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The Harsh Consequences of Ignoring the *Dower Act*

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Case Commented On: *Joncas v Joncas*, 2017 ABCA 50 (CanLII)

If you are a married Albertan with a piece of real property registered in your name alone, and you have resided on that property since the date of your marriage, then you cannot sell, mortgage, lease for more than three years, or otherwise dispose of that property without the written and acknowledged consent of your spouse. The *Dower Act*, RSA 2000, c D-15, sections 1(d), 2, 4 and 5 say the property is a "homestead" and you need consent to dispose of it. The purpose of the 100-year-old *Dower Act* is to provide a home for a widow/er — a right to a life estate on the death of the married person who owned the homestead (*Senstad v Makus*, [1978] 2 SCR 44 at 51, 1977 CanLII 201 (SCC)). And there would not necessarily be a home for the widow/er if the married person could unilaterally sell or otherwise dispose of the homestead, and so they cannot. The purpose of the *Dower Act* and the way it achieves its purpose was commendable one hundred years ago, when married women could not acquire land by homesteading, there was no social welfare safety net, divorce was far less common, life expectancies were much shorter, and families were far less complex. Today, however, things are different and the *Dower Act* can come into conflict with the *Matrimonial Property Act*, RSA 2000, c M-8 on the breakdown of a marriage. The *Matrimonial Property Act* is all about the fair distribution of matrimonial property between spouses or ex-spouses, but its fairness considerations are absent from the *Dower Act*. The potential for financially disastrous consequences is high when a married person with a homestead, whose marriage has broken down, is unaware of the requirements of the *Dower Act* and the harshness of the consequences of ignoring those requirements. *Joncas v Joncas* is an excellent example of the conflict and a cautionary tale.

Facts

The husband and wife in this case separated in May 2013 after a 21-year marriage. The husband sued for divorce and a division of their matrimonial property in October of the same year but those proceedings have yet to be concluded.

Before their marriage, the husband owned a house that the Court of Appeal referred to as the "Edgedale property". The husband (and the wife) lived there for a while before 1998 when the couple moved to the current matrimonial home. The Edgedale property was then used as a rental property. When the husband and wife separated, the wife remained in the matrimonial home and the husband sold the Edgedale property to fund the purchase of a new house (at para 4).

The husband sold the Edgedale property without his wife's consent, an action which he conceded was contrary to the *Dower Act* (at para 8). Apparently, the husband had twice mortgaged the Edgedale property without obtaining his wife's dower consent and without anyone telling him that her consent was necessary, and his lawyer did not advise him at the time of the sale of the Edgedale property that his spouse might have dower rights in that property (at para 5). The fact

that the husband would have had to swear a false affidavit when completing the sale because none of the alternatives in Form B of the Dower Act's Forms Regulation, Alta Reg 39/2000 was true, is not discussed. (Presumably he swore that "Neither myself nor my spouse … have resided on the within mentioned land at any time since our … marriage" — although why Form B adds "nor my spouse" when the definition of a "homestead" requires only that the owner live on the land is unknown and needs to be changed because it is misleading as well as wrong.)

The Edgedale property sold for $325,000. At the time of the sale, the Edgedale property secured a line of credit with an outstanding balance of $199,599 which was paid out of the proceeds of the sale in order to clear the title. After payment of the line of credit and other smaller debts, the net proceeds were $121,019. The husband also paid capital gains tax of $33,320 on the sale. His after-tax net gain on the sale of the Edgedale property was therefore $87,699 (at para 6).

Judgments

In September 2015, the wife sued under the *Dower Act* for $162,500 in damages — one-half of the $325,000 sale price of the Edgedale property.

Before a Master of the Court of Queen's Bench, the husband agreed to pay damages of $60,500, or approximately half of the net proceeds of the sale without taking into account the capital gains tax he paid. The wife's application for greater damages totaling $162,500 was heard by Justice Brian Mahoney in August 2016.

Before Justice Mahoney, the husband argued that the wife's application should be adjourned until the matrimonial property was divided. The wife argued that the two statutes had different purposes and were intended to be applied separately and Justice Mahoney agreed with her (at paras 10-11). He also held that a judge has no discretion under section 11 of the *Dower Act*, which specifies the amount of damages a married person is liable to pay when they dispose of property without their spouse's consent. He therefore granted the wife judgment for $102,000 in addition to the $60,500 awarded by the Master, for a total of $162,500 (at para 12).

The Court of Appeal — Justices Patricia Rowbotham, Barbara Lea Veldhuis, and Jo'Anne Strekaf — dismissed the husband's appeal. They agreed that Justice Mahoney did not make a mistake when he concluded that the purposes of the *Dower Act* and the *Matrimonial Property Act* were different and that the amount payable under section 11 of the *Dower Act* was one-half of $325,000 (at paras 30, 37).

So, the husband, who netted $87,699 from the sale proceeds of the Edgedale property, was ordered to pay his wife almost twice that amount — $162,500 — for her half of the sale proceeds. He did not get the exemption that the *Matrimonial Property Act* would have allowed him for the value of the Edgedale property which he owned before the marriage at the date of the marriage. He did not get to deduct the amount owing against the Edgedale property, even though debts are taken into account under the *Matrimonial Property Act*. And he had to bear the entire burden of the capital gains tax, which would have been a factor in the fair distribution of the matrimonial property under the *Matrimonial Property Act*. The Court of Appeal acknowledged "[a]ll of these are valid considerations under the *Matrimonial Property Act*" (at para 20). But they play no role in the consequences for disregarding the *Dower Act* requirements. Harsh, perhaps. A cautionary tale? For sure.

Reasons for Judgment

Because the husband conceded that the Edgedale property had been sold without his wife's consent and therefore contrary to the *Dower Act*, the Court of Appeal only discussed two issues (at para 16).

Co-existence of the Dower Act and Matrimonial Property Act

The first issue was the stand-alone nature of the *Dower Act* even when spouses are involved in a matrimonial property action. The husband wanted the damages that he owed his wife for disposing of the Edgedale property without her consent to be thrown into the mix to be considered in their matrimonial property action. However, the Court of Appeal agreed with Justice Mahoney that the two statutes had different purposes and that the wife's *Dower Act* claim both could and should be dealt with apart from the matrimonial property claim (at para 21).

The Court of Appeal noted that the *Dower Act* is limited in its scope to a certain type of property, protective of non-owning spouses, and punitive (at paras 22, 24, 27). The *Matrimonial Property Act* is much broader as it applies to all assets and liabilities and much more flexible, allowing courts discretion to make sure property distributions are fair and equitable (at para 27). Not only do they differ, but the *Dower Act* was in force when the *Matrimonial Property Act* was enacted. The Alberta Law Reform Institute, in its Report for Discussion No. 14, *The Matrimonial Home*, recommended in 1995 that the *Dower Act* be abolished and some of its protections incorporated into the *Matrimonial Property Act*, but that recommendation was ignored by the legislature (at para 28). In addition, section 28(1) of the *Matrimonial Property Act* specifically provides that "rights under this [matrimonial home possession] part are in addition to and not in substitution for or derogation of the rights of a spouse under the *Dower Act.*" The Court of Appeal read section 28 as indicating that the *Matrimonial Property Act* is not intended to and does not limit or interfere with the independent operation of the *Dower Act* (at para 29).

The Amount of Damages under Section 11(2)

The second issue was the amount of damages that section 11(2) of the *Dower Act* requires to be paid to a spouse when a married person disposes of homestead property without the spouse's consent and, specifically, the meaning of "value" in subsection 11(2)(b). Section 11(2) provides:

> The amount of the damages for which the married person is liable to the spouse is a sum equivalent to
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> (a) 1/2 of the consideration for the disposition made by the married person, if the consideration is of a value substantially equivalent to that of the property transferred, or
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> (b) 1/2 of the value of the property at the date of the disposition,
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> whichever is the larger sum (emphasis added).

The Court of Appeal observed that section 11(2) leaves the court with no discretion for calculating damages (at para 25). They acknowledged that applying section 11(2) can create "a potentially large monetary penalty" but noted that the courts had held that such a penalty is in keeping with the protective nature of the *Dower Act* and intended to deter married persons from disposing of property without their spouses' consent (at para 25). They relied upon the Court of Appeal decision in *Phan v Lee*, 2005 ABCA 142 (CanLII) and *Re Stojkovich (Estate of)*, 2006 ABQB 467 (CanLII) for those policy reasons.

In *Phan v Lee*, a creditor of a husband with dower rights in a homestead owned by his wife tried to go after his interest in the homestead. Justice Connie Hunt reviewed the purpose of the *Dower Act* and most of its provisions. The interpretation of section 11(2) was not relevant to the issue before that Court and so her comments were *obiter*. Nonetheless, the Court of Appeal in *Phan v Lee* had this to say about section 11(2):

> When a disposition is made without consent, … the dower rights holder is entitled to damages of the larger of one-half of the value of the property at the date of disposition or one-half of the consideration of the disposition, if the consideration is substantially equivalent to the value of the property transferred (s. 11(2)). This compensation underscores that the Act is intended to protect the interests of the dower rights holder. The size of the potential damages claim ought to deter an owner spouse from disposing of the homestead without consent. (at para 13)

In this passage, the Court of Appeal merely reiterated what section 11(2) says and then hinted that the amount would be a large and punitive one by referencing the protective role of the Act and the intended deterrent effect of the size of potential damages claims. However, there is no interpretation of the meaning of "value" in section 11(2)(b) in this passage.

In *Stojkovich*, a 2006 Queen's Bench decision, the issue was how to quantify a spouse's life interest under the *Dower Act* for the purposes of an application to administer the deceased married person's estate. Justice Gallant noted that while the *Dower Act* does not provide a method to value dower rights, section 11(2) did provide a statutory method for calculating damages. In doing so, he interpreted the meaning of "value" in section 11(2)(b) as follows:

> Section 11(2) provides for damages equivalent to one-half (a) of the consideration for the disposition, or (b) one-half of the value of the property, whichever is the greater. It is possible that that basis for calculating the value of a dower interest is one that could be applied in this case. That is to say, in this case, the value of the dower interest might be calculated at one-half of the fair market value of the family home, less the cost of applicable real estate commission and legal expenses for the sale, as at the date of death of the deceased. (at para 24, emphasis added)

In Justice Gallant's opinion, "the value of the property at the date of the disposition" in section 11(2)(b) means the fair market value of the property less the real estate commission and legal expenses for the sale. However, he provides no authority for this interpretation and it was not germane to the issue before him. There was, of course, no deduction for a real estate commission or legal fees — or anything else — in the *Joncas* case.

The Court of Appeal in *Joncas* did discuss the amount of the damages further. They noted that the husband argued that the word "value" in section 11(2)(b) should be interpreted as meaning "net value". The Court of Appeal conceded that the section was "curiously worded" and "subject to a number of interpretations" (at para 36). To repeat, that subsection provides that damages are the greater of one-half of (a) the consideration for the disposition if the consideration is of a value substantially equivalent to that of the property transferred, or (b) the value of the property at the date of disposition. There was an actual disposition in this case because the husband sold the Edgedale property for $325,000, bringing the amount of damages within clause (a). The husband also swore an affidavit of value stating that the current value of the land was $325,000, bringing the amount of damages within clause (b). The Court of Appeal noted that the two

possible amounts might differ if there was non-monetary consideration or if the valuation date was different than the date of disposition (at para 36). They cannot differ because a homestead was sold to a friend or relative for less than fair market value because the consideration has to be "a value substantially equivalent to that of the property transferred." Because the two amounts did not differ in this particular case, the Court of Appeal held that was unnecessary to determine the meaning of the words in section 11(2)(b) (at para 36). The wife was entitled to the greater of the two amounts and the consideration for the disposition, amount (a), was unquestionably $325,000.

Concluding Comments

Joncas is the first time that the interpretation of section 11(2) and the amount of damages owed under it has been before the Alberta Court of Appeal. It is a shame that they dealt with that interpretative issue superficially. I say this in part because the 1995 Alberta Law Reform Institute Report for Discussion No. 14, *The Matrimonial Home*, that the Court of Appeal refers to (at para 28), includes the opinion that "[t]he measure of 'value' must mean the equity held by the owning spouse, that is, the value of the land to the owner after subtracting charges on the property" (at 109, emphasis added). Unfortunately, the Report gives no reason for insisting that "value" means "equity". And because the amount of damages under section 11(2) is one-half of the greater of the consideration paid or the value — amounts which will usually be the same — the married person who disposes of a homestead without his or her spouse's consent will almost always pay a punitively large amount.

The Alberta Law Reform Institute foresaw many of the problem with having two different statutes that provided two different kinds of protection to spouses without title to property 22 years ago when it issued its Report for Discussion No. 14, *The Matrimonial Home*, in March 1995. It recommended that the dower life estate be transformed into a more flexible right of occupation under the *Matrimonial Property Act*. But, as already noted, the legislature has not acted.

Any change to correct any perceived unfairness would have to be made by the Alberta legislature because any unfairness is in the statute itself. Some would argue that the *Dower Act* is not unfair. They might argue that requiring damages in the amount of one-half the value of the property disposed of without a spouse's consent is punitive, but rightly so. And ignorance of the law is not an excuse — what kind of Hobbesian world would we live in if it was? A married person should hire real estate agents and/or lawyers to help them when they sell their property. Competent professionals should know about the *Dower Act* and what it requires and be able to prevent situations like the one that arose in this case. And, if they didn't, the agent or lawyer should be sued for negligence.

The only good news for the husband in this case is that he is now finished with the *Dower Act*. The distribution of the rest of the property he or his wife or both of them own is governed solely by the *Matrimonial Property Act* with its focus on a fair distribution of property between spouses. Even if the husband has other property that meets the definition of homestead under the *Dower Act* and so required or requires a spouse's consent to its disposition, under section 3(2)(c) that other property will have ceased to be a homestead because a judgment for damages pursuant to section 11 of the *Dower Act* was obtained against him by his spouse — so long as that judgment is registered in the proper Land Titles Office as section 3(2)(c) requires. The purpose of the *Dower Act* is to provide a home for a widow/er and only one homestead is needed to fulfill that purpose. As a result, section 3(2)(c) is only one of several sections in the *Dower Act* that

provide for "one and done": one damages judgment under section 11, one homestead on the death of the married person under section 19(1), and two or more homesteads as a reason to dispense with the consent of a spouse to disposing of one of them under section 10(1)(d).

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