Law Reform Commission of Saskatchewan

Reform of

The Homesteads Act, 1989

Final Report

March 2017

The Homesteads Act, 1989 protects spouses who do not own their homes against the sale, mortgaging or other disposition of the homestead by requiring the non-owning spouse to sign a consent and be examined separately from the owning spouse before such action can be taken. This Final Report considers two distinct issues: (1) whether an attorney acting under a power of attorney should be able to consent to a disposition of the homestead, and (2) whether a homestead should include mines and minerals. This Final Report recommends allowing an attorney to consent to a disposition of the homestead in place of a non-owning spouse, subject to the condition that where the attorney is the spouse of the non-owning spouse, the attorney only be able to consent to a disposition of the homestead where the non-owning spouse lacks capacity. This Final Report also recommends that *The Homesteads Act, 1989* be amended to specifically exclude mines and minerals from the definition of the homestead.

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in force in November, 1973. The Commission began functioning in February, 1974. Commissioners are appointed by Order in Council. The Commission's recommendations are independent, and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

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SUMMARY OF RECOMMENDATIONS

The Homesteads Act, 1989 serves the important purpose of ensuring that a spouse who does not own his or her home is nevertheless required to consent to the sale, mortgaging or other disposition of the home. In certain circumstances, however, the requirements of *The Homesteads Act, 1989* combined with the restriction against allowing an attorney acting under a power of attorney from consenting to a disposition of the homestead can create potentially costly and unnecessary hurdles to the disposition of property. In addition, the lack of specificity in *The Homesteads Act, 1989* as to whether mines and minerals are included in the homestead can create unnecessary steps in resource-related transactions. The Commission has addressed these concerns with the following recommendations:

1. Amend *The Homesteads Act, 1989* to allow an attorney acting under a power of attorney to sign the consent to the disposition of a homestead, subject to the condition that if the attorney is the spouse of the non-owning spouse, the attorney may only sign the consent to the disposition of a homestead if the non-owning spouse lacks capacity.
2. Amend the definition of homestead in *The Homesteads Act, 1989* to exclude mines and minerals.

1. INTRODUCTION

The Homesteads Act, 1989 (*Homesteads Act*),[1] protects spouses who do not own their homes (the non-owning spouse) against the sale, mortgaging or other disposition of the home. The legislation does this by requiring the non-owning spouse to sign a consent and be examined separately from the owning spouse before the home can be disposed of.

This project was initiated at the request of a lawyer in Saskatchewan and the Commission has considered two specific issues. The first is whether the consent provisions in the *Homesteads Act* should be extended to allow an attorney acting under a power of attorney to sign a consent in place of the non-owning spouse. Currently, if the non-owning spouse lacks capacity to consent, a court application must be made in order to dispose of the homestead. The second issue is whether mines and minerals should be included in or excluded from the protections afforded under the legislation.

The *Consultation Paper*[2] was released in August 2016 and invited responses to the following questions:

> 1. Should an attorney acting under a power of attorney be able to consent in the place of the non-owning spouse to the disposition of the homestead?
>
> 2. If an attorney can consent to the disposition of the homestead, should any of the following conditions be imposed?
>
> > a. Disallow the owning spouse from acting as the attorney in relation to a homestead disposition;
> >
> > b. Include new requirements when appointing the attorney to ensure the non-owning spouse is aware that he or she is authorizing the attorney to consent to a disposition of the homestead; and/or
> >
> > c. Include new requirements at the time of the execution of the disposition of the homestead by the attorney, to ensure the attorney is providing informed consent to the disposition of the homestead.
>
> 3. Are there any other conditions or limitations that should be imposed on the ability of an attorney to consent to a disposition of the homestead?
>
> 4. Should the *Homesteads Act* be amended to specifically include or exclude mines and minerals?

[1] SS 1989-90, c H-5.1 [*Homesteads Act*].

[2] Law Reform Commission of Saskatchewan, *Reform of* The Homesteads Act, 1989: *Consultation Paper* (August 2016) [*Consultation Paper*].

The *Consultation Paper* was published in August of 2016 and sent directly to a number of individuals and organizations. The Commission received one written response and eleven responses to an online survey based on the *Consultation Paper*. The Commission also consulted with lawyers who work in the areas of real estate, wills, and property, by attending two Canadian Bar Association section meetings to discuss the *Consultation Paper*.

This Final Report draws on the responses to the *Consultation Paper* and the Commission's independent research to recommend reform to *The Homesteads Act, 1989*.

2. BACKGROUND

The history of law that protects the home begins with the British concept of dower. Dower provided a life estate to a widow of part of her husband's property when her husband died so that she would not be left without shelter.[3] The life estate allowed the widow to remain in her home for the rest of her life in certain circumstances. Curtesy, another British concept, provided a similar right for widowers as long as children were born during the marriage.

Saskatchewan allows for the sale of the homestead after the death of the owning spouse by court order when one of the following circumstances exists: (i) disposition of the property is necessary or expedient for the convenient administration of the estate, (ii) the homestead is not necessary to maintain or support the non-owning spouse or children or (iii) disposition is considered just.[4]

The definition of "homestead" is important to the legislation, as it explains what is being protected, and plays a central role in the mines and minerals issue. Before the current *Homesteads Act*, the definition of "homestead" was made by reference to provisions of *The Exemptions Act*.[5] In the 1920 *Homesteads Act*[6] the definition read:

> "Homestead" means a homestead under the provisions of paragraphs 9 and 10 of section 2 of The Exemptions Act and, except for the purposes of section 9 and form C in the schedule hereto, it shall also include any property which has been such a homestead at any time within the period of one year immediately preceding the date of the transfer or other instrument referred to in section 3:
>
> Provided that a homestead under said paragraph 10 shall not for the purposes of this Act

[3] Alberta Law Reform Institute, *The Matrimonial Home,* Report for Discussion No 14 (Alberta: Alberta Law Reform Institute, March 1995) at 9-11 [Alberta Law Reform Institute]; John Williams, "The Homesteads Act: Reflections on its purpose and operation in Saskatchewan" (1984) Sask L Rev 57 at 59 [Williams].

[4] *Homesteads Act*, *supra* note 1 at s 20.

[5] RSS 1909 c 48.

[6] RSS 1920 c 69.

be restricted in value to $3,000.[7]

The provisions referred to in *The Exemptions Act*[8] were:

> 9 The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon;
>
> 10 The house and building occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of three thousand dollars.[9]

The definition of "homestead" remained essentially the same until the *Homesteads Act*.[10] It was considered incomplete by some, and left lawyers questioning what was included in the homestead.[11]

The enactment of the *Homesteads Act* brought the definition of "homestead" into the legislation. The current definition is:

> 2 (c) "homestead" means property that is or has been occupied by both spouses as the family home at any time during their spousal relationship and that is:
>
> (i) a residence, including the land appurtenant to the residence consisting of not more than 65 hectares;
>
> (ii) property used for business or other purposes if a portion of the property is or has been occupied by both spouses as the family home at any time during their spousal relationship;
>
> (iii) a trailer or vehicle commonly referred to as a mobile home, which is affixed to land, including the land appurtenant to the trailer or vehicle consisting of not more than 65 hectares; or
>
> (iv) a unit as defined in *The Condominium Property Act, 1993*, including the owner's share in the common property.

The *Homesteads Act* allows a non-owning spouse to have more than one homestead, sets out the duration of the homestead, makes the provisions gender-neutral, and states that a power of attorney cannot be used to provide consent.[12]

While the utility of the *Homesteads Act* could be questioned because most homes are now owned by both spouses, there are still homes in Saskatchewan owned solely by one spouse. In particular, this may be the

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[7] *Ibid* at s 1.

[8] RSS 1920, c 51.

[9] *Ibid* at s 2(9)(10).

[10] The dollar amounts changed under both Acts over the years.

[11] Williams, *supra* note 3 at 58.

[12] *Homesteads Act*, *supra* note 1 at ss 2(d), 2(e), 3, 4 and 6(4). (In 2001 the protection was extended to spousal relationships beyond marriage); *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001* SS 2001 c 50.

case for older spouses,[13] who are potentially in a more vulnerable position and so should be afforded protection under the legislation. Although the non-owning spouses in these relationships have rights under family property legislation, homestead legislation provides a different type of protection - the right to remain in the home. The homestead provisions are proactive and provide protection without the non-owning spouse being required to take action. The family property legislation requires the non-owning spouse to either make an application to court or enter into a properly executed settlement agreement requiring the involvement of lawyers.[14]

The consent provision is central to Saskatchewan's homestead legislation. Under this provision, the non-owning spouse must provide written consent to the disposition of the homestead. The rights of the non-owning spouse and the meaning of consent must be explained by a judge, solicitor, justice of the peace, or notary public who must sign a certificate confirming that the non-owning spouse understands and freely provides consent.[15] For one of those individuals to sign without proper examination constitutes fraud.

The importance of preventing the owning spouse from circumventing the *Homesteads Act* by acting for the non-owning spouse can be demonstrated by the 1917 revision of the 1915 Act, which ensured that a woman was able to sign the consent for herself:

> 12 This Act shall apply to all wives, whether or not they have attained the age of 21 years, and for the purposes of this Act and every matter or thing done under or by virtue of its provisions, a married woman of whatever age shall be deemed to be sui juris.[16]

This can also be seen by the inclusion of the prohibition in the consent provision with respect to a power of attorney:

> 6(4) A person acting under a power of attorney shall not sign the consent required pursuant to this section.

These provisions made clear that an owning spouse could not circumvent the consent provision by using a power of attorney or, in the case of the first provision, on the basis of a wife's age. As stated by Lamont JA in 1922:

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[13] Saskatchewan, Legislative Assembly, 21st Legis, 3rd Sess, No 78B (17 July 1989) (Hon Mr Andrews) [17 July 1989 Debates].

[14] Section 5 of *The Family Property Act*, SS 1997, c F-6.3 allows a court to make a variety of orders in relation to the family home, including an order for exclusive possession. Interests based on an order may be registered in the Land Titles Registry (s 9). Section 12 requires the spouse against whose estate or interest an order is made to obtain the written consent of their spouse or a court order prior to dealing with the estate or interest in a way that may be detrimental to the spouse in possession (s 12). Failing to comply with an order made under s 5 is an offence pursuant to s 18(1).

[15] RSS 1965 c 118 at s 3(1); *Homesteads Act, supra* note 1 at ss 7(2) & 12.

[16] *The Statute Law Amendment Act* SS 1917 c 34 at s 44; *The Homesteads Act*, SS 1920 c69 at s 12.

> Our Homestead Act was passed for the purpose of preventing a husband from disposing of the homestead without the consent of his wife [non-owning spouse], given without compulsion and of her own free will.[17]

If an owning spouse makes a disposition of the homestead without obtaining the consent of the non-owning spouse or an order dispensing with the consent of the non-owning spouse, the owning spouse is liable to the non-owning spouse in an action for damages (section 12.1).

3. Power of Attorney and Consent

Subsection 6(4) of the *Homesteads Act* states, "A person acting under a power of attorney shall not sign the consent required pursuant to this section." There are no reported cases on this prohibition, presumably because it is clear from the subsection that an attorney cannot sign a consent under the *Homesteads Act*.

An attorney is a person who, through an appointment pursuant to *The Powers of Attorney Act, 2002*,[18] (*Powers of Attorney Act*) has been given specific power to act in the place of an individual. A power of attorney can be limited or broad. It can be used for the sake of convenience, for instance, if an individual is outside of the country and wanted to sell his or her house. A power of attorney is also often used where an individual is entering a phase of life where he or she is no longer able to fully understand and make decisions. An enduring power of attorney can be used in these situations.

The *Homesteads Act* is clear that an attorney cannot sign a consent in place of a non-owning spouse.[19] When the *Homesteads Act* was discussed in the legislature before it was passed, subsection 6(4), which was new to the Act, was addressed. When the Minister of Justice, Hon. Mr. Andrews was questioned on the rationale behind the provision he stated:

> Very often you have somebody appointed as a power of attorney, and it was always felt that a power of attorney would be substantially limited to things other than the transfer of land, and that's…I don't think anyone anticipated that the power of attorney…Very often people have a power of attorney signed if they're going away for a time to handle some of their affairs and they would not want them to be able to do that.[20]

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[17] *Scott v Miller* [1922] 1 WWR 1983 (WL) (Sask CA) at para 15 [*Scott*].

[18] SS 2002, c P-20.3.

[19] Clause 8(2)(a) could be viewed as complicating this clear statement, as it allows for an attorney to sign; but in this case what is being signed is not a consent but an affidavit, which is required by those who sign a disposition where a consent is not required. For example, the land being transferred is not a homestead or the land is a homestead but the owner does not have a spouse. There are no reported court cases on the use of this clause.

[20] Saskatchewan, Legislative Assembly, 21st Legis, 3rd Sess, No 78B (17 July 1989) (Hon Mr Andrews).

3.1. Should Attorneys be Able to Consent to a Disposition of the Homestead?

The primary rationale for changing the *Homesteads Act* to allow an attorney to sign a consent is to address situations where an adult no longer has the legal capacity to sign a consent but would benefit from the disposition of the homestead. For instance, an older adult may need a greater level of care than can be received in his or her home or may benefit from moving to a more suitable residence such as a senior's residence or to a smaller home. The inability of the non-owning spouse to sign a consent can tie up the property and the major financial resource that it represents.

Presently, an interested person would need to apply for a court order under section 11 of the *Homesteads Act* to dispense with the consent requirement:

> 11(1) Where:
>
> …
>
> (c) the non-owning spouse is a person who lacks capacity:
>
> the court, by order made in a summary way on the application of any person interested, may dispense with the consent of the non-owning spouse to the proposed disposition of the homestead.

The court may do this where it would be "fair and reasonable in the circumstances" and can place terms and conditions that it considers proper.[21] Providing an attorney the ability to sign a consent would dispense with the cost and complication of obtaining a court order. What would be removed is having a disinterested third party evaluate the situation at the time of the disposition of the property to determine whether the disposition is in the best interest of the non-owning spouse. Consultations with two Canadian Bar Association (CBA) sections suggest that court applications to dispense with the consent requirement are infrequent.

A second situation where allowing consent by an attorney could prove useful is where the non-owning spouse wants to consent to the disposition of the homestead but is not physically present. In this case, the disposition of the homestead could be delayed or even become untenable despite the fact that the main disposition documents on behalf of the owning spouse could be completed by an attorney. The risks in this situation are again the possibility of fraud and the possibility that the non-owning spouse may not be properly examined and may not fully understand the rights being waived.

The benefits of allowing an attorney to sign a consent need to be weighed against the potential for misuse and weakening of the consent provision. As noted in the background, the consent provision is central to the *Homesteads Act*, and the legislature strengthened it to ensure that the non-owning spouse's position

[21] *Homesteads Act, supra* note 1 at s 11(3)(4).

is not usurped through the additions of the legal personhood provision in 1917 and the power of attorney provision in 1989.

The provisions of the *Powers of Attorney Act* allow an individual to grant an attorney authority over all of his or her property and financial affairs, which would, but for subsection 6(4) of the *Homesteads Act*, include the authority to consent to a disposition of the homestead. An argument could be made that the *Homesteads Act* should not limit the authority of the attorney under the *Powers of Attorney Act*. Grantors should be able to give an attorney authority over all of their property and financial affairs, if they so choose. In other words, the non-owning spouse's homestead rights should not be treated any differently than any other property the non-owning spouse/grantor has an interest in. Any malfeasance on the part of an attorney in relation to the homestead can be dealt with in the same way as any other property of the grantor.

The *Homesteads Act* does not similarly restrict the ability of a property guardian appointed under *The Adult Guardianship and Co-Decision Making Act*, SS 2000 c A-5.3, from signing a consent. Under subsection 43(1), a property guardian is given the broad authority to do "anything respecting the adult's estate that the adult could do if he or she had the capacity to make reasonable decisions respecting matters relating to his or her estate, except make a will, and the property guardian may sign documents and do all things necessary to give effect to the authority vested in him or her." Under the former legislation, *The Dependent Adults Act*, SS 1989-90 c D-25.1, the powers of the property guardian were not set out in a broad statement, but instead set out in a list of items, which specifically included in clause 20(1)(k) "the authority to execute any documents on behalf of a dependent adult that are necessary to comply with *The Homesteads Act, 1989."*

The result is that if a non-owning spouse loses capacity without having put in place a power of attorney prior to that loss, a court-appointed property guardian can dispose of his or her homestead interest. However, if a non-owning spouse has decided who should look after their affairs in the event they lose capacity, the individual they have chosen cannot dispose of their homestead interest without making a court application.

On the other hand, an argument could be made that the homestead should not be viewed in the same manner as the non-owning spouse's other property. It is conceivable that an older person living with dementia may lack capacity to make certain decisions, but nevertheless be perfectly capable of remaining in the home with the appropriate supports. In this situation, while it may be desirable for an attorney to be able to make decisions regarding the financial affairs of the individual, it may not be desirable for an attorney to be able to consent to a disposition of the homestead, if the result would be that the individual would be forced to leave their home against his or her wishes. In this situation, it may be preferable to have a disinterested third party make the decision.

Each of the eleven survey respondents were of the view that an attorney should be able to consent to a disposition of the homestead, and most of the respondents would impose limitations or conditions on the ability of an attorney to consent to a disposition. One survey responder offered the following comment:

> *I have run into this situation not long ago and the court application seemed very unnecessary. The person had a properly executed power of attorney for their mother and her house (which was registered only in her deceased husband's name) was being sold as she had moved into a senior's home because she was no longer capable. The idea that the power of attorney can be used for the transfer (if she had been a joint owner) but cannot be used for the homestead consent (where she is not a joint owner) does not make sense. Further, given the current language in the Homesteads Act, there is nothing a person can do to get around this or plan for this type of situation so the court application is always necessary. There should never be a situation where a person cannot avoid a court application like this with proper planning.*

Those present at the Canadian Bar Association section meetings were also largely in favour of allowing an attorney to consent to a disposition of the homestead. In contrast, an individual who submitted written comments in response to the *Consultation Paper* was opposed to allowing an attorney to consent to a disposition of the homestead, citing general concerns relating to the potential for misuse of power of attorneys.

Subject to the conditions discussed below, the Law Reform Commission is recommending that subsection 6(4) of the *Homesteads Act* be repealed or amended as necessary to allow an attorney to consent to a disposition of the homestead.

3.2. Additional Protections for the Non-Owning Spouse

There are several potential conditions that could be imposed on allowing attorneys to consent to dispositions of homesteads to provide a measure of protection to the non-owning spouse. While limiting the ability to use a power of attorney could provide protection against misuse, any limitations must be balanced against the risk of rendering the provision practically unusable.

By way of example, section 23 of Manitoba's *Homesteads Act*[22] allows an attorney to sign in the place of a non-owning spouse, but only in limited circumstances:

1. The power of attorney must expressly authorize the attorney to execute a consent or release under the *Homesteads Act*;
2. The attorney appointed under the power of attorney cannot be the owning spouse;
3. When executing the power of attorney, the non-owning spouse must acknowledge apart from the owner that they are executing the power of attorney freely and voluntarily without any compulsion on the part of the owner and that they are aware of the nature and effect of the power of attorney;
4. The acknowledgment must be in the prescribed form and be endorsed on or attached to the

[22] CCSM c H80 [*Homesteads Act (MB)*]

power of attorney; and

5. When the attorney executes a consent on behalf of the non-owning spouse, the attorney shall execute the consent in the presence of a witness who shall verify the signature of the attorney.

This provision was included when that legislation was first enacted in 1992. At that time *The Dower Act* was divided into two Acts, one dealing with matrimonial property and the other with homestead protections. There was no discussion in the legislature as to why this section was included. There are no reported cases where this section is at issue, suggesting that the provision has not caused problems.[23] The Manitoba provision is quite limited. It both excludes the owning spouse from being the attorney, and requires that the power of attorney be made in contemplation of its use in a homesteads context by way of separate examination.

The Law Reform Commission considered the following possible protections:

1. Not allowing the owning spouse to consent if the owning spouse is the attorney;
2. Placing additional requirements on the appointment of the attorney;
3. Placing additional requirements on the signing of the consent by the attorney.

3.2.1. Exclusion of owning spouse

The *Consultation Paper* asked whether the owning spouse should be excluded from consenting to a disposition of the homestead if he or she is the non-owning spouse's power of attorney. Consultation responses on the question were mixed, however most responders were of the view that the spouse should be prohibited from consenting to a disposition of the homestead. One responder suggested that children also be excluded from consenting to a disposition of the homestead, and another suggested that if the individual appointed under the power of attorney appears on the title to the homestead or may in any way benefit financially from the disposition of the property, they should also be prohibited from consenting to a disposition. Another suggested only allowing a spouse holding a power of attorney to consent to a disposition of the homestead if the non-owning spouse has lost capacity. One responder argued that there should be no exclusion, unless the actual power of attorney instrument restricts the power of attorney from consenting to a disposition of the homestead:

> *If the person appointed their spouse as their personal and property attorney, without specifically adding this type of restriction in their power of attorney itself, then there should not be limitations. The grantor of a power of attorney has the ability to add whatever restrictions and limitations to the power of attorney document they wish. If they*

[23] Subsection 23(2) was considered in one case considering whether the doctrine of ostensible authority could allow the owning spouse to enter into a disposition of the homestead, with the court finding that "ostensible authority to do what he or she cannot do as an attorney would completely emasculate the *Act*". *4414790 Manitoba Ltd. v Nelson*, 2003 MBQB 183 at para 38, [2004] 2 WWR 552.

> *want this type of restriction, they can add it. Otherwise, most people in my practice do not want these types of limitations – they are executing the power of attorney specifically to avoid these types of situations and to make it possible for someone else, often their spouse, to be able to handle their affairs without hassles and court applications.*

The Commission considered prohibiting the owning spouse from acting as the non-owning spouse's attorney in respect to a consent to a disposition of the homestead, as is provided in the Manitoba Act. While recognizing that the purpose of the *Homesteads Act* is to provide protection to the non-owning spouse from dispositions of the homestead by the owning spouse, the Commission's view is that this type of restriction would substantially restrict the effect of allowing an attorney to consent to a disposition of the homestead, as spouses are frequently appointed as each other's attorneys.

The Commission is recommending that the owning spouse be able to consent to a disposition of the homestead as attorney only if the non-owning spouse no longer has capacity. Not allowing a spouse who has a power of attorney to consent to the disposition of the homestead while the non-owning spouse has capacity (e.g. if the spouse is out of the country) will minimize concerns relating to fraudulent dispositions and dispositions being granted during or after marital breakdown. The owning spouse/attorney should be required to sign an affidavit stating that the non-owning spouse lacks capacity.

3.2.2. Appointment of the attorney

The Commission considered whether a further protection should be added at the time of the attorney's appointment to ensure the non-owning spouse is fully aware of the power being provided to the attorney. The following complications may arise with such a requirement: it may be difficult to predict beforehand that the power of attorney will be used specifically for this purpose; it could make all powers of attorney already in place unusable to provide consent; and it could add further complication to the process of appointing an attorney.

Manitoba requires an acknowledgement at the time of execution of the power of attorney in order for the attorney to be able to consent on behalf of the non-owning spouse. The relevant portion of Manitoba's Form under the *Homesteads Forms Regulation* is:

> *ACKNOWLEDGMENT BY SPOUSE OR COMMON-LAW PARTNER*
>
> *FOR POWER OF ATTORNEY*
>
> *I,_____, the donor named in the attached Power of Attorney appointing _____ as my attorney, acknowledge that:*
>
> *1. I am executing this power of attorney freely and voluntarily without any compulsion on the part of my spouse or common-law partner.*
>
> *2. I am aware of the nature and effect of this power of attorney.*

3. I am executing this acknowledgment apart from my spouse or common-law partner.[24]

This requirement focuses on two things: (i) protecting the non-owning spouse against the compulsion of the owning spouse; and (ii) ensuring that the non-owning spouse is aware of what they are agreeing to.[25] This power of attorney cannot be signed when the owning spouse is present.

Consultation responses on whether this type of a condition should be imposed were mixed.

The Commission is not recommending that such a condition be imposed. Given the legal advice provided by lawyers to individuals who are preparing powers of attorney, such a requirement would be unnecessary. Further, imposing such a requirement would create problems with existing powers of attorney.

3.2.3. Attorney consent

The Commission considered how the existing consent and acknowledgment process in the *Homesteads Act* would function with respect to an attorney. When the non-owning spouse consents to a disposition, he or she signs the consent form provided in the regulations which declares that he or she is relinquishing all homestead rights necessary for the specific disposition. The non-owning spouse must be examined by a judge, justice of the peace, lawyer or notary public separate and apart from the owning spouse.[26] The examiner must then sign an acknowledgment that the non-owning spouse understands the homestead rights being waived and is signing the consent of his or her "own free will and without any compulsion on the part of the owning spouse."[27]

In Manitoba, the attorney does not have to be examined in the same manner as a non-owning spouse,[28] but instead must have the execution of the consent witnessed and have the witness's signature verified by an affidavit of execution.[29]

The majority of survey respondents were of the view that some type of additional requirement should be imposed at the time the attorney is signing the consent to ensure the attorney is providing informed consent to the disposition of the homestead.

The Commission is recommending that the Certificate of Acknowledgment (Form B) be modified for situations where an attorney is consenting to the disposition of the homestead. Lawyers should be

[24] Man Reg 121/93 Form 9.

[25] *Homesteads Act (MB), supra* note 22 at s 23(3).

[26] *Homesteads At, supra* note 1 at s 7(1)(2).

[27] *Ibid* at s 7(3).

[28] *Ibid* at ss 9(4) & 11(3).

[29] *Homesteads Act (MB), supra* note 22 at s 23(5).

required to explain the nature of homestead rights to the attorney, and in circumstances where the attorney is not the owning spouse, the attorney should acknowledge he or she is signing the consent to the disposition of his or her own free will. Independent legal advice should not be required, but the Certificate should be completed apart from the owning spouse.

4. MINES AND MINERALS

The definition of homestead in clause 2(c) of the *Homesteads Act* does not specifically refer to mines and minerals:

> "homestead" means property that is or has been occupied by both spouses as the family home at any time during their spousal relationship and that is:
>
> (i) a residence, including the land appurtenant to the residence consisting of not more than 65 hectares;
>
> (ii) property used for business or other purposes if a portion of the property is or has been occupied by both spouses as the family home at any time during their spousal relationship;
>
> (iii) a trailer or vehicle commonly referred to as a mobile home, which is affixed to land, including the land appurtenant to the trailer or vehicle consisting of not more than 65 hectares; or
>
> (iv) a unit as defined in *The Condominium Property Act, 1993*, including the owner's share in the common property.

The lack of certainty as to whether mines and minerals are included in the definition of homestead was raised as a point of frustration in practice for lawyers. Practically, the lack of clarity is problematic in regards to oil and gas leases. If mines and minerals are included in the homestead, it is important that consents to dispositions and acknowledgements are properly executed to ensure the leases are not void. If, however, mines and minerals are not part of the homestead, unnecessary work is being done and costs incurred.

4.1 Are mines and minerals included in the homestead?

The *Homesteads Act* does not specifically refer to mines and minerals in the definition of homestead in clause 2(c), and thus it is not immediately apparent whether mines and minerals are included in the homestead.

There are no reported court decisions considering whether mines and minerals are included under the current definition of homestead in the *Homesteads Act*. However, there are cases considering the issue under the earlier definition of homestead. Prior to the definition of homestead being included in the

Homesteads Act, the definition of homestead was made by reference to *The Exemptions Act,*[30] which stated:

> 9 The homestead, provided the same be not more than one hundred and sixty acres; in case it is more the surplus may be sold subject to any lien or incumbrance thereon;
>
> 10 The house and building occupied by the execution debtor and also the lot or lots on which the same are situated according to the registered plan of the same to the extent of $3,000.[31]

Following a 1953 Supreme Court of Canada decision holding that an oil and gas mining lease under Alberta's *Dower Act* was a disposition of the homestead,[32] several Saskatchewan Court of Appeal cases treated mines and minerals as part of the homestead under the earlier definition.[33]

The definition of homestead under *The Exemptions Act* was narrower than the current definition of homestead in the *Homesteads Act* (in particular, these earlier provisions do not contain the term "land appurtenant"), and this may lead to a debate as to whether these cases continue to have precedential value in Saskatchewan. However, the fact that such a debate is possible suggests that clarification of the *Homesteads Act* may be desirable.

The current definition of homestead also suggests that mines and minerals are included in the homestead. The relevant definition of a homestead for the purposes of this discussion is found in subclauses 2(c)(i) and (iii):

> 2(c) "homestead" means property that is or has been occupied by both spouses as the family home at any time during their spousal relationship and that is:
>
> (i) a residence, *including the land appurtenant* to the residence consisting of not more than 65 hectares …
>
> (iii) a trailer or vehicle commonly referred to as a mobile home, which is affixed to land, *including the land appurtenant to the trailer or vehicle* consisting of not more than 65 hectares

[30] RSS 1940 c 80.

[31] *Ibid* at s 2(9)(10).

[32] *McColl Frontenac Oil Co. v Hamilton,* [1953] 1 SCR 127.

[33] In *Friess v Imperial Oil Ltd*, [1954] 4 DLR 100 (Sask CA), a petroleum and natural gas lease on the home quarter was declared null and void because it was signed by the daughter and not the wife of the owning spouse, and the acknowledgement was fraudulently executed by the justice of the peace. The owning spouse accepted rental payments on the land for four years and then brought this case with his wife when he discovered that other owners in the district were being offered larger amounts. The Saskatchewan Court of Appeal treated mines and minerals as part of the homestead, without engaging in any discussion on the subject. Following this decision, there were three more cases treating mines and minerals as part of the homestead: *Bonkowski v Rose*, [1955] 5 DLR 229 (Sask CA); *Farmers Mutual Petroleums Ltd v Jackson*, [1956] 5 DLR (2d) 246 (Sask CA); and *Forseth v Prudential Trust Co* (1958), 17 DLR (2d) 178 (Sask CA).

While the *Homesteads Act* does not define "land," land is defined in *The Land Titles Act, 2000*[34] as follows:

> 2(1)(u) "land" means:
>
> (i) the surface;
>
> (ii) mines and minerals; and
>
> (iii) unless the context requires otherwise, the condominium units and common property included in a condominium plan;

This section reflects the common law definition of land, which includes minerals.[35] Mines and minerals were also included in the definition of land under *The Land Titles Act*, RSS 1978, c L-5,[36] in force when the *Homesteads Act* was enacted. While these definitions of land only apply to those Acts, they suggest that a reasonable argument can be made that mines and minerals form part of the homestead under subclauses 2(c)(i) or (iii) in the *Homesteads Act*.

The inclusion of *profit à prendre* in the definition of "disposition" in clause 2(b)[37] of the *Homesteads Act* further supports the conclusion that mines and minerals are included in the homestead. The Supreme Court has described a *profit à prendre* as follows:

> A *profit à prendre* is defined in *Stroud's Judicial Dictionary* (4th ed.) vol. 4, at p. 2141 as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the [38]soil". In *Black's Law Dictionary* (5th ed.), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for

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[34] RSS c L-5.1.

[35] *Black's Law Dictionary*, 10th ed. defines land as: "An immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it."

[36] Clause 2(1)(k) defined "land" or "lands" as follows:

> Lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specifically excepted.

[37] Clause 2(b) provides as follows:

"disposition" means an instrument of disposition which is required to be executed by the owner of the land disposed of and includes:

> (i) any instrument intended to convey or transfer an interest in land and includes:
>
> (A) an agreement for sale;
>
> (B) an easement;
>
> (C) a lease;
>
> (D) a profit à prendre;
>
> (E) a quit claim; and
>
> (F) a transfer;
>
> (ii) a mortgage or other encumbrance intended to charge land with the payment of a sum of money;

[38] *British Columbia v Tener*, [1985] 1 SCR 53 at para 12.

> exercise of the profit."

While the *Homesteads Act* does not specifically refer to mines and minerals, it appears fairly clear based on the above that mines and minerals are included with the homestead given: (a) the cases under the former homestead legislation treating mines and minerals as part of the homestead, (b) the definitions of land in the former and current land titles legislation, which includes mines and minerals and reflects the common law definition of land, and (c) the inclusion of a *profit à prendre* in the definition of a disposition under the *Homesteads Act*.

That mines and minerals are included with the homestead is supported by John Bishop Ballem's *The Oil and Gas Lease in Canada*,[39] in which the author states at pages 41 to 42:

> The various provincial acts, in effect, prohibit a disposition of the homestead without the consent of the spouse. The language used in describing what is prohibited, whether it be a "disposition" or "transfer any interest in land," is certainly broad enough to include the granting of an oil and gas lease, which is both an interest in land and a disposition. The Alberta legislation expressly applies dower to mines and minerals contained in a homestead, but this specific reference does not appear necessary.

However, Ballem goes on to state:

> If however, title to the minerals is held under a separate certificate of title, dower will not attach. A "homestead" cannot exist on a mineral title that does not include the surface; hence the Acts have no application.

It could potentially be argued that due to the changes made to the law in Saskatchewan (as to how surface, and minerals, respectively, are shown on titles) the Ballem analysis supports a finding that mines and minerals are not homestead property. With the introduction of *The Land Titles Act, 2000*, a title can be in respect of a surface interest, or a mineral interest, but not both. Applying Ballem's reasoning ["*A "homestead" cannot exist on a mineral title that does not include the surface; hence the Acts have no application*], minerals would not be included in a homestead.

However, it is unlikely that the drafters of *The Land Titles Act, 2000* intended to change the substantive law respecting homesteads. Nonetheless, the continued inclusion of minerals under homestead legislation raises interesting questions of interpretation and application. For example, the shape and dimensions of a surface parcel might be different from the shape and dimensions of the mineral parcel that is in respect of the minerals that happen to be (wholly or in part) under the surface parcel. What would the result be if the mineral parcel were five times the size of the surface parcel: would there be homestead protection for the surface and only a part of the mineral parcel? This type of question further supports the conclusion that clarity is needed on this point.

[39] 4th ed., (Toronto: University of Toronto Press, 2008).

4.2 Should mines and minerals be included in the homestead?

Whether mines and minerals should be excluded from the homestead largely depends on defining the contemporary aims of the *Homesteads Act*: should it be used to protect the family home as a residence, or should it be used to also protect the financial value of the home and the land surrounding it? The practical impacts of any potential exclusion also must be considered.

The original purpose of the legislation has been described as follows:

> Our Homestead Act was passed for the purpose of preventing a husband from disposing of the homestead without the consent of his wife, given without compulsion and of her own free will. Although the Act gives the wife an interest in the homestead independent of her husband, it must not be forgotten that they are still man and wife, with, in most respects, interests which are identical. The prosperity of the husband generally speaking means the prosperity of the wife, while any losses sustained by him are losses which she must share.[40]

This explains why awarding significant damages against an owning spouse would be problematic under the *Homesteads Act*, but it also sets out the general purpose of the legislation: to allow the wife (now non-owning spouse) to consent of her own free will to the disposition of the homestead. At that time the future high value of mines and minerals was not appreciated, making it an immaterial detail. The significant value of such rights is now clear. But this excerpt also makes clear that in most ways spouses share interests and that the Act is intended to protect a non-owning spouse in particular limited circumstances. The purpose of homestead legislation has been described by the courts as "to protect the home and to prevent the husband from disposing of it without the consent of the wife freely and voluntarily given."[41]

What needs to be determined is whether the *Homesteads Act* is still primarily in existence to ensure that the non-owning spouse can stay in his or her home, or, whether it is intended to protect the financial value of the home and the land it is situated on, including any economic activity taking place there.

The Manitoba Law Reform Commission considered this question in its extensive review of *The Dower Act*, and concluded:

> While fundamental to the concept of homestead is the preservation of the family home, it may well be that the present rural definition may, in some cases, secure not only a roof over the head of the survivor but also a means of obtaining, at least in part, a livelihood. It is to be emphasized that for purposes of an allocation of property on death, the full value of the family farm, being a commercial asset, would ordinarily be included in the

[40] *Scott, supra* note 17 (WL) at para 15.

[41] *Halldorson v Holizki*, [1919] 1 WWR 472 (Sask KB) at 477.

> appropriate spouse's inventory of property and the survivor would be entitled to one-half of the shareable gain. Therefore, the policy we wish to embody by preserving the life estate in a rural homestead is not one of maintaining a continued livelihood for the survivor. Our aim is simply to ensure the survivor's place of residence.[42]

If protection of the financial value of the home and land is also an important purpose of the *Homesteads Act*, perhaps the Act should protect the rights of the non-owning spouse respecting the mines and minerals that exist within a home quarter. This consideration, however, must be balanced against the family property rights provided to spouses under *The Family Property Act*. Mineral rights can be considered family property[43] under this legislation,[44] and thus, affording mineral rights additional protection under the *Homesteads Act* may be unnecessary. However, the different nature of the rights provided to the non-owning spouse under the *Homesteads Act* and *The Family Property Act* must be considered: the *Homesteads Act* requires the non-owning spouse to consent to the actual disposition of the minerals; in contrast, *The Family Property Act* ensures that any mineral leases granted – with or without the consent of the non-owning spouse - will be included in the distribution of family property.

While this project did not consider whether the *Homesteads Act* is still necessary, it may be worth noting that several other Canadian provinces no longer have homestead or dower legislation, and instead deal with the protection of the family home under family property legislation.[45] This may suggest that it would be desirable to ensure the application of the *Homesteads Act* in Saskatchewan is limited to protection of the family home as a residence.

When the Alberta Law Reform Institute considered the mines and minerals provisions under the *Dower Act* (which include mines and minerals as part of the homestead so long as they are included in the certificate of title for the homestead but limits financial recovery based on their improper disposition)[46]

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[42] Manitoba Law Reform Commission, *Report on an Examination of* "The Dower Act" (November 19, 1984) at 183-4.

[43] "Family property" is defined in s 2(1) of *The Family Property Act*, SS 1997, c F-6.3, as follows:

> any real or personal property, regardless of its source, kind or nature, that, at the time an application is made pursuant to this Act, is owned, or in which an interest is held, by one or both spouses, or by one or both spouses and a third person, and, without limiting the generality of the foregoing, includes the following: (a) a security, share or other interest in a corporation or an interest in a trust, partnership, association, organization, society or other joint venture; (b) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse; (c) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to consume, invoke or dispose of the property; (d) property mentioned in section 28.

[44] See e.g., *Moore v Moore*, 2013 SKQB 259; *Miller v Miller*, 2008 SKQB 318; *Molloy v Molloy*, 2012 SKQB 486.

[45] Bruce Ziff in, "Whatever Happened to the Law of Dower? It's Alive and Unwell and Living on the Prairies. A Case Comment on *Schwormstede v. Green Drop Ltd.* (40 R.P.R. (2d) 1) and *Bank of Montreal v. Pawluk* (40 R.P.R. (2d) 18)", 40 RPR-Art 44, states: "The common law of dower was abolished in Ontario in 1978, when the new matrimonial property regime was ushered in. Similar reforms occurred elsewhere, at around the same time."

[46] Section 24 of Alberta's *Dower Act*, RSA 2000, c D-15 provides as follows:

> 24(1) The dower rights given to the spouse of a married person by this Act apply to mines and minerals contained in a homestead, and no married person shall make a disposition of mines and minerals contained in or forming part of a

they recommended that mines and minerals not be part of the homestead:

> The merit of the current law is that it provides a potential means of income to the widowed spouse; and where there is a right to minerals, the income produced of course can be considerable. At the same time, that right is conferred unevenly, since its existence depends on whether or not the home and the mines and minerals are registered on separate titles; whether this is so in a given case may result from fortuitous circumstances…
>
> [U]nder the modern law of dower…the home serves as a means of providing basic support. Allowing a widowed spouse to remain in the home minimizes disruption and promotes continuity. At all times, this must be balanced against the legitimate use of property owned by the other spouse. Our view is that this balance is best struck by excluding mines and minerals from the definition of the home. Under this proposal, no consent would be required to convey an interest in mines and minerals below the surface of a homestead. Additional needs of a spouse can then be dealt with through the other sources of marital support under Alberta law.[47]

A final consideration is that removing mines and minerals from the homestead under the *Homesteads Act* would simplify mineral interest-related transactions.

The majority of survey respondents suggested that the *Homesteads Act* should be amended to specifically exclude mines and minerals. Similar views were expressed by those attending the CBA section meetings.

The Commission is of the view that the *Homesteads Act* is intended to protect the homestead as a place of residence, and as such, it is inconsistent to extend the protections afforded under the Act to mines and minerals. The Commission recommends the *Homesteads Act* be amended to clearly specify that mines and minerals are not included in the homestead.

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homestead without obtaining in accordance with this Act the consent in writing of the spouse of the married person.
(2) Nothing in this section gives the spouse of a married person a dower interest in mines and minerals contained in any certificate of title registered in the name of the married person other than the certificate of title to the homestead, and no consent or acknowledgment under this Act is required to the disposition of those mines and minerals or any interest in them.
(3) Notwithstanding sections 13 to 16, no order may be made directing payment out of the General Revenue Fund of any damages awarded to the spouse of a married person by reason of a disposition by the married person of mines and minerals, whether the disposition was of mines and minerals only or of the homestead including mines and minerals.
(4) When pursuant to section 11 a spouse recovers a judgment against a married person in respect of a disposition by the married person of the homestead including mines and minerals and the judgment is not paid, an order made directing payment of the unsatisfied judgment out of the General Revenue Fund shall relate only to that portion of the awarded damages that is based on the value of the surface rights of the homestead excluding the value of the mines and minerals, and shall so relate only to the extent that that portion of the damages remains unpaid.

[47] Alberta Law Reform Institute, *supra* note 3 at 165.

5. RECOMMENDATIONS FOR REFORM

The Commission recommends that the *Homesteads Act* be amended to allow attorneys acting under a power of attorney to consent to a disposition of the homestead. Although it appears that court applications to dispense with the consent requirement under section 11 of the *Homesteads Act* are infrequent, in circumstances where a non-owning spouse has appointed a power of attorney to handle his or her financial and personal affairs, the need for a court application to deal with the homestead will typically result in unnecessary costs and complications.

In order to minimize the potential for fraudulent transactions or misuses of the power of attorney, the Commission recommends that if the attorney is the owning spouse, he or she only be able to consent to a disposition of the homestead if the non-owning spouse lacks capacity.

When the attorney is consenting to the disposition of the homestead, the individual obtaining the consent will be required to explain the nature of homestead rights to the attorney, and in situations where the attorney is not the owning spouse, the attorney will be required to acknowledge he or she is signing the consent to the disposition of his or her own free will.

The Commission recommends the definition of homesteads in clause 2(c) of the *Homesteads Act* be amended to specifically exclude mines and minerals, as the purpose of the *Homesteads Act* is to protect the family home as a residence.