

No Dower Act Consent? Is the Transaction Void or Voidable?

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Cases Considered:

[*Charanek v. Khosla*, 2010 ABQB 202](#)

The question of whether failure to comply with the *Dower Act's* requirements results in the transaction being void or voidable occurs with some frequency in Alberta (and not simply on our December Property Law examinations). This is odd because the relevant provisions of the Act have not changed since 1948 and the courts have addressed the consequences of the failure to comply with its requirements for consent quite often. Nevertheless, when Master in Chambers Jody L. Mason conducted a thorough review of the relevant legislation and case law in *Charanek v. Khosla* and concluded (at para. 61) that "the consequence of noncompliance with the consent requirements of the *Dower Act* remains an open question," she was correct. She was also echoing a conclusion reached 50 years ago by Wilber Fee Bowker (former U of A Faculty of Law Dean and first Director of the Alberta Law Reform Institute), in "Reform of the Law of Dower in Alberta" (1960) 1 Alta. Law Rev. 501 at 502 where he observed:

From 1917 until today the courts and legislature and the legal profession too have wrestled with the question - what is the effect of the disposition of the homestead made without consent, properly given and executed?

Thirty-four years later, that very question continues to be with us. . . .

The crux of the problem is that the Supreme Court of Canada said in *Meduk and Meduk v. Soja and Soja*, [1958] S.C.R. 167 that the transaction was void and the Alberta Court of Appeal, in *Schwormstede v. Green Drop Ltd.* (1994), 22 Alta. L.R. (3d) 89, 116 D.L.R. (4th) 622, held that the transaction was voidable, but without mentioning the Supreme Court of Canada case.

The void versus voidable issue matters. As the Court of Appeal noted in *Re Bridgeland Riverside Community Association and City of Calgary et al.* (1982), 135 D.L.R. (3d) 724 (C.A.) at para. 28: "the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral" is a sterile debate without paying due regard to the real consequences. Those "real consequences" are succinctly described by Justice Jack Watson in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26 at para. 28:

Nonetheless, absent a clear indication by the legislators that the fatal consequence should be automatic and inexcusable in the case of mandatory provisions, it is reasonable to infer that the legislators intended that the court should be allowed to decide, in the specific context, whether the breach is so substantial that such a destructive consequence is appropriate and necessary.

Facts

In November 2008, the Charaneks agreed to buy the Khosla's home in southwest Calgary. The home was registered at the Land Titles Office in the name of the husband alone. The transaction was to close February 2, 2009. On January 19, 2009, the Charaneks told the Khoslas that they no longer wished to buy their home. They had a number of excuses, but their legal arguments were two. First, they alleged that because a notice of waiver or satisfaction of buyers' conditions was not given prior to a date initially specified, the agreement ended in accordance with its terms. That argument is a very fact-based one, depending on who said what when, and I will ignore it in this post. Second, the Charaneks alleged the agreement was not binding because Mrs. Khosla had not provided her dower consent as required by the [Dower Act](#), R.S.A. 2000, c. D-15.

There was no question that the southwest Calgary property was Mr. Khosla's "homestead" within the definition of that term in the *Dower Act*. Under subsection 1(d) of the *Dower Act*, a "homestead" means a parcel of land "on which the dwelling house occupied by the owner of the parcel as the owner's residence is situated...". The Khosla's home met this definition: Mr. Khosla was the sole owner and he lived in the house.

Subsection 1(c) of the *Dower Act* indicates that the person who has dower rights in a homestead is the spouse of the married person who owns the homestead. A spouse's dower rights include the right to prevent disposition of the homestead by withholding consent: see section 2. Under section 1(b), a "disposition" includes a transfer of land. Mrs. Khosla's consent was therefore needed for the sale of the house to the Charaneks.

The form of such consent is prescribed by section 4 of the *Dower Act*. That section provides that the consent required for the disposition of the homestead must accompany the instrument by which the disposition is effected. Whenever that instrument is produced for registration under the *Land Titles Act*, R.S.A. 2000, c. L-4, the consent shall be produced and registered with it.

Although Mrs. Khosla signed the real estate purchase agreement and an amendment to that document, there was no consent in the form prescribed by the *Dower Act* on either the real estate purchase agreement or the amendment. Nevertheless, Mrs. Khosla did sign the prescribed consent form and provided it with the transfer of land her husband's lawyer tendered to close the sale, a tender that was not accepted. She also deposed that she was aware of her dower rights in relation to the house and that she intended to waive them by her signature on the real estate purchase agreement and subsequent amendment.

There was some evidence that the Charaneks were looking for a way out of the purchase and the courts have frowned upon parties to a contract trying to use the *Dower Act* to escape liability: see e.g., *Meduk and Meduk v. Soja and Soja*, [1958] S.C.R. 167. Mr. Charanek gave evidence that he and his wife learned about a possible death in the house shortly before closing, although in fact Mr. Khosla's grandmother had died at the Rockyview Hospital.

The Charaneks applied to the Master in Chambers for summary judgment under Rule 159 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, seeking a declaration that the real estate purchase agreement was void and an order for return of the deposits they had paid. On a summary judgment application when the applicant argues that it can prove its case on the facts without a trial, it must be "beyond doubt" that no genuine issues for trial exist: *Tottrup v. Clearwater*, 2006 ABCA 380 at para. 10. The Khoslas argued that the *Dower Act* consent need not have accompanied the initial real estate purchase agreement, so long as it accompanied the later

transfer of land. They also argued that summary determination of these issues was not appropriate.

Decision

After her review of the law on the void/voidable issue, the Master quite rightly concluded (at para. 50) that the automatic fatal consequence sought by the Charaneks was not a foregone conclusion. At the very least, there was the *Schwormstede* decision where the Court of Appeal had explicitly stated the consequence of non-compliance with the Act was that the transaction was merely voidable. There are also a number of cases — briefly canvassed by the Master — where courts have considered agreements signed by the spouse with dower rights, as was the case here with Mrs. Khosla's signature on the real estate purchase agreement. True, those cases tended to say that the sales agreement was ineffective when there was no consent in the form required by the *Dower Act*: see *McColm v. Belter* (1974), 50 D.L.R. (3d) 133 (Alta. C.A.). Nevertheless, the Khoslas wanted to argue those cases were distinguishable because Mrs. Khosla was aware of her dower rights and never waived in her intention to give them up in order to sell the house to the Charaneks.

The Master concluded she was not prepared to grant summary judgment on the basis the real estate purchase agreement was void for lack of the wife's consent under the *Dower Act*. Given the state of the law on the void/voidable issue, it was not "beyond doubt" that no genuine issues for trial existed.

Void vs. Voidable Law

Before a new *Dower Act* came into force in 1948, the old *Dower Act* had explicitly provided that a transfer of a homestead made without a wife's consent was "absolutely null and void for all purposes." That provision was removed in 1948. After 1948 (and currently), a transfer of a homestead made without a wife's consent was (and is) prohibited under penalty. Section 2(1) of the present Act provides:

2(1) No married person shall by act *inter vivos* make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time

(a) during the life of the married person, or

(b) during the life of the spouse of the married person living at the date of the disposition,

unless the spouse consents to the disposition in writing, or unless the Court has made an order dispensing with the consent of the spouse as provided for in section 10.

Section 2(3) provides the penalty for violating the prohibition in section 2(1):

(3) A married person who makes a disposition of a homestead in contravention of this section is guilty of an offence and liable to a fine of not more than \$1000 or to imprisonment for a term of not more than 2 years.

In *Shopsky v. Danyiuk* (1960), 30 W.W.R. 647 (Alta. S.C.T.D.), the plaintiff's husband, without her consent, transferred their homestead to the defendant, having sworn in the dower affidavit that he had no wife. The defendant registered the transfer. Justice Milvain held the transfer was null and void because of non-compliance with the Act, noting (at 649) that:

Sec. 3 [now s. 2] of *The Dower Act* provides a positive prohibition to any disposition of a homestead during the lifetime of the spouse unless such spouse consents in writing to the disposition

Justice Milvain acknowledged that the provision providing that a disposition without consent was "absolutely null and void for all purposes" had been deleted by the legislature from the 1948 Act, to be replaced by the prohibition under penalty. Yet he still found that the transaction was null and void because it was a prohibited contract. He stated that "null and void" had been removed from the Act because it was unnecessary:

It is clear law that every contract made about a matter or thing which is prohibited by statute is a void contract: . . .

The general principle, above expressed, has been applied to contracts made in contravention of sec. 3 [now s. 2] of *The Dower Act*, and such contracts held to be void: *Pinsky v. Waas* [1953] 1 SCR 399, which reversed (1951) 2 WWR (NS) 49; *Meduk v. Soja* [1958] 1 SCR 167.

When it is realized such a legal principle exists, it becomes obvious why the legislature dropped from the Act, as surplusage, any reference to such a transaction being void. The contract being prohibited, it is void in law, unless the legislature expressly provides to the contrary.

In *Meduk and Meduk v. Soja and Soja*, [1958] S.C.R. 167, the wife was the sole registered owner of homestead property and accepted a written offer to purchase it. Her husband did not sign the agreement; nor did he sign the *Dower Act* consent at any time. There was no indication that the husband opposed the sale; it appeared he merely thought he had no role to play in the sale because the property was his wife's. The Court held that the wife's acceptance of the purchaser's offer was "ineffective to form a contract" because it was made without the written consent of her husband and "expressly forbidden" by what is now section 2(1) of the *Dower Act*.

The Supreme Court of Canada confirmed these principles in *Senstad v. Makus*, [1977] 5 W.W.R. 731. That case dealt with the failure of a spouse to acknowledge consent, but the need to give consent in writing was confirmed by Mr. Justice Martland who detailed the history of Alberta's dower provisions and their underlying philosophy.

In *McColm v. Belter and Belter* (1974) 50 D.L.R. (3d) 133 (Alta.S.C.A.D.), the farm land was registered in the name of the husband alone but both husband and wife signed an acceptance of an offer to purchase. The husband and wife refused to carry out the agreement and were sued. Mr. Justice McDermid held (at para. 5) that because there was non-compliance with the *Dower Act*, the agreement was unenforceable. For this, Justice McDermid relied upon the Supreme Court of Canada decision in *Meduk and Meduk v. Soja and Soja*. As for the fact the wife signed the offer to purchase, Justice McDermid held (at para. 10) that "when Cartwright, J. [in *Meduk*] refers to a consent in writing he is referring to the consent required by the Act and not a mere signature of the spouse to the memorandum." There was, he noted, no consent contained in or annexed to the agreement in Form A or a similar form, as required by the *Dower Act*. The Act, he held (at para. 13) "defines what is needed to constitute a consent, and a mere signature by a spouse to an agreement, which complies with neither s. 5 or s. 6, cannot, in my opinion, be a

consent as envisaged and as ordered by s. 3 in order to make valid a disposition inter vivos by the other spouse."

The Alberta Court of Appeal in *Schwormstede* acknowledged that a number of decisions held a transaction without a spouse's consent was void, but stated (at para. 39) that "the better view is that the transaction is voidable." It noted various provisions of the Act that supported its finding that a transaction that did not comply with the Act had some legal effect until it was attacked and voided. *Shopsky*, a decision of a lower court, was the only case mentioned by name for the proposition that a number of decisions had held a transaction without a spouse's consent was void. *Schwormstede* did not mention the Supreme Court of Canada decision in *Meduk and Meduk v. Soja and Soja*.

I could go on. There are numerous decisions dealing with the consequences of non-compliance with the *Dower Act*. Suffice to say, in commenting on a summary judgment application, that those consequences remain uncertain in Alberta. The trial of the issue in this case will not resolve the void vs. voidable issue either — at least not unless the matter makes its way to the Supreme Court of Canada. And the idea that the highest court in the land would grant leave to appeal in a *Dower Act* case, in these days of *Charter* issues and security concerns, seems a very dim prospect. Neither does the legislature seem likely to address the issue with amendments to the *Dower Act*; repeal of the entire statute in favour of the *Matrimonial Property Act* or a statute dealing even more broadly with the distribution of property between all types of "spouses" seems more likely. Until then, we are left to hope that someday the Alberta Court of Appeal might take it upon itself to consider all of the conflicting authority, starting with its own decision in *Schwormstede*, and come to a reasoned conclusion on the void vs. voidable issue.