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## What's the Matter with the *Dower Act*? How Law Reform Can Help with Everyday Legal Problems

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**Reports Commented On:** Alberta Law Reform Institute, [Dower Act: Consent to Disposition, Report for Discussion 36](#); Alberta Law Reform Institute, [Dower Act: Life Estate, Report for Discussion 37](#)

Sometimes, the problem with a law is easy to see. If a government proposes legislation that might be unconstitutional, events play out in the public eye. Lawyers, academics, and other experts will point out the issue (for just a few examples, see e.g. [here](#), [here](#), and [here](#)). A court challenge can attract a lot of attention. If a court strikes down a law, news media will report the story.

Other problems are less visible. That does not mean they are less important. Most of us encounter the law in commonplace situations, like buying or selling a home, making a will or administering an estate, entering a lease, being hired or fired from a job, or getting divorced. If these transactions are inefficient or difficult to navigate, it won't make the news. Nonetheless, these problems are important to the people affected by them. Resolving them can take money and time. A common problem that affects a lot of people can have a big cumulative effect. Law reform often addresses these kinds of problems. The Alberta Law Reform Institute's (ALRI) project on the *Dower Act*, [RSA 2000, c D-15](#) is a good example.

In fall 2020, ALRI asked professionals who deal with the *Dower Act* to tell us whether it still serves a useful purpose. As my colleague Katherine MacKenzie [wrote](#), we were particularly interested to hear about practical problems the *Dower Act* may present. Katherine's post mentioned some of the problems we had already identified. The survey and other consultation revealed many more. More than 100 people responded to our initial survey. Most were lawyers, but we also heard from real estate professionals, estate and financial planners, landmen, and others. Over the following months, we had virtual roundtable meetings, presentations, and interviews with various professionals. This consultation revealed problems we never could have discovered through traditional legal research. Professionals encounter problems regularly but usually work them out behind closed doors. The problems rarely result in court applications. They will probably never show up in reported court decisions, let alone the news. We are very grateful to those who brought these problems to light by sharing them with ALRI.

After identifying the problems, we considered how to fix them. ALRI recently published two Reports for Discussion with preliminary recommendations for reforming the *Dower Act*. This post discusses some of the problems we heard about in early consultation and how ALRI's preliminary recommendations could solve them.

There will be one more chance to have your say before ALRI makes final recommendations. Anyone can give feedback on these preliminary recommendations by completing a [short survey](#) or sending comments to ALRI at [lawreform@ualberta.ca](mailto:lawreform@ualberta.ca). We have extended the deadline for comments to the end of February.

### **What Is the *Dower Act*?**

The *Dower Act* is legislation that protects the spouse of a homeowner, ensuring they do not lose their home unexpectedly. It has two key features. First, the homeowner cannot sell, mortgage, or otherwise dispose of a home without the non-owner spouse's consent. Many common transactions count as dispositions, including opening a home equity line of credit, entering a listing agreement with a real estate agent, or granting surface rights to an energy company. Second, when the homeowner dies the surviving non-owner spouse automatically receives a life estate in the home. That means the non-owner spouse keeps the home for their lifetime, but when they die it goes to the owner spouse's heirs.

### **Who Is Affected?**

The *Dower Act* affects homeowners and their spouses. Alberta has a very high rate of homeownership. There are approximately 1.5 million dwellings in Alberta. Of those, 1.1 million are owner-occupied. (These numbers are from the [2016 census](#). Numbers from the 2021 census will be released later this year.)

Currently, only legally married spouses benefit from the protection of the *Dower Act*. As Katherine wrote, the exclusion of adult interdependent partners is one of the problems ALRI identified at the outset of the project. According to the [2016 census](#), there are about 1.9 million "persons in a couple" in Alberta. There are nearly 1.6 million married spouses and approximately 300,000 people in common-law relationships.

Government agencies do not collect statistics about how couples own their homes. We do not have official statistics about how many couples live in a home owned by one spouse or partner compared to those who their homes as joint tenants or tenants-in-common. We collected anecdotal and survey information in our consultation to help us estimate. Based on that information, we believe the vast majority of couples co-own their homes as joint tenants. These couples rarely need or notice the *Dower Act*, but they do have dower rights. Once in a while, dower rights save the day for a spouse who might otherwise lose their home: see e.g., *Inland Financial Inc v Guapo*, [2020 ABCA 381 \(CanLII\)](#).

The *Dower Act* has the most impact on the smaller number of married couples who have a home owned by one of the spouses. We estimate there are tens of thousands of Alberta couples in this situation.

The *Dower Act* also affects any individual who owns land, whether or not they are married and whether or not the land is a home. If the registered owner of the land is an individual, the Land Titles Office checks for compliance with the *Dower Act*. Thanks to the Land Titles Office, we know that there are more than 800,000 titles with one individual as the registered owner.

## Is the *Dower Act* Obsolete?

The *Dower Act* was originally enacted more than 100 years ago, and the last significant reforms were in 1948. In the meantime, there have been significant social and legislative changes. We asked professionals whether the *Dower Act* still serves a useful purpose. We noticed different perspectives from professionals who practise in different areas. The *Dower Act* affects real estate transactions, wills and estates, and family law, among others. Professionals who practise in one area had deep knowledge about the issues that affect their work but did not always see the impact in other areas. Two of our roundtables brought together lawyers from different practice areas, helping to bridge the gap. For example, real estate agents and lawyers who practise real estate regularly help clients complete dower consent forms. They identified inefficiencies with the process of providing consent. A few told us they did not see the point of the process because they had never seen a situation where a spouse did not consent. Lawyers who practise family law were not necessarily familiar with the forms but were more likely to have seen cases where the *Dower Act* prevented a sole owner from selling a home behind their spouse's back. They said in many cases the protection worked before the home was ever listed for sale, so no real estate lawyers were ever involved. Conversations between lawyers in different practice areas helped us understand all sides of the issue.

Some respondents told us the *Dower Act* was obsolete. In their view, the *Dower Act* adds extra paperwork without providing any real benefit.

Many more respondents told us that the *Dower Act* still provides important protection. It may not play exactly the same role it did in the early twentieth century, but it fills a gap that no other legislation does. We heard that the *Dower Act* remains the most effective way to prevent a sole owner from selling a couple's home and running away with the money. Other protections require the non-owner to take legal action. A spouse or partner can prevent a disposition if they get a court order for exclusive possession of a family home or if they make a claim for property division and file a certificate of *lis pendens* on title (see *Family Property Act*, [RSA 2000, c F-4.7, ss 19-30, 35](#); *Family Law Act*, [SA 2003, c F-4.5, ss 67-76](#)). To do either of these things, they must suspect the sole owner plans to dispose of the home and know that a remedy is available. Court applications take time and money. If the sole owner sells the home in the meantime, the non-owner has lost their home and may face an uphill battle to collect their share of the proceeds.

We heard that an automatic life estate is also important. It ensures a surviving spouse can remain in their home no matter how an estate is distributed. The other option—making an application for family maintenance and support from an estate—would require the surviving spouse to litigate (see *Wills and Succession Act*, [SA 2010, c W-12.2, s 88](#)). One respondent's words reflected a view we heard from many others: "You shouldn't be forced to litigate to stay in your own home."

## What Are the Problems? How Would ALRI's Recommendations Solve Them?

Some issues with the *Dower Act* are apparent from reading the legislation itself, like the exclusion of adult interdependent partners or disproportionate penalties for an offence. Other issues can be found in case law. Professor Watson Hamilton has blogged about several cases considering the *Dower Act* and the problems they reveal (see [here](#), [here](#), and [here](#)).

ALRI proposes solutions to these problems in the Reports for Discussion. In our view, adult interdependent partners should have the same rights as spouses. An action for damages should be available if an owner makes a disposition without the consent of the non-owner, but a court should have the discretion to assess the damages. We propose a new rule to clarify that a disposition without consent is unenforceable but not void. Another new rule would clarify that a life estate is not part of a deceased's estate and has priority over other claims. [Dower Act: Life Estate, Report for Discussion 37](#) discusses options for valuing a life estate.

Our consultation revealed other everyday problems. They cause inconvenience and sometimes lead to disputes, but there is rarely enough money at stake in any individual case to make litigation worthwhile. Practitioners and their clients know about them, but they are nearly invisible to everyone else.

One everyday problem relates to real estate procedures. When a married sole owner sells their home, the non-owner spouse may be asked to provide dower consent multiple times. The non-owner spouse may consent to the listing agreement when the owner lists the home with a real estate agent, then sign the purchase agreement when the owner accepts an offer, and then provide consent again with the closing documents. It can seem like unnecessary rigmarole to a non-owner spouse and often to the real estate lawyers who witness their consent. It also requires time and sometimes adds cost to a transaction. It may not be a lot of time or money in each individual transaction but consider that those amounts may be multiplied over thousands of transactions each year.

In [Dower Act: Consent to Disposition, Report for Discussion 36](#), ALRI suggested this problem could be avoided if the spouse instead signed a dower release. A dower release allows a spouse to waive their dower rights for a particular property. Once it is registered on the title, no further consent is needed. We have since received some feedback on this proposal that requires further consideration. We recently heard that real estate agents may ask for consent at each step even if the spouse has made a dower release. The reason is that a dower release can be revoked without notice. We will review this issue before making final recommendations.

Another everyday problem is that the *Dower Act* can be overbroad. It applies to a “homestead”, which is a parcel of land or condominium unit where the owner lives or has lived. Due to a discrepancy between the statute and a prescribed form, in practice it applies to any home where the owner or their spouse lives or has lived: compare *Dower Act*, s 1(d); *Forms Regulation*, [Alta Reg. 39/2000, Form B](#). [ALRI recommended](#) correcting the discrepancy as far back as 1975, yet it persists. Professor Watson Hamilton has also pointed out the problem in one of her [blog posts](#). A homestead remains a homestead until it is transferred or sold, the non-owner spouse makes a dower release, or the couple is divorced. These rules can cause problems for couples who are separated but not divorced. Some couples do not finalize a divorce for years, if ever (see e.g., *Graham v Graham*, [2021 ABCA 340 \(CanLII\)](#)). We heard from respondents that separated spouses sometimes use the *Dower Act* as a sword rather than a shield, asking for something in exchange for their consent. For example, a non-owner might ask for concessions in an unrelated support or property division claim.

Some examples help to illustrate how the definition can be overbroad:

- Yuki and Sam are separated but not divorced. After their separation, Sam bought a home. Yuki has never lived in the home.
- Kelly and Nika are married but in a long-distance relationship. Kelly lives in another country and has never come to Alberta. Nika owns and lives in a home in Alberta.
- Lou and Devin used to live in a condominium unit that Lou owned. Ten years ago they moved into a new home that they own together. Lou still owns the condo unit and rents it to tenants.

Sam's home, Nika's home, and Lou's condo unit are all homesteads. The purpose of the *Dower Act* is to protect a non-owner against becoming homeless, but Yuki, Kelly, and Devin are not at risk of becoming homeless if the owners dispose of the homes or die.

ALRI proposes changes that would reduce the number of homes affected. We propose two reforms. First, the definition should change. The *Dower Act* should apply only to a home where the owner and their spouse or adult interdependent partner live or have lived together. If this change were implemented, the *Dower Act* would not apply to Sam's home or Nika's home. Second, there should be time limits. Consent to disposition should be required while the couple lives in the home and for a transition period after a move or separation. We propose a transition period of three years. We chose three years because it aligns (albeit imperfectly) with time limits for making a property division claim (see *Family Property Act*, ss 6-6.1). After three years, the owner could make any disposition without the spouse's consent. Lou would not need Devin's consent for a disposition, as they have not lived in the condo within the last three years. We propose a slightly different time limit for a life estate to align with the *Wills and Succession Act*, ss 60-63. A spouse could receive a life estate if the couple was together or had been separated for up to two years when the owner died. After two years of separation, a non-owner spouse would not receive a life estate. For adult interdependent partners, the right to receive a life estate would end when the couple becomes former adult interdependent partners—usually after a year of separation but sometimes sooner.

A third everyday problem comes up when a spouse receives a life estate. There is usually a reason that the owner does not leave the entire property to the non-owner spouse. A common reason is that the owner has children from another relationship and wants their children to inherit. During a life estate, the surviving spouse and the other heir or heirs both have interests in the property. It works best if they can cooperate. If the relationship between a stepparent and a stepchild is not a good one, cooperation can be difficult. This problem is evident from some reported cases (see e.g. *Slager Estate (Re)*, [2019 ABQB 191 \(CanLII\)](#); *Burness Estate (Re)*, [2021 ABQB 980 \(CanLII\)](#)) and respondents told they have seen many other examples that did not go to court. Many disputes are about who should pay for expenses. There are common law rules but they are in case law, which can be hard to find or interpret (see e.g. *Re Morrison Estate*, [1921 CanLII 70; 16 Sask LR 7 \(QB\)](#); *Powers v Powers Estate*, [1999 CanLII 19149; 182 Nfld & PEIR 341 \(Nfld SC \(TD\)\)](#)). Case law does not provide answers to some questions, like who should pay condominium fees. The cost of litigating a dispute about expenses usually outweighs the amount of money at stake.

In *Dower Act: Life Estate*, Report for Discussion 37, ALRI proposes legislated rules that would clarify the responsibilities of each party during a life estate. We hope a clear, up-to-date list will

help everyone understand who should pay the costs of maintaining a home and avoid drawn-out disputes.

The Reports for Discussion include other proposals for reform. ALRI's proposals would clarify the amount of land and interests in land affected by the *Dower Act*, eliminate the need to obtain consent when a spouse or partner transfers property to the other spouse or partner, allow an attorney appointed under a power of attorney to give consent on behalf of a spouse or partner with certain conditions, and improve protection for a spouse or partner if the couple's home is sold because of debt or bankruptcy.

ALRI is also seeking feedback on some specific issues before making final recommendations. The issues include:

- How could forms or procedures be improved?
- Should the *Dower Act* apply to a home that one spouse or partner co-owns with a third party?
- Should the *Dower Act* apply if a couple lives in a home owned by a closely held corporation?
- Would it be helpful to have legislation about registering and discharging caveats based on dower rights?
- Should legislation include guidance on how to value a life estate?

We welcome comments on these issues, ALRI's preliminary recommendations, or anything else related to the project. The [short survey](#) will be open through February. Comments can be sent to ALRI at [lawreform@ualberta.ca](mailto:lawreform@ualberta.ca) anytime.

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