THE LAW REFORM COMMISSION OF SASKATCHEWAN

PROPOSALS FOR A NEW

PARTITION AND SALE ACT

JUNE 2001

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Ms. Merrllee Rasmussen, Q.C., Chair
Mr. Kenneth P. R. Hodges, Q.C.,
Judge Diane I. Morris
Prof. Michaela Keen
Mr. Alan Mcintyre

Mr. Michael Finley is Director of Research.

The Commission offices are located at:
15 Campus Drive
Law Building
Saskatoon, Saskatchewan, Canada
S7N 5A6
Telephone (306) 966-4002
Fax (306) 966-5900

PROPOSALS FOR A NEW PARTITION AND SALE ACT

TABLE OF CONTENTS

INTRODUCTION

Co-ownership of land is commonplace in Saskatchewan. Spouses more often than not register title to the family home in *joint tenancy,* one of the two principal forms of co-ownership recognized in law. This arrangement is attractive because joint tenancy is subject to the rule of survivorship: On the death of a spouse, the other takes title to the deceased's share by operation of law. Because property held in joint tenancy does not pass through a will, probate fees are not required to be paid on the value of the property [1] .

The other common form of co-ownership is *tenancy in common.* Co-owners who hold title as tenants in common are not subject to the survivorship rule: A co-owner's share can be left by will, and if there is no will, it passes to heirs under *The Intestate Succession Act*[2]. Tenancy in common is not as popular in Saskatchewan as joint tenancy, but gifts of land by will to two or more persons in common will usually create a tenancy in common[3]. Business partners may also choose to register

---

[1] See Anger and Honsburger, *The Canadian Law of Real Property,* 1959, 194 for a discussion of the forms of co-ownership recognized in Canadian law. Joint tenancy and other forms of co-ownership were created and defined by the common law. They are distinct from arrangements in which two or more people have equitable rather than legal interests in the same parcel of land, such as beneficiaries of a trust. Because co-owners hold legal interests, registration of their interests is appropriate in the land titles system, and is provided for in *The Land Titles Act* R.S.S. 1978 c. L-5.

[2]R.S.S. 1978, c. I-13.

[3]The common law prefers common to joint tenancy: A grant of land to two or more persons will be presumed to create a tenancy in common rather than a joint tenancy. Wills that leave property to beneficiaries in co-ownership usually do not specify the nature of the interests created, so the grant takes affect as tenancy in common. This is usually more satisfactory than joint tenancy unless the testator wishes the survivorship rule to apply. This rule was established by the common law (see *Sellon v Huston Estate* (1991) 107 NSR 6 and *Central Trust v McCann Estate* (1987) 59 Ontario Reports 488). It has been codified in some provinces, but not in Saskatchewan. Because the common law prefers tenancy in common, it permits *severance* of a joint tenancy, which converts the title of the co-owners to tenancy in common (*Williams v. Hensman* 1883, 8 App. Cas. 314). Severance must be distinguished from partition. Only the latter ends co-ownership and divides the property between the former co-owners.

property as tenants in common, since survivorship would usually not be appropriate in this case, and this form of ownership may be preferred in a second marriage with two sets of children[4].

Co-ownership, whether in joint tenancy or tenancy in common, is subject to the doctrine of "unity of possession": All co-owners have equal rights to use and enjoyment of the property, and any dealing with the land requires the consent of all, and will bind all. If, for example, a mortgage is placed on the land, all the co-owners must be party to it.[5] Unity of possession is perhaps the primary attraction of co-ownership, but it is also its principal detraction. Co-ownership can become a source of disagreement and conflict if the parties can no longer share possession, or if the land is required for business purposes on which the co-owners cannot agree.

At common law co-owners can partition the property, subdividing it into separate parcels, by private agreement[6]. However, the co-owners may not be able to agree to partition, in which case an application to court for a partition order will be necessary. The court may divide the land between the co-owners, or order sale and distribution of proceeds.

The general law governing partition in Saskatchewan is contained in English statutes received as part of the law of the province[7]. Because actions for partition or sale are not uncommon, it is surprising

---

[4] Two other species of co-ownership were recognized at common law. A *tenancy by entireties* was created when land was conveyed to a husband and wife. A special form of co-ownership was required in this case because, prior to the *Married Women's Property Act,* a married woman could not hold property in her own name. Under *The Land Titles Act,* s.246, such a tenancy can now only be created by express words. It is extinct for all practical purposes in Saskatchewan. *Co-parcenary* was created when land descended to two or more daughters. Since land no longer descends to heirs, but passes instead according to the laws of succession (see *The Devolution of Real Property Act* R.S.S. 1978, c. D-27), co-parcenary no longer exists in Saskatchewan.

[5]There are certain other distinctions between tenancy in common and joint tenancy. Joint tenancy is subject to the "four unities"--- Unity of interest: Each joint tenant holds an equal interest in the land; Unity of title: The interests must arise from the same document; Unity of possession: Each joint tenant must have an equal right to occupy or possess the entire property; Unity of time: The interests of the joint tenants must arise or "vest" at the same time. These distinctions are particularly important in the present context.

[6]See Megarry and Wade, *The Law of Real Property* (3rd), 1966, 438

[7]English statute law as of July 15, 1870 was received in Saskatchewan in so far as it is applicable in the province and not superceded by local enactments. See the Commission's Report, *The Status of English Statute Law in Saskatchewan, 1990.*

that the statutory right to seek these remedies is contained in received English legislation rather than in the Saskatchewan statute books. The statutory right to apply for partition is ancient, created by statutes adopted in the reign of Henry VIII. The right to seek an order for sale instead of a physical partition is more recent, dating from the *Partition Act, 1868*[8]. These English statutes remain essential parts of the law of Saskatchewan. They have repeatedly been held to be in force by our courts, and are in fact among the received statutes most often applied in the province[9].

There are only two Saskatchewan statutes that affect the received partition legislation. Under *The Matrimonial Property Act,* the court has authority to order partition or sale of land co-owned by spouses as part of a matrimonial property order[10]. This provision does little more than allow judges to exercise the authority possessed by the court in partition actions in matrimonial property proceedings. as well.

The Farming Communities Land Act permits the court to order "subdivision" of co-owned farm land[11]. This is a somewhat curious piece of legislation. The reasons why it was originally enacted are now obscure. There are no reported decisions under the *Act*. Although it has apparently been used on rare occasions to effect what amounts to a partition, its scope and purpose is uncertain.

---

[8]For reasons now lost in time, only co-parceners had a right to apply for partition at common law. Other types of co-owners were given the right by the *Statute of Partition, 1539* (31 Hen. 8, c. 1). This act applied only to co-owners holding land in fee simple. The *Statute of Partition, 1540* (32 Hen. 8, c. 32) extended the right to co-owners holding land for life or a term of years. Subsequent judicial decisions held that the legislation is broad enough to apply to any co-tenancy (see *Murray V. Murray* (1879), L.R. 10, Eq. 346). The *Partition Act*, 1868, 31 & 32 Vict. c. 40 did not replace the earlier legislation. The right to partition is still grounded in the statutes of 1539 and 1540. Even when sale under the 1868 *Act,* rather than physical partition, is requested, it can only be granted because the older legislation created a right to partition. In England, The 1868 statute was replaced by the *Partition Act, 1876* (39 & 40 Vict., c. 17), which at least partly consolidated the 1539, 1540, and 1868 enactments. It was a model for legislation in some provinces, but was adopted too late to have been received in Saskatchewan.

[9] In what appears to be the earliest case on point, *Blacklaw* v *Beveridge* [1915] 3 W.W.R. 511, reception of the *Partition Act, 1868* was assumed by the Court of Appeal. The 1868 statute was expressly held to have been received by the Court of Queens Bench in *Grunert v Grunert* (1960), 32 W.W.R. 509. Since the 1868 Act assumes the existence of the 1539 and 1540 legislation, they must also be in force. Reception of these statutes was confirmed by the Court of Queen's Bench in *Bay V. Bay* (1984), 38 SR. 101.

[10] S.S. 1979, c. M-6.1, s.26.

[11]R.S.S. 1978, c. F-10.

The Farming Communities Land Act applies only to co-owned land which is being farmed by at least one of the co-owners. It allows application by a co-owner, other person with an interest in the land, or the municipality in which the land is situated, to apply for "subdivision"[12]. Since the court may direct the land titles office to issue separate titles to the former co-owners[13], it would appear that "subdivision" is equivalent to partition. Note that the *Act* differs from the received law in two respects other than its limited application to farmland. First, it allows an application for "subdivision" to be brought by a municipality or "other person with an interest in the land". Second, the *Act* applies to land co-owned in equity by trust beneficiaries are well as land held by tenants in common and joint tenants.[14]

The received partition statutes remain a vital part of our law, despite their archaic origins. The Commission has found no evidence that recourse to the received law has created real difficulty in Saskatchewan. Some problems, which will be discussed below, have been identified by the Commission, but none are serious. Nevertheless, the absence of provincial partition legislation is anomalous and inconvenient.

English partition legislation has been replaced by provincial statutes in all provinces except Saskatchewan, and has been superceded in the United Kingdom itself. In *The Status of English Statute Law in Saskatchewan,* the Commission identified the received partition acts among the handful of English statutes that should be replaced by Saskatchewan legislation as part of a general disposal of received statutes[15].

Some Provinces that have adopted partition legislation have done little more than re-enact the English precedents.[16] In others, the law has been modernized. Most notably, in 1980, Alberta replaced the

---

[12]S. 2

[13]S. 5(d)

[14]S. 2

[15]The *Status of English Statute Law in Saskatchewan,* 1990, p. 74, 311.

[16]See e.g *Partition of Property Act,* R.S.B.C. 1979, c. 311; *Law of Property Act,* R.S.M. 1970, c. L-90, s.18-26; *Partition Act,* R.S.O. 1970, c. 369. In England, partition is now governed by *Law of Property Act, 1925.* It should be noted that since the reception date in Ontario is 1791, the 1868 *Act* was not received in that province. The Ontario *Act* is based on the English *Partition Acts* of 1868 and 1876.

received law with legislation[17] that followed recommendations of the Alberta Law Reform Institute.[18] The British Columbia Law Reform Commission has recommended similar legislation[19]. We have reached the conclusion that Saskatchewan should adopt a *Partition Act* based on the principles contained in the Alberta and British Columbia proposals.

---

[17] *Law of Property Act* R.S.A. 1980, c. L-8, Part 3

[18] Alberta Institute of Law Research and Reform, *Partition and Sale,* 1977.

[19] Law Reform Commission of British Columbia, *Working Paper on Co-ownership of Land* 1987.

THE PARTITION ACT: A CRITICAL REVIEW

1. Partition or Sale

(a) The present law

As the Alberta Law Reform Institute has observed:

> Co-owners often buy or inherit property without making an agreement as to what will happen if they disagree over its use or disposition. It is in their interest that the law provide a means by which one or more of them can bring the relationship to an end. It is also in the public interest that the law provide a means by which the disuse of land, due to disagreement by the owners, can be brought to an end.

The action for partition was no doubt created for this purpose in 1539[20].

But partition itself was not always a satisfactory remedy. In some cases, it is not practical to physically divide real property. The classic example, quoted in almost every text on real property law, is a case in which the court divided a house into thirds, awarding one party all the chimneys, fireplaces and stairs[21]. This case is more than a curiosity. Houses on urban lots can rarely be partitioned in a reasonable fashion, a very real problem by the time partition legislation was reformed in the nineteenth century. In other cases, the cost of physical partition may be prohibitive, Even if physically possible, partition may contravene subdivision or zoning legislation. In retrospect it is surprising that the remedy of sale in lieu of partition was not introduced until 1868. As a practical matter, it is just those cases in which partition is impractical in which co-tenants are most apt to be unable to resolve their differences, making an application to the court for assistance necessary. Sale is now much more often sought and granted than partition.

Despite its obvious benefits, the idea of a court-ordered sale was novel enough in 1868 to be

---

[20]As a matter of history, it seems that the reformers of Henry VIII's administration regarded the common law rule that co-ownership could be dissolved only if all the co-owners agreed as a fetter on the free alienation of land, and thus a vestige of feudal land law. See A. W. Simpson, *An Introduction to the History of English Land Law,* 1961.

[21]Turner v Morgan (1803) 8 Ves. 143.

approached with caution by legislators. The *Partition Act, 1868* assumes that partition is the normal remedy, and merely gives the court jurisdiction to order sale if partition does not seem to be a satisfactory remedy. Section 3 of the *Act* provides that:

> In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, if it appears to the Court that, by reason of the nature of the Property to which the Suit relates, of the Number of Parties interested or presumptively interested therein, or of the Absence or Disability of some of those Parties, or of any other Circumstance, a Sale of the Property and Distribution of the Proceeds would be more beneficial for the Parties interested than a Division of the Property between or among them, the Court may, if it thinks fit, on the Request of any of the Parties interested, and notwithstanding the Dissent or Disability of any others of them, direct a Sale of the Property accordingly, and may give all necessary or proper consequential Directions.

By 1868, it was established law in England under the 1539 and 1540 statutes that partition is a matter of right, at least when sought by a co-tenant in possession. If one co-owner requests it, the court is compelled to grant the remedy[22]. But legislators were reluctant to make the alternative of sale a matter of right. Under section 3 of the *Partition Act, 1968,* sale is a discretionary remedy.

The broad discretion in section 3 appears to be limited, but not abrogated in section 4, which provides that if the owners of a half (or greater) interest request sale, the court must grant it "unless it sees good reason to the contrary". Since co-ownership most often involves two tenants with equal shares, section 4 will usually govern. Perhaps for this reason, and because the language of section 3 is somewhat imprecise, the English courts were less cautious in granting sale than the drafters of the 1868 *Act* likely intended. Canadian courts have been very reluctant to refuse sale when it is requested. In *Davis v. Davis,* for example, an Ontario court held that a co-owner has a *prima facie* right to a sale, and that the other co-owners have a "corresponding obligation" to permit sale[23]. In *Busst v. Busst,* the British Columbia Supreme Court held that sale should be refused only if it would

---

[22] See *Baring V. Nash* (1813)1 V. & B. 551 and other cases cited in Megarry and Wade, *The Law of Real Property,* (4th ed.), 1975. In *Bisson v. Luciani* it was held that a joint tenant or tenant in common has a prima facie right to a partition unless a"sufficient reason" could be found not to partition. *Garnet v. McGoran* demonstrates how narrowly the exception to the *prima facie* right has been construed. In that case, a mortgagee was denied partition because he did not have an immediate right to possession. The court could find no other reason for denying partition, even when one co-tenant opposed it.

[23][1954], 1 D.L.R. 827, cited with approval in *Petryshyn v. Petryshyn* (1976), 29 R.FL.37 (Sask. Q.B.).

be vexatious, malicious, or amount to economic oppression.[24]

None of the authorities cited above made much distinction between sections 3 and 4 of the *Partition Act.* However, the difference between the sections has been noted by the Saskatchewan courts. In *Grunert v Grunert,* the Saskatchewan Court of Queens Bench held that the applicant had "a right to insist upon sale" of one parcel in question, in which she had a half interest. She did not own a full half interest in another parcel, and therefore could not "compel the sale" of that parcel. The court was nevertheless prepared exercise its discretion to grant sale of the second parcel under section 3.[25]

The distinction between sections 3 and 4 was also recognized as important in a more recent Queen's Bench decision, *Bay v. Bay*. The court was, however, critical of the interpretation of these sections adopted in *Grunert v. Grunert*. Mr. Justice Wright was of the opinion that

> [Section 4] does not, with greatest respect, support the conclusion expressed [in *Grunert*]. The court may refuse a sale where the applicant is possessed of one moiety or more in special circumstances. I would not, however, go so far as the appellate division of the Alberta Supreme Court did in *Clarke v. Clarke* and say that the court has a discretion to order sale where such an interest exists[26].

No Saskatchewan decision has considered the scope of the court's discretion to grant or refuse sale under section 3. In *Grunert v. Grunert*, the court applied the section without comment. In *Bay v Bay,* Mr Justice Wright merely noted that the court possesses a discretion under section 3 that it does not possess under section 4.

The nature of the court's discretion in actions for partition and sale has perhaps been confused by differences between the 1868 and 1876 Acts. The *Partition Act,1876* appears to contemplate a discretion in regard to partition as well as sale. Since the Ontario *Partition Act* is based in part on the 1876 English legislation, it is not surprising that Ontario courts have recognized a broader discretion

---

[24](1975) 25 R.F.L. 260. The British Columbia Law Reform Commission referred to this as a "structured approach" to exercise of the discretion. However, a broader discretion appears to have been preferred in a more recent British Columbia decision, *Harmeling V. Harmeling,* (1978) 5 W.W.R. 688, in which the court reserved the right to refuse sale "if justice requires that such an order should not be made."

[25](1960), 32 W.W.R. 509.

[26](1984), 38 S.R. 101.

to refuse partition than courts in western Canada[27]. It is more surprising to discover that the British Columbia courts appear to assert a similar discretion[28]. In both Alberta[29] and Manitoba[30], on the other hand, the courts have clearly held that there is no discretion to refuse partition. The Saskatchewan courts have recorded some uncertainty on the point, but appear to have regarded the proposition that partition is a matter of right as better supported by the authorities.[31]

The policy encapsulated in the 1868 *Act* is more a matter of history than logic. It could as easily be argued that sale should be a matter of right and partition discretionary, or that both should be subject to at least a limited discretion. It is worth noting in this context that partition is much more apt to create inconvenience, and even hardship, than sale if a reasonable price can be obtained for the property. Both because its interpretation in the courts has been uncertain and as a matter of policy, the 1868 *Act* requires reconsideration.

(b) Should termination of a co-tenancy be a matter of right?

Under the common law and the *Partition Act, 1868*, termination of co-ownership is a matter of right, granted upon application by any co-tenant. As noted above, the courts in British Columbia, but not in other western provinces, have nevertheless asserted a limited discretion to refuse both partition and sale. The British Columbia Law Reform Commission has recommended that the courts should retain this residual discretion. It would permit the court to order either partition or sale, but to refuse both if "justice otherwise requires."[32]

The B.C. Commission appears to adopted this approach only because it is established law in the

---

[27]See *Davis v. Davis,* above

[28]See *Harmeling V. Harmeling,* above

[29]*Wikstrand v. Cavenaugh* [1936] 2 W W R 69.

[30]*Szmando v. Szmando* [T940] 1 D.L.R. 222.

[31] In *Grunert*, the court took note of Alberta decisions holding that partition is a matter of right, but concluded that since the applicant had asked for sale, "it is unnecessary to decide whether. . . The plaintiff might have insisted on partition."

[32]*Draft Property Law Amendment Act, s.45(3)* (B.C. L. R.C., 56.).

province. In our opinion, when co-owners can no longer agree about the use and disposition of property, both public and private interests are best served by bringing co-ownership to an end. As the Alberta Institute has argued:

> The interests of co-owners as a class, in being able to bring unsatisfactory relationships to an end appear to us to outweigh the interest of the co-owner who, in a particular case, may have reason for wanting the relationship to continue.[33]

The Alberta Institute proposed that, upon application for termination by a co-tenant, the court must order either partition or sale. We agree with this policy.

(c) Choice of the method of termination

While a co-tenant should have the right to insist on termination of co-ownership, choice of the method of ending the co-tenancy is a different matter. Under the *Partition Act, 1868,* partition is a matter of right, but sale is discretionary in at least some cases. As has been shown above, the scope of the discretion in regard to sale is uncertain in Saskatchewan. There are undoubtably cases in which partition would work a hardship on one of the co-owners, and others in which sale would be unfair. Some discretion as to the choice of remedy is justified, but it should extend to both partition and sale.

The Alberta Institute, while proposing that termination should be a matter of, would give the court a broad discretion to chose the method of termination:

> Upon application for termination of the co-ownership by one or more co-owners. *the court shall make* [italics added] one or more of the following orders:
> (a) A partition order making a physical division of all or part of the land between the co-owners; (b)An order for sale of all or part of the land . ..; or
> (d) An order for sale of all or part of the land and the distribution of proceeds of the sale, and
> (e) The sale of all or part of the interest of one or more co-owners to one or more of the other co-owners who are willing to purchase the interest . . . .[34]

---

[33]ALRI, *Report,* 7

[34]*Draft Partition and Sale Act,* s. 2(1), ALRI, *Report,* 45. .

While the British Columbia Law Reform Commission proposed retaining a discretion to refuse termination. But if, under the B.C. Commission's proposal, termination is appropriate, the court may select the remedy in much the same way as under the Alberta Institute's proposal:

> Upon hearing an application . . . the court, *unless justice otherwise requires* [italics added], shall make an order directing
>
> > (a) a physical division of all or part of the land between the co-owners,
> >
> > (b) the sale of all or part of the land and the distribution of proceeds of the sale, or
> >
> > (c) the sale of all or part of the interest of one or more co-owners to one or more of the other co-owners who are willing to purchase the interest[35].

We are of the opinion that the court should be given a discretion to oder either partition or sale when a co-tenancy is terminated.

(d) Improving the remedies

Both the remedies of sale and partition can be improved to make them acceptable in a wider range of cases. Under the regime inherited from England, partition could work an injustice if there is no practical way to divide the property equally between co-owners. The English statutes make no provision for compensation when equal division is impractical. Both the British Columbia Commission and the Alberta Institute would permit unequal division, provided that a co-owner receiving the larger share is ordered to compensate the others. The British Columbia draft legislation provides that

> In making an order [for partition or sale] the court may, where a physical division of land does not correspond to the co-owner's actual entitlement, direct that compensation be paid in adjustment.[36]

A similar provision should be adopted in Saskatchewan.

---

[35]*Draft Property Law Amendment Act, s.45(3)* (B.C. L. R.C., 56.).

[36]Draft *Property Law Amendment Act,* s.46. (B.C.L.R.C., 56). The Alberta recommendation is similar in effect (A.L.R.I., 46)

Sale will work a hardship if the market for land is temporarily depressed so that an immediate sale would not generate a fair return for the co-owner who is unwilling to sell. As the Alberta Institute noted, a forced sale in these circumstances could give rise to abuse:

> In these circumstances one co-owner may bring proceedings for partition and sale with the intention of buying the other's share cheaply at the sale under judicial process; he is most likely to do so if he is in good financial condition. . . and if he knows that the respondent does not have adequate financial resources.[37]

There may be cases in which partition is impossible, either because the property cannot be physically divided in a reasonable fashion, or because subdivision approval cannot be obtained from municipal authorities. In these cases, sale will be the only available remedy. It is important, therefore, to provide some mechanism to protect all the co-owners from unnecessary loss. The best way to provide protection is to delay the sale rather than deny the remedy. The Alberta Institute recommended that

> If the price offered at a sale pursuant to order. . . is less than the fair market value of the land and the court considers further efforts to effect such a sale unwarranted the court may
>
> (a) Refuse to approve the sale, and
>
> (b) Stay the proceedings from time to time[38].

We agree that such a provision would be useful in partition legislation.

2. Sale to a co-owner

Section 5 of the *Partition Act, 1868* provides that where a "Party interested in the Suit" undertakes to buy the interests of the others, the court may order a valuation of shares and order a sale to the party who has undertaken to buy out the others. Although this section seems reasonably clear on its face, it has given rise to controversy. In *Drinkwater v. Ratchiffe,* it was held that section 5 applies only when sections 3 and 4 do not. On this analysis, it is available only if the court has found no reason to use its discretion to order a sale. A partition would then follow but for section 5. The

---

[37]A.L.R.I., *Report,* 7.

[38]*Draft Partition and Sale Act,* s. 2(3), ALRI, *Report,* 44

section thus provides a means by which a party can avoid partition by offering to buy the property.[39] Later authorities in England cast some doubt on this interpretation,[40] and it seems to have been ignored by some Canadian courts.[41]

Whatever the correct interpretation of section 5 may be, we believe that it is good policy to permit one co-owner to buy out the interest of others rather than allow sale to a stranger. Both the Alberta and British Columbia Commissions recommend expressly extending the court's discretion to include this alternative as well as partition and judicial sale.[42] In our opinion, this is sound policy, particularly since our courts already appear willing to order sale to a co-owner.

3. Parties to applications for termination

(a) Who may apply for partition or sale

The *Statutes of Partition* of 1539 and 1540 determine who may bring a partition action. Co-owners of estates in fee simple were given the right of action in 1539. The 1540 legislation extended the right to co-owners with life or leasehold interests. As interpreted by the courts, the right extends to co-owners of any recognized interest in land, including a minor interest such as a *profit a prendre*[43], so long as it gives the owner a right of possession. [44] Even co-owners of a lease may apply for partition of the lease.

The limitation to co-owners of estates in possession is significant. Thus joint trustees, mortgagees not in possession, and persons with future interests in land cannot bring a partition action. Note also that only co-owners may apply for partition. For example, the owner of the legal title to land held by

---

[39](1875), 20Eq. 528.

[40]See the *obiter* comments *in Pitt V. Jones* (1880), 5 App. Cas. 651 (H.L.).

[41]As the Alberta Institute noted, in cases between spouses, the courts in Canada have frequently required one co-owner to sell to the other.

[42]A.L.R.I., *Report,* 6.

[43]Megarry and Wade (above). One statutory exception should be noted. Under *The Partnership Act,* land owned by the partnership is treated "as between the partners" as personal property. It is not, therefore subject to partition and sale proceedings.

[44]See *Evans* V. *Bagshaw* (1870) 5 L.R. Ch. App. 340; This rule was noted by a Saskatchewan court in *Petryshyn V Petryshyn* (1976), 29 RFL, 379 (QB)

others with equitable life interests cannot terminate the co-ownership of the tenants for life, nor can a person holding an encumbrance on the land force partition. The *Partition Act, 1868* created the alternative of sale only in cases where partition might have been granted "if this Act had not been passed". Thus the parties who may apply for sale are those who could apply for partition under the acts of 1539 and 1540.

In our opinion, the policy of the received law, as interpreted by the courts, is satisfactory. No other law reform agency has recommended altering the basic rule that only parties with a legal interest in possession should be treated as a co-owner for purposes of partition legislation. A future interest is, in our opinion, too remote to allow it to become the basis for an order for partition or sale. Disputes involving trusts are better left to trust law. On the other hand, minor interests that nevertheless give a party right to enter and possess the entire parcel of land are analogous to more conventional co-tenancies. These interests may be small, but so may the interest of a tenant in common with a small share in the land.

(b) The Farming Communities Land Act

Saskatchewan courts generally appear to have followed the received law in determining whether an applicant has standing to seek partition or sale. However, the Saskatchewan *Farming Communities Land Act* may allow a species of partition of farm land on the motion of a broader class of applicants. The *Act* contemplates applications for "subdivision" by, *inter alia*, "joint" beneficiaries under a trust, "any other person claiming an interest", and "the municipality in which the land is situated".

Note that the legislation appears to abandon the rule that only co-owners with an interest in possession can apply for "Subdivision". This may permit persons with encumbrances on the land that give no right to possession to force subdivision of the land, even if the land owners are not in arrears in payments to the encumbrancer. In our opinion, permitting the encumbrancer to apply would not be justified in any case, and certainly cannot be justified as a unique liability of co-tenants of farm land.

Division of beneficial interests under a trust amounts to variation of the trust. Equity has long been reluctant to interfere with the plans made by a settlor of a trust. Saskatchewan now has variation of trusts legislation that give the courts a tightly controlled discretion to modify trusts if it is in the interests of the beneficiaries to do so[45]. If a trust must be varied, it should be varied under this legislation rather than by application of the open-ended and vague discretion apparently conferred by *The Farming Communities Land Act.*

---

[45] *The Variation of Trusts Act,* R.S.S. 1978, c. V-1.

The policy reasons for allowing a municipality to force division of land held in co-tenancy are now obscure. The provision may have been intended to facilitate tax sales, but its utility for that purpose not clear. In any event, the legislation does not require the municipality to give a reason for making application.

Whatever virtues *The Farming Communities Land Act* might possess, it is difficult to justify a special regime for division of farm land owned in co-tenancy. Perhaps fortunately, it is almost a dead letter for lack of use in any event. In our opinion, it should be repealed.

(c) Protections for third parties

A more difficult problem in our view is protection of the those who have some interest in co-owned land, but who are not themselves co-owners. It might be argued that partition and sale of co-interests in leases or profits a prendre are inappropriate because the interests of the owner of the dominant estate might be adversely affected. However, nothing prevents a sole owner of a life interest or profit a prendre from selling, and lessees usually have a right to sublease. A change in ownership due to a partition or sale is not much different in effect. Similarly, it might be argued that the interests of a mortgagee or encumbrancer would be adversely affected by a partition or sale. Under the received law, the existence of a mortgage or encumbrance is not a reason in itself for refusing partition or sale. In general, then, the law has not allowed parties with interests in the land other than the co-owners to impede partition and sale. However, some protection for "parties interested in the land" was included in the Parition Act, 1868. Most commentators agree that protection for third parties is necessary.. The real issue is the nature and scope of the protection.

Although persons other than the co-owners who are interested in the property in question cannot apply for partition or sale under the present law, they may be necessary or appropriate parties to the action. According to Halsbury, the holder of the legal title to property subject to a partition action is a necessary party.[46] Others with interests in the property, such as encumbrancers, are not necessary parties, but may be added.[47] These requirements provide some protection, allowing interested parties to be heard in court. The protection is limited, however. The court might refuse sale in exercise of its discretion under the 1868 Act, but cannot usually refuse partition. In England, there has been some question as to whether partition could be granted when only one co-tenant's interest had been mortgaged.[48] The issue is moot in Saskatchewan, however. Under the land titles system, a mortgagee has an equitable rather than legal interest in the property, and is thus not a necessary party to a

---

[46] *Halsbury's Laws of England* (1st), vol. XXI, 811.

[47] See *Sinclair v. James* [1894] 3 Ch. 554.

[48] *Halsbury's Laws of England* (1st), vol. XXI, 814.

partition action.

The Alberta Law Institute argued that significant protection should be provided to parties with interests in the land when a partition or sale is ordered.[49] The recommended protections include: (1) A power in the court to impose terms and conditions on orders for partition or sale to "ensure that the obligations under a lease or profit a prendre are performed"; (2) retirement of mortgages and encumbrances out of proceeds of sale; (3) rules governing the way encumbrances and mortgages attach to partitioned interests; and (4) service of mortgagees and encumbrancers in partition and sale actions.[50] The British Columbia Commission did not deem such special protections necessary, but did recommend that mortgages and encumbrances should be paid down out of the proceeds of a sale of a mortgagor's or encumbrancer's interest [51]. In our view, protection is appropriate, but it should be modest. The hazards created by partition and sale are not outside the range of risks which any landlord, mortgagee or encumbrancer faces in the ordinary course of affairs. Thus we prefer the British Columbia Commission's approach to that of the Alberta Institute.

The British Columbia Law Reform Commission raised another issue involving encumbrances. It would permit a person holding an encumbrance against a co-owner's interest, including a judgement creditor with a writ of execution registered against the land, to apply for partition. The recommendation was designed to facilitate debt collection by attachment of land co-owned by a debtor and others.[52] The Alberta Commission rejected this proposal, noting that the judgement creditor may obtain sale of the debtor's interest under a writ of execution, and the purchaser may then apply for partition.[53] This procedure is often not practical, since it may be difficult to find a purchaser for a co-owner's undivided interest. Nevertheless, co-ownership does not prevent a judgement creditor from proceeding against the land. Any change in the law in this regard should be made as part of a review of debtor-creditor law.

4. Partition and the matrimonial home

A majority of reported partition and sale actions in Saskatchewan have involved disputes between husbands and wives who are co-owners of property, usually the matrimonial home. Prior to adoption

---

[49] A.L.R. I., *Report,* 21.

[50] See A.I.,R.I. , *Draft Partition and Sale Act , s.* 2(6), 6 and 7.

[51] B.C.L.R.C., *Report*, 8.

[52] B.C.L.R.C., *Report*, 18.

[53] A.L.R.I. , *Report,* 20

of *The Matrimonial Property Act,* partition and sale was an important mechanism for resolving property relations between spouses when they separated or divorced. This undoubtably affected the way in which the law has been interpreted and applied. In the context of a matrimonial dispute, partition and sale can be oppressive. A husband might, for example, attempt to use the action as a means to dispossess a wife from the matrimonial home[54]. It is likely that decisions that retreated from the notion that partition and sale are *prima facie* rights reflected concern about abusive use of the action in matrimonial disputes.

The Matrimonial Property Act has changed the context in which partition and sale legislation operates. Partition and sale actions between spouses are now rare.[55] A partition and sale action might still be commenced during marriage, but would be determinative of property rights only if neither party made application under *The Matrimonial Property Act.* The partition action would not affect the status of the property as matrimonial property subject to division. In addition, partition and sale can be ordered under *The Matrimonial Property Act* as part of a distribution scheme. It is likely that a matrimonial property action would supercede a partition action, though there is no direct authority for this proposition in Saskatchewan [56].

It should also be noted that partition and sale actions cannot be used to disturb possession of the matrimonial home under a possession order made pursuant to *The Matrimonial Property Act.* The matrimonial property order deprives one of the spouses of the right of possession of the home. Because a partition action cannot be brought by a co-owner who has lost the right to possession of the property, it cannot brought by the spouse out of possession.

When the Alberta Institute reviewed partition and sale in 1977, the province had no matrimonial property legislation except the antiquated *Married Women's Property Act.* It found it necessary to devote considerable attention to the use of partition and sale actions in matrimonial property disputes. When the British Columbia Commission reviewed partition and sale in 1987, its task was simpler.

---

[54] It is worth noting that the British Columbia courts rejected the "structured approach" and adopted a broader discretion in regard to partition and sale in an action between spouses *(Harme/ing V. Harmeling,* above).

[55] In fact, we were able to find no reported partition and sale action between spouses later than 1984, shortly after *The Matrimonial Property Act* was adopted.

[56] It has been held that an action for division of matrimonial property under British Columbia matrimonial property legislation supercedes an action for partition and sale *(Meneghetti* V. *Meneghetti* (1979), 11 R.F.L. (2nd) 104.

It noted that since adoption of the British Columbia Family Relations Act

> [S]pouses seldom rely on the *Partition of Property Act.* That Act, consequently, now tends to serve to resolve disputes between co-owners in commercial arrangements. Revision of the *Partition of Property Act* should be undertaken with that consideration in mind[57].

Adoption of *The Matrimonial Property Act* makes it less difficult to reaffirm and strengthen the principle that termination of co-ownership is a matter of right. It is no longer necessary to modify this principle to curb abuse of partition and sale in matrimonial disputes.

Strictly, there is no need to make any special provision in partition and sale legislation to harmonize it with *The Matrimonial Property Act.* As noted above, *The Matrimonial Property Act* likely takes precedence even in the absence of an express provision to that effect. Nevertheless, it would be desirable to clarify the relationship between *The Matrimonial Property Act* and new partition and sale legislation. The legislation should provide that:

> (1) An application for partition and sale shall be stayed if an application is made under *The Matrimonial Property Act* by a co-owner, and
>
> (2) No action for partition and sale may be brought while a possessory order made under *The Matrimonial Property Act* in favour of a co-owner is in effect[58].

5. Partition and subdivision

Under *The Planning and Development Act,* planning approval is required before any subdivision of land can be registered in the land titles office. [59] This likely places a fetter on the right to partition. While *The Planning and Development Act* makes no express reference to subdivision by partition, its language is broad enough to apply to partition. Although there is no reported decision on point

---

[57]B.C.L.R.C., *Report,* 23.

[58]The British Columbia Commission thought it sufficient to provide that partition and sale actions should be stayed if the property is subject to an application or order "in the nature of partition or sale" under the *Family Relations Act.* In our view, this misses the point. The proposal made here is similar to s.22 of the *Alberta Law of Property Act,* which was adopted after the Alberta *Matrimonial Property Act* came into effect.

[59]*The Planning and Development Act,* s. 134(1)

in Saskatchewan, it is likely that partition cannot be ordered if subdivision approval cannot be obtained.[60]

The land use and development policies contained in *The Planning and Development Act* serve broad public purposes. and should supercede an owner's right to subdivide by partition. It would be desirable to clarify the law by expressly providing that a partition order may be made only if subdivision approval has been obtained. If it has not, the action should stayed until it is. Both the Alberta and British Columbia Commissions recommended such a provision[61].

6. Other matters

The British Columbia Law Reform Commission noted that the *Partition Act, 1868* "shows its antiquity in several ways".[62] Not the least of these are several sections of the Act which have not yet been considered in this report. Most of them appear to have been necessary in 1868 only because of gaps elsewhere in the law or because the mechanics of judicial sale where not well developed at that date. None of them appear to be neccessary at present. Sections 7 and 8 relate to judicial sales. Section 11 is procedural. Section 9 is primarily concerned with parties under disability or who cannot be located. These matters are now regulated by the general law. Section 10 provides for costs, but does not differ in substance from general costs rules now in effect. Section 12 is, on its face, applicable only in England.

---

[60] An Alberta decision, made at a time when Alberta legislation was silent on the relationship between planning approval and partition, held that approval is required before a partition order can be made *(Wenzel V. Wenzel,* [1977] 1 W.W.R. 32).

[61] A.L.R.I., *Report*, 19; B.C.L.R.C. *Report*, 57

[62] B.C.L.R.C., *Report*, 16.

PROPOSALS FOR A NEW PARTITION AND SALE ACT

RECOMMENDATIONS

1. The *Statute of Partition, 1539, Statute of Partition, 1540,* and the *Partition Act, 1868* should be repealed as part of the law of Saskatchewan and replaced by modern partition and sale legislation.

2. *The Farming Communities Property Act* should be repealed.

DRAFT SASKATCHEWAN PARTITION AND SALE ACT

Definitions

1. In this Act

(a) "co-ownership" means ownership of an interest in land by two or more persons as joint tenants or tenants in common, but does not include any future interest in land or any other interest in land that does not give the owner a right of possession in the land, and does not include any interest in land held beneficially for others;

(b) "co-owner" means an owner of land in co-ownership;

(b) "encumbrance" means any interest in land other than a fee simple estate;

(c) "encumbrancee" means an owner of an encumbrance;

(d) "land" means any interest in land, and includes a leasehold interest and a profit a prendre;

(e) "registered" means registered under the Land Titles Act.

Application for termination of co-ownership

2(1) A co-owner may apply to the Court for an order terminating the co-ownership of the interest in land in which he is a co-owner.

(2) On hearing an application under subsection (1), the Court shall make

one or more of the following orders:

(a) a physical division of all or part of the land between the co-owners,

(b) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or

(c) the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest.

(3) A sale of an interest and distribution of proceeds under (2)(b) or (c) shall be made pursuant to the rules of court ;

(4) If all the co-owners of an interest in land have agreed in writing not to terminate the co-ownership, the court shall not may make an order terminating co-ownership unless continuance of the co-ownership would cause undue hardship to one or more of the co-owners.

Refusal to approve sale of interest in land

3. If an order is made under section 2(2)(b) and the highest amount offered for the purchase of the interest in the land is less than the market value of the interest, the Court may refuse to approve the sale for the time being, and make any further order it considers proper.

Compensation

4. Where physical division of land is ordered under section 2(2)(a), the court may, if the division does not correspond to the co-owners' actual entitlements, direct that compensation be paid for an unequal division of the land.

Ensurance that obligations performed

5. If an order is made with respect to an interest in land other than a fee simple estate, the Court may impose any terms and conditions it considers necessary to ensure that the obligations imposed in respect of the interest are performed.

Severance of joint tenancy

6 If the interest in land that is the subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy.

7 The court may, with respect to land owned by a husband and wife, stay proceedings under this Act pending the disposition of an application made under the Matrimonial Property Act, or while an order made under the Matrimonial Property Act remains in force.

Refusal to allow application

8 Notwithstanding section 2(2), if an application for an order is made under this Act with respect to an interest in land other than a fee simple estate, the Court may refuse to allow the application if the order would unduly prejudice the owner of the fee simple estate in the land.

Encumbrances against the entire interest

9(1) An order under section 2(2) does not affect an encumbrance registered against the land.

(2) If an encumbrance is registered against the land in respect of which an order is made, the court may

(a) if the interest of a co-owner is to be sold to another co-owner, direct that compensation for the vendor's liability under the encumbrance be paid to the purchaser of the interest from the proceeds of the sale.

(b) if an encumbrance is registered against an interest in land other than the entire interest in the land in respect of which the order is made, direct that the encumbrance on land being divided be registered only against the land allotted to the co-owner in respect of whose interest the encumbrance was registered, or if the land is sold, direct that the encumbrance be discharged nd and compensation paid to the encumbrancee from the proceeds accruing to the co-owner in respect of whose interest the encumbrance was registered, or

Service of application

10(1) A co-owner commencing an application under this Act shall, in accordance with the rules of court, serve notice of the application on any other co-owner, any encumbrancee who has an encumbrance registered against an interest in the land, and any other person that the Court may

direct.

(2) Every person served with notice of an application is a party to the action.

(3) An encumbrancee who holds an unregistered encumbrance against land that is the subject of an application under this Act may apply to the Court to be made a party to the action. considers proper.

Application of municipal planning legislation

11 Notwithstanding section 2(2)(a), where a party seeks physical division of land that may be subject to an order under this Act, the court shall stay the proceedings under until the requirements of any legislation or bylaw governing subdivision of property has been complied with.