

## Does the *Dower Act* Still Serve a Useful Purpose? ALRI Wants to Hear From You!

**By:** Katherine MacKenzie

**Legislation Commented On:** *Dower Act*, [RSA 2000, c D-15](#)

The Alberta Law Reform Institute (ALRI) is studying whether the *Dower Act* should be reformed or repealed. The project is still in its early stages, with a consultation document forthcoming in 2021. In the meantime, ALRI is seeking [preliminary feedback](#) on the *Dower Act* and any practical problems it may present.

### Key Features of the *Dower Act*

The rights under the *Dower Act* only apply to married people (s 1(c)). The Act is intended to protect a spouse (the “dower spouse”) if the couple’s home is solely owned by the other spouse (the “owner spouse”). It applies to a “homestead”, which is a parcel of land where the owner spouse lived during the marriage (s 1(d)). The *Dower Act* protects the dower spouse from losing their home, either during the lifetime of the owner spouse or after the owner spouse’s death.

There are two key features:

- **Consent to disposition:** The owner spouse cannot dispose of a homestead without the consent of the dower spouse (s 2(1)). Disposition includes a transfer, long-term lease, or mortgage (s 1(b)). If the owner spouse disposes of a homestead without consent, they may be subject to a penalty and liable to pay damages to the dower spouse (ss 2(3), 11).
- **Life estate:** The dower spouse is entitled to a life estate in the homestead after the death of the owner spouse (s 18).

The *Dower Act* has been part of the law of Alberta for more than 100 years, but it has not changed substantially since 1948.

### Broad Impact of the *Dower Act*

While dower rights only apply to married couples, the *Dower Act* affects all homeowners in Alberta (for example, when obtaining a mortgage, selling their land, or making any other disposition). This is because when a transaction by a homeowner is registered at the Land Titles Office, the homeowner must either submit documents proving the dower spouse’s consent to the transaction or make an affidavit establishing that the *Dower Act* does not apply. The [2016 census](#) found that nearly 75% of Albertans live in an owner-occupied residence. Thus, a large number of

individuals will either have to comply with the Act or prove that it does not apply to their transaction.

The *Dower Act* also intersects with many areas of law. Real estate lawyers encounter the *Dower Act* regularly. In most transactions they must confirm compliance with the *Dower Act* and submit the necessary documents to the Land Titles Office. On occasion, they may have to resolve more complex situations, such as a need to dispense with consent (s 10).

Lawyers who practise wills and estates also have to consider the *Dower Act*. When an estate is administered, they must determine whether a surviving spouse is entitled to a dower life estate. If so, a dower life estate takes priority over most other dispositions. Occasionally there may be difficulty reconciling the dower life estate with other dispositions or claims against an estate.

The *Dower Act* also intersects with family law. Conceptually, it is part of the package of rights, benefits, and obligations arising from marriage. More practically, family lawyers may have to consider the *Dower Act* when spouses divide property. For example, a release of dower rights may be part of a separation agreement (ss 7, 9). Issues may also arise if an owner spouse has an [adult interdependent partner](#) but is still legally married to the dower spouse.

## Repeal or Reform?

The primary question at this stage in the project is whether the *Dower Act* continues to serve a useful purpose. If it does not, it should be repealed. If it does, it will require extensive reforms in order to bring it up-to-date.

## Selected Dower Issues in Need of Reform

The *Dower Act* has not been substantially updated since 1948. Parts of the Act are now both out-of-date and out-of-step with other Alberta legislation. If it is going to remain part of Alberta's statute book, then it will require considerable modernization and reform. Some significant problems with the current Act include:

- **Excluding adult interdependent partners:** One of the obvious issues with the *Dower Act* is that it applies only to legally married spouses. Since the *Family Property Act*, [RSA 2000, c F-4.7](#) came into force in January 2020, it is now the only significant piece of legislation in Alberta that applies to spouses but not adult interdependent partners.
- **Excluding renters:** The Act's definition of "homestead" does not reflect the range of housing available to Albertans (s 1(d)). Notably, it does not extend the *Dower Act* to provide any protection to renters, which makes it inconsistent with other Alberta legislation. For example, the *Family Law Act*, [SA 2003, c F-4.5](#) (s 67(1)), the *Wills and Succession Act*, [SA 2010, c W-12.2](#) (s 72(a)), and the *Family Property Act* (s 1(a.2)) have definitions of "family home" that are more inclusive than the definition of "homestead" in the *Dower Act* (s 1(d)).

- **Uncertainty surrounding defective consent:** The *Dower Act* has specific requirements for a dower spouse's consent to a disposition, which is to be provided in a prescribed form (s 4). When a dower spouse executes the consent form, they must also acknowledge that they are aware of their dower rights and give them up voluntarily. The consent must be accompanied by a certificate of acknowledgement, also in a prescribed form (s 5). Although the requirements are specific, the Act is vague about consequences for failure to meet them. Courts have come to conflicting decisions about whether a contract is binding without a proper dower consent. [As Professor Watson Hamilton points out](#), the conflict could be fully resolved by the Supreme Court, but it is highly unlikely that it would grant leave to appeal on the issue. Thus, it is probable that the issue will need to be resolved by legislation rather than by further litigation.
- **Potentially disproportionate penalties for non-compliance:** The *Dower Act* includes consequences for non-compliance. First, a person who disposes of a homestead without consent is guilty of an offence. The offence is punishable by either a fine or a term of imprisonment (s 2(3)). The fine is up to \$1000, which seems disproportionately low. The term of imprisonment is up to two years, which seems disproportionately high. Second, a dower spouse may seek damages from the owner spouse if the homestead is transferred to another person without consent. Section 11 prescribes the amount of damages, which are extremely strict. The Alberta Court of Appeal recently confirmed that the legislation does not provide flexibility to calculate damages based on the net proceeds of sale. As a result, the owner spouse may be ordered to pay damages in an amount that is higher than what he or she actually received from the non-compliant sale (see *Joncas v Joncas*, [2017 ABCA 50 \(CanLII\)](#)).
- **Difficulties surrounding the concept of the dower life estate:** The [value of a dower life estate](#) and whether a dower life estate forms a part of the deceased owner spouse's estate are both live issues under the *Dower Act*. This makes it difficult to decide preferential shares of the deceased's estate under intestate succession laws or to determine whether the *Dower Act* prevails over claims for family maintenance and support.

The above examples are not an exhaustive list of the issues with the *Dower Act*, but illustrate how its current form is unsatisfactory.

### What Do You Think?

ALRI has started early consultation for its *Dower Act* project. We would like to hear from lawyers, real estate agents, mortgage brokers, bankers, trustees-in-bankruptcy, and other individuals who regularly encounter dower rights in their work. At this stage, we are particularly interested in hearing about any practical challenges or complications that arise because of the *Dower Act*. There is a short survey currently available on ALRI's website that addresses these questions; it can be accessed here: <http://bit.ly/dowersurvey>

You can also send comments directly to ALRI at the address below:

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