

Family

Alberta court clarifies interplay between protective Dower Act and matrimonial property division

By Barb Cotton and Christine Silverberg



Barb Cotton



Christine Silverberg

(October 21, 2021, 11:57 AM EDT) -- The *Dower Act* of Alberta has long been criticized as an archaic device as, for example, it only secures dower rights, which are in the nature of property rights, for married spouses, and does not protect adult interdependent partners. As a result, the Alberta Law Reform Institute is undergoing an extensive project to lead to the modernization of the Act.

In *Graham v. Graham*, 2021 ABCA 340, the Alberta Court of Appeal, *per curiam*, provides an overview of the *Dower Act*, its purpose and history, and has done much to bring the *Dower Act* into modern times. In doing so, the court has underscored its efficacy as another tool for a family law practitioner seeking to safeguard the property rights of their client.

In *Graham*, the husband and wife were married in 1995, had three children and separated in 1997. They did not divorce, however, although divorce proceedings had been instigated by the husband in 2014 and were still in motion at the time of trial, some 24 years later.

The wife and children lived a financially difficult life after the separation of the spouses, and with the wife working in only low-paying service positions, they were evicted from their residence, had their utility services cut off and relied on food banks for support.

Life was much different for the husband, who had a successful business as a welder, as well as other successful businesses, and in some years earned over \$1 million. He paid only minimal child support, however, and in some years paid no child support at all.

The husband bought the "Duchess Home" in 2006 and mortgaged the property twice before ultimately selling it. This would have required dower consent by the wife on three occasions. The husband swore false affidavits to declare he was not married, however, and her dower consent was not procured.

The wife sued for damages under the *Dower Act*. This action was heard at the same time as the issue of property division under the then governing *Matrimonial Property Act*, as well as the issues of child support and retroactive child support. The trial judge awarded the wife retroactive child support in the amount of \$152,649.32 but denied her any claim to a share in the property the husband had acquired, referencing the long separation of the parties and the lack of contribution of the wife to the property acquisition.

The wife's argument that she made an indirect contribution to the property acquisition by being denied what would have been her proper entitlement to child support over the years was rejected by the trial judge. The trial judge awarded the wife a penalty of \$3,000 for the husband's three-time breach of the *Dower Act*, which he characterized as a "matrimonial property/dower offset".

The wife appealed on the basis that the trial judge had failed to award her the proper measure of damages under the *Dower Act*. The Alberta Court of Appeal noted the mandatory provisions in the *Dower Act* stipulating the proper measure of damages, and awarded her one-half of the proceeds of

sale of the Duchess Home, \$162,500.

The Alberta Court of Appeal characterized her award of damages under the *Dower Act* as divisible matrimonial property and embarked on a s 8 analysis of what the division of these damages should appropriately be. The appellate court found the “abject failure” of the husband to contribute to the welfare of his family to be highly relevant.

The wife’s income and earning potential was minimal, whereas the husband made a good living and his resources had increased substantially over the two decades of separation. There was no justification for the husband having breached the *Dower Act* on three occasions. In the result the wife was awarded 75 per cent of the damages and the husband 25 per cent, for an award to the wife of \$121,875.

It is the discussion of the interplay between the *Dower Act* and the *Matrimonial Property Act* (now the *Family Property Act*) that is of interest, and that buttresses an action for damages for breach of the *Dower Act* as an efficacious tool for the family law practitioner.

On the error in conflating the two remedies, the appellate court states:

[21] In our view, the trial judge improperly conflated the analysis of damages under the *Dower Act* with the distribution of matrimonial property under the *MPA*. The *MPA* and the *Dower Act* serve different purposes: *Joncas* at para 30. Therefore, the determination of claims for damages brought under the *Dower Act* and the division of any such damages awarded as matrimonial property under the *MPA*, require two separate analyses.

After flagging that the *Dower Act* is protective in nature, the appellate court underscores the mandatory measure of damages set out in the *Dower Act*:

[29] The *Dower Act* also provides a remedy to the non-owner spouse in s. 11, under which the owner spouse is liable to the non-owner spouse in an action for damages. Once a disposition is found to be wrongful pursuant to s. 11(1), damages are owed under s. 11(2). Section 11(2) provides that the amount of damages the owner spouse will be liable for is the *larger* of either one half the consideration for the disposition or one half the value of the property at the date of disposition. There is no discretion under the *Dower Act* for calculating damages or valuing the dower rights; therefore, the damages awarded must be as directed by s. 11: *Phan* at para 13, *Joncas* at para 25.

Thus in *Graham v. Graham* the appellate court has cautioned against conflating the protective *Dower Act* with the Alberta statutes governing matrimonial property division and has provided family law practitioners with a strengthened remedy of an action for damages for breach of the *Dower Act*.

It is notable that the appellate court also stated it was not in agreement with the trial judge’s denial of a division of the husband’s property in favour of the wife, but as this was not under appeal the court did not order redress.

Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462 or e-mail barbc@bottomlineresearch.ca. Christine Silverberg is a Calgary-based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, christine@silverberglegal.com or through www.christinesilverberg.com.

Photo credit / bor-zebra ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer’s Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.