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Consultation Paper On Accounting and Contribution Between Co-Owners of Land

Prepared by the
Real Property Reform
(Phase 2) Project Com-
mittee

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Call for Responses

We are interested in your response to this consultation paper. The tentative recommendations are those of the Project Committee and have not yet been formally adopted by the Board of Directors of the British Columbia Law Institute. The tentative recommendations in this consultation paper may be subject to revision following consideration of responses received.

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Responses may be sent to us in one of three ways—

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Please forward your response before **1 September 2011**.

Your response will be used in connection with the Real Property Reform Project. It may also be used as part of future law reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name in the final report for the project, unless they expressly advise us to keep their names confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: <<http://www.bcli.org/privacy>>.

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EXECUTIVE SUMMARY

Ownership of land is associated with many expenses: property taxes, utility charges, mortgage payments, and insurance premiums to name a few. It can also yield economic returns such as rental income and profits from growing crops. When land is held in co-ownership (joint tenancy or tenancy in common), expenses may not always be borne and economic benefits may not be received in proportion to the co-owners' interests, or in another manner that is equitable in the particular circumstances. The body of law that governs rights with respect to accounting and contribution between co-owners is surprisingly unclear and archaic. It is also deficient in a number of ways.

On partition of co-owned land or sale in lieu of partition, the court has the power to adjust the accounts between co-owners to achieve a fair sharing of expenses and revenues. While the co-ownership subsists, however, present law does not give co-owners a general right to obtain contribution from one another towards necessary expenses relating to the land if these have been borne disproportionately, except in relation to payments under a joint obligation owed to a third party. There is likewise no general right to a fair distribution amongst co-owners of the rents and profits from use or occupation of the land.

British Columbia legislation contains some provisions to allow recoveries between co-owners, but they are fragmentary and opaque. They require reference to common law and equity in order to understand their operation. Section 71 of the *Estate Administration Act* dates from 1705 and deals only with one type of situation, namely where one co-owner has collected rents owing to the co-owners collectively and has retained a disproportionate amount. Section 71 is rather improbably located in the *Estate Administration Act*. Sections 13 and 14 of the *Property Law Act*, which ostensibly allow a co-owner to apply to the Supreme Court of British Columbia to recover contribution for a few categories of land-related expenses by way of a lien against the interest of a defaulting co-owner, have been characterized as purely procedural and incapable of creating rights of recovery themselves.

More than 20 years ago the former Law Reform Commission of British Columbia recommended reforms to delineate the rights of co-owners to contribution and a just sharing of rents and profits from co-owned land, and to provide effectively for their enforcement. This consultation paper endorses the same reforms, and proposes some additional ones.

The consultation paper proposes amendments to the *Property Law Act* providing for a clear right to recover contribution from other co-owners for necessary expenses

associated with the co-owned land, unless an expense is occasioned by unreasonable use of the land. Contribution would be in proportion to the co-owners' interests or quantified on some other basis found to be just in the circumstances.

A broad power would be conferred on the court to order a co-owner to contribute towards necessary expenses, to account to other co-owners for receipts and expenses associated with the land, or to compensate another co-owner. In exercising this power, the court would be expressly empowered to take into account whether:

- a co-owner, owing to the default of another co-owner, has paid more than a proportionate or just share of expenses necessary for the preservation, upkeep, or repair of the land;
- a co-owner has been excluded from occupation or use of the land;
- a co-owner has received more than a proportionate or just share of rents or profits from use or occupation of the land, including cultivation of the land or removal of its natural resources;
- a co-owner has made improvements that increased the realizable value of the land;
- a co-owner who claims contribution or a set-off for expenses should pay a fair occupation rent;
- a co-owner has engaged in unreasonable use of the land.

This power could be exercised on the application of a co-owner at any time during co-ownership or after co-ownership has ended. The court would be empowered to characterize expenses as necessary or non-essential, but an agreement between the co-owners that allocated responsibility for expenses would be binding on the court as well as the co-owners.

Sections 13 and 14 of the *Property Law Act* would be repealed, but a provision similar to section 14 would be retained to allow an order for contribution or compensation to be enforced through a lien against the interest of a defaulting co-owner in the land. The court would continue to have the power to authorize the claimant to purchase the interest of a defaulting co-owner in a sale to enforce the lien.

I. INTRODUCTION

A. General

The ownership of land is associated with many kinds of expenses. Property taxes, mortgage payments, utility service charges, upkeep and repair expenses, and insurance premiums are only a few categories of the expenses that landowners customarily must meet. When land is co-owned by two or more owners, they will often owe the same obligations to third parties such as taxing authorities, mortgagees, and service providers.¹ In other words, the third parties to whom payment is owed will often have the right to recover the amounts owed to them from all or any of the co-owners. Ownership-related expenses may not be borne proportionately, however. One or more co-owners may pay more than their fair share, while another co-owner fails to contribute towards the common expenses. Similarly, one or more co-owners may derive disproportionate financial benefits from the occupation or use of the land, to the exclusion of other co-owners.

When profits and expenses related to the land are not shared on a proportionate basis, co-owners may demand that other co-owners account to them for profits or for their use of the land, or that non-paying co-owners contribute towards expenses related to the land. The body of law that governs rights with respect to accounting and contribution between co-owners is surprisingly unclear and archaic. It also contains some relatively serious deficiencies. This consultation paper contains proposals for making this area of law clearer, more readily accessible, and effective in providing remedies against a defaulting or unjustly enriched co-owner.

B. The Real Property Reform Project

This is the second consultation paper to be issued in connection with Phase 2 of the Real Property Reform Project, a multi-year initiative funded by the Law Foundation

1. Two forms of co-ownership of land are recognized today: tenancy in common and joint tenancy. In each of these forms of co-ownership, the co-owners simultaneously have a right to possession of the whole of the land. Tenants in common hold undivided fractional interests as if they owned them under separate titles, while in joint tenancy there is theoretically only one title. On the death of a joint tenant, the surviving joint tenants own the whole instead of the deceased joint tenant's interest passing to the estate. The interests of joint tenants must be the same size relative to each other, while those of tenants in common need not be equal in size. For example, if there are three joint tenants, each has a 1/3 interest in the land. If the land is held by three tenants in common, one tenant in common could own a half-interest, while the two others each own a 1/4 interest.

of British Columbia, the Notary Foundation, and the Real Estate Foundation. The Real Property Reform Project examines certain areas of land law in British Columbia that are not known to be under review by other bodies and which are in need of reform. The objective is to develop concrete recommendations for legislative reform needed in these areas, based on extensive research and consultation. The final recommendations will appear in published reports that will be provided to provincial Ministries, the Land Title and Survey Authority, and other bodies concerned with the matters in question.

Phase 1 of the Real Property Reform Project was a preliminary scoping study completed in 2007 with the aid of an Advisory Committee. Phase 2, which began in 2008, involves active research, consultation, and development of the law reform recommendations. The members of the Project Committee for Phase 2 are listed at the beginning of this document.

C. Purpose of this Consultation Paper

This paper is issued for the purpose of eliciting comments on the tentative recommendations it contains. The recommendations are referred to as “tentative” because the Board of Directors of the British Columbia Law Institute (BCLI) has not yet formally adopted them and they are subject to change in light of the results of this consultation and further deliberations by the Project Committee and the Board. The final recommendations will be formulated after reviewing all responses to this consultation paper.

This consultation paper is one of three in a series concerning co-ownership of land that BCLI plans to issue. The other consultation papers in the series on co-ownership will deal with joint tenancy and with the *Partition of Property Act*.²

² R.S.B.C. 1996, c. 347.

II. THE PRESENT LAW ON RIGHTS OF ACCOUNT AND CONTRIBUTION BETWEEN CO-OWNERS

A. The Basic Common Law Position: No Obligation Between Co-Owners to Account or Contribute to Expenses

Understanding the present state of the law relating to the rights and obligations of co-owners to accounting and contribution amongst themselves requires some historical perspective.

The common law placed no general requirement on co-owners of land to share or contribute to expenses related to the land in the absence of an express or implied agreement by them to do so.³ There was likewise no requirement to account to one another for amounts received from its occupation or use.⁴ This was because each co-owner was considered to be in possession of the entirety of the land, irrespective of the proportion which the co-owner's interest bore to the others. Each co-owner was free to exercise acts of ownership in relation to the land. These might extend to deriving economic benefits from the land such as rents, or profits from activities such as cutting timber. It was a matter of choice whether a co-owner did so or not.⁵

It followed that a co-owner of land had no right in law to recover rents or other benefits that another co-owner received from use or occupation of the co-owned land in excess of that other co-owner's proportionate share, based on the relative size of that other co-owner's interest.⁶

3. *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.). A dictum in *Everett v. Sommerfield*, 2005 BCSC 316 at para. 6 to the effect that co-owners have a duty to share expenses related to the co-owned land was probably made in reference to the court's ability to adjust accounts between co-owners in partition and sale proceedings where one co-owner has paid more than a proportionate share of the expenses associated with the land, and claims contribution in respect of them. *Everett v. Sommerfield* was decided under the *Partition of Property Act*, *supra*, note 2. If the dictum was not made with reference to partition and sale proceedings, it is inconsistent with English and Canadian case law that follows *Leigh v. Dickeson* and holds there is no such general obligation. See, for example, *Henderson v. Henderson*, 2009 BCSC 1724 at para. 63.

4. *Wheeler v. Horne* (1740), Willes 208 at 210, 125 E.R. 1135.

5. *Griffies v. Griffies* (1863), 8 L.T.N.S. 758.

6. 32 Hals., 3rd ed. at 334, citing Co. Litt. 186a, 200b and *Pulteney v. Warren* (1801), 6 Ves. 73 at 77, 31 E.R. 944 at 946-947 (where Co. Litt. was cited in argument for this proposition); *Osachuk v. Osachuk* (1971), 18 D.L.R. (3d) 413 at 418 (Man. C.A.); *Bernard v. Bernard* (1987), 12 B.C.L.R. (2d) 75 at 80

Two exceptions to the rule that co-owners had no obligation to account to or compensate one another for the use and occupation of the land were recognized. If one co-owner agreed to act as the bailiff for another co-owner to collect rents, the co-owner who agreed to act as bailiff was accountable for rents actually received or that should have been received. The other exception concerned situations in which one co-owner had ousted another co-owner from the land. In such a case the ousted co-owner could claim compensation for the occupying co-owner's exclusive use and occupation of the land in an action for ejectment.⁷

Legislation has slightly modified the common law rules described above.⁸ This legislation is discussed later in this chapter.

B. Adjustment of Accounts Between Co-Owners on Partition

If co-ownership is dissolved through partition or a judicially ordered sale in lieu of partition, the court will "make all just allowances and...give such directions as will do complete equity between the parties."⁹ One reason for this is to prevent a co-owner who has not contributed fairly to expenses for upkeep and improvements from reaping the benefit of an increase in the value of the land when it is partitioned or sold without bearing a fair share of the expenses.¹⁰ It also provides a means of equalizing financial benefits such as rents that have been received disproportionately from use of the land in circumstances where the uneven receipt of the benefits lacks justification.

This process of adjusting accounts between co-owners involves adding and subtracting from the amount or value that each co-owner would otherwise receive purely on the basis of the size of that co-owner's interest from the sale proceeds, or from the portion of land allotted to the co-owner in a partition. The additions and subtractions will be for amounts that will level out discrepancies between the co-owners in terms of benefits received from occupation or use, such as rents, and land-related

(S.C.).

7. *Wheeler v. Horne*, *supra*, note 4. See also *Bernard v. Bernard*, *supra*, note 6 at 80; *Osachuk v. Osachuk*, *supra*, note 6, at 418.

8. *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 71 (see also Bill 10, 3rd Sess., 39th Parl., the *Wills, Estates and Succession Amendment Act, 2011*, s. 52); *Property Law Act*, R.S.B.C. 1996, c. 377, ss. 13, 14. See below under the headings "C. Section 71 of the *Estate Administration Act*" and "D. Sections 13 and 14 of the *Property Law Act* and Rights of Contribution by Co-Owners in Respect of Common Obligations."

9. *Mastron v. Cotton*, [1926] 1 D.L.R. 767 at 768 (Ont. S.C., App. Div.).

10. *Ibid.*

expenses such as mortgage payments and property taxes to the extent that these have been borne by one or more co-owners and not by another.

If a co-owner who has been in sole occupation makes a claim in the partition proceeding to recover expenses incurred in relation to the land, the court normally does not allow these to be recovered from other co-owners unless the occupying co-owner compensates the non-occupying co-owner for the exclusive use of the land by paying an occupation rent.¹¹ The choice to claim expenses lies with the occupying co-owner. If no claim for expenses is made, the occupying co-owner is not liable to absentee co-owners for occupation rent.¹² Expenses of improvements that have increased the value of the land, as opposed to other land-related expenses such as property taxes, insurance, and repairs, may ordinarily be claimed without giving rise to liability for occupation rent.¹³

There is some authority that a co-owner who has been in sole occupation may claim contribution from other co-owners for payments of mortgage principal without being liable to compensate them for exclusive occupation by way of occupation rent, but that occupation rent must be paid if contribution towards mortgage interest payments is claimed.¹⁴

While some earlier authorities indicated that co-owners could compel one another to account for profits from the land and obtain “all just allowances” by a suit in equity that did not involve partition, the predominant view came to be that a judicial adjustment of accounts between co-owners is only available in partition proceedings.¹⁵

11. *Ibid.*; *Bernard v Bernard*, *supra*, note 6 at 81; *Stasiewski v. Stasiewski*, (2007), 67 B.C.L.R. (4th) 81 at 88-89.

12. *Osachuk v. Osachuk*, *supra*, note 6 at 422; *Bernard v. Bernard*, *supra*, note 6 at 81. In *Dacyshyn v. Semeniuk*, 2007 BCSC 71, there are dicta at paras. 30-31 stating occupation rent is not automatically payable merely because a co-owner claims expenses, and that whether it is payable depends on what is equitable between the co-owners in each case. In *Dacyshyn*, the non-occupying co-owner claiming occupation rent had acquired a half-interest in a condominium by way of gift and had never attempted to enter the property.

13. *Re Kostiuk* (2002), 2 B.C.L.R. (4th) 284 at 297; *L.M.R. v. J.F.R.*, 2010 BCSC 363 at para. 39.

14. *Baker v. Baker*, [1976] 3 W.W.R. 492 (B.C.S.C.).

15. In *Ruptash v. Zawick*, [1956] S.C.R. 347 at 361 there is an especially strong statement by a unanimous Supreme Court of Canada that an “equitable right of accounting” between tenants in common regarding allowances for repair is only available in a proceeding for partition. See also *Henderson v. Henderson*, *supra* note 3 at paras. 68-69, where the court declined to make a determination regarding the property-related expenses claimed by one tenant in common against the other in a proceeding for declaratory relief. In refusing the declaration, the court stated that any

C. Section 71 of the *Estate Administration Act*

In 1705 the English Parliament passed legislation that provided a limited right to accounting between co-owners. The legislation gave the ability to recover, by an action at law, rents and profits received by another co-owner acting as bailiff in excess of that co-owner's proportionate share.¹⁶

This legislation became part of the received law in British Columbia and was re-enacted in 1897.¹⁷ It now appears in its modern form as section 71 of the *Estate Administration Act*.¹⁸

Actions of account

71 (1) Actions in the nature of the common law action of account may be brought and maintained against the executor or administrator of a guardian, bailiff or receiver, and also by one joint tenant or tenant in common, the (*sic*) executor or administrator of the joint tenant or tenant in common, against the other as bailiff for receiving more than comes to that person's just share or proportion, and against the executor or administrator of the joint tenant or tenant in common.

(2) The registrar or other person appointed by the court to inquire into the account

(a) may administer an oath and examine the parties touching the matters in question, and

(b) is entitled, for taking the account, to receive the allowance that the court orders from the party that the court may direct.

Apart from the anomaly of legislation dealing with rights and obligations of co-owners being found in the *Estate Administration Act*, this provision is unusual in additional ways. First, it refers to the common law action of account, which was largely obsolete before 1705, having been supplanted as a remedy by the bill of account in equity.¹⁹

such determination would have to be made in a proceeding for partition and/or sale.

16. 4 & 5 Anne, c. 16, s. 27.

17. *Executors and Administrators Act*, R.S.B.C. 1897, c. 73, s. 47.

18. R.S.B.C. 1996, c. 122.

19. Law Reform Commission of British Columbia, *Report on Co-Ownership of Land* (LRC 100) (Vancouver: The Commission, 1988) at 16, online at: <http://www.bcli.org/sites/default/files/LRC100->

Second, section 71 has a very narrow scope. In *Spelman v. Spelman (No. 2)*,²⁰ the British Columbia Court of Appeal adopted the following interpretation of the corresponding 1705 legislation contained in the mid-nineteenth century English case *Henderson v. Eason*:²¹

The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.

But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation than the other, we have insuperable difficulties to encounter.

There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything...It appears impossible to hold that such a case would be within the statute; and an opinion to that effect was expressed by Lord Cottenham in *M'Mahon v. Burchell*...Such cases are clearly out of the operation of the statute.

In other words, the provision now in force as section 71 of the *Estate Administration Act* extends to only one type of case, namely where rent or another form of land-related payment is due to the co-owners collectively by a third person, and one co-owner has collected and retained an amount disproportionate to the relative size of that co-owner's undivided interest. It does not empower the court generally to redistribute profits derived from the land among the co-owners where one co-owner has derived greater benefits from occupation or use of the land than another, nor does it give a general right to co-owners to require an accounting in those circumstances.²²

Co-Ownership_of_Land.pdf; Holdsworth, *A History of English Law*, 3rd ed., vol. 5 (London: Sweet & Maxwell, 1945) at 288.

20. (1944), 59 B.C.R. 551 (C.A.).

21. (1851), 17 Q.B. 701 at 719, 117 E.R. 1451 at 1458 (Ex. Ch.).

22. Thus in *Spelman v. Spelman*, *supra*, note 20, the Court of Appeal held that the provision equivalent to s. 71 of the *Estate Administration Act* did not support an order directing an accounting between joint tenants in respect of the profits from a rooming house held in joint tenancy where one of the

Section 71 will be repealed along with the rest of the *Estate Administration Act* when the *Wills, Estates and Succession Act*²³ comes into force. A consequential amendment re-enacting section 71 as section 13.1 of the *Property Law Act*²⁴ with little change is contained in a bill currently before the Legislative Assembly.²⁵

D. Sections 13 and 14 of the *Property Law Act* and Rights of Contribution by Co-Owners in Respect of Common Obligations

Sections 13 and 14 of the *Property Law Act* concern the rights of a co-owner to claim contribution:

Remedy of co-owner

13 In addition to the owner's other rights and remedies, an owner who, because of the default of another registered owner, has been called on to pay and has paid more than the owner's proportionate share of the mortgage money, rent, interest, taxes, insurance, repairs, a purchase money installment, a required payment under the *Strata Property Act* or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the land may be subject to forced sale or foreclosure, may apply to the Supreme Court for relief under section 14 against the other registered owners, one or more of whom is in default.

Court may order lien and sale

14 (1) On hearing an application under section 13, the court may do one or more of the following:

(a) order that the applicant has a lien on the interest in land of the defaulting owner for the amount recoverable under subsection (2);

(b) order that if the amount recoverable under subsection (2) is not paid by the defaulting owner, within 30 days after the date of service of a certified copy of the order on the defaulting owner or within another

parties had operated the business and the other had not taken an active part, but had not been ousted from the jointly owned property. The Court of Appeal set aside that portion of the trial judgment, but upheld the portion directing an accounting of profits from another rooming house to which one of the parties held the full legal title subject to a resulting trust in favour of the other party as to a three-fifths share.

23. S.B.C. 2009, c. 13, not yet in force.

24. *Supra*, note 8.

25. See Bill 10, 3rd Sess., 39th Parl., *Wills, Estates and Succession Amendment Act, 2011*, s. 52. The proposed re-enacted As re-enacted as s. 13.1 of the *Property Law Act*

period the court considers proper, the defaulting owner's interest in the land be sold under the Supreme Court Civil Rules governing sales by the court;

(c) make a further or other order, including an order that the applicant may purchase the interest in the land of the defaulting owner at the sale.

(2) The amount recoverable by the applicant is the amount the defaulting owner would, at the time the application is made or repayment is tendered, have been liable to contribute to satisfy the defaulting owner's share of the original debt if it had been allowed to accumulate until that time.

(3) If there is a sale under this section, the transfer to the purchaser must be executed by the registrar of the court, and, on registration, passes title to the interest in land sold.

(4) Surplus money received from the sale must be paid into court to the credit of the defaulting owner.

These provisions have been held to be purely procedural, not conferring any rights of contribution themselves.²⁶ They can only be used to enforce a right of contribution that exists independently of them.

While there is no general right of co-owners to claim contribution from one another for property-related expenses, they may claim contribution from one another in respect of payments made on account of a contractual debt owed to a third party for which the co-owners are jointly liable.²⁷ This right does not stem from the law of co-ownership, but from the law of joint obligations. Thus a co-owner who has made payments to retire mortgage debt for which all co-owners are liable as mortgagors may claim proportional contributions from the other co-owners. This type of claim could be pursued by making an application under section 13 for a lien to be imposed under section 14 on the interests of the non-paying co-owners, rather than in partition proceedings. The lien would be enforceable by sale of the non-contributing co-owners' interests.

26. *Bernard v. Bernard*, *supra*, note 6.

27. *Batard v. Hawes* (1853), 2 El. & Bl. 287 at 296-297, 118 E.R. 775 at 778. See also *Bernard v. Bernard*, *supra*, note 6 at 79. This right may now be statutory under s. 34(2) of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, inasmuch as the subsection speaks of indemnification between co-debtors, although s. 34 appears to deal primarily with rights of contribution between a principal debtor and surety.

It may be noted that section 13 refers only to expenses. There is no corresponding lien remedy in respect of amounts, such as rents, that are wrongly withheld by one co-owner rather than being distributed amongst the co-owners.²⁸

Section 13 only applies to the categories of expenses specifically mentioned: mortgage money, rent, interest, taxes, insurance, repairs, instalments of the purchase price, payments required under the *Strata Property Act*,²⁹ payments required by a term of the instrument of title or a charge on the land, or a payment on account of a charge carrying the right of foreclosure or sale. Only these categories of property-related expenses, therefore, can be the subject of a lien under section 14(1).

There is some ambiguity about the scope of the term “repairs” in section 13. The predecessor provision to section 13 was interpreted in *Re Brook and Brook* as not covering “repairs of elective improvements not necessary for the maintenance of the structure.”³⁰ Under this interpretation, the cost of non-essential improvements that might enhance the value of the land would not be lienable.

In *Bernard v. Bernard*, however, the following was said in relation to sections 13 and 14:

In [the court’s] opinion the determination of the extent of the right to contribution is analogous to the accounting between co-owners which takes place on partition and sale. The same principles should apply.³¹

In *Bernard v. Bernard* it was held that a co-owner could be required to pay occupation rent to a non-occupying co-owner as a condition of recovering contribution under sections 13 and 14. If there were no implicit jurisdiction to require that occupation rent be paid, an injustice could result because the non-occupying co-owner would be subject to a lien and involuntary sale in respect of the unpaid contribution, despite having a potential claim that could be recognized in partition proceedings, and which might offset the claim for contribution entirely.³²

28. Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, *supra*, note 19 at 15.

29. S.B.C. 1998, c. 43.

30. (1969), 6 D.L.R. (3d) 92 at 95 (B.C.S.C.). The court expressly refrained from making a determination in *Re Brook and Brook* on the scope of the term “repairs” in the predecessor provision to s. 13.

31. *Bernard v. Bernard*, *supra*, note 6 at 80.

32. Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, *supra*, note 19 at 13.

If the same principles do apply to sections 13 and 14 of the *Property Law Act* as in the accounting between co-owners that can take place in partition and sale proceedings, however, the cost of improvements made at the expense of one co-owner that have enhanced the value of the land to the benefit of all co-owners should be capable of being taken into consideration in adjusting accounts between them. Taking the cost of improvements made by one co-owner into account is justifiable when co-ownership is brought to an end by partition or sale of the land, because at that point all co-owners share in realizing the enhanced value. Depending on the circumstances, it could nevertheless be inappropriate to require other co-owners to contribute to the cost during the continuance of co-ownership if they did not agree to the improvements being made and are not parties to any joint obligation that would give rise to a duty to contribute.

It is apparent that there is a lack of clarity surrounding the scope of section 13 and the court's powers under sections 13 and 14.

E. Spouses as Co-Owners: Division of Family Assets Under the *Family Relations Act*

When land is co-owned by spouses, resolution of financial issues between them is possible in the context of a division of family assets under Part 5 of the *Family Relations Act* following marital breakdown.³³

Part 5 of the Act provides for the division and possible reapportionment of family assets between spouses on dissolution of marriage or other specified “triggering event” associated with marital breakdown.³⁴ The British Columbia Supreme Court has jurisdiction under Part 5 to “determine any matter respecting the ownership, right of possession or division of property” under Part 5 and “may make orders that are necessary, reasonable or ancillary to give effect to the determination.”³⁵

Part 5 empowers the court to order partition or sale of family assets to facilitate a reapportionment of family assets, and to specify how the proceeds of sale are to be distributed between the spouses.³⁶ The court may also “order one spouse to com-

33. R.S.B.C. 1996, c. 128.

34. The so-called “triggering events” that produce a division of family assets are set out in s. 56 of the *Family Relations Act*, *ibid.*: dissolution of marriage or judicial separation, a declaration of nullity of marriage, entry into a separation agreement, and a declaration under s. 57 of no prospect of reconciliation.

35. *Ibid.*, s. 66(1).

36. *Ibid.*, s. 66(2)(d).

pensate the other spouse if property has been disposed of, or to adjust the division.”³⁷ These powers are exercised within the context of a global reapportionment of the family assets including land, rather than with reference exclusively to the financial issues surrounding the management and use of a particular piece of land of which the spouses are co-owners.³⁸ On occasion, however, the power to order compensation of one spouse by another in a reapportionment has been used with reference to particular family assets in a manner not unlike the way the court will compel one co-owner to compensate another in a partition or sale proceeding.³⁹

F. Summary

The state of the law governing accounts and obligations between co-owners of land in British Columbia can be briefly summarized as follows:

1. Co-owners have no general obligation to contribute to one another to equalize the expenses of preservation, upkeep, repair, or improvement of the land they own together, except where they jointly owe a debt to a third party.
2. Co-owners cannot compel one another to account to each other for profits obtained from use and occupation of the land, except as stated in 3. below and on partition or sale proceedings. Co-owning spouses are an exception as stated in 7. below.
3. If one co-owner collects and retains rent payable to all the co-owners in an amount greater than that co-owner’s proportionate share based on the relative size of the co-owners’ interests, another co-owner can compel the owner retaining the rent under section 71 of the *Estate Administration Act* to account for it.
4. When partition of the co-owned land or sale in lieu of partition is ordered, the court may make “all just allowances” between the co-owners. A co-owner may claim

37. *Ibid.*, s. 66(2)(c).

38. *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C.C.A.) held that the power to order compensation under the predecessor provision to s. 66(2)(c) of the *Family Relations Act* is only intended as a means of carrying out determinations under the equivalent of s. 65(1) that reappportionment rather than equal division of family assets is required to avoid unfairness. The Court of Appeal emphasized that the power to order compensation is not exerciseable only because one spouse has dissipated, before the triggering event, a particular item of property (“potential family asset”) that would otherwise have been be a family asset available for division.

39. In *Piercy v. Piercy* (1991), 31 R.F.L. (3d) 187 (B.C.S.C.); supplementary reasons at (1994), 86 B.C.L.R. (2d) 285 (S.C.) a spouse who had enjoyed exclusive use of income-generating assets after the triggering event but before the division of property was resolved was required to compensate the other spouse for his exclusive use. The assets in question were not interests in land, but it is reasonable to presume the court might have made a similar order if they had been land.

for expenses incurred in relation to the land to the extent that the claiming co-owner has borne them on a disproportionate basis. If a co-owner asserts a claim for expenses relating to the land and has had exclusive occupation, the court may require the occupying co-owner to pay non-occupying co-owners occupation rent as a condition of recovering contribution towards the property-related expenses. Expenses of improvements that have increased the value of land may ordinarily be claimed without incurring liability for occupation rent.

5. If a co-owner has paid a disproportionate share of an expense coming within the categories listed in section 13 of the *Property Law Act* because another co-owner has failed to contribute towards the expense, and the co-owner who has paid the disproportionate share has a right to claim contribution that is given by law, that co-owner may apply for relief under sections 13 and 14 of the Act against the defaulting co-owner by way of a lien against the defaulting co-owner's interest, enforceable by sale.

6. On an application under sections 13 and 14 of the Act by a co-owner who has had exclusive occupation of the land, the court may require the co-owner to pay occupation rent to the non-occupying co-owners as a condition of obtaining relief under those provisions. It is unclear whether this jurisdiction extends to making other adjustments of accounts between the co-owners as the court may do in partition proceedings.

7. If the co-owners of land are spouses, the financial issues between them relating to the land may be addressed in the context of judicial reapportionment of family assets under Part 5 of the *Family Relations Act*, if the court finds that a reapportionment is justified.

III. REFORM

A. General

The present state of the law is unsatisfactory for numerous reasons. As long ago as 1705, legislators perceived that the common law in this area was deficient and sometimes unjust. The inroads made by legislation into the common law are, however, obscure, fragmentary, inconsistent and confusing. They necessitate looking behind the legislation at the common law and equity to discover what the legislation actually does.⁴⁰

The present law is far from transparent. It is not a straightforward task to discern what non-statutory rights exist amongst co-owners in relation to accounting and contribution. The jurisdiction to inquire into and adjust accounts between co-owners on partition or sale is not referred to in the *Partition of Property Act* or any other piece of legislation.

B. Enabling Provisions Conferring Remedial Powers to Require Accounting and Contribution

More than twenty years ago the former Law Reform Commission of British Columbia proposed legislative reform in this area.⁴¹ In the meantime, the law has not undergone any significant change that would cause the reforms recommended by the former Commission to be superseded. The Project Committee approves of virtually all of the former Commission's recommendations on this subject, and some of the tentative recommendations that appear below coincide closely with those of the Commission. Some of our tentative recommendations are additional to what the Law Reform Commission proposed in the late 1980's.

The draft legislation on co-ownership of land that the Commission proposed would have replaced s. 71 of the *Estate Administration Act* and sections 13 and 14 of the *Property Law Act* with broadly worded provisions directly empowering the court to order accounting and contribution between co-owners or an adjustment of accounts. The Commission was concerned that the court be given jurisdiction to deal with all

40. Law Reform Commission of British Columbia, *supra*, note 19 at 17.

41. *Ibid.* at 9-18, 65-67.

monetary issues outstanding between co-owners and achieve a just result. The Project Committee shares that concern and endorses the intent and broad terms of the legislative reforms recommended by the former Commission.

The court's jurisdiction to resolve monetary disputes between co-owners should not be confined to the stage of dissolution of co-ownership through partition or sale of the land.⁴² It should be invocable while co-ownership is continuing as well as when it has ended. For example, co-owners may wish to defer partition or sale, possibly for market reasons, but may still be engaged in a monetary dispute that requires resolution in the meantime. Suppose that:

A and B are co-owners of a run-down building. A and B arrange for major repairs in order to avoid having the building condemned. A pays the general contractor in full because B refuses to contribute, and A wishes to avoid builder's liens being filed. A is verging on insolvency as a result of having borne this major expense alone. B justifies the refusal to contribute on the ground that there are deficiencies in the work and A should have withheld payment. B has also held back rents that B has collected while managing the building, refusing to pay A's share to A on the ground that B will need to hire another contractor to correct the deficiencies. In reality, B hopes to take advantage of A's distressed financial situation and buy out A's interest cheaply, while reaping the benefit of the increased value of the building.

A should have a timely means of compelling B to contribute towards the cost of repairs and turn over A's share of the rents that B has collected.

The Project Committee tentatively recommends that :

- 1. Sections 13 and 14 of the Property Law Act and section 71 of the Estate Administration Act should be repealed and provisions reflecting Tentative Recommendations 2 to 7 below should be substituted.*
- 2. The Property Law Act should be amended to provide that on the application of a co-owner made at any time during or after the period of co-ownership, a court may order that a co-owner*

42. This position, which was integral to the recommendations of the former Law Reform Commission of British Columbia, was also accepted by the Victorian Law Reform Commission in a later report. While the Victorian Law Reform Commission recommended that co-ownership disputes be heard by a statutory tribunal instead of a county court, it also made a clear recommendation that a co-owner should be able to compel another co-owner to account for payments (including but not limited to rents) received from a third party during the continuance of the co-ownership, rather than having to apply for partition or sale in order to obtain this relief. See Victorian Law Reform Commission, *Disputes Between Co-Owners* (Melbourne: The Commission, 2002) at 88-89.

- (a) *account to another co-owner for amounts received or expended in relation to the co-owned land or the interest of the co-owner in the land,*
- (b) *contribute proportionally to a necessary expense related to the co-owned property, either before or after the expense is incurred, or*
- (c) *compensate another co-owner.*

C. Criteria for the Court

The former Law Reform Commission included in its recommendations a non-exhaustive list of factors the court would be empowered to consider on an application by a co-owner for relief against another co-owner. These were whether:

- (a) a co-owner had excluded another co-owner from the land;
- (b) a co-owner had received more than a just share of the rents or profits from the use or cultivation of the land or removal of its natural resources;
- (c) a co-owner had engaged in unreasonable use of the land;
- (d) a co-owner had made improvements or capital payments that increased the realizable value of the land;
- (e) a co-owner should be compensated for non-capital expenses in respect of the land (i.e., repairs and upkeep);
- (f) an occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent;
- (g) a co-owner, owing to the default of another co-owner, had been called on to pay and had paid more than a proportionate share of “mortgage money, rent, interest, taxes, insurance, repairs, a purchase money instalment, a required payment under the *Condominium Act*⁴³ [now the *Strata Property Act*⁴⁴] or under a term or covenant in the instrument of title or a charge on the land, or a payment on a charge where the

43. R.S.B.C. 1979, c. 61.

44. *Supra*, note 29.

land may be subject to a forced sale or foreclosure. (Note: This is the same catalogue of expense categories as is found in section 13 of the *Property Law Act*.⁴⁵)

All of these factors are potentially relevant to the proper adjustment of accounts between co-owners. The terms “capital” and “non-capital” expenses are employed in section 17(2) of the Alberta *Law of Property Act*, on which this list of criteria was originally modelled.⁴⁶ These terms are not particularly illuminating in the context of land ownership. The Project Committee prefers to use the term “improvements” to refer to capital outlays enhancing the value of land and “expenses” to refer to expenditures for the preservation of the property, its upkeep, and repair.

While the former Law Reform Commission criticized s. 13 of the *Property Law Act*, it did not elaborate on why paragraph (g) of its list of criteria was limited to the same categories of expenses as the present s. 13 and employed the same language. There is substantial overlap between paragraph (e) of the list and paragraph (g), but the specificity of (g) could lead to a restrictive interpretation regarding the expenses that may be considered as capable of attracting contribution, cutting down the breadth of (e). The Project Committee prefers instead to have the enabling provisions state that the court may consider whether a co-owner has borne more than a proportionate share of expenses that are *necessary* for the preservation, upkeep, and repair of the land, rather than listing specific categories.

The Project Committee tentatively recommends that:

3. *The Property Law Act should be amended to provide that, on an application by a co-owner for relief described in Tentative Recommendation 2, the court may, without limitation, consider whether*

- (a) *a co-owner, owing to the default of another co-owner, has paid more than a proportionate or just share of expenses necessary for the preservation, upkeep, or repair of the land;*
- (b) *a co-owner has been excluded from occupation or use of the land;*

45. *Supra*, note 8.

46. Paragraphs (a) to (f) of the list were derived from what is now s. 17(2)(a)-(g) of the Alberta *Law of Property Act*, R.S.A. 2000, c. L-7. See Law Reform commission of British Columbia, *supra*, note 19 at 66.

- (c) *a co-owner has received more than a proportionate or just share of rents or profits from use or occupation of the land, including cultivation of the land or removal of its natural resources;*
- (d) *a co-owner has made improvements that increased the realizable value of the land;*
- (e) *a co-owner who claims contribution or a set-off for expenses should pay a fair occupation rent;*
- (f) *a co-owner has engaged in unreasonable use of the land.*

D. Duty to Contribute to Necessary Expenses

A case can be made that responsible co-owners of land are not well served by the common law, which permits non-contribution by a co-owner to even the most necessary expenditures to preserve the land and the value of the land unless it involves a joint obligation owed to a third party.

If a co-owner should undertake improvements unilaterally that are only cosmetic but enhance the value of the land, then it may be fair that other co-owners should not be required to contribute towards the cost until they would derive the benefit of them on a partition or sale, at which time they should be compellable to pay proportionate contributions to the cost of the improvements out of their shares of the proceeds. On the other hand, if the non-contributing co-owners obtain an immediate benefit from an expense made by a co-owner that is necessary to preserve the land, it should be possible for the co-owner who acts in the economic interest of all the co-owners to force the rest to contribute in proportion to their interests.

For example, it may be necessary to construct a retaining wall quickly to prevent damage not only to the co-owners' land but also to prevent damage to adjoining properties that would engender liability on the part of all the co-owners. If absentee co-owners ignore the danger, the occupying co-owner may have no choice but to arrange for the construction of the retaining wall and pay the entire cost. In these circumstances, the absentee co-owners will have received an immediate benefit from the preservation and repair of their property and also from the avoidance of liability to third parties, even though they are not themselves in occupation. There is, however, no joint contractual obligation owed to a third party, so section 13 of the *Property Law Act* is of no assistance. Under the present law, the co-owner who bore the expenses individually cannot compel contribution from the others.

After many centuries in which this deficient aspect of the common law has persisted with band-aid solutions like section 71 of the *Estate Administration Act* and the deceptive and misleading section 13 of the *Property Law Act*, the time has come to recognize a general duty on the part of co-owners to contribute to necessary expenses associated with the preservation, upkeep, and repair of the land. This duty should be an incident of co-ownership, not dependent on the existence of a joint obligation of the co-owners owed to a third party.

Co-owners should be able to agree amongst themselves to modify the proposed general duty to share necessary expenses. The terms of an agreement between co-owners allocating responsibility for some or all expenses associated with the land should govern in a dispute between co-owners. To the extent that the terms of an agreement between co-owners do not cover a particular dispute, the general duty of contribution towards necessary expenses should apply.

In some cases an expense may become necessary because one or more co-owners act in an unreasonable manner. If the retaining wall in the foregoing example became necessary not as a result of natural erosion or subsidence, but because the occupying co-owner foolishly decided without consulting the other co-owners to extract sand and gravel from an obviously unstable embankment, it would be unjust to force the other co-owners to contribute to the cost. Instead, the expense should ultimately be borne by the co-owner whose unreasonable use of the land made it necessary. The duty to contribute should not apply in circumstances where the need for an expense is attributable solely or primarily to the unreasonable use of the land by another co-owner.

The Project Committee tentatively recommends:

4. The Property Law Act should be amended to provide that co-owners are liable to contribute to the payment of necessary expenses associated with the co-owned land in proportion to their respective interests, subject to the terms of an agreement between the co-owners in relation to the allocation of responsibility for expenses.

5. Co-owners should not be liable to contribute to the payment of expenses that are necessitated by unreasonable use of the land by another co-owner.

E. Characterization of Expenses

In the example mentioned earlier involving the retaining wall, the wall itself might be characterized as an improvement, but its construction was also a necessary repair. A court to which the co-owner who bore the expense of construction resorts for relief should not be constrained by having to determine whether an expenditure

is technically an improvement or is purely of a repair or maintenance nature. Instead, the court should be in a position to consider whether, as a question of fact, the expenditure was necessary for the preservation, upkeep, or repair of the property.

The co-owners should be able, however, to characterize expenses for the purpose of allocating responsibility for them amongst themselves. In the same example, the co-owners might have agreed before the problem with lateral stability of the property arose that the occupying co-owner would have sole responsibility for the repair of the property in exchange for being permitted to have exclusive occupation. There should be no objection to giving effect to an agreement of this kind, provided it does not contravene an overriding public policy objective, such as might be reflected in an enactment assigning responsibility for remediation of environmental harm.

The Project Committee tentatively recommends:

6. The court should have the discretion to characterize expenses associated with co-owned land as necessary or non-essential, regardless of their legal character, subject to the terms of an agreement between the co-owners as to the characterization of expenses for the purpose of allocating responsibility for the expenses amongst themselves.

F. Lien for Contribution to Expenses or for Proportionate Share of Rents and Profits Against the Interest of a Co-Owner

Once a defaulting co-owner has been found liable to contribute towards a necessary expense associated with the land, or to compensate another co-owner in respect of benefits received from occupation or use on a disproportionate basis, there needs to be a means of enforcing payment. The procedure provided by section 14 of the *Property Law Act*⁴⁷ for imposing a lien on the interest in the land of the defaulting or disproportionately enriched co-owner, enforceable by sale of the interest, provides a just and effective means of recovering the contribution. The Project Committee believes this remedy should be retained.

The Project Committee also believes that the jurisdiction given by section 14(1)(c), namely the power to order that the claimant co-owner may purchase the defaulting co-owner's interest in a sale, should be retained. It is difficult to market a fractional interest in real estate, and purchase by the claimant co-owner for whose relief the lien was imposed may be the only effective means by which that co-owner will obtain compensation.

The Project Committee tentatively recommends:

47. *Supra*, note 8.

7. (1) *A provision corresponding to section 14 of the Property Law Act, providing a remedy in the form of a lien against the interest of a defaulting or disproportionately enriched co-owner, should be retained after the Property Law Act is amended in accordance with Tentative Recommendations 2 to 6.*

(2) *A provision corresponding to the present section 14(1)(c) of the Property Law Act should be retained, authorizing the court to allow the claimant co-owner to purchase the interest of a defaulting co-owner in a sale to enforce the lien for unpaid contributions.*

G. Conclusion

The Project Committee believes the foregoing recommended changes to the law will create a more just, modern and realistic legal framework for the rights and liabilities amongst co-owners of land, and invites public comment on them.

LIST OF TENTATIVE RECOMMENDATIONS

1. *Sections 13 and 14 of the Property Law Act and section 71 of the Estate Administration Act should be repealed and provisions reflecting Tentative Recommendations 2 to 7 below should be substituted.*

[p. 16]

2. *The Property Law Act should be amended to provide that on the application of a co-owner made at any time during or after the period of co-ownership, a court may order that a co-owner*

- (a) account to another co-owner for amounts received or expended in relation to the co-owned land or the interest of the co-owner in the land,*
- (b) contribute proportionally to a necessary expense related to the co-owned property, either before or after the expense is incurred, or*
- (c) compensate another co-owner.*

[p. 16]

3. *The Property Law Act should be amended to provide that, on an application by a co-owner for relief described in Tentative Recommendation 2, the court may, without limitation, consider whether*

- (a) a co-owner, owing to the default of another co-owner, has paid more than a proportionate or just share of expenses necessary for the preservation, upkeep, or repair of the land;*
- (b) a co-owner has been excluded from occupation or use of the land;*
- (c) a co-owner has received more than a proportionate or just share of rents or profits from use or occupation of the land, including cultivation of the land or removal of its natural resources;*
- (d) a co-owner has made improvements that increased the realizable value of the land;*
- (e) a co-owner who claims contribution or a set-off for expenses should pay a fair occupation rent;*

(f) a co-owner has engaged in unreasonable use of the land.

[p. 18]

4. The Property Law Act should be amended to provide that co-owners are liable to contribute to the payment of necessary expenses associated with the co-owned land in proportion to their respective interests, subject to the terms of an agreement between the co-owners in relation to the allocation of responsibility for expenses.

[p. 20]

5. Co-owners should not be liable to contribute to the payment of expenses that are necessitated by unreasonable use of the land by another co-owner.

[p. 20]

6. The court should have the discretion to characterize expenses associated with co-owned land as necessary or non-essential, regardless of their legal character, subject to the terms of an agreement between the co-owners as to the characterization of expenses for the purpose of allocating responsibility for the expenses amongst themselves.

[p. 21]

7. (1) A provision corresponding to section 14 of the Property Law Act, providing a remedy in the form of a lien against the interest of a defaulting or disproportionately enriched co-owner, should be retained after the Property Law Act is amended in accordance with Tentative Recommendations 2 to 6.

(2) A provision corresponding to the present section 14(1)(c) of the Property Law Act should be retained, authorizing the court to allow the claimant co-owner to purchase the interest of a defaulting co-owner in a sale to enforce the lien for unpaid contributions.

[p. 22]

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