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# Do Common-Law Spouses have Dower Rights?

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**Cases Considered:**

*Nielson v. Paumier Estate*, 2008 ABCA 159

Strictly speaking, Mr. Justice Jack Watson's decision in *Nielsen v. Paumier Estate* is simply a decision denying an application to restore an appeal to the Court of Appeal's hearing list. However, the factual and legal context of the application is both tragic and complex. It includes at least twelve court orders since 2003 dealing with the sale of one house in Edmonton. The real legal issue in the last few judgments, including this one by Mr. Justice Watson, was said to be whether or not Paul Nielsen's consent to the sale of the house owned by Michele Paumier could be dispensed with under the provisions of the *Dower Act*, R.S.A. 2000, c. D-15. However, given that Nielsen is described as Paumier's "common-law spouse," is it not questionable whether Nielsen even has dower rights?

Before addressing the dower rights issue, some account of the convoluted procedural history behind the latest judgment is required. However, this summary will be as brief as possible and leave whole areas of legal argument and numerous issues unmentioned.

In May 2006, in an unreported decision, Mr. Justice Agrios denied Nielsen the ability to sue Paumier to enforce a claim against her under s. 11(2) of the *Dower Act*. That May 2006 decision was the decision that was appealed by Nielsen. When six months have passed since a Notice of Appeal has been filed, that appeal is entered on the General Appeal List. Counsel are to appear and indicate if the appeal is ready to be heard. Rule 515.1(7) of the *Alberta Rules of Court* provides that "[i]f counsel does not appear when a case is called on the General Appeal List and an adjournment has not been granted, the case shall be struck from the General Appeal List." Nielsen's appeal was struck from the hearing list in September 2007 and it was that appeal that became the subject of Nielsen's application to restore it to the hearing list that was decided by Mr. Justice Watson on April 30, 2008.

Nielsen's claim, which he was not allowed to make according to Mr. Justice Agrios' decision, was a claim under section 11 of the *Dower Act.* That section allows a spouse to sue for damages for the disposition of a homestead without that spouse's consent. A "homestead" is a parcel of land containing a house that is occupied by the parcel's owner as his or her residence. In this case, the homestead was Paumier's house in Edmonton. However, it was not the owner of the house, Paumier, who had disposed of the house without Nielsen's consent. In fact, no one has yet disposed of the house. Instead, on several occasions since 2003 various Judges and Masters of the Court of Queen's Bench have ordered that the house be sold. It was ordered sold as a result of an application by Paumier's Trustee in Bankruptcy, on notice to Nielsen and the Public Trustee. Paumier had assigned herself into bankruptcy in October 2001. In the summer of 2002 she suffered a medical catastrophe that left her mentally incapacitated and under the *Dependent*

*Adults Act*, R.S.A. 2000, c. D-11, the Office of the Public Trustee had been appointed to take care of her financial interests. The Public Trustee advised that Paumier's estate had enough money to pay out a *Dower Act* claim to Nielsen but that such a payout would deplete her assets.

I will skip over the eight or more court orders made after 2003 that approved or stayed sales of the house and discharged caveats filed by Nielsen claiming an interest in the house. It appears that it was 2006 before an application to dispense with Nielsen's consent was first dealt with by the courts. In March of that year, Mr. Justice Wilson adjourned an application by the Trustee in Bankruptcy to dispense with Paul Nielsen's consent to a sale of Paumier's house under the *Dower Act*. He gave Nielsen ten days to apply under section 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 for the court's permission to sue. Mr. Justice Wilson's order went on to provide that if Nielsen was denied permission to sue, then the Trustee in Bankruptcy could renew the application to dispense with Nielsen's consent.

Now we come to the May 2006 order of Mr. Justice Agrios, the order Nielsen wanted to appeal. That order arose from Nielsen's application under section 69.4 of the *Bankruptcy and Insolvency Act* for permission to sue Paumier to enforce his alleged dower rights. To simplify greatly, bankruptcy essentially takes away the ability of a creditor to sue the bankrupt for the amounts owed to them. In this case, the fact that Paumier had assigned herself into bankruptcy meant that Nielsen could not sue her for his alleged dower rights. There is an exception to this rule. Section 69.4 allows a court to restore that ability to sue:

> 69.4 A creditor . . . may apply to the court for a declaration that those sections [denying the creditor the ability to sue the bankrupt] no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
> (b) that it is equitable on other grounds to make such a declaration.

Mr. Justice Agrios dismissed Nielsen's application for a declaration under section 69.4 and discharged yet another caveat that Paul Nielsen had filed against title to the house. It appears from Mr. Justice Watson's discussion of the decision (at paragraph 21) that Mr. Justice Agrios was of the view that Nielsen's dower claim was "devoid of merit." Although Nielsen appealed Mr. Justice Agrios' order within a week, the appeal was never set down for hearing and it was, as already indicated, struck.

The test for restoration of an appeal is well established: see, e.g., *Aldecoa v. Nayebi*, 2008 ABCA 130, at paragraphs 3 and 4. The Court will consider the timely intention to appeal, inordinate delay, explanations or excuses for the delay, prejudice to the respondents, and whether it is in the interests of justice that the appeal be reinstated. Some consideration of the merits of the appeal is required in order to decide whether to restore an appeal to the list.

When Mr. Justice Jack Watson heard the application to restore the appeal he noted that there would be no material prejudice to Nielsen, as required by section 69.4 of the *Bankruptcy and Insolvency Act*, if Nielsen's dower claim was without merit. Nielsen had to have dower rights and they had to have monetary value before the denial of his proposed law suit to claim those rights would prejudice him.

In refusing to restore Nielsen's appeal to the hearing list, Mr. Justice Watson relied on section 10(5) of the *Dower Act*, the section that, if applicable, would allow a court to dispense with Nielsen's consent. It should be recalled that, in March 2006, Mr. Justice Wilson had adjourned an application by the Trustee in Bankruptcy to dispense with Nielsen's consent and the Trustee could not renew that application until Nielsen's application for permission to sue under section 69.4 of the *Bankruptcy and Insolvency Act* had been unsuccessful. Unless and until this application to restore his appeal to the list was denied, Nielsen's application for that section 69.4 permission was not unsuccessful. In his decision, Mr. Justice Watson was therefore predicting the likely result of the Trustee in Bankruptcy's renewed application to dispense with Nielsen's consent under the *Dower Act* when he denied Nielsen's application to restore the appeal. As Mr. Justice Watson noted (at paragraphs 20 and 21), Mr. Justice Agrios' finding of no material prejudice to Nielsen as a result of his being unable sue Paumier rests on the "debatable nature of the dower claim."

Section 10 of the *Dower Act* specifies, first, when a court can be asked to dispense with a spouse's consent to a disposition of the homestead:

> 10(1) A married person who wishes to make a disposition of the married person's homestead and who cannot obtain the consent of the married person's spouse
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> (a) when the married person and the married person's spouse are living apart,
>
> (b) when the spouse has not since the marriage lived in Alberta,
>
> (c) when the whereabouts of the spouse is unknown,
>
> (d) when the married person has 2 or more homesteads,
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> (e) when the spouse has executed an agreement in writing and for valuable consideration to release the claim of the spouse to dower pursuant to section 9, or
>
> (f) when the spouse is a mentally incompetent person or a person of unsound mind for whom the Court has not authorized a trustee under the Dependent Adults Act to make a disposition of the homestead and the Public Trustee has not become trustee of the estate under section 72(1) of the Dependent Adults Act,
>
> may apply by notice of motion to the Court for an order dispensing with the consent of the spouse to the proposed disposition.

Under section 10(1), there are six different situations in which a married person such as Paumier — or, in this case, her Trustee in Bankruptcy — may ask a court to dispense with her spouse's consent to the disposition of her homestead — or, in this case, to dispense with Nielsen's consent to the sale of her Edmonton house. There is, however, little indication on the facts recited by Mr. Justice Watson that any of these six situations existed in this case. He did indicate (at para. 20) that Nielsen had taken the initial position that he and Paumier were separated. However, the reference to "initial positioning" suggests that Nielsen subsequently abandoned that position and the inference is that the couple was not separated. The point could be clearer.

Mr. Justice Watson relied on the fact that section 10(5) of the *Dower Act* provides that a court asked to dispense with a spouse's consent under section 10(1) may do so "if in the opinion of the Court it appears fair and reasonable under the circumstances to do so." A reader could probably understand why Mr. Justice Agrios and Mr. Justice Watson thought it was "fair and reasonable" under all the circumstances to dispense with Nielsen's consent. As Mr. Justice Watson noted (at para. 21), the defendant in a lawsuit by Nielsen would be "the helpless common law spouse of

the applicant, hospitalized and under constant care, and whose expenses occasionally exceed her public support."

Mr. Justice Watson does not state that any of the six set of circumstances listed in section 10(1) of the *Dower Act* actually existed so that Mr. Justice Agrios was justified in refusing Paul Nielsen permission to sue. Instead, he rather awkwardly, and perhaps carefully, states (at para. 21): "I cannot see a reasonable prospect that this court would find reversible error in the view of Agrios J. that the proposed action was devoid of merit."

Nielsen's dower claim might not be fair or reasonable in the circumstances. However, it is a statutory claim, not an equitable one, and must therefore be determined by the provisions of the *Dower Act*. Unless he and Michele Paumier were separated when she suffered her medical crisis, it is not clear that the Trustee in Bankruptcy has grounds on which to apply to dispense with Nielsen's consent to the sale of the matrimonial home.

However, there is one other fact that might make all the difference. Although Mr. Justice Watson refers throughout his judgment to Michele Paumier (also known as Michele Nielsen) and Paul Nielsen as "spouses," to Michele Paumier as the "wife," and to the Edmonton house as the "matrimonial home," in para. 21 he expressly identifies Paumier as the "common law spouse of the applicant." Previous reported decisions involving this couple also consistently refer to Nielsen as "the common law spouse." This is very confusing (although in a subsequent communication we were informed by Nielsen that he and Michele were legally married).

If Nielsen and Paumier were not legally married, can he have any rights under the *Dower Act*? Section 26 of the *Dower Act* states that it applies to "all married persons whether or not they have attained the age of 18 years . . . ." Dower rights, under section 1(c), are "all rights given by this Act to the spouse of a married person in respect of the homestead and property of the married person . . . ." It is not obvious that Nielsen would have dower rights if he was never legally married to Paumier.

While "spouse" is not defined in the *Dower Act*, that statute was one of the few not amended by the *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5. More than 70 different statutes were amended by the *Adult Interdependent Relationships Act*, usually by adding the words "or adult interdependent party" after the word "spouse." That act defines "spouse" as "the husband or wife of a married person." Its preamble makes a clear distinction between "a spouse", who is "a person who is married" and "Albertans in interdependent relationships outside marriage" and implements the distinction is numerous statutes. Common law couples fall within the definition of adult interdependent relationships; therefore, unless a particular statute has been amended to include adult interdependent relationships, common law couples will still be excluded.

Like the *Dower Act*, the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 was not amended by the 2002 *Adult Interdependent Relationships Act* to include common-law spouses. Ever since the Supreme Court of Canada issued its surprising decision in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, Alberta courts have consistently held that the *Matrimonial Property Act* only grants a presumption for the equal division of property rights upon relationship breakdown to spouses who are (or were) legally married. The most recent examples are *Parchewsky v. Kozakevich*, 2008 ABQB 4 and *Davidson v. Loucks*, 2008 ABQB 154.

The Supreme Court decision in *Walsh* dealt with the question of whether the exclusion of unmarried cohabiting couples from the definition of "spouse" in Nova Scotia's *Matrimonial Property Act* violated s. 15(1) of the *Canadian Charter of Rights and Freedoms.* The Court held it did not, making it clear that statutes that exclude unmarried cohabitants from benefitting from presumptions about equal divisions of assets do not infringe the *Charter*. The court concluded that unmarried cohabitants maintained their respective property rights and interests throughout their relationship and at the end of that relationship. The focus on property rights is key. In a concurring opinion in *Walsh*, Justice Gonthier even suggested (at para. 204) that although differential treatment of unmarried cohabitants is constitutionally acceptable for property law purposes, it might not be acceptable for the purpose of spousal support law.

The rights granted by the Alberta *Dower Act* are also property rights. The life estate is the main dower right. On the death of the owner, the life estate ensures that the non-owner spouse has a home for the rest of their life. The other dower rights, such as the right to prevent the disposition of the homestead, protect that life estate and might ensure the family home is available for division under the *Matrimonial Property Act* upon marriage breakdown.

Why would a statute like the *Dower Act* be found to violate the *Charter* when the *Matrimonial Property Act* did not? The outcome and reasons in *Walsh* strongly suggest that any *Charter* challenge to the *Dower Act* for failing to include common law spouses would be unsuccessful. The dower life estate, and the right of occupation of the matrimonial home under the matrimonial property legislation, are both support devices. They serve as fall-backs in the cases of need: Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion No. 14 (March 1995) < http://www.law.ualberta.ca/alri/docs/rfd014.pdf>.

Is there an argument about adverse effects that can be made about the *Dower Act* that could not have been made about the *Matrimonial Property Act* in *Walsh*? The commentary on the Supreme Court of Canada's decision in *Walsh* has been critical of the Court's failure to look at the gendered impact of excluding unmarried cohabitants. See, for example, Nicholas Bala, "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 Queen's L.J. 41; 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 L.J. 715; James T. McClary, "A Different View of Nova Scotia (Attorney-General) v. Walsh" (2005) 22 Can. J. Fam. L. 43; Caroline A. Thomas, "The Roles of Registered Partnerships and Conjugality in Canadian Family Law" (2005-2006) 22 Can. J. Fam. L. 223; and Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in M. Denike, F. Faraday & K. Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006). All of these articles offer ideas for challenging the exclusion of unmarried cohabitants based the equality rights guaranteed by section 15(1) of the *Charter*. These arguments are all based on *women's* inequality in marriage-like relationships, however. It is difficult to imagine that someone in the position of Nielsen could successfully challenge his lack of dower rights as an infringement of his human dignity, an essential part of equality rights claims since *Law v. Canada*, [1999] 1 S.C.R. 497.

The Supreme Court sent a strong message in *Walsh* that choosing marriage indicates a decision to be covered by statutory rules on property division. The *Dower Act*, like the *Matrimonial Property Act*, contains statutory rules about property division.