

The Impact of Red Tape Caused by the Dower Act

Repealing the Dower Act in favour of protections already existing in modern legislation reduces red tape by creating efficient real estate transactions, decreasing liability for professionals and consumers.

Summary of the issue

In Alberta, a non-owner spouse has dower rights if they or the owner spouse live in the property any time after they marry – even if it is only for one day. The owner on title is legally required to seek consent to the disposition of property. This law is restricted to legally married couples and offers no protection for common-law couples.

For decades, real estate and legal professionals have questioned if the *Dower Act* continues to serve a purpose. The last reform to the Act occurred in 1948 and much has evolved in the nearly ensuing 73 years; for example, families are no longer establishing a “homestead” as they were when the *Dower Act* was enacted in 1917. While the *Dower Act* is seemingly succinct, it has an unrelenting reputation of being misunderstood, misused and misaligned with modern Alberta legislation. As the representative of 10,500+ licensed real estate professionals, AREA thinks protections for spouses concerning property are better addressed in modern legislation, such as the *Matrimonial Property Act*, the *Family Property Act* and the *Wills and Succession Act*.

Protection Provided to Albertans by Modern Alberta Legislation vs. the Dower Act

Family Description	Dower Act	Matrimonial Property Act	The Family Property Act	Wills and Succession Act
Married Couple	✓	✓	✓	✓
Common Law Couple	✗	✓	✓	✓
Divorced	✗	✓	✓	✗
Married but Separated	✓	✓	✓	✓
Widowed and Not Remarried	✓	✓	✓	✓
Divorced and Not Remarried	✗	✓	✓	✓
Single or Never Married	✗	✓	✓	✓

Main Concerns Regarding the Dower Act

- I. Logistics to Complying with the Requirements of the *Dower Act*
- II. The *Dower Act* is Outdated and Out of Step with Other Alberta Legislation
- III. Protection for Families is Found Under Modern Alberta Legislation

Under the Dower Act, the spouse who is not on title needs to consent to the disposition or of their home, including the sale or mortgaging of the property.

I. Logistics to Complying with the Requirements of the Dower Act

Dower consent is required three times during a typical sale of a property: when listing the home for sale, when an offer is accepted, and when transferring title. AREA provides Dower Consent and Acknowledgment forms for the listing and purchase contracts and a lawyer oversees dower consent for the transfer of title as part of the closing process.

In most home purchases, a mortgage is placed on title. This requires a fourth dower consent.

Issues from these logistics arise and have severe consequences for consumers and the professionals advising them. Challenges of complying with the *Dower Act* include:

i.) The non-titled spouse is required to go before a notary or commissioner to sign a dower release consent at each decision point. The non-titled spouse must acknowledge consent at each step right up to closing day (and sometimes after closing).

ii.) While the requirements of consent to a disposition outlined in the *Dower Act* are specific, the *Act* is less prescriptive on the consequences of failing to meet the requirements, which causes confusion and increases risk. As such, commissioners recognize the delicate and specific nature of the *Dower Act* requirements and are often reluctant to commission them. When a willing commissioner is unavailable, consumers must instead make several visits to a lawyer to fulfill the requirements. The unnecessarily complex consent process increases the liability to industry professionals and increases the potential for consumer non-compliance. Any time dower applies, it can threaten the stability of the transaction from start to finish. Because of complex modern family structures, sometimes the need for dower consent is not discovered until the title transfer.

iii.) The *Dower Act* can also create an imbalance of power fueled by the outdated *raison d'être* of the *Dower Act*. Specifically during divorces, a non-titled spouse may use their dower rights to steer negotiations. In extreme situations, a non-titled spouse can frustrate the sale of the family home, causing financial hardship, and even bankrupting the titled spouse. This contradicts the original purpose of the *Dower Act*, which was established to protect the homestead and ensure a widows' management and control of family property and a life estate in the deceased husband's estate.

II. The Dower Act is Outdated and Out of Step with Other Alberta Legislation

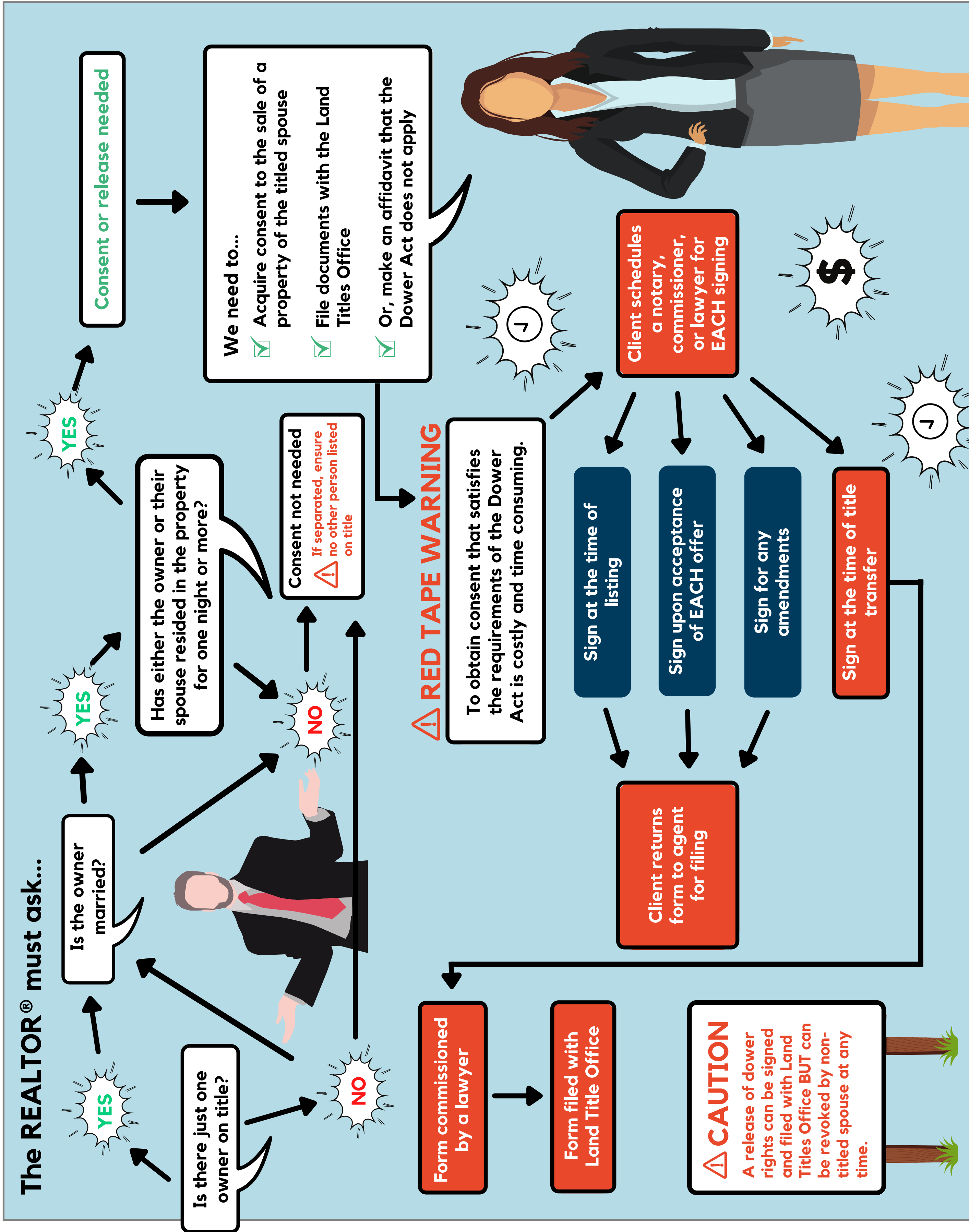
i.) The *Dower Act* was last reviewed in 1948; it doesn't reflect modern family structures:

a.) It includes only "married couples" and does not take into consideration modern definitions of adult interdependent partners that are included in legislation such as, the *Family Property Act*, 2020.

b.) The definition of "homestead" does not reflect Alberta housing in 2021. The *Dower Act* does not provide protection to renters, for example, whereas the *Family Law Act*, SA 2003, c F-4.5 (s 67(1)), the *Wills and Succession Act*, SA 2010, c W-12.2 (s72(a)) and the *Family Property Act* (s1(a.2)) all provide more inclusive definitions such as "family home" which is more meaningful to Albertans than "homestead."

c.) Even courts have conflicting views surrounding the legally binding question of a contract when there is conflict around proper dower consent. Resolving this uncertainty involves the *Dower Act* being sent to the Supreme Court of Canada. Since this is unlikely, the Legislature is the most appropriate place to address this confusion through legislative changes.

Satisfying the Dower Act



d.) Alberta's own Court of Appeal observes that the *Dower Act* does not provide flexibility to calculate damages based on the net proceeds of the sale. This means the titled spouse may in fact be ordered to pay damages that exceed the amount they received out of the non-compliant sale. The consequences of ignoring the *Dower Act* are severe and damages are most often equal to half the value of the home – not half of the equity in the home. (See Appendix A-Case Study)

e.) A dower release under section 7 of the *Dower Act* allows the owner on title to avoid securing the consent of their spouse each time they wish to grant an interest in land. In the possession of a section 7 release, the owner may remortgage or transfer an ownership interest in the land an unlimited number of times. Caution is advised, however, as the *Dower Act* allows for revocation of a section 7 release at any time.

f.) To add to the uncertainty and confusion, the *Dower Act* provides for three different approaches to the waiver of dower rights. A spouse may execute a “consent,” a “release,” or “an agreement releasing” dower rights. Each of these three alternatives are treated differently under the law. For example, if “an agreement releasing” dower rights is executed under section 9 of the *Dower Act*, the agreement may not be unilaterally revoked, while a release under section 7 is revocable.

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. . . .

~ Wilber Fee Bowker, “Reform of the Law of Dower in Alberta” (1960)
1 Alta. Law Rev. 501 at 502 observed

III. Protection for Families is Found Under Modern Alberta Legislation

The protections for which dower was created are better met by modern legislation: the *Matrimonial Property Act*, the *Family Property Act* and the *Wills and Succession Act*.

- o **Matrimonial Property Act**

The *Dower Act* and Part 2 of the *Matrimonial Property Act* both focus on the home as a way of obtaining support. The *Dower Act* provides for protection against the sale of a property without the non-titled spouse's consent and provides for a life estate upon the death of the titled spouse. However, the *Matrimonial Property Act* describes a more modern “family home” as a possession that can be divided between titled and non-titled people (common law or legally married) equally.

- o **Family Property Act**

The *Dower Act* often interferes with other rights or obligations that arise out of marriage, especially during separation agreement negotiation (ss 7,9). In this case, the owner spouse is vulnerable to issues arising from a legal spouse who refuses consent to disposition or who revokes dower release arbitrarily. This causes financial risk for the owner spouse who may, for example, seek to divide assets or to enter an adult interdependent relationship with a new partner. Use of the *Dower Act* in this respect works against the spirit of the *Family Property Act* which is meant to allow for modern-day families a structure to divide assets fairly, with the least amount of disruption to family members, especially children.

Many Albertans are burdened with dower concerns:

- **75% of Albertans live in an owner-occupied residence.**

Source: 2016 Census

- **Between 2014-2020 the average volume of property Alberta sales amounted to over 60,000 home sales per year**

- **Wills and Succession Act**

In wills and estate law, the *Dower Act* also has critical consequences for the administration of an estate where the surviving spouse is entitled to a dower life estate. Several issues can arise, such as reconciling the dower life estate next to other dispositions or claims against an estate. But also, because of the inflexible nature of the legislation, courts are often handcuffed to having no discretion in providing dependent relief because dower rights prevent dependent children from being allowed legal right or access to the “homestead.” This means that if the surviving spouse wishes to exclude dependents, such as stepchildren, from the home or its assets, the courts have no recourse. Similarly, a spouse on title who is imminently palliative cannot use their will to allow for relief to dependents out the home assets without seeking consent or releasing of dower rights, which the non-owner spouse could revoke at any time.

Caring for Family at Death

Dower rights pre-date the Magna Carta of 1215. The United Kingdom replaced common-law dower rights with a *Dower Act* in 1833. In 1917, Alberta adopted its own *Dower Act*.

Today, few common law jurisdictions recognize dower rights. The United Kingdom repealed its *Dower Act* in 1925. In the United States, only Ohio, Arkansas and Kentucky retain dower rights. As recently as 2017, Michigan abolished dower rights.

It is difficult to justify anachronistic dower rights in a modern society (“Dower, it may be safely said, is the last relic of feudalism. It is not only an anachronism but it is obsolete ... the best that can be said of dower is that it has a nuisance value.” 6 *Chitty’s Law Journal* 133 (1956)). Alberta has sophisticated real estate title, family property and estate legislation, which may be amended to protect family members upon the death of a primary asset holder or income earner. This is the original purpose of dower rights and remains a public policy concern worthy of the attention of the legislature.

Conclusion

REALTORS® and lawyers agree that the *Dower Act* is widely misunderstood. The convoluted nature of securing a consent, a release, or an agreement releasing dower rights constitutes red tape, since it adds unnecessary layers of administration, paperwork, fees and additional liability for consumers, government officials and real estate professionals. The consequences of non-compliance are overly punitive and the rights of non-titled spouses are easily abused. Furthermore, courts are restricted by the inflexible nature of the *Dower Act* and must often enforce an injustice upon one or both parties. In addition, the General Revenue Fund of the Government of Alberta is at risk each time land is transferred subject to a potential *Dower Act* claim. This is because section 13 of the requires the General Revenue Fund to cover any losses suffered by a spouse when the person to whom they are married makes a false representation at the time their home is transferred and is or becomes impecunious.

The *Dower Act* unfairly inhibits today’s families from dividing assets fairly and according to modern legislation created for modern family dynamics: the *Matrimonial Property Act*, the *Family Property Act* and the *Wills and Succession Act*, which together house the protective aspects laid out in the *Dower Act* without the red tape. Repealing the *Dower Act* would allow consumers and the professionals serving them to address property transactions more efficiently and cost-effectively, while still protecting the rights of all involved.

Appendix A

Case study by LESA

Case Summaries – Alberta Family Law Decisions of Interest

Prepared for: Legal Education Society of Alberta

50th Annual Refresher

LESA LIBRARY

Presented by:

Marie L. Gordon QC

Gordon Zwaenepoel

Edmonton, Alberta

For presentation in:

Lake Louise, Alberta – May 7 - 9, 2017

CASE SUMMARIES – ALBERTA FAMILY LAW DECISIONS OF INTEREST 2016-2017

Every year our Alberta judges write a huge number of decisions on family law matters, both at the Provincial Court (Family and Youth Division), the Court of Queen's Bench, and the Alberta Court of Appeal . Here are a few of the ones from mid-2016 to date that I thought were of interest to all of us. There are many more of them that are important and interesting; these are just my choices.

JONCAS V. JONCAS 2017 ABCA 50

It's not often we get a case involving the Dower Act that makes us sit up and take notice, but this is a reminder that Courts continue to apply the strict word and spirit of an Act that was originally passed in 1911, and which at the time represented a major protection for spouses (then wives, who had no legal status to own property in their own name).

In *Joncas*, the husband sold a property without the dower consent of his wife. This was a home owned by the husband prior to the marriage, in which the parties had lived before moving to the matrimonial home. The property became a rental home. After separation, the wife stayed in the matrimonial home, and the husband sold the rental property, swearing a Dower Affidavit saying that neither he nor his spouse had resided in the property during the marriage. No dower consent was obtained from the wife. The husband sold it for \$325,000 and paid out the line of credit secured against title for \$199,599, also paying capital gains tax of \$33,320, and used the net proceeds of \$121,019 to purchase a new home.

The wife commenced an application under the Dower Act seeking summary judgment for \$162,500 (half of the property value). After an appearance before the Master, the matter proceeded to Queen's Bench Chambers for a full hearing.

In the end, the Court rejected his arguments and applied s. 11 of the Dower Act, which mandates damages to the non-owner spouse, being one-half of the value of the property (excluding any consideration of the debt secured against title). The wife was awarded \$162,500 in damages.

The QB decision was approved by the Court of Appeal, who heard the matter in January of 2017, and dismissed the husband's appeal.

The key issue in this case had to do with the parallel remedies and application of the Dower Act and the Matrimonial Property Act. The husband argued that the Dower Act was not a "stand-alone" piece of legislation, and had to be applied in consolidation with the matrimonial property division. The

Chambers Justice had refused the husband's application for an adjournment in order to try to consolidate the actions. The husband also argued that the issues of the husband's exemption and the burden of the capital gains tax and the line of credit were issues for determination under the MPA, and could not be ignored in the Dower Act disposition.

The husband's argument that "value" was net value (i.e. "equity") was considered, but the CA reviewed the rather "curious" wording of the section and prior cases decided on point, and decided that it couldn't stretch the interpretation of the word "value" in his favour.

None of this affects the parties' ability to argue about exemptions and debts at the trial of the matrimonial property issues, but the Court specifically indicated that the purpose of the two statutes was different and that summary judgment was available on the Dower Act claim.

The Court of Appeal refused the Husband's plea that they somehow determine the effect of the damages award on the division of matrimonial property.

The CA decision reviews the interaction between the two statutes, and reaffirms the strict statutory (and non-discretionary) protections for spouses under the Dower Act, noting that the Legislature did not act on the 1995 recommendations of the ALRI to abolish the Dower Act and roll protective provisions into the Matrimonial Property Act. The Acts have different purposes, and have separate remedies and application. ¹

The case serves as a bold reminder to all of us (and our clients) that the Dower Act is going to be strictly applied on a family law file, and that there is a potentially huge price to be paid by a spouse who fails to obtain a Dower consent, or who swears a false Dower Affidavit, assuming perhaps that nothing rides on it. That assumption couldn't be more wrong, as this case demonstrates.

FLOCK V. FLOCK ESTATE 2017 ABCA 67

For those involved with family law cases that can span over several years, it's worthwhile and prudent to stay on top of cases dealing with Rules 4.31 and 4.33 of the Alberta Rules of Court. These are the Rules governing applications to dismiss actions for long delay and want of prosecution. I think about the nightmares that family lawyers (not to speak of their clients) can go through (on both sides of the file!) when matters have just taken way too long, for a multitude of reasons.

¹ See the excellent annotation dated March 14, 2017 by Jonnette Watson Hamilton entitled "The Harsh Consequences of Ignoring *The Dower Act*" in *ABlawg.ca*