Law Reform Commission of Saskatchewan

Reform of

The Homesteads Act, 1989

Consultation Paper

August 2016

This consultation paper:

- Discusses the history and purposes of *The Homesteads Act, 1989*
- Considers the need for reform of s. 6(4) of *The Homesteads Act, 1989*, which prevents a person acting under a power of attorney from consenting to a disposition of the homestead
- Considers the need for clarification in *The Homesteads Act, 1989* as to whether mines and minerals form part of the homestead
- Presents options for reform on these two issues

YOUR COMMENTS AND OPINIONS ARE WELCOME.

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 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.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

The Commission can be contacted at:

Law Reform Commission of Saskatchewan
University of Saskatchewan, Room 185, College of Law
15 Campus Drive
Saskatoon, SK S7N 5A6
Telephone: (306) 966-1625
Fax: (306) 966-5900
E-mail: director@lawreformcommission.sk.ca

This consultation paper and other Law Reform Commission of Saskatchewan publications are available on our website: http://www.lawreformcommission.sk.ca

ISBN 978-0-921923-32-9 (print)
ISBN 978-0-921923-33-6 (PDF)

CALL FOR RESPONSES

The Law Reform Commission of Saskatchewan is interested in your response to this consultation paper. Your comments and opinions on the topic are welcome. Please allow the following questions to guide you in your response:

1. Should an attorney acting under a power of attorney be able to consent in the place of the non-owning spouse to a disposition of the homestead? Why? (Refer to Part 3.2)

2. If an attorney acting under a power of attorney is able to consent to a disposition of the homestead, should there be any additional conditions or restrictions placed on this exercise of power? (Refer to Part 3.3)

3. Should mines and minerals be included in the homestead, such that the non-owning spouse must consent to their disposition?

How to Respond

Responses may be sent **no later than October 31, 2016:**

By email - director@lawreformcommission.sk.ca

By fax - (306) 966-5900

By survey - http://lawreformcommission.sk.ca/consultations/

By mail - Law Reform Commission of Saskatchewan
University of Saskatchewan
Room 185, College of Law
15 Campus Drive
Saskatoon, SK S7N 5A6

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 form of 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 consultation was initiated at the request of a lawyer in Saskatchewan. This project is not intended to be an exhaustive review of the *Homesteads Act*, but instead focusses on 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. This could be useful in situations where the non-owning spouse lacks the capacity to consent to a disposition of the homestead. 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 that the *Homesteads Act* does not explicitly address whether mines and minerals form part of the homestead. This has resulted in a lack of clarity as to whether the non-owning spouse's consent is required where there is a disposition of mines and minerals. In addition to recommending clarification, this consultation paper considers whether mines and minerals should be included in or excluded from the protections afforded under the legislation.

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

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.[2] 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.[3] The important role of the concept of dower in the protection of homestead rights is reflected in Alberta's continuing use of this term in the title of their homestead legislation, the *Dower Act,*[4] and its use in Manitoba until 1992 when Manitoba replaced its *Dower Act*[5] with family property legislation[6] and the *Homesteads Act*.[7] Manitoba and Alberta legislation reflect the concept of dower more closely than Saskatchewan, as both provide a non-owning spouse with a life estate after the death of the owning spouse.[8]

In contrast, 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.[9]

The homestead provisions in the prairie provinces were derived in part from homestead provisions brought to Canada from the United States. The Manitoba Law Reform Commission explained this history and the differences between dower and homestead provisions in their project on *The Dower Act*:

> The earliest homestead legislation appears to be a uniquely American contribution to the law of property which traces its origins to a statute of the Republic of Texas in 1839. The fundamental aim of the legislation was the protection of the family home…the homestead protections differed from common law dower…. [Homestead legislation] stemmed from a much broader public policy standpoint….[It] addressed more than

---

[2] 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].

[3] *Ibid.*

[4] RSA 2000 c D-15 [*Dower* RSA].

[5] CCSM c D100.

[6] *The Family Property Act* CCSM c F25.

[7] CCSM c H80 (current version) [*Homesteads* CCSM].

[8] *Dower* RSA, *supra* note 4 at s 18; *Homesteads* CCSM, *supra* note 7 at s 21.

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

> simply the concern of providing a form of maintenance to the widow; it sought to ensure that the homes of the nation were beyond the reach of financial misfortune.[10]

Another major difference between dower and homestead was that homestead applied during the owning spouse's life and not simply after the owning spouse's death.[11] John Williams explained the three common features of homestead legislation:

> First, the homestead is exempt from forced sale under claims of execution creditors. Second, the owner of the homestead cannot dispose of or encumber it without the consent of the spouse. Third, the widow and family have the use of it after the husband's death.[12]

The legislative history of the *Homesteads Act* begins in the Northwest Territories with a federal provision from 1878, which applied in what is now Saskatchewan until its repeal in 1894.[13] That provision: allowed a homestead to be registered; provided protection against seizure; required consent by the non-owning spouse to sell; provided a life estate on the death of the owning spouse (or intestacy rights) and; on the death of both spouses, provided rights for any minor children.[14] There was only one registration under that Act leaving the provision practically unused.[15] The first Saskatchewan homestead legislation was enacted in 1915.[16] According to John Williams, it was part of a group of statutes intended to protect farmers from creditors, particularly where farmers had borrowed money to purchase farm implements.[17]

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*.[18] In the 1920 *Homesteads Act*[19] the definition read:

---

[10] Manitoba Law Reform Commission, *Report on an Examination of "The Dower Act",* Report #60 (Manitoba: Manitoba Law Reform Commission, 1984) at 159-60 (footnotes exempted) [Manitoba Law Reform Commission].

[11] *Ibid* at 161.

[12] Williams, *supra* note 2 at 61.

[13] Alberta Law Reform Institute, *supra* note 2 at 12; *The Homesteads Exemptions Act* SC 41 Vict, c 31.

[14] Alberta Law Reform Institute, *supra* note 2 at 12-13.

[15] Alberta Law Reform Institute, *supra* note 2 at 13; *Re Claxton* (1890), 1 Terr. L.R. 282 (S.C.).

[16] SS 1915 c 29.

[17] Williams, *supra* note 2 at 63.

[18] RSS 1909 c 48.

[19] RSS 1920 c 69.

> "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 be restricted in value to $3,000.[20]

The provisions referred to in *The Exemptions Act*[21] 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.[22]

The definition of "homestead" remained essentially the same until the *Homesteads Act*.[23] It was considered incomplete by some, and left lawyers questioning what was included in the homestead.[24]

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.

[20] *Ibid* at s 1.

[21] RSS 1920, c 51.

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

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

[24] Williams, *supra* note 2 at 58.

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.[25]

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 case for older spouses and recently immigrated spouses,[26] 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.[27]

The consent provision is central to Saskatchewan's homestead legislation. Under this provision, the non-owning spouse (prior to 1989, the non-owning wife) 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, registrar of land titles[28] (before 1989), solicitor, justice of the peace, or notary public who must sign a certificate confirming that the non-owning spouse understands and freely provides consent.[29] 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:

---

[25] *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.

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

[27] 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).

[28] Including a deputy of the registrar.

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

> 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. [30]

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:

> 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.[31]

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 (s 12.1).

A disposition of a homestead given without the non-owning spouse's consent is void (*Friess v Imperial Oil Ltd.* (1954) 12 WWR (NS) 151 (SKCA); *Morsky v Harris* (1998), 168 Sask R 27 (CA)). The situation becomes more complicated where the non-owning spouse is alleged to have consented (or admits to having consented) to the disposition, but the formal consent requirements of the *Homesteads Act* are not complied with. The result of this scenario was summarized by Wilkinson J in *Verlaan v Lang Estate*, 2005 SKQB 453 at para 25:

> There have been cases where a non-owning spouse's actual consent to a disposition is found to exist, and different considerations may arise. Examples are set out in the case of the *Toronto-Dominion Bank v. Gordon et al*, [1981] 5 W.W.R. 235 (Sask. C.A.) where Bayda, J.A. said that there are two elements necessary before the husband is able to convey his interest in homestead property – firstly, the wife's freely consenting mind and, secondly, the formal expression (recording) of the wife's consent. He then went on to list, at para. 10 the four basic recording requirements under *The Homesteads Act*, as it then was:

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

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

1. The wife must sign the document that disposes of the husband's interest.
2. The wife must be examined by a proper officer and make an acknowledgement to him.
3. The wife must make a written declaration relinquishing her rights in the homestead.
4. The officer who examines the wife must sign a certificate, which must be annexed to or endorsed on the document.

If the wife has not consented to the disposition and all of the formal requirements are missing, the conveyance is a *nullity*; if the wife has a consenting mind but all four formalities are missing, the situation produces a condition of *unenforceability*; if the wife has a consenting mind, and requirements one and three are complied with, the transaction is *valid and enforceable*.

With regard to third parties who receive a disposition of an interest in a homestead, s. 9(1) of the *Homesteads Act* states that no person acquiring an interest under a disposition is bound to inquire into the truthfulness of the facts alleged in a consent, affidavit or certificate under the Act. Subject to s. 12, a disposition which purports to be completed in accordance with the Act shall be valid and binding. Section 12 provides that knowledge on the part of a person acquiring an interest in a homestead under a disposition not meeting the requirements of s. 6 (form of consent) and s. 7 (acknowledgment of consent) that the land is a homestead, and that the owner has a non-owning spouse whose consent has not been given, is fraud. Subsection 12(2) entitles the non-owning spouse to bring an action to set aside and cancel the disposition to any person affected by the fraud outlined in s. 12(1).

3. Power of Attorney and Consent

A Saskatchewan lawyer has raised for discussion the issue of whether an attorney under a power of attorney should be able to sign a consent under the *Homesteads Act*. Currently, subsection 6(4) 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*.

In this consultation paper the use of the word attorney refers not to a lawyer, but to a person who is acting under a power of attorney. An attorney is a person who, through an appointment pursuant to

The Powers of Attorney Act, 2002,[32] (*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 first issue for this consultation paper is whether an attorney should be able to sign a consent. The second issue is, if an attorney can sign a consent, what specific protections should be included to prevent misuse of that power?

The *Homesteads Act* is clear that an attorney cannot sign a consent in place of a non-owning spouse.[33] 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.[34]

Several provisions of the *Powers of Attorney Act* are relevant in considering whether the prohibition against an attorney providing consent in the *Homesteads Act* should be repealed or amended. This section of the consultation paper sets out the relevant provisions of the *Powers of Attorney Act*, outlines two possible scenarios where allowing an attorney to consent would be of use, and discusses the potential risks of allowing an attorney to consent to a disposition of a homestead.

3.1. Relevant Provisions of the *Powers of Attorney Act*

An "attorney" is defined in subsection 2(1) as a person who is appointed to act for the grantor under the terms of a power of attorney. Section 3 allows an individual to grant an "enduring power of attorney,"

[32] SS 2002, c P-20.3.

[33] 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.

[34] 17 July 1989 Debates, *supra* note 26.

which allows the attorney's authority under the power of authority to continue in the event the grantor lacks capacity. Under an enduring power of attorney, an individual can be appointed to act for the grantor with respect to the grantor's personal affairs (a "personal attorney") and/or with respect to the grantor's property and financial affairs (a "property attorney").

Clause 6(1)(a) sets out restrictions on who may act as an attorney: attorneys must be at least 18 years of age, must not be an undischarged bankrupt if they will be acting as a property attorney, and must not have been convicted within the last 10 years of an assault, sexual assault or other act of violence, intimidation, criminal harassment, uttering threats, fraud or breach of trust (unless the individual has been pardoned, and the grantor acknowledges the conviction and consents to the individual acting). In addition, an individual whose occupation or business involves providing personal care or health care services to the grantor for remuneration may not act as an attorney (clause 6(1)(b)). Subsection 8(1) allows a grantor to appoint a corporate attorney.

Enduring powers of attorney must be in writing, dated and signed by the grantor, or, at the direction of the grantor, by an adult with capacity, other than the attorney or family member of the grantor or attorney (section 11). In addition, enduring powers of attorney must be either witnessed by a lawyer and accompanied by legal advice, or be witnessed by two adults with capacity who are not the attorney or family members of either the grantor or the attorney (section 12).

Subsection 14(1) sets out that the attorney has authority respecting the property and financial or personal affairs of the grantor pursuant to the terms of the enduring power of attorney. Subsection 14(2) allows the grantor to give an attorney:

(a) specific authority respecting certain property or financial matters;
(b) general authority respecting all of the grantor's property and financial affairs;
(c) specific authority respecting certain personal matters; or
(d) general authority respecting all of the grantor's personal affairs.

Subsection 15(1) requires an attorney to exercise his or her authority honestly, in good faith, in the best interests of the grantor, and with the care that could reasonably be expected of a person of the attorney's experience and expertise. In addition, the attorney must take into consideration the wishes of the grantor, wherever possible, in carrying out his or her duties under an enduring power of attorney (subsection 15(2)).

Section 19 sets out several ways in which the authority under an enduring power of attorney may be terminated, including by application to the court by an interested party on the basis that the attorney

had abused his or her authority. Section 18 allows the grantor to request an accounting, and sets out the procedure to be followed when the grantor lacks the capacity to make an accounting request.

In addition to being subject to civil proceedings for breach of fiduciary duty or unjust enrichment, attorneys who behave fraudulently may be subject to criminal consequences. An attorney may be charged with theft under s. 322 of the *Criminal Code,* and theft by a person holding power of attorney under section 331, which states:

> Everyone commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he or she was entrusted by the power of attorney.

Following a conviction, a court can make a restitution order in favour of the estate, in addition to sentencing the offender to a term of imprisonment.

3.2. Discussion

The primary rationale for changing the *Homesteads Act* to allow an attorney to sign a consent would be 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.[35] 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.

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 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 their 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*. A grantor 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 section 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*

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

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 s. 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 their 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 dispassionate manner as the non-owning spouse's other real property. It is conceivable that an elderly person suffering from a disease such as Alzheimer's disease may lack capacity to make certain decisions, but nevertheless be perfectly capable of remaining in their 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 their wishes. In this situation, it may be preferable to have a disinterested third party make the decision.

A further issue to consider are the remedies available to the non-owning spouse in the event an attorney acts either fraudulently, or in contravention of their duties under section 15 of the *Powers of Attorney Act* when consenting to a disposition of the homestead. While subsections 21(3) and (4) of the *Powers of Attorney Act* limit the liability of the attorney to the grantor in certain circumstances, acting in violation of section 15 is not included.[36]

---

[36] Subsections 21(3) and (4) of the *Powers of Attorney Act* provide as follows:

(3) The attorney is not liable to the grantor, or to the estate of the grantor, for an action taken under a power of attorney if:

(a) any or all of the following circumstances occur:

(i) the authority under the power of attorney is terminated;

(ii) in the case of an enduring power of attorney that has apparently been signed and witnessed in accordance with sections 11 and 12:

(A) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 4; or

(B) the enduring power of attorney does not meet the requirements of section 11 or 12;

(b) the attorney did not know of the existence of one or more of the circumstances mentioned in clause (a); and

(c) the attorney, with the existence of reasonable care, could not have known of the existence of one or more of the circumstances mentioned in clause (a).

(4) The attorney is not liable to the grantor, or to the estate of the grantor, for failing to act in pursuance of an enduring power of attorney if:

(a) the attorney's appointment was a contingent appointment; and

(b) the attorney:

As discussed above, if there is fraud (as defined in subsection 12(1) of the *Homesteads Act*) on the part of the individual acquiring the homestead disposition, the non-owning spouse may bring an action to set aside the disposition. In addition, under section 12.1 an owning spouse is liable to the non-owning spouse in an action for damages if the owning spouse makes a disposition of a homestead to which a consent is required without obtaining consent or a section 11 court order dispensing with the consent of the non-owning spouse. It is difficult to see how either of these remedies could be used in the case of a power of attorney signing a consent in violation of their section 15 duties. Thus, the remedy available to a non-owning spouse (or their estate) would be to bring an action against the attorney.

Just as *bona fide* purchasers are protected by section 9 of the *Homesteads Act, bona fide* purchasers of a homestead disposition would also be protected if a consent is signed by an attorney in violation of their section 15 duties. Subsection 9(1) of the *Homesteads Act* provides that no person acquiring an interest under a disposition is bound to inquire into the truthfulness of the facts alleged in a consent, affidavit or certificate required under the legislation. Subsection 9(2) states that subject to section 12, a disposition which purports to be completed in accordance with the act shall be valid and binding according to its tenor. Similarly, subsections 21(1) and (2) of the *Powers of Attorney Act* provide as follows:

> (1) An action taken by an attorney under a power of attorney is valid and binding in favour of a person dealing with the attorney or receiving any benefit from the attorney, and in favour of a person claiming under him or her, if that person does not know of the existence of one or more of the following circumstances:
>
> (a) the authority under the power of attorney is terminated;
>
> (b) in the case of an enduring power of attorney that has apparently been signed and witnessed in accordance with sections 11 and 12:
>
> (i) the grantor did not have the capacity to grant the enduring power of attorney pursuant to section 4;
>
> (ii) the attorney acted in violation of section 6; or
>
> (iii) the enduring power of attorney does not meet the requirements of section 11 or 12.
>
> (2) No person is required to inquire into or ascertain the existence of one or more of the circumstances mentioned in subsection (1) if that person does not know of its existence.

> (i) did not know that the contingent appointment under the enduring power of attorney had come into effect; and
>
> (ii) with the exercise of reasonable care, could not have known that the contingent appointment under the enduring power of attorney had come into effect.

3.3. Protections for the Non-Owning Spouse

If there is to be a provision allowing for an attorney to consent, it may be desirable to attach specific conditions on the use of that power in order to protect 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.

This section describes Manitoba's approach in allowing attorneys to sign homesteads consents or releases, and then discusses several possible conditions that could be placed on an attorney's ability to sign a homestead disposition consent in Saskatchewan.

Section 23 of Manitoba's *Homesteads Act* 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 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.[37] 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.

[37] 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.

3.3.1. Exclusion of owning spouse

The first protection that could be added would be to prohibit the owning spouse from acting as the non-owning spouse's attorney in respect to a consent to a disposition of the homestead. This is provided in the Manitoba Act, and is logical, as the legislation aims to provide protection to the non-owning spouse against the disposition of the property by the owning spouse. However, this type of restriction would potentially restrict the effect of any provision allowing an attorney to consent to a disposition of the homestead, as spouses are frequently appointed as each other's attorneys. Further, if the attorney for the non-owning spouse is one of his or her children, it is possible that the owning spouse will have some degree of influence over the attorney's decision.

3.3.2. Appointment of the attorney

A further protection could 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 Regulations* 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*.[38]

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

[38] Man Reg 121/93 Form 9.

to.[39] This power of attorney cannot be signed when the owning spouse is present. A requirement like this in Saskatchewan where the attorney has the ability to consent to release homestead rights could help to ensure that the non-owning spouse is freely consenting, but could also limit the usefulness of the section.

3.3.3. Attorney consent

An additional consideration is 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.[40] 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."[41]

In Manitoba, the attorney does not have to be examined in the same manner as a non-owning spouse,[42] but instead has to have the execution of the consent witnessed and have the witness's signature verified by an affidavit of execution.[43]

If there are to be specific requirements in Saskatchewan authorizing an attorney to sign a consent, an issue to consider would be whether to dispense with an examination of the attorney. Regardless of the specific process used, the knowledge of the individual appointed as the attorney needs to be considered. Many attorneys will likely be a child or trusted friend of the non-owning spouse. In this case, the person may not have a particular knowledge of what homestead rights are and what is being waived. If the attorney has a close relationship with the non-owning spouse, he or she could also have a close relationship with the owning spouse. In that case, having an explanation of homestead rights apart from the owning spouse may prove useful to bring about the best decision for the non-owning spouse.

A provision that requires examination of the attorney could be useful. For efficiency in the process, certain classes of individuals who provide professional power of attorney services who have specific knowledge of what is being consented to could be exempted from such examination. An examination at

[39] *Homesteads* CCSM, *supra* note 7 at s 23(3).
[40] *Ibid* at s 7(1)(2).
[41] *Ibid* at s 7(3).
[42] *Ibid* at ss 9(4) & 11(3).
[43] *Ibid* at s 23(5).

this stage could allow for powers of attorney already in place and powers of attorney prepared outside of Saskatchewan to be used as long as the owning spouse was not the attorney.

Consultation 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. MINES AND MINERALS

The second area covered in this consultation paper is the status of mines and minerals under the *Homesteads Act*. 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.

There have not been any cases dealing with the issue of whether mines and minerals are included in the current definition of homestead under the *Homesteads Act*. There are, however, several cases decided under previous homestead legislation which included mines and minerals as part of the homestead.

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?

Prior to the definition of homestead being included in the *Homesteads Act*, the definition of homestead was made by reference to *The Exemptions Act,*[44] 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;

[44] RSS 1940 c 80.

> 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.[45]

This definition is narrower than the current definition of homestead in the *Homesteads Act*. In particular these provisions do not contain the term "land appurtenant."

In 1953, the Supreme Court of Canada determined in *McColl Frontenac Oil Co. v Hamilton* [*McColl*][46] that an oil and gas mining lease under the *Dower Act* in Alberta was a disposition of the homestead. The majority found that the lease was essentially a contract for the sale of property focusing on a demise of the surface allowed under the leases as well as a mineral lease (*profit à prendre*).[47] In 1955, the Saskatchewan Court of Appeal heard *Friess & v Imperial Oil Ltd.* [*Friess*].[48] In this case 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.[49] The Saskatchewan Court of Appeal treated mines and minerals as part of the homestead, without engaging in any discussion on the subject. Following *Friess* there were three more Saskatchewan cases treating mines and minerals as part of the homestead: *Bonkowski v Rose*[50], *Farmers Mutual Petroleums Ltd. v Jackson*[51] and *Forseth v Prudential Trust Co.*[52]

As mentioned above, the definition of homestead under previous homestead legislation was narrower than the current definition of homestead in the *Homesteads Act*. However, while this point may lead to a debate as to whether these cases continue to have precedential value in Saskatchewan, the fact that such a debate is possible, given the *Homesteads Act*'s silence on the issue of mines and minerals, suggests that clarification of the *Homesteads Act* may be desirable.

The relevant definition of a homestead for the purposes of this discussion is found in subclauses 2(c)(i) and (iii):

---

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

[46] [1953] 1 SCR 127 [*McColl*].

[47] *Ibid* at (WL) para 24. In 1957, the Supreme Court clarified the *McColl* decision in *Berkheiser v Berkheiser*, [1957] SCR 387 holding that a petroleum and natural gas lease is a *profit à prendre* and not a sale of property.

[48] [1954] 4 DLR 100 (Sask CA).

[49] *Ibid* at para 5.

[50] [1955] 5 DLR 229 (Sask CA).

[51] (1956) 5 DLR (2d) 246 (Sask CA).

[52] [1960] SCR 210.

> 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[53]

While the *Homesteads Act* does not define "land," land is defined in *The Land Titles Act, 2000*[54] 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.[55] Mines and minerals were also included in the definition of land under *The Land Titles Act*, RSS 1978, c L-5,[56] in force when the *Homesteads Act* was enacted. These definitions of land suggest 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)[57] 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:

---

[53] Emphasis added.

[54] RSS c L-5.1.

[55] *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."

[56] 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.

[57] 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

> 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 [58]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 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*,[59] 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 then 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 change 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*

(F) a transfer;

(ii) a mortgage or other encumbrance intended to charge land with the payment of a sum of money;

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

[59] 4th ed., (Toronto: University of Toronto Press, 2008).

"homestead" cannot exist on a mineral title that does not include the surface; hence the Acts have no application], minerals are not 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 very 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.

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 need to 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.[60]

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 unimportant 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

[60] *Scott, supra* note 31 (WL) at para 15.

voluntarily given."[61] The purpose of the *Homesteads Act* has also been discussed various times in the legislature. In 1989, during the second reading of the *Homesteads Act*, Mr. Andrews stated:

> *The Homesteads Act* has a great historical significance in the protection of women's rights in our province since 1915. This legislation has prevented a husband from selling or mortgaging the family home or the family quarter section without the wife's knowledge and consent. While the position of women in society has improved dramatically since 1915, the protections of this Act are still important. This Bill that is before the House today makes one major and necessary improvement to the Act, Mr. Speaker. It extends the homestead protection to husbands. Under the proposed Bill, if the family home is owned by one spouse, the consent of the other spouse will be required before **the home can be sold, mortgaged, or otherwise dealt with**.[62]

During the second reading of *The Saskatchewan Farm Land Security Act* in 1993, Mr. Gooshen discussed the *Homesteads Act*, stating:

> Fundamentally *The Homesteads Act* was in place to protect farm wives, to make sure that no matter what happened through the droughts of the Dirty Thirties, the Depression of the Dirty Thirties, the causes of war, and the effects of the 1980s – all through those periods of stress and trouble that could happen, a farm wife was guaranteed that she and her children were protected, **to have their home with a roof over their heads on the home quarter of land**. That was a fundamental right that was written into the law…It is a fundamental right that is necessary unless you provide some other guarantee to farm wives and their children that they will not be forced out of their home and left destitute. It is the kind of thing that farm wives are entitled to; they deserve to have this protection.[63]

Finally, Bruce Ziff describes the purpose of the law of dower as follows:

> This law of dower continues to perform an important function: the right of a spouse to remain in the home serves as a fall-back support mechanism for a widowed spouse. Allowing the house to be preserved for the life of the survivor recognizes the special place of the home in the lives of many families. Today, dower has another use: by controlling dispositions of the home, the law also preserves spousal **rights of occupancy** *before* death…Hence, far from being obsolete, the law of dower retains vibrancy. This is

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

[62] Saskatchewan, Legislative Assembly, 21st Legis, 3rd Sess, No 65 (26 June 1989) at 1500 [emphasis added].

[63] Saskatchewan, Legislative Assembly, 22nd Legis, 3rd Sess, No 53 (12 May 1993) at 1645-6 [emphasis added].

> why both Saskatchewan and Manitoba have recently reformed – not abolished their homestead provisions.[64]

It is clear from the foregoing that the original purpose of homestead legislation on the prairies was to protect the family home as a residence for the non-owning spouse.

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 business taking place there.

The Manitoba Law Reform Commission considered this question in its 1984 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 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**.[65]

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*, S.S. 1997 c. F-63. Mineral rights can be considered family property[66] under this legislation,[67] and thus, affording mineral rights

---

[64] "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 [emphasis added].

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

[66] "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

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 is not considering whether the *Homesteads Act*, as a whole, 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.[68] This may suggest that it would be desirable to ensure the *Homesteads Act*'s application 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)[69] they recommended that mines and minerals not be part of the homestead:

---

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.

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

[68] 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."

[69] 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 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 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.[70]

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

Consultation question:

4. Should the* Homesteads Act *be amended to specifically include or exclude mines and minerals?

---

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.

[70] Alberta Law Reform Institute, *supra* note 2 at 165.

5. SUMMARY OF CONSULTATION QUESTIONS AND REQUEST FOR COMMENT

Power of attorney and consent

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?*

Mines and minerals

4. *Should the* Homesteads Act *be amended to specifically include or exclude mines and minerals?*

Written responses can be emailed to the Commission at director@lawreformcommission.sk.ca. Alternatively, online responses can be provided via a survey located on the Commission's website: http://lawreformcommission.sk.ca/consultations/.