

February 7, 2023

## There's No Place Like Home: Why the *Dower Act* Remains Relevant

By: Laura Buckingham

**Case Commented On:** *James v Belanger*, [2023 ABKB 34 \(CanLII\)](#)

**Editors' Note:** February 6 to 10 is Equity, Diversity, and Inclusion Week at the University of Calgary. We will be publishing a number of posts this week that touch on EDI issues. This first post deals with dower rights and the inequalities experienced by unmarried spouses. For more on the Faculty of Law's commitment to taking action on EDI issues, see [here](#).

*James v Belanger*, [2023 ABKB 34](#) is interesting because of something that isn't mentioned in the decision. The case is not about the *Dower Act*, [RSA 2000, c D-15](#). If the *Dower Act* applied, the whole dispute might have been avoided. A retired man would be able to stay in the home he shared with his partner for more than 15 years.

The *Dower Act* is legislation with a very specific purpose. It protects the spouse of a homeowner. If one spouse is the sole owner of the couple's home, the *Dower Act* ensures the other spouse will not lose their home unexpectedly. It has two key features:

1. The homeowner cannot sell, transfer, or mortgage a home unless their spouse consents.
2. If the homeowner dies first, the surviving spouse automatically receives a life estate in the home. In other words, the surviving spouse can live in the home or use it for as long as they live. The surviving spouse receives a life estate no matter what the sole owner's will says. Once the surviving spouse dies, the home passes to the sole owner's other heir or heirs.

The *Dower Act* applies only to married spouses. It does not protect adult interdependent partners. It is unusual in this sense, as other Alberta legislation treats spouses and adult interdependent partners alike. In 2020, when the *Family Property Act*, [RSA 2000, c F-4.7](#) came into force, the *Dower Act* was left as the only significant legislation that applies only to married spouses.

The Alberta Law Reform Institute (ALRI) recently completed a project reviewing the *Dower Act*. The project wrapped up with the publication of [Dower Act, Final Report 118](#).

One of the big questions ALRI considered in our project was whether the *Dower Act* still serves a useful purpose. We concluded that it does. Although there are other protections for spouses and adult interdependent partners, the *Dower Act* fills a particular niche in relation to a home. It serves as a safety net when other protections fail. In the end, ALRI recommended the protection should remain, but the *Dower Act* should be replaced with new legislation. Among other things, new legislation should protect spouses and adult interdependent partners alike.

*James v Belanger* illustrates why the protections in the *Dower Act* are still relevant, what can happen to a partner without this protection, and why adult interdependent partners should have the same protections as spouses.

## **The Facts**

Elsie Slywka and Marcel Belanger are adult interdependent partners. They have been a couple for nearly 35 years, living together since 1988. When she developed dementia, he was her primary caregiver. They call each other wife and husband, although they are not legally married.

Ms. Slywka had been married before and had children with her first husband. She was widowed before the relationship with Mr. Belanger began. Ms. Slywka owned a home. She had paid off the mortgage with the proceeds of a mortgage life insurance policy when her first husband died. Later, Mr. Belanger moved into that home with her. In 2004, she sold the home and used the proceeds to buy a condo. She and Mr. Belanger lived in the condo together until 2020, when Ms. Slywka entered a care facility. From 2004 to 2017, she was the sole owner of the condo.

In 2014, Ms. Slywka made a will. According to the will, her children and grandchildren would inherit her property. She did not leave anything to Mr. Belanger. She explained the decision in her will, saying that he understood her wish to leave her estate to her descendants.

Starting in about 2015, Mr. Belanger and other family members noticed Ms. Slywka was increasingly forgetful. In 2016, she was diagnosed with dementia.

The dispute that came to court was about a transaction that made Mr. Belanger a co-owner of the condo. In 2017, Ms. Slywka signed a transfer of land so she and Mr. Belanger would own the condo as joint tenants. Joint tenants have equal interests and share the whole property. If one of them dies, the other automatically becomes the sole owner of the property. The transfer meant that if Ms. Slywka were to die first, Mr. Belanger would receive the condo outright.

Mr. Belanger made all the arrangements for Ms. Slywka to sign the transfer of land. He contacted the lawyer and gave instructions for preparing the transfer of land. He did not tell the lawyer that Ms. Slywka had been diagnosed with dementia. When the lawyer met Ms. Slywka, he did not notice anything amiss. In his notes about the meeting, which he made the same day, he wrote: “She seemed very clear in her thinking, and understood what she was signing.” An expert who testified in the case explained that it is common for people with dementia to present well. At that stage of her illness, it may have been difficult to detect Ms. Slywka’s cognitive difficulties in ordinary conversation.

The dispute that came to court was about whether Ms. Slywka had capacity to make the transfer of land. The dispute arose in 2020, when Ms. Slywka’s family learned about the transfer. By then, one of Ms. Slywka’s children—Lee James—had the power to make financial decisions for Ms. Slywka under a power of attorney. Ms. James sought to have the transfer of land set aside. After considering evidence from Ms. James, Mr. Belanger, the lawyer who met with Ms. Slywka to sign the transfer, and a neuropsychologist, the court found Ms. Slywka did not have the necessary capacity and declared the transfer void (at para 56).

The decision means Ms. Slywka is the sole owner of the condo. According to her will, upon her death the condo and all her other property will go to her children and grandchildren. Mr. Belanger will not inherit anything from her estate. What's more, he has no right to stay in the condo now that Ms. Slywka resides in an assisted living facility. The court expressed hope that Ms. James would allow Mr. Belanger to stay (at para 58), but if she does not, he must move out by April 30, 2023.

### **How Could the *Dower Act* Help?**

The decision in this case is fairly straightforward. The dispute was about facts, not law. The court heard evidence, made findings of fact, and applied the law to the facts.

The interesting aspect of this case is the underlying problem. Mr. Belanger is at risk of losing his home. Mr. Belanger and Ms. Slywka have been partners for more than three decades. The condo was their home for more than 15 years. It is still Mr. Belanger's home.

A home is more than just shelter. Many of us value our homes for reasons that can't be measured in money. We may like the location or the neighbourhood. We may have good relationships with our neighbours. We may be attached to our homes for sentimental reasons and the memories we have there. Mr. Belanger may want to stay in the condo for any or all of these reasons.

It is also understandable that Ms. Slywka would want her children and grandchildren to benefit from the condo. According to Ms. James, Ms. Slywka considered that she had acquired first, the house, and later the condo, due to her first husband. By leaving the condo to her children and grandchildren, she was giving them an inheritance from him.

It seems likely that the purpose of making Mr. Belanger a joint tenant was to avoid him losing his home. Mr. Belanger's evidence was that Ms. Slywka raised the issue, telling him she wanted him to have the property, and that she regretted not transferring it earlier. Whether it was her idea or his, joint tenancy would allow him to stay in the home during her lifetime and after her death. But it would do more than that. If Mr. Belanger were a joint tenant and Ms. Slywka predeceased him, he would become the sole owner of the home. He could sell it or leave it to his own heirs. It would defeat her plan to leave her estate to her children and grandchildren.

If the *Dower Act* applied, events might have been different. If Mr. Belanger and Ms. Slywka had been married, or if the *Dower Act* applied to adult interdependent partners, Mr. Belanger would have protection against losing his home during his lifetime. Ms. Slywka (or Ms. James acting as her attorney) would need Mr. Belanger's consent to sell or dispose of the condo. If Ms. Slywka were to die before Mr. Belanger, he would be able to remain in the condo for the rest of his life. After his death, it would pass to the heirs Ms. Slywka named in her will. Maybe they both would have been happy with this arrangement. If so, they might not have tried to make Mr. Belanger a joint tenant.

### **Do Other Protections Replace the *Dower Act*?**

In our project, ALRI considered whether other protections have replaced the need for the *Dower Act*. We found it still serves a purpose. The *Dower Act* is unique because it automatically prevents

the spouse of a homeowner from unexpectedly losing their home. Mr. Belanger's situation shows how the protections in other legislation leave gaps.

Couples who are joint tenants do not need the *Dower Act*. They both have to participate in transactions involving the home, and upon death of one spouse, the survivor receives the property. Joint tenancy works for many couples but not all. Some—like Mr. Belanger and Ms. Slywka—have good reasons for avoiding joint tenancy. In our consultations we heard about reasons one spouse or partner may be the sole owner of a couple's home. Some, like Ms. Slywka, want to leave the property to other heirs. Other reasons include conditions of a mortgage or protecting the home from creditors of one spouse. Our project included an online survey of 586 members of the public. The survey asked respondents about their marital status and who owns the home they live in. Based on the results of that survey and anecdotal information from our consultation, we estimate 10-20% of couples in Alberta live in a home owned by one spouse or partner.

If Mr. Belanger and Ms. Slywka had separated, there are remedies in the *Family Property Act* that Mr. Belanger might have used to stay in the home. After a separation, a spouse or partner can make a claim for property division or for exclusive possession of a home. A claimant can take steps to prevent a sale or other disposition of the home (at ss 19-22, 35). These remedies are intended to help spouses or partners who have separated, not ones like Mr. Belanger who are still in a relationship.

If Ms. Slywka had died, Mr. Belanger might have used remedies under the *Wills and Succession Act*, [SA 2010, c W-12.2](#), to keep the home. If he was living in the home at the time of her death, he could stay for 90 days (at s 75). He could also make a claim for family maintenance and support (s 88). In a similar case from 2019, the adult interdependent partner of the deceased received the couple's home as family maintenance and support (*Fliczuk Estate (Re)*, [2019 ABQB 946](#)). However, as long as Ms. Slywka is alive, these remedies are not available to Mr. Belanger.

Even if Mr. Belanger could benefit from the protections in the *Family Property Act* or the *Wills and Succession Act*, he would have to go to court to get them. He would have to make an application to court for a property division order, an order for exclusive possession, or an order for family maintenance and support. Litigation takes time, is inconvenient, costs money, and can exacerbate conflict. It is also risky. The claim might be unsuccessful. If so, the applicant would receive nothing and still have to pay their own legal fees and possibly costs to the other party. No one would want to choose between litigation and losing their home.

The *Dower Act* acts as a safety net for spouses. It provides automatic protection during a relationship, after separation, and after death. Spouses do not have to litigate to benefit from the *Dower Act*.

Unfortunately, adult interdependent partners, like Mr. Belanger, have no such safety net. He is not alone. The [2021 census](#) found nearly 17% of couples in Alberta who share a household are not married.

### **What Does ALRI Recommend?**

ALRI's first recommendation in *Dower Act*, Final Report 118, is that adult interdependent partners should be granted the same rights as spouses. This change would reflect social realities, promote

equality, and make Alberta legislation consistent. It would also bring the law into alignment with many people’s expectations. In our consultation, most respondents supported treating spouses and adult interdependent partners alike. Many respondents told us they consider common-law relationships equivalent to marriage.

ALRI’s report includes other recommendations to improve upon the *Dower Act*. We found many problems with the form of the *Dower Act*. A major recommendation is to replace the existing *Dower Act* with clear, modern legislation. ALRI also recommended changing the homes affected, so protections would only apply to a place where the couple lived together. Another recommendation is to include mobile homes, which are not covered by the current legislation. There are other recommendations to reduce administrative burdens, increase efficiency, and strengthen protections.

With these changes, there would be a safety net for spouses and adult interdependent partners alike. Disputes like the one in *James v Belanger* might be avoided. It is our hope that these recommendations will be implemented so all those in need can benefit from the protections in the *Dower Act*.

---

This post may be cited as: Laura Buckingham, “There’s No Place Like Home: Why the Dower Act Remains Relevant” (February 8, 2023), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2023/02/Blog\\_LB\\_James\\_v\\_Belanger.pdf](http://ablawg.ca/wp-content/uploads/2023/02/Blog_LB_James_v_Belanger.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

