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## Consultation Paper on the *Partition of Property Act*

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

June 2011

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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.

## How to Respond

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

by mail:        British Columbia Law Institute  
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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

When one or more co-owners of land want to sell or divide the land and the other co-owners oppose it, the stalemate may be broken by recourse to the remedies of partition of the land proportionally in accordance with the size of the co-owners' interests, or sale of the land in lieu of partition. In British Columbia, the remedy of sale is governed by the *Partition of Property Act*. The remedy of partition is governed by the Act only in part.

The *Partition of Property Act* dates from 1868. It is not a self-contained enactment and its operation is dependent on the pre-Act law. This creates considerable obscurity. For example, instead of declaring who may apply for partition or sale, the Act refers obliquely to a person "who, if this Act had not been passed, might have maintained a proceeding for partition..." The Act deals with sale as if partition is the norm and sale is the exception, when today the remedy requested is nearly always sale. Much of the Act consists of procedural provisions that are largely superfluous, because their subject-matter is now covered by rules of court.

While reference to statutes passed in 1539 and 1540 is needed for verification of the point, it can be said with confidence that the only classes of persons eligible to seek partition or sale are co-owners of a fee simple, a life estate, a profit à prendre, or a leasehold. A mortgagee or a judgment creditor of a co-owner cannot seek partition or sale of the entire property in order to be in a position to realize on the co-owner's undivided interest to which the mortgage or judgment attaches.

In the 1980's the former Law Reform Commission of British Columbia recommended that the class of applicants eligible to obtain the remedies of partition and sale should be expanded to include mortgagees and judgment creditors. The Commission also recommended that the legislation on partition and sale contain a clear list of the classes eligible to apply for and obtain these remedies. The consultation paper endorses those still unimplemented recommendations. It would also add to the eligible classes vendors and purchasers under an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act*, i.e. an agreement for the sale of land calling for payment of the purchase price by instalments over a period of time, during which the purchaser normally goes into possession.

The consultation paper recommends a more robust statutory right of first refusal to purchase the interest of a co-owner desiring sale than the one currently provided by section 8 of the *Partition of Property Act*. The current right is available to a co-owner only in the event that an interested party has requested sale and the co-owner has given an undertaking to purchase, but not when the court orders sale as an exercise

of its discretion under section 7 of the Act to grant either partition or sale when the remedies are sought as alternatives. The consultation paper recommends that whenever sale is ordered, the co-owners be allowed to purchase the dissident co-owner's undivided interest before the entire property is placed on the open market, regardless of the route by which the order for sale came about.

Co-owners now have a presumptive right to partition and sale. The remedies can only be refused if justice requires it. If the eligible class of applicants is expanded to include mortgagees and judgment creditors, the question arises whether they too should be presumptively entitled to partition or sale on application, or whether the remedies should be discretionary in their case. The consultation paper does not take a stance on this question, and instead asks the question for purposes of consultation. Readers are invited to make their views known on that point as well as on the tentative recommendations themselves.



## I. INTRODUCTION

### A. General

There are occasions when co-owners of land wish to end their co-ownership. They may disagree on how to use the land, for example. One or more co-owners may wish to sell it, and others to remain in possession. The co-owners may be members of a partnership of individuals or corporations who intend to liquidate their business, and the co-owned land may be one of the capital assets that must be realized so that the partners' capital contributions can be returned.

When one or more co-owners want to end the co-ownership, they may wish to divide the land into separately owned parcels. Alternatively, they may wish to sell the land and divide the proceeds among them. If the co-owners are all in agreement with one of these courses of action, there is generally no obstacle, although subdivision approval requirements may need to be met if the land itself is to be divided. If one or more of the co-owners oppose a sale or division of the land, however, there could be a stalemate. While co-owners have the right to transfer their own interests separately from those of other co-owners of the same land under the forms of co-ownership that exist in the present day, it may be quite difficult in actual practice to market a fractional interest.

The means by which the law provides for resolution of a stalemate surrounding termination of the co-ownership of land are the remedies of partition (division of the land) and sale in lieu of partition. In British Columbia the remedy of sale is governed by the *Partition of Property Act*.<sup>1</sup> The remedy of partition is governed by that Act in part.

The *Partition of Property Act* is based on mid-nineteenth century English legislation. Its essential features have undergone no significant change since that legislation was re-enacted in British Columbia in the late nineteenth century. More than twenty years ago the former Law Reform Commission of British Columbia (LRCBC) recommended its replacement by more modern legislation, but those recommendations have remained unimplemented.<sup>2</sup>

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1. R.S.B.C. 1996, c. 347.

2. See Law Reform Commission of British Columbia, *Report on Co-Ownership of Land* (LRC 100) (Vancouver: The Commission, 1988).

This consultation paper reviews the *Partition of Property Act* and the earlier recommendations for its reform. While this review yields some of the same conclusions as the LRCBC reached, it has also generated a number of additional proposals for features that our Project Committee sees as desirable in new partition legislation.

### **B. The Real Property Reform Project**

This is the third 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 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 currently 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 consultative documents concerning co-ownership of land that BCLI plans to issue. The other consultation papers in the co-ownership series deal with joint tenancy and with rights of accounting and contribution between co-owners, respectively.

## II. THE *PARTITION OF PROPERTY ACT*

### A. General

The operation of the *Partition of Property Act* is dependent to some extent on the law surrounding the remedy of partition as it existed before the passage of the nineteenth century English legislation on which the Act is modelled. Some of its provisions are couched in terms that are only understandable in light of the historical background of partition legislation.<sup>3</sup>

For example, several sections of the Act that deal with the jurisdiction to order sale in lieu of partition state “In a proceeding where, if this Act had not been passed, an order for partition might have been made....” In order to understand the application of these provisions, therefore, it is necessary to know when an order for partition was available before the Act was passed.

### B. A Brief History of Partition Legislation

At common law, land that was held in coparcenary tenancy could be partitioned among the coparcenary tenants by means of the writ *de partitione faciundo*.<sup>4</sup> Coparcenary tenancy was a form of co-ownership that arose when several people inherited land together. It had some of the characteristics of both joint tenancy and tenancy in common.<sup>5</sup>

A 1539 statute extended the benefit of this common law writ to joint tenants and tenants in common.<sup>6</sup> In 1540 another statute extended the writ to holders of life estates and lessees.<sup>7</sup> The writ *de partitione faciundo* was abolished by the *Real Property Limitation Act, 1833*,<sup>8</sup> but partition continued to be granted in equity by the Court of Chancery.<sup>9</sup>

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3. Law Reform Commission of British Columbia, *supra*, note 2 at 20.

4. Megarry and Wade, *The Law of Real Property*, 4th ed. (London: Sweet & Maxwell, 1975) at 427.

5. *Ibid.*, at 429-430.

6. *Statute of Partition*, 31 Hen. 8, c. 1.

7. *Statute of Partition*, 32 Hen. 8, c. 32.

8. 3 & 4 Will. 4, c. 27, s. 36.

9. Holdsworth, *A History of English Law* (London: Methuen, Sweet & Maxwell, 1965), vol. XV at 180.

The *Partition Act, 1868* empowered the court to decree sale and distribution of the proceeds among the co-owners instead of partition where it would be more beneficial than actual division of the land.<sup>10</sup> This 1868 statute, subsequently amended in 1876, was re-enacted in British Columbia in 1880.<sup>11</sup> It is the foundation of the present *Partition of Property Act*.<sup>12</sup>

### C. Overview of the *Partition of Property Act*

#### 1. PARTITION OR SALE MAY BE COMPELLED

Section 2(1) of the *Partition of Property Act* sets out the essence of the remedies of partition and sale, namely that a co-owner may force partition or sale of the co-owned land against the wishes of the other co-owners and others having an interest in the land, such as mortgagees:

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

#### 2. WHAT INTERESTS ARE SUBJECT TO PARTITION

Section 2(2) declares that section 2(1) applies to both legal and equitable estates. Equitable estates are estates in land recognized only in equity, such as the interest of a beneficiary under a trust. If land is subject to a trust and the beneficiaries hold their interests in it as joint tenants or tenants in common, the beneficial title is subject to partition and sale in the same way as the legal title to the land would be.

Sections 2(3) and 2(4) refer to special timber licences, which were formerly a type of area-specific tenure giving an exclusive right to harvest and remove Crown timber.<sup>13</sup> While the inclusion of special timber licences in the definition of “land” for the purposes of the Act in section 1 allows the remedies of partition and sale to be sought in relation to them, section 2(4) prohibits the partition of a special timber licence, or in other words its subdivision by area. Instead, section 2(3) allows special timber licences to be assigned to interested parties “in order to achieve partition.” Section 2(4) further provides that a special timber licence “left over after the others have been assigned” must be sold and the proceeds distributed among the inter-

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10. 31 & 32 Vict., c. 40.

11. *Partition Act*, S.B.C. 1880, c. 21.

12. *Supra*, note 1.

13. See s. 18 of the *Forest Act*, S.B.C. 1912, c. 17.

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ested parties. Special timber licences are now obsolete, having been converted to a different form of forest tenure or extinguished by legislation.<sup>14</sup> Sections 2(3) and (4), and the reference to “special timber licences, and all estates and interests in them” in the definition of “land” in section 1, may now be regarded as spent.

### 3. WHO CAN APPLY FOR PARTITION OR SALE

Section 2(1) states who is subject to an order for partition or sale, but does not say who has standing to apply for it.<sup>15</sup> Section 4(1) states who may apply for sale, however. It is anyone who would be eligible to apply for partition if the Act had not been passed:

4(1) Any person who, if this Act had not been passed, might have maintained a proceeding for partition may maintain such a proceeding against any one or more of the interested parties without serving the other or others, and a defendant in the proceeding may not object for want of parties.

In order to determine who is eligible to seek partition, therefore, the English law pre-dating the English *Partition Act, 1868*<sup>16</sup> needs to be examined. Specifically, it is the law of England as it existed on 19 November, 1858 that needs to be examined, as the *Law and Equity Act*<sup>17</sup> makes English law as it existed on that date applicable in British Columbia except to the extent it has been altered by laws of the province or is inapplicable to local circumstances. As of that date, the classes of persons eligible to seek partition were coparcenary tenants and those co-owners to whom the statutes of 1539 and 1540 had extended the remedy. As coparcenary tenancy no longer exists,<sup>18</sup> the persons eligible to seek partition or sale in lieu of partition in British Columbia are those described in the 1539 and 1540 statutes, namely:

(a) joint tenants of the fee simple or a profit à prendre;

(b) tenants in common of the fee simple or a profit à prendre;

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14. Section 19 of the *Forest Act*, S.B.C.1978, c. 23 provided for any special timber licences that were in effect on 1 January 1979 to either expire by specific dates or be replaced by “timber licences,” a different form of forest tenure.

15. See *Jillings v. Blewett Estate* (1993), 79 B.C.L.R. (2d) 217 at 221 (S.C.).

16. *Supra*, note 10.

17. R.S.B.C. 1996, c. 253, s. 2.

18. Coparcenary tenancy is now impossible because real property of a deceased person now passes to the personal representative in the same manner as personal property, instead of devolving directly on the heirs, as it did at common law: *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 77(1). See also *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 162(1), not yet in force.

(c) joint tenants or tenants in common of a life estate;

(d) co-owners of a leasehold estate (co-lessees).<sup>19</sup>

There is another requirement: anyone seeking partition or sale must have an immediate right to possession of the land.<sup>20</sup> Thus owners of a future interest, such as joint tenants of a remainder following a life estate, cannot claim these remedies.<sup>21</sup>

#### 4. RIGHT TO PARTITION OR SALE

The court will grant either partition or sale on the application of an eligible co-owner unless justice requires otherwise.<sup>22</sup> In this respect, the law of British Columbia differs from that in other western provinces, where no discretion to refuse partition is recognized.<sup>23</sup>

Section 17 of the *Partition of Property Act* deems partition into two or more parcels of land to result in a subdivision of land for the purposes of the *Land Title Act*,<sup>24</sup> however. An order for partition must contain an express declaration that it is sub-

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19. *Morrow v. Eakin*, [1953] 2 D.L.R. 593 (B.C.S.C.).

20. *Ibid.* It appears co-owners of a *profit à prendre* had a right to partition as well, since their interests are also possessory.

21. *Morrow v. Eakin*, *supra*, note 19; *Bunting v. Servos*, [1931] 4 D.L.R. 167 (Ont. H.C.); *Morrison v. Morrison* (1917), 39 O.L.R. 163 (S.C., App. Div.). The status of co-owners who have leased the land and thus relinquished possession to a lessee is unclear. In *Bourgeault v. Walton*, [1998] B.C.J. No. 1957 (S.C.), co-owners who had leased the premises successfully applied for sale subject to the leases, but no prior authority is cited. There are authorities holding or containing *obiter dicta* to the effect that a reversion does not confer the right to obtain partition or sale because a reversioner has no immediate right to possession: *Evans v. Bagshaw* (1870), L.R. 5 Ch. App. 340; *Morrison v. Morrison*, *supra*. Conversely, a right to immediate possession will not confer standing to seek partition unless it is coupled with the status of a co-owner. In *Sherk v. Smith*, [2007] B.C.J. No. 1915 (S.C.) the owners of a share in a company offering time-sharing arrangements in beachfront property could not obtain partition of their interest in the share because they were characterized only as shareholders and not co-owners.

22. *Harmeling v. Harmeling*, [1978] 5 W.W.R. 688 at 691 (C.A.); *Bradwell v. Scott*, [2000] B.C.J. No. 2151 (C.A.).

23. Saskatchewan Law Reform Commission, *Proposals for a New Partition and Sale Act* (Saskatoon: The Commission, 2001) at 5.

24. R.S.B.C. 1996, c. 250.

ject to compliance with the *Land Title Act*.<sup>25</sup> This means that the subdivision contemplated by the order may not be implemented without the approvals required by Part 7 of that Act. If the approvals are not obtainable, the order may not be capable of being implemented.

## 5. SALE

### *(a) General*

The main purpose of the 1868 English legislation now incorporated into the *Partition of Property Act* was to confer jurisdiction to order sale of co-owned land and distribution of the proceeds according to the respective interests of the co-owners as a remedy instead of partition. It was recognized that physical division of land between co-owners is sometimes impractical. An example often cited is of a case where a house was divided into three parts, with the owner having a two-thirds share receiving the chimneys, fireplaces and stairs.<sup>26</sup>

Today, sale and distribution of proceeds between co-owners in proportion to their respective interests is sought far more frequently than partition. It is the primary remedy.

Section 7 of the Act empowers the court to order sale and distribution of proceeds in a proceeding for partition whether or not any party opposes sale, if sale is requested by any of the parties and the court finds that it would be more beneficial than division of the land because of

- (a) the nature of the property;
- (b) the number of interested parties;
- (c) the absence or disability of some of the interested parties; or
- (d) any other circumstance.

The court may allow co-owners and others interested in the land to bid at a sale.<sup>27</sup>

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25. *Ibid.*, s. 17.

26. *Turner v. Morgan* (1803), 8 Ves. 143, 32 E.R. 307.

27. *Supra*, note 1, s. 10.

*(b) Purchase by other parties of interest of co-owner requesting sale*

If sale is requested by a party and any of the other parties interested in the land undertake to buy the interest of the party requesting sale, the court is not required to order sale of the entire property on the open market. Under sections 8(2) and 8(3), the court may instead order the valuation of the interest of the party requesting the sale and give directions for sale of the land to the parties willing to purchase. Those directions commonly take the form of an order that those parties may acquire the interest at the valuation set by the court by paying that amount to the other co-owner within a stated period, failing which the interest will be sold on the open market.<sup>28</sup>

*(c) Sale requested by majority owner*

Section 6 provides that if sale is requested by co-owners who individually or collectively own more than a 50 per cent interest in the land, the court must order sale “unless it sees good reason to the contrary.”<sup>29</sup> Several decisions hold that the qualified right of a majority owner under section 6 to a sale on the open market cannot be overridden by an undertaking to buy out that owner’s interest under section 8(2).<sup>30</sup> In other words, section 8(2) does not carve out an exception to section 6.

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28. *Guiomar v. Prevost*, 2009 BCSC 307; *Nelson v. Swannie*, [1995] B.C.J. No. 848 (QL). The court may not make the order in terms of granting an option to purchase, however: *Wilson v. Wilson and Temperton*, [1995] B.C.J. No. 544 (C.A.) (QL).

29. A recent example of a rare case where the court did see good reason to refuse sale and order division of the land instead is *Sahlin v. Nature Trust of British Columbia, Inc.* (2010), 317 D.L.R. (4th) 26 (B.C.S.C.); aff’d 2011 BCCA 157. The land in question was ecologically sensitive. It was owned by four individuals to the extent of 50% , with the Nature Trust having a 50% interest. The four individuals wanted to divide the land into four parcels and retain it in order to build dwellings on them, while the Nature Trust wanted a sale on the open market and hoped to purchase the entire tract of land. All parties were dedicated to preserving the natural character of the land. The court ordered partition into four parcels, reasoning that a sale might result in ownership by a purchaser with no ecological sensitivity. On appeal, it was argued that there is no jurisdiction under the *Partition of Property Act*, *supra*, note 1, to divide land into more parcels than there are co-owners. The Court of Appeal declined to decide the point because it was inconsistent with the appellants’ position in the lower court and with the relief claimed. The Court of Appeal affirmed the trial court’s exercise of discretion to order partition instead of sale.

30. *Machin v. Rathbone*, 2006 BCSC 252; *Dunford v. Sale*, [2007 BC] 2089; *Martin v. Chidley*, 2008 BCSC 329; *Ryser v. Rawlings*, 2008 BCSC 1050.

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6. PROCEDURAL PROVISIONS OF THE *PARTITION OF PROPERTY ACT*

Section 3 of the *Partition of Property Act* deals with matters of procedure. Section 3 provides that a claim for sale may be made without having to claim partition as well.

Other procedural provisions of the Act deal mostly with matters that nowadays are covered by rules of court. For example, section 4(1) provides that persons who can maintain a proceeding for partition may name one or more interested parties without serving others, and a defendant may not raise the objection that the action fails for non-joinder of parties. Rule 6-2(7)(b)(i) of the *Supreme Court Civil Rules* (Civil Rules) would now prevent a proceeding from failing for non-joinder, however, because the court may add parties.<sup>31</sup> The references to “defendants” in section 4(1) are obsolete, because a proceeding for partition or sale in lieu of partition must now be brought by petition and the term used in the Civil Rules to refer to parties other than the petitioner in such a proceeding is “petition respondent.”<sup>32</sup>

Section 4(1) is also inconsistent with the current rules of service in petition proceedings, because Rule 16-1(3) requires a petition and supporting affidavits to be served on “all persons who may be affected by the order sought.” While the Act supersedes the rule of court, there does not seem to be any reason to create a special statutory rule for service in proceedings for partition and sale different from the rule applicable in other petition proceedings.

Section 4(2) requires that an order directing inquiries relating to a partition proceeding must be served on anyone who would have been a necessary party if the Act had not been passed. Section 4(3) provides that such persons who have standing in the proceeding are bound by the proceeding as if made parties to it originally, and may apply to amend the order. These subsections now largely duplicate the rules of court dealing with service. All persons whose interests may be affected by the relief claimed in the petition would have to be served with the petition at the outset of the proceeding. This would include encumbrancers and other holders of non-title interests in the land.

Section 5(1) deals with substitutional service in partition proceedings. Rule 4-4 of the Civil Rules deals with substitutional service (“alternative service”) in all proceedings.

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31. B.C. Reg. 168/2009, as amended.

32. See Rules 2-1(2)(g)(iv), 16-1(1).

Section 9 allows the legal representative of a person under a disability, such as a minor or mentally incapable adult, to request a sale or give an undertaking to purchase on behalf of the person under disability. Section 9(2) provides that the court is not required to comply with a sale request on behalf of a minor (“infant” in the terminology of the Act) unless the sale or purchase is for the minor’s benefit. The matters covered by section 9 are now covered by other legislation dealing with legal disability. In the case of a mentally incapable adult, section 15(1) of the *Patients Property Act* gives a committee the same powers the incapable person would have if he or she had full capacity, subject to any restrictions imposed by the order appointing the committee. Thus, unless restricted by the terms of the appointment, a committee acting as litigation guardian under the Civil Rules would be able to carry out the acts referred to in s. 9(1) in any case.<sup>33</sup> In the case of a minor, a litigation guardian could take any step on the minor’s behalf without a need for a special provision regarding partition proceedings.<sup>34</sup>

Sections 11, 12 and 13 deal with the application of proceeds of sale. The matters they cover would be within the scope of the power under the rules of court to give directions for the conduct of a sale in a proceeding.

Section 16 provides for costs to be awarded in a partition proceeding for the period prior to hearing. Before the 1868 Act, costs were evidently not awarded for the period before hearing.<sup>35</sup> Section 16 is now unnecessary because the tariff of costs under the Civil Rules provides for costs in respect of the pre-hearing phase of a proceeding.<sup>36</sup>

The *Partition of Property Act* contains provisions in sections 5(2) and 14 for dispensing with notice to persons who cannot be served with an order under s. 4(1) directing inquiries, for substituted service by advertisement on those persons, and for their protection in a sale of the co-owned property. Sections 5(2) and 14 overlap to some extent and are partly contradictory. Section 5(2)(b) states that the powers of the court under the *Trustee Act*<sup>37</sup> extend to the interests of the substitutionally

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33. See Rule 20-2(6).

34. Rule 20-2(2), (3).

35. *Boggs v. Lake*, [1973] B.C.J. No. 397 (S.C.), para. 10. See also LRCBC, *supra*, note 2 at 24, citing *Seton on Decrees* (7th ed., 1912) at 1810.

36. Civil Rules, Rule 14-1(1) and Appendix B.

37. *Trustee Act*, R.S.B.C. 1996, c. 464.

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served persons. It is not clear which provisions of the *Trustee Act* empowering the court are meant.<sup>38</sup>

Under Rule 13-5(4) of the Civil Rules, the court has a wide-ranging power to give directions for the conduct of any judicially ordered sale. This would allow for directions that protect holders of interests in land being sold under an order of the court by allowing them a window of time to establish their claims before a sale or a distribution of sale proceeds takes place. It is unnecessary to retain separate statutory provisions like sections 5(2) and 14 that are applicable only to partition and sale proceedings.

### C. Partition and Sale under the *Family Relations Act*

The *Family Relations Act*<sup>39</sup> empowers the court to order partition or sale of property owned by spouses in proceedings under Part 5 (Matrimonial Property) of the Act. Under section 66(2) of the *Family Relations Act*, the court has broader powers than under the *Partition of Property Act* and the general law of partition. For example, the court may allocate the proceeds of the sale of co-owned assets otherwise than in proportion to the percentage of each spouse's share of ownership. It may also direct that property or a share in it be sold to the other spouse.

Partition or sale is not a matter of right for co-owning spouses under the *Family Relations Act*. Unlike regular partition proceedings, the court has a wide discretion. Various factors may lead the court to refuse partition, such as the presence of young children.<sup>40</sup> If there is a conflict between the *Family Relations Act* and the *Partition of Property Act*, the *Family Relations Act* prevails.<sup>41</sup>

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38. Section 39 of the *Trustee Act* provides a procedure whereby the court may authorize a trustee or personal representative to distribute trust and estate property on the basis of claims and entitlements known or presented as of a specified date. Possibly it is this provision that is referred to in s. 5(2)(b) of the *Partition of Property Act*.

39. R.S.B.C. 1996, c. 128. The procedure in matters under the *Family Relations Act*, including those governing the division and re-allocation of family assets, are governed by the *Supreme Court Family Rules*, B.C. Reg. 169/2009. The *Family Relations Act* has been under review since 2006. In July 2010 the Ministry of Attorney General published the *White Paper on Family Relations Act Reform*, online at <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-White-Paper.pdf>. The court would continue to have a power to order partition and sale under the new family property provisions proposed in the White Paper.

40. *Greenlees v. Greenlees* (1981), 23 R.F.L. (2d) 323 (B.C.C.A.).

41. *Supra*, note 39, s. 69(1). In *Telatar v. Telatar*, 2004 BCCA 125, one spouse applied under the *Partition of Property Act* for partition and the other spouse reactivated an earlier counter-petition seeking a division of family assets under the *Family Relations Act*. Judgment was entered in both proceedings in the same terms, which provided for sale of the matrimonial home and an unequal

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distribution of the proceeds. The Court of Appeal noted that the orders could not have been made under the *Partition of Property Act*, but the jurisdiction to make them did exist under the *Family Relations Act* and treated the order, for purposes of the appeal, as if made under the latter Act.

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### III. REFORM

#### A. General

As noted in the previous chapter, the *Partition of Property Act* has a number of archaic features, including provisions that are now superfluous because modern rules of court and other legislation has overtaken them. The repeated references in the Act to the law of partition previous to its enactment create obscurity.

Furthermore, as the Act is a re-enactment of the English *Partition Act, 1868*, it treats sale as an exceptional remedy, when today it is the normal remedy and actual partition is the exception.

The class of eligible applicants for the remedies of partition and sale remains very narrow. Only co-owners with an immediate right of possession may obtain these remedies, yet others with interests in the land such as mortgagees, judgment creditors, and purchasers awaiting transfer of title may be affected to a considerable extent by whether they are granted or withheld.

This seems to point to a need for modern partition and sale provisions that place sale and partition on an equal footing, that are focused on the remedies and the jurisdiction to grant them, and that leave most matters of procedure to the rules of court. The legislation should be comprehensive and eliminate the need to consult Tudor-era statutes to determine questions of standing to apply for the remedies.

#### B. Eligibility to Apply for Partition or Sale

##### 1. GENERAL

At the very least, modern legislation to replace the *Partition and Sale Act* should state clearly who is eligible to claim the remedies. Cryptic references to “persons who could have maintained a proceeding for partition if this Act had not been passed” should be eliminated and a positive statement listing the categories of claimants should be substituted. As a starting point, this would include the class now eligible, namely co-owners of a legal estate in the land with an immediate right to shared possession. The Project Committee would add to the eligible class other categories of claimants mentioned below.

##### 2. CO-OWNERS WITHOUT IMMEDIATE RIGHT TO POSSESSION

In Chapter II it was mentioned that only co-owners having an immediate right to possession of the land can apply for partition and sale. This has the effect of excluding co-owners of future interests, such as joint tenants in remainder, and possibly

also co-owners who have leased their land, from eligibility to apply for these remedies with respect to their estates. In the view of the Project Committee, it is unnecessary to restrict the right to partition to those having an immediate right to possession, as long as the estate that is sought to be partitioned and sold is the one in which the applicant holds his or her interest. Thus, co-owners of leased land could apply for partition or sale of their reversion. Joint tenants in remainder could apply for partition or sale of the remainder interest, but not the preceding life estate.

The Project Committee tentatively recommends:

1. *A co-owner of land or a profit à prendre should have a right to apply for partition or sale of the estate in the land in which the co-owner holds an interest, whether or not having an immediate right of possession.*

### 3. MORTGAGEES

A partition or sale may be forced on a mortgagee of land that is held in co-ownership. This is clear from section 2(1) of the *Partition of Property Act*. If the mortgage attaches to the entire property, the mortgagee should be unaffected as long as a sale realizes the fair market value of the mortgaged land. The outstanding mortgage debt will form a charge on the proceeds of sale. If the property is partitioned instead of being sold, the mortgage security would continue to attach to the subdivided parcels.

The case of a mortgagee of the interest of an individual co-owner is quite different. The mortgagee may face difficulty in realizing on the security if the mortgagor's interest remains undivided, or is not marketable as may often be the case with a fractional interest. The mortgagee has no standing under current law to obtain partition in the event of a default so that the mortgagor's land can be realized separately.

There is some logic in treating a mortgagee like a co-owner in some respects because the mortgagee could potentially obtain title to the mortgaged interest in the co-owned land through a foreclosure and stand in the place of the mortgagor vis-à-vis the other co-owners. It seems just to allow the mortgagee to seek partition or sale in the event of default. This was the conclusion reached by the LRCBC, and the Project Committee agrees with it.<sup>42</sup> It also seems logical that a mortgagee should have to establish that a default has taken place by obtaining an order *nisi* of foreclosure before being in a position to obtain either partition or sale.

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42. *Supra*, note 2 at 68.

The Project Committee tentatively recommends:

2. *A mortgagee of a co-owner's interest in land should have a right to apply for partition or sale after obtaining an order nisi of foreclosure.*

#### 4. JUDGMENT CREDITORS

Judgment creditors of a co-owner, like mortgagees, currently have no standing to apply for partition or sale. They can pursue execution of a registered judgment against the judgment debtor's interest through to an execution sale by the sheriff, following which the purchaser would be able to apply for partition or sale. The need to take that step after buying the judgment debtor's interest when there is a strong possibility it will be opposed by the other co-owners is a disincentive to buying from the sheriff, however.<sup>43</sup>

A judgment creditor's chances of realization would be improved if partition occurred before the execution sale. The Project Committee agrees with the recommendations of the former LRCBC to extend the right to apply for partition or sale of co-owned land to judgment creditors of a co-owner.<sup>44</sup> Enforcement of a judgment against land is not automatic in the same way as the goods of a judgment debtor are automatically liable to seizure and sale under a writ of execution, however. Before land may be sold to satisfy a judgment under the *Court Order Enforcement Act*, a judgment debtor must first register the judgment against the title to land and then obtain an order for sale of the judgment debtor's interest in it.<sup>45</sup> Obtaining an order for sale of the judgment debtor's interest in the co-owned land should be a prerequisite for the judgment creditor to be eligible for additional relief in the form of partition or sale of the entire co-owned property, as without such an order for sale being made the judgment creditor has no right to recovery of the judgment debt from the land. It should be possible nevertheless for a judgment creditor to apply for partition or sale simultaneously with the application for the order for sale of the judgment debtor's interest under the *Court Order Enforcement Act*, rather than being forced to make successive applications.<sup>46</sup>

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43. *Supra*, note 2 at 21.

44. *Ibid.* The LRCBC also made a similar recommendation in its earlier *Report on Execution Against Land* (LRC 40) (Vancouver: The Commission, 1978) at 26.

45. R.S.B.C. 1996, c. 78, ss. 92-96.

46. *Ibid.* As different modes of procedure are currently prescribed for the two applications, they must be made separately, even if they are made concurrently. The application for an order for sale of the judgment debtor's interest under the *Court Order Enforcement Act* would be an interlocutory application in the action in which the judgment was given, while the application for partition and sale would have to be made by petition. The former LRCBC recommended that a judg-

The Project Committee tentatively recommends:

3. *A judgment creditor of a co-owner who has registered a judgment against the interest of the judgment debtor in the co-owned land and has obtained an order under the Court Order Enforcement Act for sale of the judgment debtor's interest should be eligible to obtain partition and sale.*

#### 5. VENDORS AND PURCHASERS UNDER LONG-TERM AGREEMENTS FOR SALE

##### *(a) General*

A general reform of the *Partition of Property Act* provides an opportunity to clarify the standing of a vendor and purchaser under a long-term agreement for sale to apply for partition or sale of the entire property. “Agreement for sale” in this context refers to a contract for the sale of land in which the purchase price is paid by instalments over an extended period and title is not transferred to the purchaser until the entire price is paid. Generally, the purchaser is placed in possession during the term of the agreement. The purchaser’s interest, described as a “right to purchase,” may be registered as a charge against the vendor’s title in the B.C. land title system.

Agreements for sale function much like mortgages in serving as a security device, and the remedies of vendors against a defaulting purchaser have strong similarities to those of mortgagees.<sup>47</sup> Section 16(1) of the *Law and Equity Act*, which assimilates the procedure for cancellation of an agreement for sale with foreclosure of a mortgage, applies the term “foreclosure” to orders in cancellation proceedings.

##### *(b) Vendors*

Occasionally vendors of fractional interests in land under agreements for sale, which have the effect of creating a de facto co-ownership during the term of the agreement, have obtained partition or sale to themselves of the entire property against the defaulting purchasers and the other co-owners. In these cases the standing of the vendor to claim the remedy has not been directly questioned.<sup>48</sup>

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ment creditor of a co-owner be able to apply for partition and sale as additional relief in the application for the order for sale of the judgment debtor’s interest in co-owned land: *Report on Execution Against Land*, *supra*, note 44 at 27.

47. See *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 16.

48. *Balkau v. Sanda* (1984), 53 B.C.L.R. 292 (S.C.); *Blacklaw v. Beveridge*, [1939] 4 D.L.R. 676 (Sask.



The position of an unpaid vendor of a fractional interest in co-owned land under an agreement for sale is not unlike that of a mortgagee foreclosing on a mortgage of such an interest. They should be treated in a similar manner, or in other words be accorded the ability to apply for partition or sale of the entire property so as to be in a better position to realize the debt owed to them.

If a vendor has obtained an order *nisi* of foreclosure, thereby establishing that the purchaser is in default, the vendor should be able to apply for partition or sale.

*(c) Purchasers*

Purchasers under agreements for sale have attempted to claim partition or sale against co-purchasers in several instances without objection, but without a direct ruling having been given on whether they have standing to do so.<sup>49</sup> A purchaser under an agreement for sale is usually in possession and in that respect is not very differently situated than a mortgagor who is a joint tenant or tenant in common. Accordingly, the purchaser who is not in default should have the same right of standing to seek partition or sale.

The Project Committee tentatively recommends:

4. *(a) A vendor of an interest in land held in co-ownership that is sold under an agreement for sale should have a right to apply for partition or sale after obtaining an order nisi of foreclosure.*

*(b) In paragraph (a), "agreement for sale" and "foreclosure" have the same meanings as in section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253.*

5. *A purchaser of an interest of a co-owner under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253 should have a right to apply for partition or sale of the co-owned property if the purchaser is not in default under the agreement.*

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C.A.).

49. *Diehl v. Chobot*, [1975] S.J. No. 128 (Q.B.) (QL); *B.T.S. v. W.C.S.*, [1976] B.C.J. No. 550 (S.C.); *Corbett v. Davis*, [1978] B.C.J. No. 156 (S.C.) (QL).

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## Consultation Paper on the *Partition of Property Act*

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### 6. LIST OF CLASSES OF ELIGIBLE APPLICANTS

In keeping with the goal of greater clarity in partition and sale legislation, all the classes of interest holders eligible to apply for these remedies should be set out in the legislation that will replace the *Partition of Property Act*.

The Project Committee tentatively recommends:

6. *Legislation replacing the Partition of Property Act should state clearly that the following are eligible to claim partition of co-owned property or sale in lieu of partition:*

- (a) a co-owner of an estate in fee simple or a profit à prendre;*
- (b) a co-owner of a life estate, with respect to the life estate;*
- (c) a co-owner of a leasehold estate, with respect to the leasehold;*
- (d) a mortgagee of the interest of a co-owner referred to in paragraphs (a) to (c) who has obtained an order nisi of foreclosure of that interest;*
- (e) a judgment creditor of a co-owner referred to in paragraphs (a) to (c) who has registered a judgment against the interest of the co-owner in the co-owned land and has obtained an order under the Court Order Enforcement Act for sale of the co-owner's interest;*
- (f) a vendor of an interest in land held in co-ownership that is sold under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253 after obtaining an order nisi of foreclosure within the meaning of that subsection;*
- (g) a purchaser of the interest of a co-owner under an agreement for sale within the meaning of section 16(1) of the the Law and Equity Act, R.S.B.C. 1996, c. 253 if the purchaser is not in default under the agreement.*

### C. Presumptive Right to Partition or Sale

As noted in Chapter II, co-owners have a presumptive right to partition or sale, and these remedies can only be refused if justice requires it. If the class of eligible

applicants is expanded to include mortgagees, judgment creditors, and vendors and purchasers who are parties to long-term agreements for sale, should they enjoy the benefit of this presumptive right as well?

It is arguable that there should be no distinction drawn between these classes of interest holders in regard to access to the remedies of partition and sale. There are considerable difficulties in marketing a fractional ownership interest in land. A foreclosing mortgagee or a judgment creditor of a co-owner, a foreclosing vendor of a fractional interest under an agreement for sale, or a purchaser in possession may all need to obtain a sale of the entire co-owned parcel of land or, more rarely, actual partition in order to realize their respective interests. In addition, it could be useful as a matter of policy to extend a presumption of entitlement to sale or partition to mortgage lenders to encourage them to finance real estate transactions involving co-ownership.

It is also arguable, however, that mortgagees and other creditors, and unpaid vendors under agreements for sale who are in a position similar to mortgagees, are not in the same position as co-owners in possession wishing to disengage their own property from the rest. They are seeking to alter an arrangement under which other co-owners having no obligation toward them hold and enjoy their own property. Accordingly, they should have to advance cogent grounds to justify disrupting the co-ownership arrangement.

The Project Committee has as yet no settled view on this issue. The Project Committee seeks the views of readers on this question:

*If mortgagees, judgment creditors, and any other non-owners are given standing to apply for partition or sale, should they*

(a) *have a right to partition or sale, subject to a judicial discretion to refuse this relief when justice otherwise requires?*

*or*

(b) *have to justify the exercise of a judicial discretion to divide or order sale of the entire property and if so, on what basis should the discretion be exercised?*

#### **D. Statutory Right of First Refusal for Co-Owners**

Sections 8(2) and (3) of the *Partition of Property Act* now provide for a kind of right of first refusal for co-owners in that they may pre-empt a request for sale on the

open market by undertaking to purchase the interest of the co-owner desiring sale. The Project Committee sees this as a desirable feature that should be preserved.

If the majority of co-owners wish to maintain their ownership circle despite a dissident co-owner's desire to dissolve it, and are willing to buy out the dissident, they should be allowed to do so before the entire property is placed on the open market. As currently configured, however, the right of first refusal under section 8(2) is triggered only if an interested party requests sale. If the court directs sale under section 7 because it concludes that sale would be more beneficial than partition, for example, without a request for sale having been made, the court is not obliged to offer the co-owners the right to make the first offer.

The Project Committee believes that the property should be offered first to the remaining co-owners whenever an order for sale is made.

The Project Committee tentatively recommends:

*7. Legislation supplanting the Partition of Property Act should provide for a right of first refusal for co-owners if an order for sale of co-owned property is made.*

## **E. Transitional Considerations**

### **1. GENERAL**

The changes in the law of partition and sale of co-owned property proposed in this consultation paper may be summarized as follows:

- (a) the addition under Tentative Recommendations 1 and 2 of mortgagees and judgment creditors to the classes of interest holders eligible to claim partition and sale;
- (b) the introduction under Tentative Recommendation 7 of a statutory right of first refusal for co-owners when the court orders a sale of the co-owned property.

Tentative Recommendations 3 and 4 call for legislative confirmation of the ability of a vendor and purchaser under a long-term agreement for sale to obtain partition or sale. They do not change the law, because vendors and purchasers under long-term agreements for sale have been able to obtain these remedies. They merely call for its clarification. The requirement under Tentative Recommendation 3 for a vendor

to obtain an order *nisi* of foreclosure (as defined under s. 16(1) of the *Law and Equity Act*) before obtaining partition or sale reflects the reality that in order to make use of these remedies free of the purchaser's interest under the present law, the vendor would have to first pursue foreclosure in any event.

As only Tentative Recommendations 1, 2, and 6 call for changes in the law, only they would raise any transitional implications in connection with rights that have accrued or are accruing when legislation implementing these tentative recommendations comes into force (the "effective date").

## 2. APPLICATIONS BY MORTGAGEES AND JUDGMENT CREDITORS FOR PARTITION OR SALE: TRANSITIONAL POINTS

After the effective date, a mortgagee of the interest of a co-owner would have a right to apply for partition and sale of the entire property under Tentative Recommendation 1 if all of these events have occurred: the mortgage has been granted, default has taken place under it, and the mortgagee has obtained an order *nisi* of foreclosure.

Similarly, after the effective date a judgment creditor of a co-owner would be able to seek these remedies under Tentative Recommendation 2 if the judgment has been granted, the judgment has been registered, and an order for an execution sale has been obtained.

Should it make a difference to the entitlement of mortgagees and judgment creditors to the remedies of sale or partition if any of the requisite events occur before the effective date of the implementing legislation? The Project Committee concludes that it should not for the reasons, first, that these changes do not alter the relative positions of the parties in any detrimental fashion and, second, the changes arguably are to the economic benefit of all the interested parties.

In the case of mortgagees, Tentative Recommendation 1 really only removes a step, namely the need to acquire title through an order of foreclosure absolute before applying for partition or sale of the entire property. Under the present law, once a mortgagee of a co-owner's interest acquires the title to that interest through an order absolute of foreclosure, the mortgagee would have the same right as the mortgagor had to claim partition or sale as a co-owner. Regardless of whether Tentative Recommendation 1 were limited in its temporal application to cases where either mortgages are signed, or defaults occur, or orders *nisi* are obtained after the effective date, any mortgagee proceeding with foreclosure could ultimately be in a position to apply for sale or partition of the entire property. The mortgagor's position is essentially unaffected by the change.

Sale of the entire property would likely bring a better recovery for the mortgagee and better protection for the mortgagor's equity. Tentative Recommendation 1 does not place the remaining co-owners in any better or worse position than they are under the present law. As a result of the statutory right of first refusal under Tentative Recommendation 6, their position will arguably have been improved.

While Tentative Recommendation 2 would confer a new remedy against the entire property on judgment creditors, the possibility that sale of an entire property rather than a fractional interest would bring a better return for both the judgment creditor and judgment debtor, just as it is likely to do for the parties to a mortgage, is a strong one. Other co-owners who oppose sale or partition will have had an opportunity to be heard and to have the merits of their arguments weighed by the court. If a sale proceeds, they will have the benefit of the statutory right of first refusal contemplated by Tentative Recommendation 6. This may accord them an opportunity to acquire the entire interest in the land which they may not otherwise have had.

For these reasons, a majority of the Project Committee believe Tentative Recommendations 1 and 2 should apply regardless of whether any of the events entitling a mortgagee or judgment creditor to seek partition or sale have occurred before the effective date of their implementing legislation. A minority would confine the scope of those tentative recommendations to mortgages executed after the effective date on the ground that the conferral of additional remedies alters the configuration of rights between the mortgagor and mortgagee.

### 3. THE STATUTORY RIGHT OF FIRST REFUSAL AND PENDING PROCEEDINGS FOR SALE OR PARTITION

The transitional point arising in relation to Tentative Recommendation 6, which requires co-owners to be given a first opportunity to purchase the interest of a co-owner seeking sale, is whether the tentative recommendation should apply to proceedings for partition or sale that are pending at the effective date. The view of the Project Committee is that the introduction of a statutory right of first refusal is remedial and should be given as wide an application as possible. As it should not operate to the prejudice of any interested party, it should apply in proceedings pending at the effective date as well as to those commenced afterwards.

### 4. TENTATIVE RECOMMENDATION

The Project Committee therefore tentatively recommends:

8. (1) *In this recommendation, “effective date” means the date on which legislation implementing a tentative recommendation comes into force.*

(2) *Tentative Recommendations 1 to 4 should apply regardless of whether any event relevant to their application occurred before or after the effective date.*

9. *Tentative Recommendation 6 should apply to proceedings for sale or partition that are pending at the effective date as well as to those commenced after the effective date.*

#### **F. Conclusion**

The Project Committee believes these tentative recommendations will clarify and simplify the law, and make the remedies of partition and sale more effective. Comment on them is invited. In order to ensure that the Project Committee and the Board of Directors of BCLI are in a position to consider your comments on this consultation paper in reaching final recommendations on the reform of this area of the law, please provide comments by **1 September 2011**.





**LIST OF TENTATIVE RECOMMENDATIONS**

1. *A co-owner of land or a profit à prendre should have a right to apply for partition or sale of the estate in the land in which the co-owner holds an interest, whether or not having an immediate right of possession.*

**(p. 14)**

2. *A mortgagee of a co-owner's interest in land should have a right to apply for partition or sale after obtaining an order nisi of foreclosure.*

**(p. 15)**

3. *A judgment creditor of a co-owner who has registered a judgment against the interest of the judgment debtor in the co-owned land and has obtained an order under the Court Order Enforcement Act for sale of the judgment debtor's interest should be eligible to obtain partition and sale.*

**(p. 16)**

4. (a) *A vendor of an interest in land held in co-ownership that is sold under an agreement for sale should have a right to apply for partition or sale after obtaining an order nisi of foreclosure.*

(b) *In paragraph (a), "agreement for sale" and "foreclosure" have the same meanings as in section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253.*

**(p. 17)**

5. *A purchaser of an interest of a co-owner under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253 should have a right to apply for partition or sale of the co-owned property if the purchaser is not in default under the agreement.*

**(p. 17)**

## Consultation Paper on the *Partition of Property Act*

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6. *Legislation replacing the Partition of Property Act should state clearly that the following are eligible to claim partition of co-owned property or sale in lieu of partition:*

- (a) a co-owner of an estate in fee simple or a profit à prendre;*
- (b) a co-owner of a life estate, with respect to the life estate;*
- (c) a co-owner of a leasehold estate, with respect to the leasehold;*
- (d) a mortgagee of the interest of a co-owner referred to in paragraphs (a) to (c) who has obtained an order nisi of foreclosure of that interest;*
- (e) a judgment creditor of a co-owner referred to in paragraphs (a) to (c) who has registered a judgment against the interest of the co-owner in the co-owned land and has obtained an order under the Court Order Enforcement Act for sale of the co-owner's interest;*
- (f) a vendor of an interest in land held in co-ownership that is sold under an agreement for sale within the meaning of section 16(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253 after obtaining an order nisi of foreclosure within the meaning of that subsection;*
- (g) a purchaser of the interest of a co-owner under an agreement for sale within the meaning of section 16(1) of the the Law and Equity Act, R.S.B.C. 1996, c. 253 if the purchaser is not in default under the agreement.*

**(p. 18)**

7. *Legislation supplanting the Partition of Property Act should provide for a right of first refusal for co-owners if an order for sale of co-owned property is made.*

**(p. 20)**

8. (1) *In this recommendation, "effective date" means the date on which legislation implementing a tentative recommendation comes into force.*

*(2) Tentative Recommendations 1 to 4 should apply regardless of whether any event relevant to their application occurred before or after the effective date.*

**(p. 23)**

*9. Tentative Recommendation 6 should apply to proceedings for sale or partition that are pending at the effective date as well as to those commenced after the effective date.*

**(p. 23)**

Readers are also invited to comment on the following question:

*If mortgagees, judgment creditors, and any other non-owners are given standing to apply for partition or sale, should they*

*(a) have a right to partition or sale, subject to a judicial discretion to refuse this relief when justice otherwise requires?*

*or*

*(b) have to justify the exercise of a judicial discretion to divide or order sale of the entire property and if so, on what basis should the discretion be exercised?*

**(p. 19)**



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