] There is a notable exception. There are no legislated rules for property division upon the breakdown of a common-law relationship. The *Matrimonial Property Act* [MPA] does not apply to common-law partners.[3] When common-law partners separate, there are no presumptions or formulas about how they should divide property. If they cannot agree, they face litigation that is likely to be long, expensive, and unpredictable.

[4] In this Report for Discussion, ALRI proposes legislated rules for division of property upon the breakdown of a relationship between common-law partners. These proposals are intended to make the law clearer and more predictable, promote settlement, and improve access to justice.

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[1] *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 [AIRA].

[2] See e.g. *Family Law Act*, SA 2003, c F-4.5, ss 56–63; *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62, 72(b), 88.

[3] *Matrimonial Property Act*, RSA 2000, c M-8 [MPA]. The other notable exception is from the rights, benefits, and obligations provided by the *Dower Act*, RSA 2000, c D-15. ALRI has determined that potential reform to the *Dower Act* lies outside the scope of this project. ALRI reviewed some issues with the *Dower Act* in Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion 14 (1995), online: <https://www.alri.ualberta.ca/docs/rfd014.pdf>.

B. Background to this Project

[5] In the past 40 years, there have been significant reforms to laws affecting couples and their property. ALRI has studied many of the issues. Its 1975 *Matrimonial Property* report led to the enactment of the MPA in 1978.[4] Its 1989 report, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* rejected the idea of equating marriage and common-law relationships in all situations, but recommended a number of specific reforms. It did not recommend changes to the law relating to property division for common-law partners.[5] ALRI published a research paper on *Recognition of Rights and Obligations in Same Sex Relationships* in 2002, which identified discrimination in legislation that provided certain rights to married spouses but not same sex partners.[6] Many other projects have touched on laws affecting couples. [7] To date, ALRI has not recommended legislated rules about division of property for common-law partners upon relationship breakdown.

[6] There are several reasons why ALRI decided to take on this project now.

[7] First, the number of common-law couples is on the rise. Statistics Canada data shows that in recent years, the number of common-law couples has increased faster than the number of married couples.[8]

[8] Second, ALRI's research indicates that property division for common-law partners is a troublesome issue. In a 2010 research paper commissioned by ALRI, Professor Jonnette Watson Hamilton and Annie Voss-Altman identified property

[4] Institute of Law Research and Reform, *Matrimonial Property*, Final Report 18 (1975), online: <https://www.alri.ualberta.ca/docs/fr018.pdf>.

[5] Alberta Law Reform Institute, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, Final Report 53 (1989), online: <https://www.alri.ualberta.ca/docs/fr053.pdf>.

[6] Alberta Law Reform Institute, *Recognition of Rights and Obligations in Same Sex Relationships*, Research Paper 21 (2002), online: <https://www.alri.ualberta.ca/docs/rp021.pdf>. At the time the research paper was published, same sex partners were not able to marry.

[7] See e.g. Alberta Law Reform Institute, *Non-Pecuniary Damages in Wrongful Death Actions – A Review of Section 8 of the Fatal Accidents Act*, Final Report 66 (1993) at 40–41, online: <https://www.alri.ualberta.ca/docs/fr066.pdf>; Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Final Report 78 (1999) at 98–131, online: <https://www.alri.ualberta.ca/docs/fr078.pdf>.

[8] Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, (Ottawa: Statistics Canada, 22 December 2015), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>. Statistics Canada defines a common-law couple as two people living together who are not legally married to each other. There is no minimum period of cohabitation to be considered a common-law couple for statistical purposes: Statistics Canada, *Classification of Census Family Status*, (Ottawa: Statistics Canada, 16 September 2016), online: <www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=61912&CVD=61915&CPV=1.1.2&CST=01012004&CLV=3&MLV=3>

division for common-law partners as "the second thorniest issue" arising from a review of the MPA case law, and noted it "causes much uncertainty and inefficiency."[9] Further research conducted for this project supports their conclusions.[10]

[9] Third, two Supreme Court decisions have made it clear that significant reform will require legislation. In *Nova Scotia (AG) v Walsh* and in *Quebec (AG) v A*, the Court heard arguments that matrimonial property legislation should apply to common-law partners, but each time the majority declined to extend the scope of legislation.[11] The Court has held that it is for legislatures to decide whether to maintain distinctions between married spouses and common-law partners in division of property.

[10] Finally, members of the legal profession and other justice system participants are calling for reform. Both academics and practitioners have written about the need for legislated rules.[12] The lack of presumptions or formulas has been specifically identified as an access to justice issue. For example, in its 2013 report, the Action Committee on Access to Justice in Civil and Family Matters called for simpler rules offering "more guidance by way of rules and presumptions" to resolve property claims between common-law partners.[13]

[11] The President of the Canadian Bar Association, Alberta Branch [CBA], asked ALRI to take on this project in a December 2014 letter. The letter indicated that "members of the profession have identified this as a pressing legislative

[9] Jonnette Watson Hamilton & Annie Voss-Altman, *The Matrimonial Property Act: A Case Law Review*, Research Paper (2010) at para 179, online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/docs/OP MPA Case Law.pdf> [Case Law Review].

[10] The research is discussed in Chapter 2, below.

[11] *Nova Scotia (AG) v Walsh*, 2002 SCC 83 [*Walsh*]; *Quebec (AG) v A*, 2013 SCC 5 [*Quebec v A*].

[12] See e.g. Winifred Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can J Fam L 114; Philip M. Epstein, "'Houston, We Have a Problem': Constructive Trust and Unjust Enrichment", Unmarried and Unjust [Enrichment] SuperConference (November 2012); Doug Moe, "Yours, Mine and Ours: A Family Lawyer's Guide to Unjust Enrichment in Alberta", Unmarried and Unjust [Enrichment] SuperConference (November 2012); Lonny Balbi and Lily Rabinovitch, "Unequal Justice for Unmarried Couples: The Problem Surrounding Common-Law Property Division in Alberta", Unmarried and Unjust [Enrichment] SuperConference (November 2012); Natasha Bakht, "A v B and Attorney General of Quebec (Eric v Lola): The Implications for Cohabiting Couples Outside Quebec" (2013) 28 Can J Fam L 261; Andrew Morrison, "Who Is a Family: Cohabitation, Marriage, and the Redefinition of Family" (2015) 29 Can J Fam L 381.

[13] Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final Report (2013), at 57–59, online: Canadian Forum on Civil Justice <www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>.

issue and one very key access to justice issue."[14] The CBA included a call for legislation in its "Agenda for Justice", a document released in advance of the 2015 Alberta provincial election. The CBA continues to advocate for reform.[15]

C. Scope of the Project

[12] This project focuses on issues specific to property division for common-law partners.

[13] Several related issues came up in background research and early consultation for this project. ALRI has determined that these issues are outside the scope of this project, although they may deserve their own review.

[14] The following issues are outside the scope of this project:

- Whether the MPA requires reform. Professor Jonnette Watson Hamilton and Annie Voss-Altman identified a number of issues with the MPA that may require attention.[16] ALRI has already considered valuation date, which was one of the issues they identified, but other issues may deserve review.[17] For example, they identified the distribution of debt as a problematic area "fraught with uncertainty and inconsistent treatment by the courts."[18] Reforms to the MPA would affect married spouses, so are outside the scope of this project.
- Whether AIRA requires reform. In early consultation for this project, we heard various concerns about AIRA. AIRA affects eligibility for many different kinds of benefits and obligations. A review of AIRA should not be limited to issues relating to property division.
- Whether the *Dower Act* should apply to common-law partners. ALRI has previously questioned whether the *Dower Act* continues to serve a useful purpose.[19] It would be appropriate to consider the *Dower Act* as

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[14] Letter from Steven N Mandziuk, QC to Peter Lown, QC (17 December 2014).

[15] Canadian Bar Association, "Justice Matters: An Agenda for Justice" (2016), online: <www.cba-alberta.org/getattachment/Publications-Resources/Resources/Agenda-For-Justice/Agenda-for-Justice-%E2%80%93-Backgrounders/agenda-for-justice_dec8-16.pdf>.

[16] Case Law Review.

[17] Alberta Law Reform Institute, *Matrimonial Property Act: Valuation Date*, Final Report 107 (2015), online: <https://www.alri.ualberta.ca/docs/FR107.pdf> [Valuation Date Report].

[18] Case Law Review at para 183.

[19] Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion 14 (1995), online: <https://www.alri.ualberta.ca/docs/rfd014.pdf>.

a whole before making any recommendations about its application to common-law partners.

- How Alberta law could best address the needs of those in relationships involving more than two partners. There are Albertans living in relationships where more than two partners share their lives at the same time, but these relationships are not recognized by Alberta law. [20] Reform may be needed to address the needs of individuals in these relationships, especially those who are vulnerable or unable to negotiate the terms of the relationship. Property division is only one of many potential legal issues. It would be best to review the issues in a comprehensive way. The Canadian Research Institute for Law and the Family is currently conducting research on legal issues faced by those in polyamorous relationships, which may offer further insight. [21]

[15] Although this project focuses on property division for common-law partners, it may have implications for some other individuals. A common-law relationship is usually understood to be one that is conjugal, or marriage-like. In Alberta, two individuals who meet the criteria in AIRA may become adult interdependent partners without necessarily having a conjugal relationship. As discussed in Chapter 5, ALRI's preliminary recommendations would apply to all adult interdependent partners, including any who may be in a non-conjugal relationship.

D. Framework of the Project

[16] The preliminary recommendations in this Report for Discussion were developed with the benefit of some early consultation.

[17] Background research for this project revealed there was little available data about the attitudes and expectations of common-law partners, especially relating to property. There are many sources for demographic data, but very few sources of information about how common-law partners perceive their

[20] At our roundtables, a few lawyers mentioned issues related to polyamorous or polygamous relationships. In some cases, these relationships involve individuals who choose to share their lives with more than one partner. In other cases, individuals may be in a non-monogamous relationship that is not of their choice. In either case, the relationship may involve economic interdependence.

[21] Canadian Research Institute for Law and the Family, "Current Projects", online: <www.crilf.ca/current_projects.htm>; Alison Crawford, "Canadian polyamorists face unique legal challenges, research reveals", *CBC News* (14 September 2016), online: <www.cbc.ca/news/politics/polyamorous-families-legal-challenges-1.3758621>.

relationships or how they plan to deal with property. The most significant source of data on the attitudes and expectations of common-law partners in Alberta was a 1983 survey commissioned by ALRI (then called the Institute of Law Research and Reform).[22] Although this survey provided a large amount of detailed data, including data about arrangements and expectations relating to property, the results are now quite dated.

[18] ALRI decided this project would benefit from public opinion research. We worked with the Population Research Lab at the University of Alberta to conduct this research. ALRI placed a series of questions about attitudes and expectations related to common-law relationships on the Population Research Lab's 2016 Alberta Survey. The Alberta Survey was a random-sample telephone survey of Alberta adults. There were 1208 respondents to the survey. Aleena Amjad Hafeez, a graduate student in the Department of Sociology at the University of Alberta, analyzed the results and prepared a report under the supervision of Dr. Gillian Stevens, Executive Director of the Population Research Lab. ALRI is publishing Ms. Hafeez's report concurrently with this Report for Discussion.[23]

[19] ALRI also sought early input from members of the legal profession. In November 2016, ALRI hosted two roundtable discussions with lawyers who practice family law. One roundtable discussion was in Edmonton and one was in Calgary. In these discussions, ALRI sought input on specific options for reform and any legal or practical issues associated with those options.

[20] This Report for Discussion reviews some of the results from these early consultations.

[21] ALRI is now seeking broad input on the preliminary recommendations in this Report for Discussion. All comments will be considered when ALRI makes its final recommendations.

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[22] Institute of Law Research and Reform (Alberta), *Survey of Adult Living Arrangements: A Technical Report*, Research Paper 15 (1984), online: <https://www.alri.ualberta.ca/docs/rp015.pdf>.

[23] Aleena Amjad Hafeez, *Albertans' Perceptions and Attitudes Regarding Common-law Property Division Laws: Exploring Evidence from the Alberta Survey 2016, Research Paper* (2017), online: Alberta Law Reform Institute <https://www.alri.ualberta.ca/images/stories/docs/AB_cohab_survey_results.pdf> [Alberta Survey Report].

CHAPTER 2

The Need for Reform

A. Introduction

[22] This chapter briefly summarizes the current law and key reasons for reform.

B. A Significant Number of People Are Affected

[23] There are many common-law couples in Alberta. Some of these couples will break up. When they do, they need to divide their property.[24]

[24] With the increasing prevalence of common-law relationships, the issue is not a rare or unusual one. In 2011, Statistics Canada found there were 135,660 couples in Alberta who were living together without being legally married, which is more than 15 per cent of all "couple families".[25] Between 2006 and 2011, the number of common-law couples in Canada grew faster than the number of legally married couples.[26] There is no sign that the trend will change.

C. The Existing Law Is Complex

[25] There is a widespread misconception that the law about division of property treats common-law partners and married spouses alike.[27] In fact, the

[24] Some research shows that unmarried couples are, on average, more likely to separate than married couples. If so, the need for rules may be particularly acute for common-law couples: see e.g. Statistics Canada, "Navigating Family Transitions: Evidence from the General Social Survey", by Pascale Beaupré & Elisabeth Cloutier, in *General Social Survey, Cycle 20*, Catalogue No 89-625-XIE (Ottawa: Statistics Canada, 2006) at 19.

[25] There were a total of 855,020 "couple families", of which 135,660 were common-law: Statistics Canada, *Families and Households*, *Families and Household Highlight Tables, 2011 Census*, *Couple Families by Presence of Children*, (Ottawa: Statistics Canada, 23 November 2016), online: <www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/fam/Pages/highlight.cfm?TabID=1&Lang=E&Asc=1&OrderBy=1&View=1&tableID=301&queryID=5&Children=1&PRCode=48>.

[26] Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, (Ottawa: Statistics Canada, 22 December 2015), online: <www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>.

[27] Anecdotally, Alberta lawyers report meeting with many individuals who believe living in a common-law relationship establishes a legal right to share property with a partner. The Alberta Survey supported this observation, showing that a significant number of respondents had misconceptions. Approximately 31 per cent of all respondents said that when common-law partners split up, property acquired by either partner is equally divided between them: see Alberta Survey Report at 10–15. Surveys in other jurisdictions have also

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rules for division of property are very different. The legislation that applies to married spouses is clear and generally produces predictable results. In contrast, the rules for common-law partners are difficult to find, difficult to describe, and produce inconsistent results.

1. THE *MATRIMONIAL PROPERTY ACT* APPLIES TO MARRIED SPOUSES

[26] The MPA applies to married spouses who separate or divorce. The MPA uses presumptions and formulas that make outcomes easy to predict. With some help from public legal education materials, separating or divorcing spouses should be able to make a reasonable estimate of how a court would divide their property. This estimate can help spouses to settle disputes without going to court.

[27] The MPA presumes that married spouses are economically interdependent and that they intend to share property acquired or improved during the relationship.[28] This presumption is not absolute. Married spouses may make an agreement that the MPA will not apply to some or all of their property.[29] The MPA includes rules for making an enforceable agreement.[30]

[28] The MPA provides a formula for dividing property when married spouses separate or divorce. [31] All the property owned by the spouses is divided into categories. Each category has its own rules for distribution. Property in one category is exempt from distribution, which means the spouse who owns the property keeps it. Property in a second category is distributed in a way that the court considers fair, taking relevant circumstances into account. The third category includes most property acquired during the marriage. There is a

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revealed large numbers of people who mistakenly believe living together has the same legal consequences as marriage. For example, a 2013 study in the UK found 47 per cent of respondents aged 18 to 34 believed common-law partners had the same legal rights as married spouses: "Moving in together–the common law marriage myth", online: Couple Connection <thecoupleconnection.net/articles/moving-in-together-the-common-law-marriage-myth >. A 2013 survey in Quebec showed that nearly 50 per cent of respondents believed that common-law partners "are as well protected as married couples" and 62 per cent were unaware that property accumulated while living with a common-law partner would not be equally divided: "The Myths", online: Chambre des Notaires – Common Law Spouses <www.uniondefait.ca/en/commonlawspouses-2007survey.php>.

[28] *Jensen v Jensen*, 2009 ABCA 272 at para 1: "In 1978, Alberta enacted matrimonial property legislation to legally recognise marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis".

[29] MPA, s 37.

[30] MPA, ss 37–38.

[31] The description in this paragraph is a very brief summary. The MPA rules are explained in more detail below.

presumption that each spouse will receive an equal share of property in the third category.

2. PROPERTY DIVISION BASED ON LEGAL OWNERSHIP FOR COMMON-LAW PARTNERS

[29] When common-law partners separate, the starting point is to divide property based on legal ownership. For many kinds of property—including land, bank accounts, shares of corporations, and other kinds of investments—there are records that show the legal owner. Each partner keeps the property registered in their own name. If the partners have property registered in both names, they each receive their share. For property without records of legal ownership—like furniture and household goods—each partner normally keeps the items they paid for.

[30] Legal ownership is not always an accurate reflection of each partner's contribution to the property. Couples often work together, with each making financial or non-financial contributions. For example, one partner may pay for groceries and utilities, allowing the other partner to make mortgage payments. Or one partner may take primary responsibility for childcare and domestic work, freeing up the other partner to focus on earning money.

3. THE LAW OF UNJUST ENRICHMENT FOR COMMON-LAW PARTNERS

[31] The law of unjust enrichment allows a court to divide property based on contributions, instead of legal ownership. If either partner believes dividing property based on legal ownership would not produce a fair result, that partner may file a lawsuit asking the court to divide property based on unjust enrichment.

[32] The law of unjust enrichment is judge-made law, found in court decisions. The most recent decision of the Supreme Court of Canada on unjust enrichment, *Kerr v Baranow*, sets out a framework to be followed in most claims between common-law partners.[32]

[33] In *Kerr*, the Supreme Court introduced a concept it called the joint family venture. A joint family venture exists when both partners have contributed to the accumulation of property. There is no presumption that common-law partners

[32] *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*].

are in a joint family venture.[33] Rather, the partner making the claim must prove that the couple was in a joint family venture with evidence about the relationship. In *Kerr*, the Court identified various factors to be considered, grouped under four headings.[34] The Court was explicit that the list of factors is not closed and it is not a checklist. One writer, attempting to synthesize *Kerr* and the cases that follow it, identified 21 factors that must be considered to determine if there is a joint family venture.[35] In practice, establishing a joint family venture requires a great deal of detailed evidence.

[34] If a joint family venture is established, the partner making the claim (the plaintiff) must still prove that the other partner (the defendant) was unjustly enriched. Unjust enrichment occurs in a joint family venture if, upon separation, one partner "retains a disproportionate share of the assets which are the product of their joint efforts."[36] To establish unjust enrichment in a joint family venture, a plaintiff must prove:

a. The defendant was enriched;

b. The plaintiff experienced a corresponding deprivation;

c. There is no juristic reason for the enrichment;

d. The relationship was a joint family venture;

e. The plaintiff contributed, directly or indirectly, to assets owned by one or both partners; and

f. The relative contributions the partners made to the assets.

[35] If there is unjust enrichment in a joint family venture, the remedy will usually be a monetary award. The award "should be calculated on the basis of the share of those assets proportionate to the claimant's contributions."[37] There is no presumption that the shares will be equal and no formula to calculate the amount of money to be paid.

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[33] *Kerr*, note 32 at para 88.

[34] *Kerr*, note 32 at paras 89–99.

[35] David Frenkel, "Joint Family Venture: A Synthesis of the Post-Kerr Case Law" (2014), 34 CFLQ 35.

[36] *Kerr*, note 32 at para 60.

[37] *Kerr*, note 32 at para 100.

D. There Are Barriers to Access to Justice for Common-Law Partners

[36] The law of unjust enrichment requires a court to consider the facts of each case and exercise discretion to achieve a fair result. While this approach may produce justice in individual cases, it provides little guidance for future cases with different facts.

[37] It is unlikely that court decisions will produce more specific rules, as *Kerr* prescribes a very deferential standard of review for most issues.[38] Appellate courts are limited in their ability to enforce consistency or develop presumptions or formulas.

[38] For separating common-law partners, access to justice would mean being able to divide their property fairly. Without presumptions or formulas to help them negotiate a fair settlement or the resources to pursue a claim in court, separating common-law partners experience barriers to access to justice.

1. THE LAW OF UNJUST ENRICHMENT IS A BARRIER TO NEGOTIATED SETTLEMENTS

[39] Access to justice does not necessarily mean access to litigation, but it does mean people can resolve disputes fairly. As Justice Cromwell said:[39]

> I think we can agree that, in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters.

[40] The lack of legislated rules makes it difficult for common-law partners to settle disputes about unjust enrichment. There are two main reasons.

[41] First, it is difficult to find and interpret the applicable law, particularly for self-represented individuals. The law of unjust enrichment is found in court decisions, which can be difficult to find and interpret. Public legal education resources exist, but generally provide little information beyond the fact that a claim for unjust enrichment is possible and it is wise to seek legal advice.[40]

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[38] *Kerr*, note 32 at paras 88, 158.

[39] The Honourable Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63 UNBLJ 38 at 39.

[40] See e.g. Centre for Public Legal Education Alberta, "Property Division for Married and Unmarried Couples" (2014), online: <p.b5z.net/i/u/10086419/f/PropertyDivision.pdf>; Family Justice Services, "Property Division for Unmarried Couples – General Information", online: Alberta Courts <albertacourts.ca/docs/default-source/Family-Justice-Services/fjs_property_unmarried_12.pdf>.

[42] Second, it is difficult to predict the outcome in a particular case, which discourages settlement. When individuals or their lawyers cannot predict how a court would resolve their dispute, they have difficulty evaluating options for settlement. As Kevin Hannah puts it, individuals "often have very different perspectives on what is fair and they look to the law as a source of objective standards that can be applied to their case." [41] When they cannot identify objective standards, they cannot determine whether a proposed settlement is a "fair" one.

2. LITIGATION IS DISPROPORTIONATELY TIME-CONSUMING, EXPENSIVE, AND RISKY

[43] As it is difficult to settle disputes, common-law partners are pushed towards litigation. Litigation takes time, is expensive, and is risky. Few potential plaintiffs will have the resources and risk-tolerance to take a claim to trial, so there is a lack of access to justice.

[44] The time, cost, and risk of litigation are evident from reported cases. As part of our research for this project, ALRI reviewed all reported Alberta trial decisions of unjust enrichment claims between former common-law partners issued since *Kerr* was decided in 2011. There are seventeen such decisions.[42] While reported cases may not be representative of all unjust enrichment cases, they provide a snapshot of the issues.

a. Litigation is time-consuming

[45] The reported cases show that unjust enrichment cases take a long time, both to get from separation to trial and in trial time.

[46] There was generally a delay of several years from separation to trial. In six of the seventeen cases, the trial was more than three years after the separation.[43] Delay can produce significant hardship in family litigation. For a partner who

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[41] Kevin E. Hannah, "Top 7 Property Issues" in *Issues in Matrimonial Property* (Alberta: Legal Education Society of Alberta, 2012), at 10.

[42] *Rubin v Gendemann*, 2011 ABQB 71, aff'd 2012 ABCA 38 [*Rubin*]; *Thompson v Williams,* 2011 ABQB 311 [*Thompson*]; *Boissoneault v McNutt*, 2011 ABQB 568, aff'd 2012 ABCA 365; *Montgomery v Schlender*, 2012 ABQB 332 [*Montgomery*]; *Macgregor v Hosack*, 2012 ABQB 647 [*Macgregor*]; *Lemoine v Griffith*, 2012 ABQB 685, aff'd 2014 ABCA 46 [*Lemoine*]; *Lotnick v Berezowski*, 2013 ABQB 304; *KGH v SLV*, 2013 ABQB 326 [*KGH*]; *Gauthier v Gauthier*, 2013 ABQB 566; *JLC v RGC*, 2013 ABQB 701 [*JLC*]; *Brick v Cross*, 2014 ABQB 35 [*Brick*]; *Wen v Li*, 2014 ABQB 195 [*Wen*]; *Mailhot v Galbraith*, 2014 ABQB 396 [*Mailhot*]; *Thew v Nichol*, 2015 ABQB 556; *Klein v Wolbeck*, 2016 ABQB 28; *Rockey v Hartwell*, 2016 ABQB 438 [*Rockey*]; *Buchner v Long*, 2016 ABQB 523 [*Buchner*].

[43] See *Montgomery*, *Macgregor*, *KGH, Wen,* and *Brick,* note 42; *Klein v Wolbeck*, 2016 ABQB 28.

has to leave the family home or who lacks money to pay for housing or other basic needs, waiting years for a resolution can be intolerable.

[47] When the cases reached trial, they often took a great deal of trial time. Ten of the seventeen cases required five or more days of trial.[44] Further, unjust enrichment trials can be complex, requiring a great deal of detailed evidence. For example, the trial in *Rubin* involved at least 22 witnesses and 3000 pages of documentary evidence.

b. Litigation is expensive

[48] Trials of five days or more—like those in many unjust enrichment cases—can be prohibitively expensive. A 2015 survey showed average legal fees for a family law trial up to 5 days was $33,425 in the Western provinces and could be up to $76,668.[45] Those fees are for one party; if both parties are represented by lawyers, the total fees for both would be approximately double. In 2012, the median net worth of Alberta family units was $267,500.[46] For a family at or below the median, a long trial could consume most of their assets.

[49] The alternative is self-representation. While self-represented litigants may not pay legal fees, they often spend significant time and resources working on their case. For example, they may have to take time off work to attend court.[47]

[50] Long trials also require significant court and judicial resources.

c. Litigation is risky

[51] Unjust enrichment claims are risky. A plaintiff faces the possibility that the claim will be entirely unsuccessful. If so, the plaintiff will receive nothing while having to pay legal fees and usually paying costs to the defendant.[48]

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[44] See *Rubin, Thompson, Macgregor, Lemoine, KGH, JLC, Wen, Rockey* and *Buchner,* note 42; *Gauthier v Gauthier*, 2013 ABQB 566.

[45] Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* (June 2015) 33 at 37.

[46] Median net worth of Alberta family units was $267,500 in 2012, according to Statistics Canada: Statistics Canada, *Survey of Financial Security, 2012,* (Ottawa: Statistics Canada, 25 February 2014), online: <www.statcan.gc.ca/daily-quotidien/140225/dq140225b-eng.htm>. For the half of families below the median, a long trial could consume most of a family's assets.

[47] Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Final Report (2013) at 109–10, online: National Self-Represented Litigants Project <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>. There are other costs for self-represented litigants, such as stress and social isolation (at 108–11).

[48] *Rubin*, note 42 may be a cautionary tale for potential plaintiffs. The plaintiff's claim was dismissed so she received nothing from her former common-law partner. Instead, she was required to pay her former partner

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[52] Even if a plaintiff is successful, it is difficult to predict the share of property or amount the plaintiff will receive. It is difficult to discern any pattern in the share of property awarded in reported cases. We have heard a few lawyers suggest a rule of thumb that a plaintiff will receive about 30 to 35 per cent of assets in question, but the reported decisions did not show any consistent pattern. Awards range from zero to 50 per cent of family assets. As noted, some plaintiffs receive nothing, despite living in a common-law relationship for years.[49] Some plaintiffs in long-term relationships have received awards in the range of 30 per cent of assets accumulated during the relationship.[50] Less often, plaintiffs receive awards approximating equal division.[51] In still other cases, courts have made awards that appear to be in the nature of fee-for-services.[52]

[53] The law is unclear as to what property should be included or excluded from distribution. Courts have taken different approaches. Sometimes, the court distributes only a subset of the total property.[53] Sometimes, a court treats property as exempt from distribution for specific factual reasons.[54]

[54] Given the time, cost, and risk of litigation, few potential plaintiffs will be willing or able to take an unjust enrichment claim to trial, no matter how worthy the claim.

[55] Reform is needed to improve access to justice for separating common-law partners. Regardless of whether separating partners negotiate or litigate, they would benefit from legislated rules with presumptions or formulas. Presumptions or formulas would help partners resolve disputes outside of court, and would streamline litigation for those who are unable to settle.

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more than $100,000.00 in costs for the trial (not including costs for subsequent applications and an unsuccessful appeal), in addition to her own legal costs: see *Rubin v Gendemann*, 2011 ABQB 466 (decision on costs).

[49] *Rubin* and *Montgomery,* note 42.

[50] See e.g., *Lemoine* and *Thompson,* note 42.

[51] See e.g., *Brick* and *Buchner,* note 42.

[52] See e.g., *Boissoneault v McNutt*, 2011 ABQB 568, aff'd 2012 ABCA 365; *Mailhot,* note 42.

[53] For example, in *Lemoine* the trial judge awarded the plaintiff 30 per cent of the increase in the value of the defendant's assets, essentially treating the increase in the value of the plaintiff's assets as exempt: *Lemoine,* note 42 at paras 155–56, 161. In some cases, the "exemption" is explained by the plaintiff's claim. Despite the creation of the joint family venture, some plaintiffs still limit their claims to specific property, often the shared home. See e.g. *Macgregor* and *Wen,* note 42.

[54] For example, in *Thompson* the court treated one real estate investment as exempt from distribution because the defendant had offered to put the plaintiff's name on title when he acquired it, but the plaintiff had refused: *Thompson*, note 42 at para 14.

CHAPTER 3

Property Division by Agreement

A. Agreements Allow Partners to Choose Their Own Rules

[56] One way to create clear rules is by agreement. Agreements allow partners to choose rules that suit them and are fair for their specific circumstances. Whenever possible, partners should be encouraged to make their own agreements about division of property.

[57] Common-law partners in Alberta may make agreements about property. They may also make agreements about support and other issues. Common-law partners may make an agreement prospectively at the beginning of the relationship or during the relationship. Such an agreement is often called a cohabitation agreement. Common-law partners may also make an agreement at the end of the relationship. Such an agreement may be called a separation agreement. In a cohabitation or separation agreement, common-law partners may agree to divide property based on legal ownership, to divide property using a formula like the one in the MPA, or to divide property in any other way that they choose.

[58] ALRI's early consultation shows strong support for agreements. In the Alberta Survey, a majority of respondents would support allowing common-law partners to opt-in to property division rules by written agreement. Approximately 68 per cent of all respondents, and 66 per cent of respondents living in a common-law relationship, agreed that common-law partners should divide property like married spouses if they have a written agreement to do so.[55] At our roundtables with lawyers, many expressed a strong preference for opt-in approaches—such as agreements—that allow individuals to assume legal obligations by choice.

[59] Some common-law partners do make agreements about property. In the Alberta Survey, 23 per cent of respondents living in a common-law relationship said they had a written agreement with their partner about how they would divide property if they split up. Those with agreements are the minority. A large majority—77 per cent—said they did not have a written agreement with their

[55] Alberta Survey Report at 10.

partner about how they would divide property if they split up.[56] This result confirms anecdotal information from family law lawyers, who have told us their impression is that cohabitation agreements are uncommon.

B. How Can Legislated Rules Facilitate Agreements?

ISSUE 1

How can legislation promote agreements about ownership and division of property?

[60] In Alberta, there are no legislated rules about agreements for division of property for common-law partners.[57] Legislated rules would be useful for two reasons. First, they would clearly inform common-law partners that they may make agreements about property. Second, they would inform partners of the conditions that must be met for the agreement to be enforceable. Partners could then ensure that their agreements are enforceable, giving them peace of mind and helping them avoid litigation.

[61] The rules should apply to agreements made at the beginning of the relationship, during the relationship, or at the end of the relationship.

[62] Common-law partners should be able to make comprehensive agreements that cover every issue about division of property. By making a comprehensive agreement, they could opt-out of any legislated presumptions or formulas that might be enacted.

[63] Common-law partners should also be able to make more limited agreements, addressing specific issues. For example, they might make an agreement to include or exclude certain property from division.

RECOMMENDATION 1

Legislation should expressly provide that partners may make an agreement about ownership and division of property.

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[56] Alberta Survey Report at 10.

[57] The *Family Law Act* has rules about agreements respecting spousal support, which apply to both married spouses and common-law partners: *Family Law Act*, SA 2003, c F-4.5, s 62. The MPA has rules about agreements between married spouses respecting property, but the provisions do not apply to common-law partners: MPA, ss 37–38. Some other Canadian jurisdictions have legislation that applies to agreements between common-law partners respecting property or other matters: see e.g. *Family Law Act*, SBC 2011, c 25, ss 92–93; *Family Law Act*, RSO 1990, c F.3, ss 53, 55–58.

[64] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

C. What Safeguards Should Be Required?

[65] If common-law partners make an agreement, there should be safeguards to ensure that both partners are aware of the consequences of the agreement and are entering it voluntarily.

[66] Alberta has existing legislation about safeguards for married spouses. Rather than creating safeguards from scratch, it makes sense to ask whether the existing safeguards in the MPA would also be appropriate for common-law partners.

ISSUE 2

Should the formal requirements for agreements about ownership and division of property be based on the requirements in the *Matrimonial Property Act*?

[67] Sections 37 and 38 of the MPA describe how married spouses may make an agreement about division of property and what conditions must be met for the agreement to be enforceable. An agreement is only enforceable if certain formalities are observed:

- The agreement must be in writing;
- Each spouse must receive independent legal advice regarding the agreement;
- The spouses cannot consult the same lawyer. The lawyer that gives one spouse independent legal advice must be different from the lawyer who gives the other spouse independent legal advice;
- When receiving independent legal advice from his or her lawyer, each spouse must acknowledge that he or she is:
  - aware of the nature and effect of the agreement;
  - aware of the possible future claims to property he or she may have under the MPA and that he or she intends to give up those claims in order to give effect to the agreement; and

  - executing the agreement freely and voluntarily, without any compulsion from the other spouse;

- The acknowledgments listed above must be made in writing and apart from the other spouse.

[68] All of these requirements appear to be appropriate for agreements about property between common-law partners. ALRI's preliminary recommendation is that an agreement that does not meet these requirements should not be enforceable.

RECOMMENDATION 2

Legislation should include formal requirements for agreements about ownership and division of property based on the requirements in the *Matrimonial Property Act*. In particular, legislation should require that an agreement be in writing and that each partner obtain independent legal advice.

[69] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

D. Should There be an Exception to the Safeguards for Agreements About the Date a Relationship Began?

[70] ALRI has identified a specific issue about agreements that may arise in the context of a common-law relationship. Common-law partners may make an agreement about the date a relationship began, to narrow the issues in dispute. There is a question about whether a requirement for independent legal advice is necessary in this situation.

ISSUE 3

Should the requirement for independent legal advice apply to an agreement about the date the relationship began?

[71] In a common-law relationship, the date that a relationship began may be an issue in dispute. It may be difficult to identify a specific date when a common-law relationship began, as moving in together may be something that occurs over a period of time. Also, partners may disagree on the significance of dates or facts. The Alberta Survey included a question asking respondents who had lived with a partner when they considered themselves to be a common-law relationship.

The answers showed respondents had a wide range of views on the features that made a relationship a common-law relationship.[58]

[72] Common-law partners might resolve the dispute by making an agreement about the date a relationship began. The agreement may be essentially a convenience, to narrow the issues in dispute. There is potential, however, for the agreement to have significant consequences. If either partner acquired property near the beginning of the relationship, the date may determine whether certain property is exempt from distribution.

[73] In this example, should each partner be required to obtain independent legal advice before agreeing on a date for the purpose of property division? On the one hand, a requirement to obtain independent legal advice would increase the time and cost to make the agreement, particularly if one or both parties are self-represented. It may discourage couples from settling easy or minor issues. On the other hand, a requirement for independent legal advice would ensure both partners are aware of the consequences of the agreement. The consequences may not be apparent without legal advice.

[74] ALRI's preliminary view is that an agreement about the date a common-law relationship began should not require independent legal advice. The date a relationship began is primarily a question of fact. For this specific issue, the requirement for independent legal advice seems likely to be a barrier to narrowing the issues in dispute. We also note that, for married spouses, the fact of marriage and the date of marriage have legal consequences that may not be apparent without legal advice, yet there is no requirement to obtain independent legal advice before marrying. Similarly, there is no requirement for individuals to obtain independent legal advice before entering an adult interdependent partner agreement. Although it might be wise for each partner to obtain independent legal advice, we are not convinced an agreement about the date a common-law relationship began should always require independent legal advice.

[75] An agreement could deal only with the date a common-law relationship began or could also address other issues. If partners make an agreement without independent legal advice, the part setting the date the relationship began might be upheld even if the rest of the agreement is unenforceable.

[58] Alberta Survey Report at 7–9.

RECOMMENDATION 3

An agreement about the date a relationship began should not require that each partner obtain independent legal advice.

[76] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

[77] This example raises broader questions about whether there should be any exceptions to a requirement for independent legal advice. ALRI would appreciate comments on the following questions:

- Could a requirement for independent legal advice be a barrier to partial settlements or agreements that narrow the issues in dispute?
- Should the requirement for independent legal advice apply to every agreement that could affect ownership or division of property?
- If not, what kinds of agreements should be excepted? How could legislation distinguish between those agreements that should always require independent legal advice and those for which it should be optional?

E. What Should Happen to an Agreement if Common-Law Partners Marry?

[78] It is common for couples to live together before marrying. If common-law partners with a cohabitation agreement later marry, what should happen to the agreement?

[79] Of course, the partners may deal with the transition by agreement. They might have planned for the possibility that they would marry and included terms about it in their cohabitation agreement. They might also make a new agreement when they marry. But some partners may not make an agreement explicitly in contemplation of marriage.

ISSUE 4

Should an agreement about ownership and division of property continue in effect if the partners marry?

[80] It is not clear that common-law partners with a cohabitation agreement would expect the agreement to change or be revoked upon marriage.[59] They would likely expect to have the same rules throughout the relationship. Having already negotiated rules that they consider fair in their specific circumstances, there is no apparent reason that they should be required to renegotiate.

[81] In most Canadian jurisdictions, a cohabitation agreement continues in effect if the partners later marry.[60] There should be a similar rule in Alberta. If a couple has a cohabitation agreement, it should be presumed that they would want their agreement to prevail over the default rules in the MPA.

RECOMMENDATION 4

An agreement about ownership and division of property should continue in effect if the partners marry, unless the partners agree otherwise.

[82] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

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[59] For similar reasons, the rule that a will is revoked by the testator's marriage has been abolished in Alberta: *Wills and Succession Act*, SA 2010, c W-12.2, s 23(2). ALRI recommended this reform in Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at 32–36, online: <https://www.alri.ualberta.ca/docs/fr098.pdf>.

[60] Seven Canadian jurisdictions have legislation stating that a cohabitation agreement is considered to be a marriage agreement if the partners marry. The seven jurisdictions are Ontario, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories, and Nunavut: *Family Law Act*, RSO 1990, c F.3, s 53(2); *Marital Property Act*, SNB 2012, c 107, s 35(3); *Family Law Act*, RSPEI 1988, c F-2.1, s 52(2); *Family Law Act*, RSNL 1990, c F-2, s 63(2); *Family Property and Support Act*, RSY 2002, c 83, s 60(2); *Family Law Act*, SNWT 1997, c 18, s 4(2); *Family Law Act*, SNWT (Nu) 1997, c 18, s 4(2). In two other jurisdictions—British Columbia and Saskatchewan—common-law partners who have cohabited for at least two years are defined as spouses in family property legislation, so an agreement would continue in effect as long as the parties cohabit: *Family Law Act*, SBC 2011, c 25, ss 3, 92; *The Family Property Act*, SS 1997, c F-6.3, ss 2(1), 38, 41.

CHAPTER 4
The Need for Legislated Rules

A. Opt-in Approaches Are Not a Complete Solution

[83] Agreements are not a complete solution to the lack of legislated rules. A key goal of reform should be to reduce the number of people who must rely on claims for unjust enrichment to divide property. Experience, in Alberta and elsewhere, has shown that many common-law partners will not make agreements. If the law of unjust enrichment remains the default for common-law partners without an agreement, the problem will not be solved.

[84] To achieve effective reform, there must be legislated rules to replace the law of unjust enrichment.

1. BARRIERS TO MAKING COHABITATION AGREEMENTS

[85] As discussed above, common-law partners in Alberta are currently able to make agreements about division of property, but most do not make agreements in advance. In the Alberta Survey, a large majority of respondents living in a common-law relationship—77 per cent—said they did not have a written agreement with their partner about how they would divide property if they split up.[61]

[86] Legislation may facilitate agreements, but it is unlikely to prompt all common-law partners into making agreements. There are at least three reasons why cohabitation agreements are likely to remain uncommon.

[87] The first reason is that preparing a cohabitation agreement is costly and inconvenient. Many common-law partners need legal help to prepare an enforceable, effective agreement. A 2015 survey found the average fees for a lawyer to prepare a marriage or cohabitation agreement was $1,945 in the western provinces.[62] Many partners will be unable or unwilling to pay a lawyer to prepare a cohabitation agreement, despite the likelihood that the immediate cost of the agreement would be significantly less than the cost of resolving a potential claim for unjust enrichment. Even if partners buy a low-cost standard

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[61] Alberta Survey Report at 10.

[62] Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* (June 2015) 33 at 37.

form agreement or prepare their own agreement, they will still need to pay for independent legal advice to ensure that it is enforceable.

[88] The second reason is that it can be difficult to negotiate an agreement. A lawyer at one of our roundtables reported drafting many cohabitation agreements, but said that few are executed. In this lawyer's experience, partners often cannot agree on terms. When they reach an impasse, they either break up or decide to live together without a cohabitation agreement.

[89] The third reason is a tendency to "sliding versus deciding" among common-law partners, which has been identified by some sociologists. [63] In other words, relationships tend to progress gradually without partners making a clear decision to progress from one stage to the next. Over time, the partners' lives become intertwined without making a formal commitment. They may be in an economic partnership and intend to share property, but they are unlikely to take a formal step to record their intentions.

2. EXPERIENCE SHOWS OPT-IN APPROACHES ARE INEFFECTIVE

[90] Opt-in approaches, which require common-law partners to take a formal step to be bound by property division rules, have also been shown to be ineffective at reducing the number of people who must rely on claims for unjust enrichment to divide property.

a. Registration system

[91] Two provinces, Nova Scotia and Manitoba, allow common-law partners to opt-in to certain consequences of marriage, including legislated property division rules, by registering their relationship with a government agency. Following registration, property division legislation applies to the partners as if they were married spouses.[64]

[92] In theory, a registration system is an attractive option. It does not require partners to marry, with all that marriage signifies. It also offers a relatively simple way to opt-in to legislated rules, without significant cost to the partners.

[63] See Wendy D. Manning & Pamela J. Smock, "Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data" (2005) 67 J of Marriage and Family 989; Scott M. Stanley, Galena Kline Rhoades & Howard J. Markman, "Sliding Versus Deciding: Inertia and the Premarital Cohabitation Effect" (2006) 55:4 Family Relations 499.

[64] *Vital Statistics Act*, RSNS 1989, c 494, ss 53–54; *Family Property Act*, CCSM, c F25, s-1(1) "common-law partner", s 13.

[93] It is likely that many people would support a registration system. In 2002, Alberta Justice commissioned a public consultation on family law [2002 Consultation]. It included a phone survey and roundtable discussions. The phone survey had 800 respondents, randomly selected within quotas for gender, age, and geographic region to ensure the sample was representative of Alberta's population. Results were summarized in a report, which provides insight into public opinion at the time on a number of issues related to family law.[65] There was strong support for a registration system in the 2002 Consultation. In the phone survey, 68 per cent of respondents supported the concept of a government registry for common-law and same sex relationships.

[94] At our roundtables, several lawyers were strongly in favour of a registration system.

[95] Unfortunately, experience in Nova Scotia and Manitoba shows that a registration system is unlikely to substantially reduce the number of people who have to rely on the law of unjust enrichment. Both provinces have had registration systems in place for more than ten years. They have seen very low numbers of registrations. Out of tens of thousands of common-law couples (38,460 in Nova Scotia and 39,060 in Manitoba, according to the 2011 census), only a tiny fraction have registered. In Manitoba, a total of 416 couples registered common-law relationships in the first ten years of the registration system.[66] Cumulative numbers are not available for Nova Scotia, but the annual number of registrations is similar to Manitoba. There were 68 registrations in Nova Scotia in 2013 (the latest year for which statistics are available), 51 in 2012, and 76 in 2011.

b. Marriage

[96] We have sometimes heard the argument that common-law partners who want to benefit from property division rules should marry.

[97] Many couples do marry. In 2011, approximately 84 per cent of "couple families" in Alberta were married couples.[67]

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[65] Marcomm Works, *Alberta Family Law Reform Stakeholder Consultation Report*, Consultation Report (2002) [2002 Consultation Report].

[66] Manitoba Vital Statistics Agency, *2014/15 Annual Report* at 13, online: <vitalstats.gov.mb.ca/pdf/2015_vs_annual_report_en.pdf>.

[67] Statistics Canada, *Families and Households*, *Families and Household Highlight Tables, 2011 Census*, *Couple Families by Presence of Children*, (Ottawa: Statistics Canada, 25 February 2014), online: <www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-

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[98] Nonetheless, a significant number of couples do not marry. As noted above, as of 2011, 135,660 couples in Alberta—more than 15 per cent of couples living together in Alberta—were unmarried.[68]

[99] There is evidence that only a small fraction of common-law partners make a deliberate choice not to marry to avoid the legal or financial consequences of marriage. In the 2011 General Social Survey, Statistics Canada asked individuals in a common-law relationship whether they intended to marry their current partner, and if not, why not. Only four per cent of respondents who did not intend to marry said that their main reason for not marrying was "to maintain financial independence."[69]

[100] For most couples, the decision to marry or not involves other considerations. To many people, marriage is more than a legal or financial transaction. Marriage may have personal, social, cultural, and religious meaning.[70] In the 2011 General Social Survey, married respondents were asked their main reason for marrying, and individuals living with a common-law partner who wanted to marry their partner were asked why they would like to marry. The most common reasons were "cultural/moral/religious beliefs" (35 per cent) and "proof of love and commitment" (32 per cent). Only one per cent of respondents who were married or who intended to marry said their main reason was financial security.[71]

[101] Further, as discussed below, the decision to marry requires both partners to agree. In the 2011 General Social Survey, two per cent of respondents who did

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fst/fam/Pages/highlight.cfm?TabID=1&Lang=E&Asc=1&OrderBy=1&View=1&tableID=301&queryID=5&Children=1&PRCode=48>.

[68] Statistics Canada, *Families and Households*, *Families and Household Highlight Tables, 2011 Census*, *Couple Families by Presence of Children*, (Ottawa: Statistics Canada, 23 November 2016), online: <www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/fam/Pages/highlight.cfm?TabID=1&Lang=E&Asc=1&OrderBy=1&View=1&tableID=301&queryID=5&Children=1&PRCode=48>.

[69] The most common reasons not to marry in the 2011 General Social Survey were "current situation is fine as it is" (33 per cent of respondents) and "don't believe in the institution of marriage" (23 per cent of respondents): Statistics Canada, *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

[70] *Walsh*, note 11 at para 43; see also John Eekelaar & Mavis Maclean, "Marriage and the Moral Bases of Personal Relationships" (2004) 31:4 JL & Soc'y 510.

[71] Statistics Canada, *Table 2: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl02-eng.htm>.

not intend to marry their common-law partner said the reason for not marrying was "partner does not want to".[72]

[102] Whatever their reasons, many couples do not marry. A system that requires couples to marry in order to opt-in to legislated property division rules is not a true choice system and will leave many common-law partners to rely on claims for unjust enrichment.

3. SHORTCOMINGS OF OPT-IN APPROACHES

[103] Agreements, registration systems, and marriage all require that couples agree to be bound by legislated property division rules and take a formal step to indicate their choice. An opt-in approach has a strong appeal to those who believe that legal obligations should be a matter of choice. Holders of this view are found in the courts, among lawyers, and in the general public. In *Walsh* and *Quebec v A*, some judges of the Supreme Court of Canada said that legal obligations should be freely chosen rather than imposed.[73] At our roundtables with lawyers, many said they would prefer for common-law partners to assume legal obligations by choice. In the Alberta Survey, 21 per cent of respondents said that the most important value in any new law about division of property was "individuals should not have to divide property with a partner unless they agree to do so."[74] Of respondents currently in a common-law relationship, 31 per cent said that this value was the most important.[75]

[104] There are problems with relying only on an opt-in approach, however.

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[72] Statistics Canada, *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

[73] See the majority decision in *Walsh*, note 11 at para 43: "Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount," Bastarache J; the decision of LeBel, Fish, Rothstein, and Moldaver JJ in *Quebec v A*, note 11 at para 257:

> In Quebec family law, these rights and obligations are always available to everyone, but imposed on no one. Their application depends on an express mutual will of the spouses to bind themselves. This express, and not deemed, consent is the source of the obligation of support and of that of partition of spouses' patrimonial interests. As we have seen, this consent is given in Quebec law by contracting marriage or a civil union, or entering into a cohabitation agreement. Participation in the protective regimes provided for by law depends necessarily on mutual consent.

[74] Alberta Survey Report at 25.

[75] Email from Aleena Amjad Hafeez to Laura Buckingham, ALRI Counsel (5 February 2017).

a. Lack of agreement

[105] When partners agree, an opt-in approach respects individual choice. When partners do not agree, however, an opt-in approach prioritizes one partner's choice and discounts the other's.

[106] At our roundtables, some lawyers pointed out that there is often a correlation between the relative economic power of the partners and their preferences. The partner with more assets or higher income is usually the one who prefers not to share property. The partner with fewer assets or lower income has little power to compel the other to share property, and the most to lose if the relationship breaks down. The burden of an opt-in approach therefore tends to fall on the most vulnerable. As Professor Winifred H. Holland said: "The flip side of one person's autonomy is often another's exploitation."[76]

[107] Further, a vulnerable partner may not have a free choice about remaining in the relationship. The reasons an individual may not feel able to leave a relationship could include children, financial dependence, personal care needs, or abuse, among others. It should also be noted that leaving the relationship may crystallize a loss. Partners often share resources during a relationship. As long as the relationship is intact, the partner with fewer assets or lower income can expect that sharing will continue. They may hope that someday their partner will agree to marry or opt-in to property division rules. If the individual leaves the relationship, they lose the opportunity to share now and for the future.

b. Misconceptions

[108] An opt-in approach works best if individual choices are informed ones. There is reason to believe many common-law partners mistakenly believe they are already subject to legislated property division rules. As discussed above in Chapter 2, anecdotal information and survey results indicate many Albertans believe legislated property division rules apply to common-law partners and married spouses alike.[77] Individuals who have this misconception would not know a formal step is necessary to opt-in, so they would be unlikely to take the necessary step.

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[76] Winifred H. Holland, "Marriage and Cohabitation — Has the Time Come to Bridge the Gap?" in *Special Lectures of the Law Society of Upper Canada 1993 — Family Law: Roles, Fairness and Equality* (Scarborough, Ont: Thomson, 1994) 369 at 380.

[77] See note 27, above.

c. Other barriers to opting-in

[109] Even if partners agree and are informed, they may fail to take the necessary steps to opt-in. Sometimes there are barriers to opting-in, such as the cost of a cohabitation agreement or a wedding.[78] The tendency to "sliding versus deciding" may also mean common-law partners are unlikely to take a formal step to opt-in to legislated property division rules.

[110] Regardless of the reason, experience shows that an approach that relies only on common-law partners opting-in to legislated property division rules will leave many partners to rely on the law of unjust enrichment.

B. The Need to Clarify Obligations

[111] Legislated property division rules should not be seen as creating entirely new obligations. Obligations already exist under the law of unjust enrichment. As Justice Dickson pointed out in *Pettkus v Becker* nearly 40 years ago, an individual who benefits from a relationship already has an obligation to share the benefit:[79]

> [W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it

[112] Rather, legislated property division rules would clarify the obligations. Legislated property division rules with presumptions or formulas would allow common-law partners to predict how they must fulfill their obligations.

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[78] In the 2011 General Social Survey, Statistics Canada asked individuals in a common-law relationship whether they intended to marry their current partner, and if not, why not. Eight per cent of respondents gave their main reason for not marrying as "Wedding (preparations, cost)": Statistics Canada *Table 3: Main Reason Why People Living in Common-law Do Not Intend to Marry Their Current Partner, Canada, 2011*, (Ottawa: Statistics Canada, 30 November 2015), online: <www.statcan.gc.ca/pub/89-650-x/2012001/tbl/tbl03-eng.htm>.

[79] *Pettkus v Becker*, [1980] 2 SCR 834 at 849.

CHAPTER 5

To Whom Should Legislated Rules Apply?

A. The Need for Eligibility Criteria

[113] Property division legislation for common-law partners requires eligibility criteria to clearly define which relationships are affected by the rules.

[114] The term "common-law" is regularly used to mean a relationship between two individuals who live together in a marriage-like relationship without being legally married, but the term has no fixed technical meaning. It is used in different ways, and does not necessarily mean the same thing in all contexts.[80]

[115] If legislation does not include eligibility criteria, it would be difficult for separating common-law partners to determine whether legislated property division rules apply to them. It would be difficult to settle disputes, and partners would be pushed towards litigation about whether or not the rules apply. Courts might eventually fill the gap, developing eligibility criteria through judicial decisions, but it would take time. Legislation should provide clear guidance from the start about which relationships are affected.

B. The *Adult Interdependent Relationships Act*

[116] Alberta has legislation that defines which common-law partners are eligible for many statutory obligations, rights, and benefits. In 2002, after certain Alberta legislation was found to discriminate against Albertans in same sex relationships or on the basis of sexual orientation, [81] the Alberta legislature

[80] For example, most federal legislation uses the term "common-law partners", usually defined as individuals who have lived together in a conjugal relationship for at least one year: see e.g. *Canada Pension Plan*, RSC 1985, c C-8, s 2(1); *Citizenship Act*, RSC 1985, c C-29, s 2(1). The definition of common-law partner under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 248(1) also includes partners who have lived together for less than one year, if they have a child together. Some provincial legislation uses a different definition: see e.g. *Family Property Act*, CCSM c F25, s 1(1), which defines "common-law partner" as a person who has lived with another person in a conjugal relationship for at least three years, or has registered a common-law relationship with another person. Statistics Canada defines a common-law couple as two people living together who are not legally married to each other, with no minimum period of cohabitation: Statistics Canada, *Classification of Census Family Status*, (Ottawa: Statistics Canada, 16 September 2016), online: <www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=61912&CVD=61915&CPV=1.1.2&CST=0101 2004&CLV=3&MLV=3>.

[81] In *Johnson v Sand*, 2001 ABQB 253, the Alberta Court of Queen's Bench struck down provisions of the *Intestate Succession Act*, RSA 1980, c I-9. In *A (Re)*, 1999 ABQB 879, the legislature amended the *Child Welfare Act*, SA 1984, c C-8.1 to permit step-parent adoptions by the same sex partner of a child's parent shortly

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adopted AIRA. AIRA extended many of the rights and benefits of marriage to adult interdependent partners. The term adult interdependent partners is defined in AIRA and used throughout Alberta legislation.

[117] Before creating eligibility criteria from scratch, it makes sense to ask whether the existing criteria in AIRA are appropriate for property division.

ISSUE 5

Should the definition of adult interdependent partners in the *Adult Interdependent Relationships Act* be used as eligibility criteria for property division rules?

[118] To become adult interdependent partners, two people must live in a “relationship of interdependence”. The definition of a relationship of interdependence in AIRA has both emotional and economic aspects. For ease of reference, the definition is:[82]

> 1(1) In this Act,
>
> ...
>
> (f) “relationship of interdependence” means a relationship outside marriage in which any 2 persons
>
> (i) share one another’s lives,
>
> (ii) are emotionally committed to one another, and
>
> (iii) function as an economic and domestic unit.
>
> (2) In determining whether 2 persons function as an economic and domestic unit for the purposes of subsection (1)(f)(iii), all the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant:
>
> (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;

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before a *Charter* challenge was to be heard. See also *Vriend v Alberta*, [1998] 1 SCR 493, where the Supreme Court of Canada read in sexual orientation as a protected ground under the *Individual’s Rights Protection Act*, RSA 1980, c I-2.

[82] AIRA, s 1.

(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;

(i) the ownership, use and acquisition of property.

[119] Under AIRA, two people in a relationship of interdependence may become adult interdependent partners in three ways: by living together for at least three years; by living together and having a child of the relationship; or by entering an agreement to become adult interdependent partners. The ways to become adult interdependent partners are set out in section 3:[83]

> 3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if
>
> (a) the person has lived with the other person in a relationship of interdependence
>
> (i) for a continuous period of not less than 3 years, or
>
> (ii) of some permanence, if there is a child of the relationship by birth or adoption,
>
> or
>
> (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.
>
> (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

[83] AIRA, s 3.

[120] There is an additional condition that should be noted. Relationships in which one person is being remunerated to provide domestic support or personal care to another are expressly excluded.[84]

C. Arguments For and Against Using the Criteria in AIRA

1. PURPOSE OF AIRA

[121] AIRA's preamble states that a purpose of the act is "to define a legal context for the nature of those interdependent relationships and to set out the applicability of Alberta laws to them".[85]

[122] At our roundtable discussions, several lawyers told us that the AIRA criteria were appropriate to determine support obligations between partners, but not property division. In their view, AIRA was not designed with property division in mind. This point merited further investigation, so we reviewed the legislative history of AIRA. We found nothing in the history or in AIRA itself to indicate it was designed specifically for support obligations.

[123] When AIRA was introduced in the legislature, its sponsor said it was intended to address financial and property issues people in committed relationships may face:[86]

> Over the years courts and lawmakers have recognized the need for laws that allow people in committed personal relationships outside of marriage to deal with the financial and property issues that they face. ...
>
> Committed relationships of all kinds can create financial interdependencies. Government does not create these relationships; people do. But it is our duty to ensure that our laws help Albertans address the emotional and financial responsibilities which are created through those relationships and which then have to be taken care of when those relationships break down.

[124] From the beginning, AIRA has applied to certain property issues. In particular, AIRA applies to intestate succession. If an adult interdependent partner dies without a will, the surviving partner receives a preferential share of

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[84] AIRA, s 4(2).

[85] AIRA, Preamble.

[86] Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1388 (Hon David Hancock).

the deceased's property.[87] Adult interdependent partners and married spouses have the same claim to property in the case of intestate succession.

[125] The fact that AIRA does not affect property division between separating adult interdependent partners appears to be the result of timing more than policy choice. During debate in the Legislature, the sponsor of AIRA explained that the MPA had been excluded from the statutes amended by AIRA to await the Supreme Court's decision in *Walsh*.[88] He indicated that the issue might be revisited once the Supreme Court issued its decision. Although the Supreme Court issued its decision the following month, the legislature did not revisit property division for adult interdependent partners.

2. SUITABILITY OF AIRA CRITERIA

[126] There are two reasons commonly given for why property division rules should apply to particular relationships. One reason is that the relationship is an economic partnership. If the spouses or partners both contribute to any gains accumulated during the relationship, it is fair that they share those gains. The other reason is that the spouses or partners intend, or should be presumed to intend, to share any gains accumulated during the relationship.[89]

[127] It is impractical to require plaintiffs to prove the actual degree of economic partnership or the actual intentions of both partners. This approach is the one currently required by the law of unjust enrichment. It requires a detailed inquiry into the facts of the particular case and outcomes are unpredictable.[90] This approach contributes to a lack of access to justice.

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[87] *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62.

[88] Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (27 November 2002) at 1608 (Hon David Hancock). The Supreme Court issued its decision the following month. The legislature did not revisit the exclusion of the MPA.

[89] These justifications can be seen in case law and academic writing. Both justifications are evident in the Supreme Court's discussion of the joint family venture in *Kerr*. The Court described a joint family venture as a partnership, involving joint effort and economic integration (although not a presumption of equal sharing): *Kerr*, note 32 at paras 85, 90–93. The Court also identified "actual intent" as one of the four main headings of factors to consider in determining whether a relationship is a joint family venture, stating "the actual intentions of the parties must be given considerable weight": *Kerr*, note 32 at para 94. See also *Jensen v Jensen*, 2009 ABCA 272, at para 1; Brenda Cossman & Bruce Ryder, "What Is Marriage-like Like? The Irrelevance of Conjugality" (2001) 18 Can J Fam L 269 at 283–91 [Cossman & Ryder].

[90] Despite the Supreme Court's admonition that the remedy for unjust enrichment "should not be based on a minute totting up of the give and take of daily domestic life" (*Kerr*, note 32 at para 7), evidence often amounts to exactly that. Alberta cases following *Kerr* (e.g., *Mailhot, Rockey, Montgomery, Rubin* and *Macgregor*, note 42) refer to details such as who paid the mortgage, who paid for utilities (*Mailhot* at paras 59, 65; *Rockey* at paras 77, 153), who purchased furniture (*Mailhot* at para 75; *Montgomery* at para 57), who paid

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[128] Legislated eligibility criteria should instead rely on presumptions. If the relationship between two individuals meets certain easily measured criteria, it should be presumed that they have formed an economic partnership or that they intend to share property.

[129] AIRA provides easily measured criteria relevant to economic partnership and the intention to share property. ALRI's early consultation shows support for most of the general criteria in AIRA, although we also heard concerns about specific issues.

a. Relationship of interdependence

[130] To become adult interdependent partners, two individuals must live in a relationship of interdependence. The definition of a relationship of interdependence refers to a number of observable factors. Several of the factors are relevant to whether the relationship is an economic partnership. Partners in a relationship of interdependence must "function as an economic and domestic unit."[91] Specific factors to be considered include "the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being",[92] "the degree of financial dependence or interdependence and any arrangements for financial support between the persons",[93] and "ownership, use and acquisition of property."[94]

[131] In other Canadian jurisdictions with legislated property division rules for common-law partners, the rules apply only to partners in a conjugal, or marriage-like, relationship.

[132] There is a tendency to use "conjugal relationship" as a synonym for sexual relationship, but there is more to it. Canadian courts usually refer to the factors in *Molodowich v Penttinen* when considering whether a relationship is a conjugal

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for groceries and who ate the groceries (*Mailhot* at paras 59, 65; *Montgomery* at para 34–35; *Rockey* at paras 71–75), who did the cooking (*Rubin* at para 218–221; *Rockey* at paras 71–75), who did the housework (*Macgregor* at para 88; *Rockey* at paras 71–75), who mowed the lawn (*Rubin* at para 231; see also *Anthony v Berger*, 2010 ABQB 3 at paras 47–49), who performed specific home improvement jobs (*Montgomery* at para 37) and similar details.

[91] AIRA, s 1(1)(f)(iii).

[92] AIRA, s 1(2)(f).

[93] AIRA, s 1(2)(g).

[94] AIRA, s 1(2)(i).

one.[95] The factors are considered holistically.[96] It is not necessary to establish all the factors.

[133] AIRA does not require that partners have a conjugal relationship to be adult interdependent partners, although it is one of the factors to be considered in determining whether they live in a relationship of interdependence.[97]

[134] ALRI is aware of concerns about extending property division rules to those in non-conjugal interdependent relationships (in other words, to two individuals who would not be considered to be in a common-law relationship).

[135] Public opinion research conducted fifteen years ago found Albertans were divided on extending benefits and obligations to those in non-conjugal

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[95] *Molodowich v Penttinen* (1980), 17 RFL (2d) 376 at para 16, (Ont Dist Ct) [*Molodowich*]. The factors are:

1. SHELTER:
   - (a) Did the parties live under the same roof?
   - (b) What were the sleeping arrangements?
   - (c) Did anyone else occupy or share the available accommodation?

(2) SEXUAL AND PERSONAL BEHAVIOUR:
   - (a) Did the parties have sexual relations? If not, why not?
   - (b) Did they maintain an attitude of fidelity to each other?
   - (c) What were their feelings toward each other?
   - (d) Did they communicate on a personal level?
   - (e) Did they eat their meals together?
   - (f) What, if anything, did they do to assist each other with problems or during illness?
   - (g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

What was the conduct and habit of the parties in relation to:
   - (a) Preparation of meals,
   - (b) Washing and mending clothes,
   - (c) Shopping,
   - (d) Household maintenance,
   - (e) Any other domestic services?

(4) SOCIAL:
   - (a) Did they participate together or separately in neighbourhood and community activities?
   - (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

What was the attitude and conduct of the community towards each of them and as a couple?

(6) SUPPORT (ECONOMIC):
   - (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?
   - (b) What were the arrangements concerning the acquisition and ownership of property?
   - (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) CHILDREN:

What was the attitude and conduct of the parties concerning children?

[96] See generally Cossman & Ryder, note 89 at 291–300.

[97] AIRA, s 1(2)(a).

relationships. As discussed in Chapter 4, Alberta Justice commissioned a public consultation on family law in 2002, before the introduction of AIRA.[98] One of the questions in the phone survey was, "Do you agree or disagree that the same benefits and obligations that would be applied to married, common law and same-sex relationships should be applied to … committed platonic relationships?" Fifty percent of all respondents disagreed. The other half either agreed that the same benefits and obligations should be applied to committed platonic relationships (43 per cent) or had no opinion (7 per cent).[99]

[136] At our roundtables, some family lawyers expressed concern about legislated property division rules applying to those in non-conjugal relationships. The main concern was that it cannot safely be presumed that individuals in a non-conjugal relationship are in an economic partnership or intend to share property.

[137] ALRI has considered whether property division rules should apply only to partners in conjugal relationships. It is difficult, however, to identify a principled reason to exclude those in non-conjugal relationships of interdependence.

[138] It is not easy to distinguish a conjugal relationship from a relationship of interdependence. There is significant overlap between the *Molodowich* factors and the factors in section 1 of AIRA. It is often thought that sexual relations are a necessary part of a conjugal relationship but are not essential to a relationship of interdependence. On closer examination, however, that distinction is unclear. Although sexual relations are one of the *Molodowich* factors, Canadian courts have held that it is possible for two individuals to have a conjugal relationship without having sexual relations.[100] Further, one of the factors in determining whether two individuals are in a relationship of interdependence is whether they have a conjugal relationship.[101]

[139] Even if sexual relations are a necessary part of a conjugal relationship, it is not clear why sexual relations should affect eligibility for legislated property

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[98] 2002 Consultation Report.

[99] 2002 Consultation Report at 90.

[100] See generally Cossman & Ryder, note 89 at 291–300.

[101] AIRA, s 1(2)(a).

division rules. As discussed by Professors Cossman and Ryder, sexual relations are a poor proxy for economic partnership:[102]

> The presence or absence of a sexual relationship is a poor indicator of whether cohabitants should be entitled to legal rights and responsibilities. It is both over- and under-inclusive. Many persons who have a sexual relationship do not have a close economic relationship. And conversely, many persons who do not have a sexual relationship may have an economically and emotionally interdependent relationship. It is not clear how the details of cohabitants' sexual lives are relevant in any way to the attainment of legitimate state objectives.

[140] In any case, it is likely that the vast majority of adult interdependent relationships are between partners who have or had sexual relations.

[141] At our roundtables, some lawyers were uneasy about the possibility that roommates or adult siblings might be considered adult interdependent partners, despite having no intention to accept legal obligations towards each other.

[142] ALRI's research indicates that the potential for roommates to unintentionally become adult interdependent partners is mostly a theoretical concern. There are no reported cases where unrelated roommates who did not have sexual relations were found to be adult interdependent partners. AIRA sets a high bar for becoming adult interdependent partners. A relationship of interdependence requires much more than sharing accommodations and household chores. Very few unrelated roommates would have the degree of emotional commitment and economic integration required for a relationship of interdependence.

[143] In the case of siblings or other close relatives, there is an additional requirement. Under AIRA, persons related by blood or adoption can only become adult interdependent partners by entering an adult interdependent partner agreement. If two siblings, or a parent and adult child, or other relatives enter such an agreement, they have clearly indicated their intention to accept legal obligations to each other.

[144] In practice, the definition of relationship of interdependence appears to work as intended. Reported cases do not reveal obvious problems with applying the criteria. We are not aware of any cases where a court found a relationship of interdependence where the partners were not in an economic partnership or had

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[102] Cossman & Ryder, note 89 at 297.

no intention to share property. Anecdotal information also suggests the definition generally works well. We are not aware of widespread problems.

b. Period of cohabitation

[145] Under AIRA, one way to become adult interdependent partners is to live together in a relationship of interdependence for three years. (As discussed below, the period can be shorter if partners have a child together or enter an adult independent partner agreement.)

[146] Of the Canadian jurisdictions that have legislated property division rules for common-law partners, the minimum period of cohabitation varies from one year to three years. In a few jurisdictions, the minimum period of cohabitation can be shorter if partners have a child together or take a formal step to obtain recognition of the relationship.

[147] The following table summarizes the minimum period of cohabitation to become eligible for legislated property division rules in other Canadian jurisdictions:

British Columbia	2 years of cohabitation
Saskatchewan	2 years of cohabitation
Manitoba	3 years of cohabitation or registered a common law relationship under the *Vital Statistics Act*
Northwest Territories	2 years of cohabitation or lived together in a relationship of some permanence if there is a child
Nunavut	2 years of cohabitation or lived together in a relationship of some permanence if there is a child
Nova Scotia[103]	Made a domestic partnership declaration under the *Vital Statistics Act*
Federal (*Family Homes on Reserves and Matrimonial Interests or Rights Act*)[104]	1 year of cohabitation

[103] The Nova Scotia Law Reform Commission recently published a Discussion Paper proposing that property division rules should be extended to common-law partners who have cohabited for at least two years: Law Reform Commission of Nova Scotia, *Division of Family Property*, Discussion Paper (2016), online: <www.lawreform.ns.ca/Downloads/Division%20of%20Family%20Property%20Discussion%20Paper.pdf>.

[148] Public opinion research suggests a significant number of Albertans (although perhaps not a majority) believe that a committed relationship arises before three years of cohabitation.

[149] In the 2002 Consultation, phone survey respondents were "asked to consider which time period of living together would be long enough to establish that a common law or same-sex relationship is a committed one."[105] Three years was the most common answer, with 35 per cent of respondents selecting it. The next most common answers were two years and one year, with 22 per cent of respondents selecting two years and 20 per cent selecting one year. Together, the number of respondents selecting either one year or two years was 42 per cent of respondents, more than the number selecting three years. It should also be noted that a small number of respondents selected a period longer than three years.[106]

[150] In the Alberta Survey, a large majority of respondents (68 per cent) agreed that property division rules should apply to common-law partners who have lived together for a certain number of years.[107] The answers to another question, about when respondents considered themselves to be in a common-law relationship, suggested most people who had lived in a common-law relationship used a lower threshold to establish their commitment. A large majority of those who had been in a common-law relationship considered it to be a common-law relationship by the end of the first year.[108]

[151] At our roundtables with lawyers, we heard a range of views about what the minimum period of cohabitation should be in eligibility criteria for property division. Some thought three years was too long, others thought it was too short, and still others that it was just right.

[104] This table refers to the provisional rules under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20. Under the act, a First Nation may enact its own laws for division of homes or land on reserve. The provisional rules apply if a First Nation does not enact its own laws.

[105] 2002 Consultation Report at 88. It should be noted that the question did not directly ask about the appropriate period of cohabitation for eligibility for legal benefits and obligations. There might be a difference between a committed relationship and one that should have legal consequences. For example, some individuals may consider themselves to be in a committed relationship when they are engaged to be married, but would not expect the relationship to have legal consequences before they marry. Some individuals may consider their common-law relationship to be a committed one when they begin living with a partner, but would not necessarily expect the relationship to have legal consequences immediately.

[106] 2002 Consultation Report at 88.

[107] Alberta Survey Report at 18–21. The number of years was not specified in this question.

[108] Alberta Survey Report at 7.

[152] Partners are more likely to be in an economic partnership or have the intention to share property after living together for a period of time. Some sociologists have noted that partners may begin living together to "try out" a relationship.[109] Property division rules should not apply when partners separate after a short trial period, but a trial period does not last forever. As Heather Conway and Philip Girard said, "at some necessarily arbitrary point, one can infer that the 'trial' period of a relationship has passed, such that it is reasonable to consider a commitment to exist."[110]

[153] Ultimately, choosing a minimum period of cohabitation to become eligible for legislated property division rules is a somewhat arbitrary exercise. Economic partnership and the intention to share property often develop gradually, with no bright line marking the end of the trial period. Further, every couple is different. There could be reasonable arguments to draw the line at one year or two years, instead of three years, but there is no obvious problem with drawing the line at three years.

c. Child of the relationship

[154] Under AIRA, two individuals may become adult interdependent partners by living together in a relationship of some permanence if there is a child of the relationship. In effect, the minimum period of cohabitation is shortened for partners with a child or children.

[155] In the Northwest Territories and Nunavut, legislated property division rules apply to partners who live together in a relationship of some permanence if they have a child together. In the other Canadian jurisdictions that have legislated property division rules for common-law partners, having a child does not change the minimum period of cohabitation.

[156] In the Alberta Survey, a majority of respondents (approximately 59 per cent) agreed that property division rules should apply to partners who have children together.[111]

[157] At our roundtables with lawyers, we heard different views about whether having a child of the relationship should affect eligibility for property division

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[109] See e.g. Larry L. Bumpass, James A. Sweet & Andrew Cherlin, "The Role of Cohabitation in Declining Rates of Marriage" (1991) 53 J of Marriage and the Family 913 at 920–21.

[110] Heather Conway and Philip Girard, "'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 Queen's LJ 715 at 730.

[111] Alberta Survey Report at 18–21.

rules. Some lawyers said that children are a "game-changer". They felt that raising children requires economic interdependence and partners with children should be presumed to be in a joint family venture. In contrast, they said that each partner in a couple without children should usually be capable of economic self-sufficiency. Other lawyers said that the presence of children may be relevant to support, but should not affect property division.

[158] It is reasonable to presume that partners raising a child or children are in an economic partnership, even if the relationship lasts less than three years. Usually, both partners contribute to meeting the needs of the family. The contributions may include money, caregiving, or other domestic work. If there are any gains accumulated during the relationship, it is reasonable to presume that both contributed to those gains.

d. Adult interdependent partner agreement

[159] Under AIRA, a third way to become adult interdependent partners is to enter an adult interdependent partner agreement. Two individuals can enter an adult interdependent partner agreement if they live together in a relationship of interdependence or if they intend to live together in a relationship of interdependence.[112] There is a prescribed form of agreement.[113] Two individuals who are living together can become adult interdependent partners immediately upon entering an agreement, even if they have not lived together for three years.

[160] If two individuals who are related by blood or adoption wish to become adult interdependent partners, they can only do so by entering an adult interdependent partner agreement.[114]

[161] In Manitoba and Nova Scotia, common-law partners can opt-in to legislated property division rules by registering their relationship with a government agency. In Manitoba, registration allows common-law partners to shorten or eliminate the minimum period of cohabitation to become eligible for legislated property division rules. In Nova Scotia, registration is the only way common-law partners may become eligible for legislated property division rules.

[162] In the Alberta Survey, a large majority of respondents (68 per cent) agreed that property division rules should apply to common-law partners who opt-in to

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[112] AIRA, s 7.

[113] *Adult Interdependent Partner Agreement Regulation*, Alta Reg 66/2011, Schedule.

[114] AIRA, s 3(2).

property division rules by written agreement.[115] A similar percentage of respondents currently in a common-law relationship (66 per cent) agreed with this statement.[116]

[163] The lawyers at our roundtables generally agreed that common-law partners should be able to opt-in to property division rules by agreement.

[164] An agreement is presumed to reflect the parties' intentions. When partners enter an agreement, they agree to have certain legal obligations to each other.

[165] It is unclear whether most adult interdependent partners who have already entered an adult interdependent partner agreement intend to share any gains accumulated during the relationship. Currently, there are no legislated property division rules that apply to adult interdependent partners. As discussed in Chapter 6, a transition period would allow adult interdependent partners to revisit existing agreements to ensure the agreements reflect their actual intentions.

[166] If legislated property division rules apply to adult interdependent partners in the future, it can be presumed that any partners entering a new adult interdependent partner agreement intend for the rules to apply. It would be helpful if the prescribed form of adult interdependent partner agreement clearly stated the rights, benefits, and obligations of adult interdependent partners, to ensure individuals are fully aware of the effects of the agreement they enter.

e. AIRA criteria generally

[167] The AIRA criteria may not be perfect, but they are reasonable. There is no single right answer about which partners should be presumed to be in an economic partnership or have the intention to share property. Rather, there is a range of reasonable answers. The criteria in AIRA fall within the range of reasonable answers.

[168] Any easily measured criteria will necessarily be imperfect and somewhat arbitrary. It is likely that some adult interdependent partners are not in an economic partnership and do not intend to share property. It should be remembered, however, that partners have the option to opt-out of legislated

[115] Alberta Survey Report at 19.

[116] Alberta Survey Report at 20.

property division rules by making an agreement. Similarly, some couples who are in an economic partnership or who intend to share property may not meet the definition of adult interdependent partners. These couples also have the option of making an agreement about property division. By making an agreement, couples may agree to divide property in a way that reflects their actual intentions.

[169] At our roundtables, we heard a number of specific concerns about AIRA, but there was no clear consensus on what the flaws were or how they should be addressed. Many of the concerns were about AIRA in general, not specifically about its application to property division. In our view, the best way to address the perceived shortcomings of AIRA would be to review, and potentially reform, AIRA itself. Such a review is beyond the scope of this project. AIRA affects eligibility for many different kinds of benefits and obligations. A review of AIRA should not be limited to issues relating to property division.

3. CONSISTENCY WITH OTHER LEGISLATION

[170] Using AIRA's definition of "adult independent partner" to determine eligibility for property division would promote consistency throughout Alberta legislation.

[171] Before AIRA was adopted, there were inconsistent definitions of spouse and common-law partner in Alberta legislation. A couple might meet the criteria for rights, benefits, or obligations in one area, but not another. The piecemeal approach to eligibility criteria made it difficult for partners to determine which rights, benefits, or obligations applied to their relationship.

[172] One of the goals of AIRA was the use of consistent criteria throughout Alberta legislation.[117] AIRA defines "adult interdependent partner" and "adult interdependent relationship". The *Interpretation Act* defines these terms by reference to AIRA.[118] A consequential amendment made as a result of AIRA also established a consistent definition of "spouse". The *Interpretation Act* now states that "'spouse' means the spouse of a married person".[119] These definitions are used throughout Alberta legislation.

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[117] Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1388 (Hon David Hancock).

[118] *Interpretation Act*, RSA 2000, c I-8, ss 28(1)(b.1)–(b.2).

[119] *Interpretation Act*, RSA 2000, c I-8, s 28(1)(zz.1).

[173] More than 130 different Alberta statutes and regulations now include the words "adult interdependent partner". Generally, this legislation extends the same rights, benefits, and obligations to married spouses and adult interdependent partners. Married spouses and adult interdependent partners have the same rights to spousal support,[120] intestate succession, maintenance and support from an estate,[121] and certain social benefits.[122]

[174] The AIRA criteria seem to be well-understood. There is a body of case law interpreting and applying AIRA. Case law illustrates how AIRA applies in practice and helps with interpretation of the legislation.

[175] In ALRI's view, consistency among Alberta statutes is a key consideration.[123] Many separating couples have disputes about both property and support. If eligibility criteria for property division and support were different, separating common-law partners would have to consider two lists of factors. If there was a dispute about eligibility, they might have to separately establish whether the relationship met two different sets of criteria. The process is likely to be confusing, would be inefficient, and would add complexity to the dispute, contributing to lack of access to justice.

[176] ALRI's preliminary recommendation is that property division rules should apply to adult interdependent partners, as defined in AIRA.

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[120] *Family Law Act*, SA 2003, c F-4.5, ss 56–63.

[121] *Wills and Succession Act*, SA 2010, c W-12.2, ss 60–62, 72(b), 88.

[122] See e.g. *Fatal Accidents Act*, RSA 2000, c F-8. Other legislation extends the same rights, benefits, and obligations to spouses and common-law partners who meet certain criteria, without using the definition of adult interdependent partner. Often, a different definition is used in provincial legislation that must harmonize with federal legislation: see e.g. *Income and Employment Supports Act*, SA 2003, c I-0.5 ("cohabiting partner"); *Employment Pension Plans Act*, SA 2012, c E-8.1 ("pension partner"); *Alberta Personal Income Tax Act*, RSA 2000, c A-30 and *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("common-law partner").

[123] It should be noted that there are differences between the AIRA criteria and the definition of "common-law partner" used in most federal legislation. The differences are usually not problematic, as federal and provincial legislation address different matters. There is one particular area of concern that would affect couples with interests in homes or land on reserve, however. The recently-enacted *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 applies to division of interests in homes or land on reserves, while provincial laws apply to division of off-reserve real property or personal property. Couples who have an interest in a home or land on reserve, and also have other property, will have to determine whether they meet the criteria under both federal and provincial legislation. Lawyers who advise couples who have real property on reserves should be aware of the differences.

RECOMMENDATION 5

Property division rules should apply to couples who are adult interdependent partners, as defined in the *Adult Interdependent Relationships Act*.

[177] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

CHAPTER 6

What Should the Legislated Rules Be?

A. The *Matrimonial Property Act*

[178] Alberta has legislation about property division for married spouses. The MPA provides clear rules that address most issues about division of property.

[179] Unlike the law of unjust enrichment, the MPA clearly defines the property to be distributed and provides a formula for dividing property.

[180] The MPA applies to "all the property owned by both spouses and by each of them".[124] In a matrimonial property action, the court classifies all property owned by each spouse in one of three categories. Each category has its own rules for division.

[181] The first category is sometimes called exempt property because the market value of the property at the time of acquisition or marriage (whichever is later) is exempt from distribution. It includes property acquired by gift or inheritance, or owned by the spouse before marriage. Subsection 7(2) addresses exempt property: [125]

> 7(2) If the property is
>
> (a) property acquired by a spouse by gift from a third party,
>
> (b) property acquired by a spouse by inheritance,
>
> (c) property acquired by a spouse before the marriage,
>
> (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
>
> (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses,
>
> the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.

[124] MPA, s 7(1).

[125] MPA, s 7(2).

[182] The second category includes the increase in value of exempt property, property acquired after separation, and property that one spouse acquired as a gift from the other spouse. Property in the second category is to be divided in a way that the court "considers just and equitable." Subsection 7(3) addresses this category: [126]

> 7(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:
>
> (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired
>
> (i) as a result of an exchange for the original property, or
>
> (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
>
> (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
>
> (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act* is made in respect of the spouses;
>
> (d) property acquired by a spouse by gift from the other spouse.

[183] The third category is a residual category, consisting of all other property acquired during the marriage. This property is to be divided equally between the spouses, unless the court decides "that it would not be just and equitable to do so". Subsection 7(4) states: [127]

> 7(4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

[126] MPA, s 7(3).

[127] MPA, s 7(4).

[184] The MPA also includes a number of factors that a court should consider to determine if a distribution is just and equitable.[128] The factors include "any fact or circumstance that is relevant."

B. Would Rules Based on the *Matrimonial Property Act* be Appropriate for Adult Interdependent Partners?

[185] As with eligibility criteria, before creating rules from scratch, it makes sense to ask whether rules similar to those in the MPA would be appropriate for adult interdependent partners.

ISSUE 6

Should property division rules be based on the *Matrimonial Property Act*?

1. THE MPA RULES ARE CLEAR AND WELL-UNDERSTOOD

[186] The MPA has mostly been successful in helping married spouses divide their property fairly. In a review of MPA case law commissioned by ALRI, Professor Jonnette Watson Hamilton and Annie Voss-Altman noted that "much

[128] MPA, s 8. For ease of reference, section 8 states:

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;

(d) the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, and

(ii) that each spouse has at the time of the trial;

(e) the duration of the marriage;

(f) whether the property was acquired when the spouses were living separate and apart;

(g) the terms of an oral or written agreement between the spouses;

(h) that a spouse has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

(l) that a spouse has dissipated property to the detriment of the other spouse;

(m) any fact or circumstance that is relevant.

of the MPA appears to work as intended and without any significant or persistent problems."[129]

[187] The MPA rules are clear and generally produce predictable outcomes. The rules are clear enough that, with some help from public legal education materials, separating spouses should be able to calculate how a court would divide their property.[130] While there is some room for discretion, separating spouses or their lawyers should generally be able to predict the outcome with reasonable accuracy.

[188] The rules in the MPA have been further clarified by judicial interpretation. If the rules in the MPA applied to adult interdependent partners, they would benefit from the predictability and certainty that has developed since the MPA was enacted.

2. THE MPA IS COMPLETE

[189] The MPA also anticipates and addresses many of the ancillary issues that are likely to arise in applying property division rules. For example, section 9 of the MPA allows a court to make orders about how property is to be transferred or equalization payments are to be made.

3. UNIFORM RULES SIMPLIFY TRANSITIONS

[190] Using the existing rules in the MPA would avoid difficulty when couples transition from a common-law relationship to marriage. It is common for couples to live together, sometimes for an extended period of time, before eventually marrying. In our roundtables with lawyers, we heard that different rules would create difficulty for couples that transition from a common-law relationship to marriage. It would be confusing, inefficient, and potentially unfair to have different rules for different stages of the relationship.

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[129] Case Law Review at 93.They identified certain specific issues that may call for reform. ALRI addressed one of the identified issues in a recent project: Valuation Date Report.

[130] See Centre for Public Legal Education Alberta, "Property Division for Married and Unmarried Couples" (2014) at 7–14 online: Centre for Public Legal Education Alberta <p.b5z.net/i/u/10086419/f/PropertyDivision.pdf>.

4. THERE IS SUPPORT FOR RULES BASED ON THE MPA

[191] ALRI's early consultation suggests there is support for using the rules in the MPA for common-law couples.

[192] In the Alberta Survey, 67 per cent of respondents said that the MPA rules about dividing property would also be appropriate for common-law couples.[131] Support was even stronger among those currently in a common-law relationship. Of respondents currently in a common-law relationship, 76 per cent said that the MPA rules would be appropriate for common-law couples.[132] Another question asked respondents to choose from several options the most important value to be considered in any new law about division of property for common-law partners. The most common choice was "all couples should be treated the same, whether they are married or not."[133]

[193] ALRI's early consultation revealed some opposition to having legislated rules, but no significant opposition to using the MPA as a model for legislated rules. In our roundtable discussions, opinion was nearly unanimous that any legislated rules should be based on the MPA. No lawyers suggested that the rules in the MPA would be unworkable for common-law partners or that common-law partners would be better served by different rules. Although some would prefer not to have legislated rules, most seemed to agree that if there were to be legislated rules, the rules in the MPA would be appropriate.

[194] There are strong reasons to base legislated rules on the MPA, and no apparent reasons not to do so. Accordingly, ALRI's preliminary recommendation is that legislated property division rules for adult interdependent partners should be the same as the rules under the MPA to the extent possible.

RECOMMENDATION 6

Property division rules should be based on the *Matrimonial Property Act*.

[131] Interviewers read a brief summary of the rules for dividing property from section 7 of the MPA and asked respondents whether these rules were appropriate: Alberta Survey Report at 4, 16–17.

[132] Alberta Survey Report at 16.

[133] Forty-four per cent of all respondents said this value was the most important and 50 per cent of respondents currently in a common-law relationship said that this value was the most important: Alberta Survey Report at 25–27; email from Aleena Amjad Hafeez to Laura Buckingham, ALRI Counsel (5 February 2017).

[195] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

C. What Changes Would be Required to Adapt Rules in the *Matrimonial Property Act* for Adult Interdependent Partners?

[196] As the MPA was drafted for married spouses, some rules may need adjustment to apply the rules to adult interdependent partners. This section considers the specific adjustments that would be required.

[197] ALRI has identified three areas where the MPA rules would create difficulty when applied to adult interdependent partners.

1. BEGINNING OF THE RELATIONSHIP

[198] The rules for division of property in section 7 of the MPA require establishing a "time of marriage". Exemptions depend on whether property was acquired before the marriage or during the marriage, and the amount exempted from distribution is the value at the time of marriage.

ISSUE 7

For purposes of property division, how should rules determine when an adult interdependent relationship began?

[199] It is straightforward to identify the date a legal marriage begins. A legal marriage begins on the date of the marriage ceremony. In case of any question about the date of marriage, spouses can usually consult an official registry that maintains records of the date of marriage.[134]

[200] Unlike a legal marriage, it can be challenging to pinpoint the beginning of a common-law relationship or an adult interdependent relationship. Property division legislation for adult interdependent partners requires an approach suited to adult interdependent relationships.

[134] Alberta, like all other Canadian jurisdictions and many foreign ones, maintains a registry of marriages: see *Vital Statistics Act*, SA 2007, c V-4.1, s 53; *Alberta Evidence Act*, RSA 2000, c A-18, s 36, 39.

a. Difficulty establishing the beginning of the relationship

[201] The difficulty in establishing the beginning of a common-law relationship or adult interdependent relationship relates both to the nature of these relationships and the definitions in AIRA.

[202] It is common for partners to experience a gradual progression in the relationship. It may be difficult to identify a specific date when partners began living together, for example, as moving in together may be something that occurs over a period of time.[135]

[203] AIRA does not require adult interdependent partners to identify the beginning of the relationship with precision. Further, the criteria to establish an adult interdependent relationship under AIRA do not necessarily refer to events that occur on a specific date. Some of the factors for determining a relationship of interdependence, such as "the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being", could only be established over a period of time.[136]

[204] Even if partners enter an adult interdependent partner agreement, there may be some uncertainty about when the relationship began. Two individuals may enter an adult interdependent partner agreement before they live together (although they must intend to live together in a relationship of interdependence), or while they are living together in a relationship of interdependence.[137] Depending on the circumstances, they may become adult interdependent partners at different points. For partners who enter an agreement before living together, AIRA does not state whether the agreement takes effect immediately or only once the partners begin living together in a relationship of interdependence. If the partners live together before entering the agreement, they may become adult interdependent partners immediately upon entering the agreement. If they have lived together for more than three years or have a child together, however,

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[135] See Wendy D. Manning & Pamela J. Smock, "Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data" (2005) 67 J of Marriage and Family 989 at 994. They observed that few of the cohabitants they interviewed were able to quickly state a specific date that they started living with their partner. One woman's description is a good example:

> Within that next year, he basically moved in, there wasn't a definite date, he would stay one night a week, and then two nights, then . . . it got to a point where he just never left.

See also *Rubin*, note 42 at paras 26–27, where each party described the process of moving in as occurring gradually.

[136] AIRA, s 1(2)(f).

[137] AIRA, s 7(1).

they may already be adult interdependent partners before entering the agreement.

[205] When a court is required to determine whether two people are adult interdependent partners for support or other purposes, it usually does not matter exactly when the relationship began. Participants at our roundtables observed that there has been very little litigation focused on the start date of an adult interdependent relationship.

b. Agreement on the beginning of the relationship

[206] Partners could make an agreement about the date the relationship began for the purpose of property division. As discussed above in Chapter 3, we would appreciate comments on the safeguards that should be required for such an agreement.[138]

c. A default date for the beginning of the relationship

[207] Legislation should include a default rule for establishing the beginning of the relationship. Such a rule would provide guidance to partners who have difficulty reaching agreement and to courts when they are required to resolve the question.

[208] If partners begin their life together by living in a common-law relationship, there will usually be a "waiting period" between the time they begin living together and the time they become adult interdependent partners. The waiting period may be as much as three years. It may be shorter for those who have a child or who enter an adult interdependent partner agreement. Some will marry before the end of the waiting period, so they will never become adult interdependent partners. No matter which way partners become adult interdependent partners under AIRA, the criteria require that they live in a relationship of interdependence. The date that the partners began living in a relationship of interdependence is therefore the natural starting point.

[209] If partners cannot agree, courts are able to hear and weigh the evidence to make a decision. Courts are also able to interpret the legislation to develop general guidelines or clarify legal issues as necessary.

[138] See paras 70–77, above.

d. Impact on exemptions

[210] The default rule for determining the date a relationship began has an impact on exempt property. Under subsection 7(2) of the MPA property "acquired by a spouse before the marriage" is exempt from distribution.[139] In other words, the question is: should property acquired during the waiting period be exempt? There are two different approaches to this issue in other Canadian jurisdictions.

i. The Saskatchewan approach

[211] In Saskatchewan, property acquired during the waiting period is exempt from distribution. This approach is unique in Canada. (For the following discussion, we call it the "Saskatchewan approach"). Saskatchewan's *Family Property Act* states that property is exempt from distribution if it was owned by one of the partners before the "spousal relationship" began.[140] Saskatchewan courts have interpreted the legislation to mean that, for common-law partners, the spousal relationship begins once the waiting period is over.[141] The waiting period is two years in Saskatchewan, so common-law partners do not have to share property acquired in the first two years they lived together.

ii. The BC approach

[212] The remaining jurisdictions with legislation about property division for common-law partners—the Northwest Territories, Nunavut, Manitoba, and British Columbia—have taken the opposite approach. (For the following discussion, we call it the "BC approach"). In each jurisdiction, the legislation clearly requires common-law partners to divide property acquired from the time they began living together. In each jurisdiction there is a waiting period to become eligible for property division rules. If a relationship does not survive the waiting period, property division rules will not apply. Once the waiting period is over, however, the rules apply to all property acquired from the time the partners began living together.

[213] For example, under British Columbia's *Family Law Act*, the waiting period is two years.[142] The act defines the beginning of the relationship as the earlier of

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[139] MPA, s 7(2)(c).

[140] *Family Property Act*, SS 1997, c F-6.3, s 23(1)(c).

[141] See e.g. *Ruskin v Dewar*, 2005 SKCA 89; *Swystun v Janzen*, 2016 SKCA 117 at paras 3–4.

[142] See *Family Law Act*, SBC 2011, c 25, s 3(1):

Continued

"the date on which they began to live together in a marriage-like relationship … or the date of their marriage."[143] The exemptions include "property acquired by a spouse before the relationship between the spouses began."[144] Non-exempt property is equally divided between the spouses.[145] If common-law partners split up after living together two years or more, they will equally divide property that either partner acquired from the time they began living together.

iii. Which approach is preferable?

[214] At our roundtables with family lawyers, there was strong support for the Saskatchewan approach. Some lawyers said that economic interdependence develops over time. They thought common-law partners would usually not begin their lives together expecting to share property and it would be unusual for them to make significant contributions to each other's property in the first few years of the relationship. Some lawyers noted that, under the Saskatchewan approach, a partner could make an unjust enrichment claim for contributions to property acquired during the waiting period. They said that having two claims—one for unjust enrichment in the early part of the relationship and one for property division under the MPA—would not be problematic because it is just like the current procedure for couples who live in a common-law relationship before marriage.

[215] There was also some support for the BC approach at our roundtables. The lawyers who preferred this approach said it would be better to have a single set of rules for the whole relationship. They thought it was undesirable for a partner to make two claims under different rules, especially because of the problems with the law of unjust enrichment. They would prefer to see legislated rules replace the law of unjust enrichment as much as possible.

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3 (1) A person is a spouse for the purposes of this Act if the person

(a) is married to another person, or

(b) has lived with another person in a marriage-like relationship, and

(i) has done so for a continuous period of at least 2 years, …

[143] *Family Law Act*, SBC 2011, c 25, s 3(3):

3 (3) A relationship between spouses begins on the earlier of the following:

(a) the date on which they began to live together in a marriage-like relationship;

(b) the date of their marriage.

[144] *Family Law Act*, SBC 2011, c 25, s 85(1):

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began; …

[145] *Family Law Act*, SBC 2011, c 25, s 81.

[216] ALRI has considered both perspectives and our preliminary view is that the BC approach is the better one.

[217] The most important reason is that the BC approach would minimize the need to rely on the law of unjust enrichment. Reform is needed because the law of unjust enrichment is unsatisfactory. The Saskatchewan approach leaves common-law partners relying on the law of unjust enrichment, with all its problems, to divide part of their property. It is better to eliminate the need to have recourse to unjust enrichment by enacting legislated rules that apply to the whole relationship.

[218] ALRI also believes the BC approach is more likely to reflect the expectations of common-law partners or adult interdependent partners. It may be true that partners do not immediately expect to share property, and it is probably true that economic interdependence develops over time. Both approaches recognize these issues by requiring a waiting period. The waiting period is a fairly arbitrary measure of expectations, however. The Saskatchewan approach may lead to seemingly arbitrary results. For most partners, their relationship will be much the same on the day before the waiting period ends as it is the next day. They may not mark or celebrate the second or third anniversary of the day they started living together. But under the Saskatchewan approach, the date would be all-important for identifying exempt and non-exempt property. For example, there would be significantly different consequences to buying a house on a day before the waiting period ends compared to buying it the day after, even though the partners had already lived together for some time and may have made the decision to buy the house together.

[219] The Saskatchewan approach may be particularly difficult to apply in the Alberta context. Under Saskatchewan's *Family Property Act*, there is a single standard waiting period. In contrast, AIRA establishes different waiting periods depending on how a couple becomes adult interdependent partners. In particular, for those couples that become adult interdependent partners by having a child of the relationship, it may be hard to know when the waiting period ends. While the date the child was born or adopted will be known, the parents only become adult interdependent partners by living in a relationship of interdependence "of some permanence". This phrase leaves room for uncertainty.

[220] The BC approach recognizes that starting to live together marks a change in the relationship. For many partners, there will be some degree of economic

interdependence as soon as they live together because they will share expenses, chores, and domestic work. It is likely partners would expect some change in their obligations from the time they start to live together. By treating all property acquired while living together as non-exempt, the BC approach avoids arbitrary results that might surprise partners.

[221] Finally, adopting the BC approach would result in more uniformity across jurisdictions. The Saskatchewan approach is unique to Saskatchewan, while the BC approach is used in several provinces and territories. Where possible, it is desirable to have rules that are consistent across jurisdictions.

[222] ALRI's preliminary recommendation is therefore that, for property division legislation, the default date an adult interdependent relationship began should be the date that the adult interdependent partners began living in a relationship of interdependence as defined by AIRA.

[223] It should be noted that this recommendation would not affect couples who never become adult interdependent partners. Property division legislation would apply only once two individuals become adult interdependent partners, either by living together for at least three years, having a child together, or entering an adult interdependent partner agreement. Couples who do not meet these conditions would not have legislated obligations to divide property.

RECOMMENDATION 7

For purposes of property division, an adult interdependent relationship began on the date that the partners began living together in a relationship of interdependence, unless the partners agree otherwise.

[224] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

It should be noted that this recommendation has the potential to affect some married spouses who lived together in a relationship of interdependence before marriage. Currently, any property acquired before marriage is exempt, even if it was acquired while the couple was living in a common-law relationship. Under the proposed rule, the default rule would be that couples would equally divide non-exempt property acquired while they were married or living in a relationship of interdependence. The implications of the proposed rule on married couples are considered in Report for Discussion 31, *Property Division: Living Together Before Marriage*. Married spouses who do not wish to be bound by the default rules would always have the option of making an agreement about ownership of property acquired before marriage, if the appropriate safeguards are observed.

2. OVERLAPPING CLAIMS

[225] Under AIRA, it is possible for an individual to have both a spouse and an adult interdependent partner. A married person who is separated from their spouse may form an adult interdependent relationship with a new partner. It should be noted that a married person cannot form a new adult interdependent relationship while living with their spouse.[146]

[226] If a person has both a spouse and an adult interdependent partner, there is a possibility of overlapping claims to property.

ISSUE 8

How should property division legislation address overlapping claims, where both a spouse and an adult interdependent partner have claims to the same property?

[227] The problem of overlapping claims arises because Alberta law requires matrimonial property to be valued and divided at the time of trial.

[228] By the time of trial, one or both spouses may have adult interdependent partners. A new adult interdependent partner may have made contributions to maintaining, improving, or acquiring property. If the property is non-exempt matrimonial property, however, valuation at the time of trial means the value of those contributions would be shared with the legal spouse.

[229] Under the MPA, a court has some flexibility to address a situation with overlapping claims. In particular, subsection 8(f) allows a court to use discretion in distributing property "acquired while the spouses were living separate and apart".[147] Subsection 8(m) also allows a court to consider "any fact or circumstance that is relevant", which could include a new relationship.[148]

[230] Although these provisions are useful, they do not provide predictable rules. They rely on a court's discretion and so encourage litigation instead of settlement.

[231] A more predictable, legislated approach would be better.

[146] AIRA, s 5(2).

[147] MPA, s 8(f).

[148] MPA, s 8(m).

a. Valuation date as a solution to overlapping claims

[232] One solution would be to value matrimonial property at the time of separation, instead of trial. ALRI recently recommended this change in *Matrimonial Property Act: Valuation Date*, Final Report 107 [Valuation Date Report].[149] We concluded this change would benefit married spouses. Recommendation 4 in our Valuation Date Report was:

> If spouses do not agree on a valuation date, the *Matrimonial Property Act* should expressly provide that the default valuation date will be the date on which the parties begin to live separate and apart.

[233] The recommendations in our Valuation Date Report would have the additional benefit of resolving the problem of overlapping claims. This change would mean that the spouses would divide the property as it was at the time of separation, before the new adult interdependent relationship was formed. The adult interdependent partner's contributions would not be included in the property to be divided between the spouses. At our roundtables, we heard general consensus that overlapping claims would be avoided if matrimonial property was valued as at the date of separation.

[234] To be clear, the approach to valuation date should be the same for married spouses and adult interdependent partners. ALRI has recommended that the MPA be amended to provide for valuation at separation. Our preliminary recommendation is that legislation for adult interdependent partners should mirror the MPA.

RECOMMENDATION 8A

The default valuation date should be the date on which the parties began to live separate and apart.

[235] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

b. Other ways to address overlapping claims

[236] A change in valuation date would affect married spouses and involves considerations outside the scope of the current report. For that reason, ALRI also considered narrower solutions to the problem of overlapping claims.

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[149] Valuation Date Report at 29.

i. Restriction on forming a new adult interdependent relationship

[237] At first glance, it might seem the problem could be resolved by amending AIRA to extend the restriction on forming a new adult interdependent relationship. AIRA could state that a married person could never become an adult interdependent partner. A married person could not become an adult interdependent partner until the marriage was ended, either by divorce or by the death of their spouse. This approach would mean property division rules could apply to only one relationship at a time. There would be no possibility of overlapping claims under legislation.

[238] Unfortunately, a stricter restriction on forming a new adult interdependent relationship would be only a superficial solution. It would not address the underlying problem. Separated people would still begin new relationships. Those new relationships still would often involve economic interdependence, and the partners might accumulate wealth through joint efforts. If the new relationship eventually broke down, the partners would still need to divide their property. If they are not recognized as adult interdependent partners, they would have to rely on the law of unjust enrichment. There would still be overlapping claims, but they would be especially difficult to resolve.

ii. A new section 8 factor

[239] Another possible solution, suggested by lawyers attending our roundtables, was that a new factor should be added to section 8 of the MPA to take into consideration any contribution to property by a third party. This factor would allow a court to consider a new partner's contributions when dividing property at the time of trial.

iii. A priority rule

[240] Another suggestion from our roundtables was that legislation should include a rule about priority of claims. Lawyers at the roundtables identified at least two possibilities. One would be a rule that a spouse's claim would have priority over the claim of an adult interdependent partner. The other would be a rule that a claim from the earlier relationship would have priority over a claim from the later relationship. In either case, the spouses or partners in the higher-priority relationship would have to divide their property first. They would value and divide their property at the time of trial. The spouses or partners in the lower-priority relationship would then value and divide only the remaining property. A spouse or partner in the lower-priority relationship would have no

claim to property retained by their partner's former spouse or adult interdependent partner.

[241] A rule about priority of claims would address most overlapping claims, but the rule should not be absolute. There will be situations where it would cause injustice. One such situation might occur when there is a long delay between the first couple's separation and the trial of their property claims. In the meantime, a new partner may have made substantial contributions to property. It would be unfair for a former spouse or partner to reap the benefit of the new partner's contributions.[150]

iv. Which approach is preferable?

[242] ALRI's preliminary view is that a rule about priority of claims is an appropriate solution. We prefer a rule that gives priority to a claim from the earlier relationship.

[243] The rule should be subject to the factors in section 8 of the MPA. ALRI's preliminary view is that no new factor is required. The existing factors include "whether the property was acquired when the spouses were living separate and apart" and "any fact or circumstance that is relevant".[151] A court may refer to these factors in adjusting the distribution of certain property to achieve a "just and equitable" result.[152] The existing section 8 factors could be used to address any unfairness that may arise as a result of a rule about priority of claims.

RECOMMENDATION 8B

If the default valuation date remains the date of trial, the parties to the relationship that is first in time should value and divide property first.

[244] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

[150] See e.g. *Doege v Doege*, 2015 ABQB 802. The parties separated in 2001. Mr. Doege moved in with a new partner after separation. Mrs. Doege filed a claim for divorce and division of matrimonial property in 2004. The trial did not take place until 2015. In the meantime, Mr. Doege and his new partner acquired real property and vehicles together. At trial, the court determined the post-separation property should not be divided with Mrs. Doege.

[151] MPA, ss 8(f), 8(m).

[152] MPA, ss 7(3), 7(4).

3. TIME TO MAKE A CLAIM

[245] The MPA includes rules about when a spouse may make a claim for property division.

ISSUE 9

When should an adult interdependent partner be permitted to make a claim for property division?

[246] Section 5, "Conditions precedent to application", sets out the events that may trigger a claim for property division.[153] Property division rules apply only if the relationship has broken down. Section 5 lists the scenarios when the relationship has broken down, allowing a court to make an order about property division. In general, a court may make a property division order if married spouses are divorced or separated.

[247] Section 6, "Time for application", sets out time limits to make a claim.[154] A spouse must apply for property division within a certain time after the triggering

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[153] For ease of reference, MPA, s 5(1) states:

> 5(1) A matrimonial property order may only be made
>
> (a) if
>
> (i) a judgment of divorce has been granted, or
>
> (ii) a declaration of nullity of marriage has been made
>
> with respect to the marriage,
>
> (b) if one of the spouses has been granted a judgment of judicial separation,
>
> (b.1) if one or both of the spouses have obtained a declaration of irreconcilability under the *Family Law Act*,
>
> (c) if the Court is satisfied that the spouses have been living separate and apart for a continuous period of at least one year immediately prior to the commencement of the application,
>
> (d) if the Court is satisfied that the spouses are living separate and apart at the time the application is commenced and the defendant spouse
>
> (i) has transferred or intends to transfer substantial property to a third party who is not a bona fide purchaser for value, or
>
> (ii) has made or intends to make a substantial gift of property to a third party,
>
> with the intention of defeating a claim to property a spouse may have under this Part, or
>
> (e) if the Court is satisfied that the spouses are living separate and apart and one spouse is dissipating property to the detriment of the other spouse.

[154] For ease of reference, the relevant parts of MPA, s 6 state:

> 6(1) An application for a matrimonial property order to which section 5(1)(a) or (b) applies
>
> (a) may, notwithstanding subsection (2), be commenced at or after the date proceedings are commenced for a decree of divorce, a declaration of nullity, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act*, but
>
> (b) may be commenced not later than 2 years after the date of the decree nisi, declaration or judgment.
>
> (2) An application for a matrimonial property order to which section 5(1)(c) or (e) applies may be commenced within 2 years after the date the spouses separated.
>
> (3) An application for a matrimonial property order to which section 5(1)(d) applies may be commenced within
>
> (a) two years after the date the spouses separated, or

Continued

event. If they wait too long to apply, the court will not make an order. In most circumstances, the time limit is two years after divorce or separation.

[248] ALRI reviewed these rules at our roundtables with lawyers. Some of the triggering events in the MPA are specific to married spouses and would not apply to common-law couples or adult interdependent partners.[155] In general, however, we heard that the same triggering events and time limits would be appropriate for common-law couples or adult interdependent partners.

[249] There are also some small additions that would be required to harmonize property division rules with AIRA. AIRA has its own criteria for establishing that the relationship has broken down. Section 10 of AIRA sets out the events that cause adult interdependent partners to become former adult interdependent partners. The events are: [156]

a. The partners make a written agreement about separation;

b. The partners live separate and apart for more than a year;

c. The partners marry each other;

d. One of the partners marries another person;

e. One of the partners becomes the adult interdependent partner of another person by entering an adult interdependent partner agreement with the new partner; or

f. A court makes a declaration of irreconcilability.

[250] Two of these events—living separate and apart for more than a year, declaration of irreconcilability—are equivalent to triggering events in sections 5 and 6 of the MPA.

[251] Most of the other events indicate that the relationship has broken down and would be appropriate triggering events for property division. If partners make a written agreement about separation or if one of them enters a new relationship, the relationship is no longer intact and the partners will need to

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(b) one year after the date the property is transferred or given,

whichever occurs first.

...

[155] In particular, the provisions that permit a matrimonial property order to be made if there is a judgment of divorce or a declaration of nullity of marriage would not apply to common-law partners or adult interdependent partners.

[156] AIRA, s 10.

divide their property. If they cannot agree, they should have recourse to the courts.

[252] One of the events is different. If the partners become former adult interdependent partners by marrying each other, the relationship has not broken down. It would not be appropriate for a court to make a property division order just because the partners married each other. This event should not be included in the ones that may trigger property division.

RECOMMENDATION 9

Property division legislation should state that a property division order may be made if adult interdependent partners have become former adult interdependent partners in accordance with the *Adult Interdependent Relationships Act*, unless the reason they became former adult interdependent partners was that they married each other.

[253] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

[254] We would appreciate comments about any other areas where the MPA rules would create difficulty when applied to adult interdependent partners and how the issues should be addressed.

D. Transition Issues

[255] ALRI will consider transition issues and consequential amendments fully when it makes final recommendations. There are, however, two key issues about transition to the new legislation where we would appreciate input.

1. TRANSITION PERIOD

[256] It would be advisable to have a transition period before new legislation comes into force. The transition period would allow time for individuals and lawyers to learn about the change in the law. It would also provide time for couples to make agreements about ownership and division of property if they wish to avoid the default rules in the new legislation.

2. APPLICATION TO SEPARATED COUPLES

[257] ALRI's preliminary view is that new property division legislation should apply to couples who separate after the legislation comes into force, regardless of when the relationship began. This approach is a standard one: when the MPA came into force it applied to spouses regardless of when they were married, and AIRA applies to relationships that arose before or after it came into force.[157] This approach accomplishes the goal of reducing the number of people who must rely on claims for unjust enrichment to divide property.

[258] There will be some couples who have already separated but have not reached a final resolution of claims for property division when new legislation comes into force. ALRI would appreciate comments on whether new legislation should apply to these couples.

ISSUE 10

What transition rule should apply to new property division legislation?

[259] There are arguments for and against new legislation applying to couples who have already separated. On the one hand, new legislation should simplify resolution for most couples. On the other hand, if a claim is close to trial, both partners may have invested considerable resources to prepare a case based on the law of unjust enrichment.

[260] There are different places where a line could be drawn. The dividing line could be at the time of separation, at the time a statement of claim is issued, at the time a matter is set down for trial, at trial, or at some other time.

[261] ALRI's preliminary view is that new legislation should apply only to couples who separate after the legislation comes into force. It may be confusing and inefficient to change the rules for couples who may already be working toward resolution.

RECOMMENDATION 10

New property division legislation should only apply to couples who separate after the legislation comes into force.

[262] **We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.**

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[157] *Matrimonial Property Act*, SA 1978, c 22, s 40; AIRA, s 2.

Deadline for comments on the issues raised in this document is **November 20, 2017**

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