

# **Report on the Partition of Property Act**

**A Report prepared for the British Columbia Law  
Institute by the Members of the Real Property  
Law Reform (Phase 2) Project Committee**

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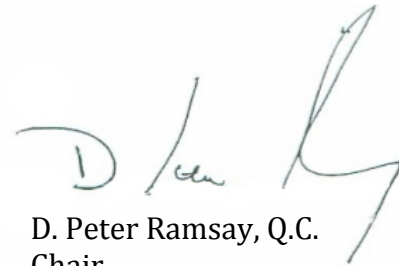
# INTRODUCTORY NOTE

## Report on the Partition of Property Act

Partition and sale in lieu of partition are remedies available to a co-owner of land who wishes to end the co-ownership without the consent of other co-owners. In British Columbia these remedies are partly governed by the *Partition of Property Act*, which is based on English legislation dating from 1868. Much of the Act consists of procedural provisions that are now covered by modern rules of court, and other portions of the Act cannot be applied without referring to the law as it existed before 1868. Sixteenth century statutes govern other aspects of the law of partition.

This report recommends replacement of the *Partition of Property Act* and the older statutes with modern legislation that would remove the need to examine the pre-1868 state of the law. The report also recommends expanding the classes of persons interested in land who are eligible to seek partition or sale to include mortgagees, judgment creditors, and the parties to long-term agreements for sale of an individual co-owner's interest. A right to immediate possession of the land would no longer be a prerequisite for standing to apply for these remedies. In all cases, co-owners would be given the opportunity before sale of the land was ordered to buy the interest of the co-owner seeking the sale.

The reforms recommended in this report would clarify aspects of the law of partition and sale that are now obscure and provide a contemporary legislative framework for these important remedies.



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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 only partially governed by the Act.

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. This report endorses those still unimplemented recommendations. This report also recommends adding 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 report 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 un-

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dertaking 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 report 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. The report does not propose any change in relation to this, but recommends that the remedies be available only as a matter of judicial discretion when sought by mortgagees and judgment creditors of a co-owner.

# PART ONE

## 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) recom-

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

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mended its replacement by more modern legislation, but those recommendations have remained unimplemented.<sup>2</sup>

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

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

This report is 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 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, involved 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.

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

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## 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 Prop-*

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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. *An Act for Joint Tenants and Tenants in Common*, 31 Hen. 8, c. 1.

7. *An Act concerning Joint Tenants for Life or Years*, 32 Hen. 8, c. 32.

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*erty Limitation Act, 1833*,<sup>8</sup> but partition continued to be granted in equity by the Court of Chancery.<sup>9</sup>

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 li-

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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.

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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cence, 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 interested 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 without saying who has standing to apply for it.<sup>15</sup> Section 4(1) indicates in a very circuitous manner 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 19 November 1858, 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 is not part of the law of British Columbia,<sup>18</sup> the persons eligible to seek parti-

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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 arose at common law when real property descended to two or more women because of the lack of a male heir at law. Coparcenary tenancies can no longer be created because the concept of the heir at law has been abolished and real property of a deceased person now passes to the personal representative, instead of devolving directly on the heir: *Estate Administra-*

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tion or sale in lieu of partition in British Columbia today 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;
- (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>

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*tion 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.

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 of an estate. 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.). See also *Dosanjh v. Singh*, 2011 BCCA 179 at para. 10.

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



There is, however, an important qualification on the right of an eligible co-owner to obtain the remedy of partition. 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> An order for partition must contain an express declaration that it is subject 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 an alternative to 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.

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

25. *Ibid.*, s. 17.

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

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

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

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] B.C.J. 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) of the Act deals with substitutional service in partition proceedings. Rule 4-4 of the Civil Rules pertains to substitutional service (“alternative service”) in all civil proceedings, however, rendering section 5(1) superfluous.

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

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

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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. See Rules 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* and the New *Family Law 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. A review of the *Family Relations Act* commenced in 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>. Under the proposals for legislative reform in the White Paper, the court would continue to have a power to order partition and sale in family property proceedings. This was carried forward in the *Family Law Act*, S.B.C. 2011, c. 25, which will replace the *Family Relations Act* when brought fully into force.

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

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Similar provisions are found in the new *Family Law Act*, which is not fully in force as of the date of this report.<sup>42</sup>

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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 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.

42. *Supra*, note 39.

### 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 as it existed 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 sale is the normal remedy and actual partition is the exception.

The class of applicants eligible to obtain 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 of Property 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 Institute concludes that the other categories of claimants mentioned below should be added to the class of eligible applicants.

### 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 could 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 Institute, 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 Institute recommends:

*1. An immediate right to possession of land should not be a prerequisite for obtaining the remedies of partition or sale.*

### 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.

Giving the ability to a mortgagee to seek partition or sale raises different issues. If a mortgage is effective over all the interests of a set of co-owners, the mortgagee may, in the event of default, realize on the security in the same manner as any other mortgagee. 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 security could be realized upon 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 Institute concurs.<sup>43</sup>

The consultation paper contained a tentative recommendation that a mortgagee of the interest of an individual co-owner should be eligible to seek partition or sale of the entire property once the mortgagee has established that default has taken place under the mortgage by obtaining an order *nisi* of foreclosure. The reasoning behind this recommendation was that requiring the mortgagee to wait out the redemption period and then apply for a final order would delay a sale that may be in the best financial interests of all parties while interest is continuing to run. As a practical matter, creditors with security on fractional interests face greater difficulty in realizing upon the security than those whose security extends over an entire land holding, and it would likely be easier to obtain financing on the basis of a fractional interest if lenders were less disadvantaged in taking such security. Allowing the mortgagee to obtain sale of the entire property at the order *nisi* stage would also give the remaining co-owners an early opportunity to purchase the mortgagor's interest and avoid having to deal with the mortgagee as a co-owner.

It is possible for orders *nisi* of foreclosure to be set aside, however, and it is unusual in foreclosure proceedings for sale to be ordered during the redemption period. On further consideration following review of the responses to the consultation paper, the Project Committee reached a consensus that it should be a matter of judicial discretion whether partition and sale should be granted on the application of a mortgagee of the individual interest of a co-owner following an order *nisi* of foreclosure, or whether these remedies should be withheld until the mortgagee obtains a final order of foreclosure.

The Institute recommends:

2. (a) *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.*

(b) *It should be a matter of judicial discretion whether to grant partition or sale on the application of a mortgagee of a co-owner's interest in land following an order nisi of foreclosure or to require the mortgagee to re-apply upon obtaining a final order of foreclosure.*

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43. *Supra*, note 2 at 68.

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### 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>44</sup>

A judgment creditor's chances of realization would be improved if partition occurred before the execution sale. The Institute 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>45</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>46</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>47</sup>

The Institute recommends:

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44. *Supra*, note 2 at 21.

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

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

47. *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 judgment 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 45 at 27.

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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>48</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 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>49</sup>

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

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

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

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such an interest. The unpaid vendor should be treated similarly to the mortgagee, 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 recover the debt owed.

### *(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>50</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, a purchaser who is not in default should have a right to seek partition or sale.<sup>51</sup>

The Institute 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) It should be a matter of judicial discretion whether to grant partition or sale on the application of a vendor of an interest in land held in co-ownership that is sold under an agreement for sale following an order nisi of foreclosure or to require the vendor to re-apply upon obtaining a final order of foreclosure.*

*(c) In paragraphs (a) and (b), "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.*

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50. *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).

51. If a purchaser under an agreement for sale succeeds in obtaining an order for sale, a question might arise whether the vendor would be entitled to be paid in full from the proceeds of sale immediately, or have only the right to continue receiving instalments of the price at the intervals specified in the agreement. If the vendor were left only with a right to continue receiving instalments, he or she would have no further security. There is authority, however, that an unpaid vendor under a sale of land calling for instalments of price has a vendor's lien until the purchase price is paid in full, as does a vendor in a normal conveyance: see *Balkau v. Sanda*, *supra*, note 49. The existence of a vendor's lien would appear to entitle the vendor to receive immediate payment of the unpaid portion of the purchase price if the land were sold at the instance of the purchaser. It might be necessary for the vendor to obtain an order declaring the lien to be in effect and charging the proceeds with its amount: see T. Cyprian Williams and John Mason Lightwood, *A Treatise on the law of Vendor and Purchaser of Real Estate and Chattels Real*, 4th ed. (London: Sweet & Maxwell, 1936) at 988.

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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.

### 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 Institute 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, whether or not having an immediate right to possession:

- (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?

The consultation paper put forward no fixed position on this issue. Instead, it sought comment from readers on whether mortgagees, judgment creditors and parties to agreements for sale should have a presumptive right to the remedies or whether they should be able to obtain them only on a discretionary basis. Only one correspondent addressed the point, saying that mortgagees and vendors under agreements for sale should have access to the remedies of purchase and sale on essentially the same basis as co-owners now do, but only after obtaining final orders of foreclosure or cancellation granting them possession. Judgment creditors should have to purchase the judgment debtor's interest in an execution sale before becoming eligible to seek partition or sale of the entire property, in the view of the correspondent. This would mean that the remedies would be available to these applicants only after they virtually became co-owners.

It is arguable that no distinction should be drawn between these classes of interest holders in regard to the availability 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 of an individual co-owner 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.

Our conclusion, after further consideration, is that partition or sale should be available to mortgagees, judgment creditors, and vendors on a discretionary basis rather than as a matter of right.

The case of purchasers under agreements for sale presents a more perplexing dilemma, because it is possible to take one of two contrasting but equally cogent views of their status. One view is that the similarities between the position of a long-term purchaser and that of a co-owner of land subject to a mortgage justify giving purchasers a presumptive right to the remedies of partition and sale. Like a co-owner of mortgaged land, the purchaser is in possession of the land while gradually building up equity by making periodic payments towards the discharge of a monetary obligation. When the obligation is fully discharged by payment of the last instalment, the purchaser has a right to a transfer of the title. Upon discharge of a mortgage, the unencumbered legal title is notionally reconveyed to the mortgagor.

Another view is that a purchaser should not be equated with a co-owner until, at the earliest, the entire purchase price is paid in full. While a co-owner holds an equity of redemption derived from the fee simple, a purchaser has only what amounts to a charge on the land capable of ripening into a right to demand transfer of the title. As such, the purchaser should be treated as a chargeholder until that stage is reached. A vendor who has received only partial payment should not be forced to accept partition or sale on the demand of a purchaser who has paid only a fraction of the price of the land. While the position may shift gradually in favour of the purchaser as the purchaser's equitable interest increases with each instalment payment, this in itself justifies making the remedies of purchase and sale available as a matter of judicial discretion rather than as of right. This is the view held by a slight majority of the members of the Project Committee.

The Institute accordingly recommends:

*7. Mortgagees, judgment creditors, and vendors and purchasers under agreements for sale should be able to obtain the remedies of partition or sale only as an exercise of judicial discretion.*

#### **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 saw this as a desirable feature that should be preserved.

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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 without a request for sale having been made because it concludes that sale would be more beneficial than partition, the court is not obliged to provide the co-owners an opportunity to make the first offer.

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

The Institute recommends:

*8. 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 report may be summarized as follows:

- (a) the abolition under Recommendation 1 of the requirement that a co-owner have an immediate right to possession as a requirement of eligibility to claim partition or sale;
- (b) the addition under Recommendations 2 and 3 of mortgagees and judgment creditors to the classes of interest holders eligible to claim partition and sale;
- (c) the introduction under Recommendation 8 of a statutory right of first refusal for co-owners when the court orders a sale of the co-owned property.

The remaining recommendations are principally matters of clarification rather than change. Recommendations 4 and 5 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. The requirement under Recommendation 4 for a vendor to obtain an order *nisi* of foreclosure (as defined under s. 16(1) of the *Law and Equity Act*) before becoming eligible to obtain



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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 first have to pursue foreclosure in any event.

Recommendation 6 summarizes the effect of the current law plus Recommendations 2 and 3.

Recommendation 7 clarifies the basis on which the new rights given by Recommendations 2 and 3 may be enjoyed by mortgagees and judgment creditors. It is not clear that Recommendation 7 would make any change in the law with respect to the availability of partition or sale to vendors and purchasers under agreements for sale, because the case law does not elaborate upon the question of whether these classes of claimants have obtained these remedies in the past as of right or on the basis of judicial discretion.

Only Recommendations 1, 2, 3 and 8 would raise transitional implications in connection with rights that have accrued or are accruing at the time when legislation implementing the recommendations in this report comes into force (the "effective date").

### 2. ABOLITION OF THE REQUIREMENT OF AN IMMEDIATE RIGHT TO POSSESSION

The extension under Recommendation 1 of eligibility to seek partition or sale of the co-owned estate to co-owners who do not have an immediate right to possession confers a new right, rather than detracting from or limiting existing rights. As the co-owners could only obtain partition or sale of their postponed estate (such as a reversion or remainder), holders of immediate possessory interests such as leaseholds or life tenancies would not be prejudiced by the change contemplated by Recommendation 1.

We conclude that Recommendation 1 should apply to co-ownerships formed before as well as after the effective date.

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

After the effective date, a mortgagee of the individual interest of a co-owner would have a right to apply for partition and sale of the entire property under Recommendation 2 if all of these events have occurred: the mortgage has been granted, de-

fault 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 Recommendation 3 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? Our conclusion is that it should not for the reasons, first, that the recommended changes in the law 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, Recommendation 2 really only removes a step, namely the need to acquire title through a final order of foreclosure before applying for partition or sale of the entire property. Under the present law, once a mortgagee of a co-owner's interest becomes entitled to be registered as the owner of 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 Recommendation 1 is limited in its temporal application to cases where 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 giving the mortgagee the right to seek partition or sale before becoming the registered owner of the mortgagor's former fractional interest.

Sale of the entire property would likely bring a better recovery for the mortgagee and better protection for the mortgagor's equity. Recommendation 2 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 Recommendation 8, their position will arguably have been improved.

While Recommendation 3 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 contem-

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plated by Recommendation 8. This may accord them an opportunity to acquire the entire interest in the land which they may not otherwise have had.

For these reasons, we conclude that Recommendations 2 and 3 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.

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

The transitional point arising in relation to Recommendation 8, which requires co-owners to be given a first opportunity to purchase the interest of a co-owner seeking sale, is whether the recommendation should apply to proceedings for partition or sale that are pending at the effective date. The view of the Institute is that the introduction of a statutory right of first refusal is remedial and should be given as wide an application as possible. As the statutory right of first refusal to purchase at a fair value would 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.

#### 5. RECOMMENDATION

The Institute therefore recommends:

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

*(2) Recommendation 1 should apply to co-ownerships whether they are formed before or after the effective date.*

*(3) Recommendations 2 to 5 should apply regardless of whether any event relevant to their application occurred before or after the effective date.*

*10. Recommendation 8 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.*



#### IV. CONCLUSION AND LIST OF RECOMMENDATIONS

##### A. Conclusion

The current *Partition of Property Act* dating from 1868 is unclear in numerous aspects and is not understandable without reference to much earlier legislation and common law. Clearly, much obscurity and unnecessary technicality surrounds the remedies of partition and sale in lieu of partition. The Institute believes the recommendations in this report will clarify and improve the law, and render partition and sale more flexible and adaptable remedies for modern circumstances.

##### B. List of Recommendations

1. *An immediate right to possession of land should not be a prerequisite for obtaining the remedies of partition or sale.*

**(p. 14)**

2. (a) *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.*

(b) *It should be a matter of judicial discretion whether to grant partition or sale on the application of a mortgagee of a co-owner's interest in land following an order nisi of foreclosure or to require the mortgagee to re-apply upon obtaining a final order 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. 17)**

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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) *It should be a matter of judicial discretion whether to grant partition or sale on the application of a vendor of an interest in land held in co-ownership that is sold under an agreement for sale following an order nisi of foreclosure or to require the vendor to re-apply upon obtaining a final order of foreclosure.*

(c) *In paragraphs (a) and (b), "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. 18)**

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. 19)**

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, whether or not having an immediate right to possession:*

- (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;*

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- (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. 19)**

7. *Mortgagees, judgment creditors, and vendors and purchasers under agreements for sale should be able to obtain the remedies of partition or sale only as an exercise of judicial discretion.*

**(p. 21)**

8. *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. 22)**

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

(2) *Recommendation 1 should apply to co-ownerships whether they are formed before or after the effective date.*

(3) *Recommendations 2 to 5 should apply regardless of whether any event relevant to their application occurred before or after the effective date.*

**(p. 25)**

10. *Recommendation 8 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. 25)**





## PART TWO—DRAFT LEGISLATION

The draft legislation set out below is intended only as an illustration of one manner in which the recommendations in this report could be implemented and does not form part of the recommendations themselves.

### *Property Law (Sale and Partition) Amendment Act, 20\_\_*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

#### **1. The *Property Law Act* is amended by adding the following after section 41:**

##### **Sale or partition of land in co-ownership**

42. (1) The following persons may apply to the Supreme Court for relief under this section:
- (a) a co-owner of the fee simple in land or of a *profit à prendre*;
  - (b) a co-owner of a life estate in land, with respect to the life estate;
  - (c) a co-lessee of land, with respect to the leasehold;
  - (d) if an order *nisi* setting a redemption period or a final order of foreclosure has been made in a foreclosure proceeding in respect of a mortgage of the interest of a co-owner referred to in paragraphs (a) to (c), the mortgagee;
  - (e) if an order has been made setting a redemption period or cancelling or determining an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act* relating to the interest of a co-owner referred to in paragraphs (a) to (c), the vendor;
  - (f) if a purchaser of the interest of a co-owner referred to in paragraphs (a) to (c) under an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act* is not in default under the agreement for sale, the purchaser;

- (g) if an order has been made under Part 5 of the *Court Order Enforcement Act* finding an interest of a co-owner referred to in paragraphs (a) to (c) liable to be sold to satisfy a judgment registered against the interest and directing the sale of the interest by the sheriff, the judgment creditor.

**Comment:** Subsection (1) states who may apply for the remedies of sale or partition of co-owned land in order to bring about an end to the co-ownership. The categories of eligible applicants listed in paragraphs (1)(a) to (c) have standing under the present law to claim either remedy. Paragraphs (1)(e) and (f) restate what appears to be the effect of existing case law regarding the ability of vendors and purchasers under long-term agreements for sale of an individual interest of a co-owner to obtain partition or sale. Paragraphs (1)(d) and (g) add new categories of eligible applicants, namely mortgagees of the fractional interest of an individual co-owner and judgment creditors of a co-owner. A mortgagee of an individual co-owner's interest in the co-owned land must have established that the mortgagor is in default by obtaining at least an order *nisi* of foreclosure before applying to have the entire property sold or partitioned. A judgment creditor must have registered the judgment against the interest of the judgment debtor in the co-owned land and have obtained an order for an execution sale of the judgment debtor's interest before being in a position to apply for sale or partition.

*Profits à prendre* mentioned in paragraph (1)(a) are rights to extract and remove substances from land that form part of the realty, such as minerals, growing crops or standing timber. They are considered to be real property and are subject to partition and sale under current law.

- (2) A person referred to in subsection (1) may apply for relief under this section whether or not the person has a present right to possession of the land that is the subject of the relief.

**Comment:** Subsection (2) abolishes the requirement under the present law that anyone claiming partition or sale must have a right to immediate possession of the land. In theory, this requirement prevents a co-owner of leased land from obtaining partition or sale because it is the lessee who has the im-

mediate right to possession, rather than the co-lessors. The requirement has not always been strictly enforced, because on occasion co-owners of leased land have obtained relief under the present *Partition of Property Act*, R.S.B.C. 1996, c. 347. It is possible to grant sale or partition of leased land on terms that protect an existing lease. Furthermore, the requirement of an immediate possessory right is incompatible with the recognition of new categories of applicants without immediate possessory rights, such as mortgagees and judgment creditors.

- (3) Subject to subsections (5) and (6) and section 43, on the application of a person referred to in paragraphs (1)(a) to (c), the court must, unless justice otherwise requires, make an order directing one of the following:
- (a) sale of the land and distribution of the proceeds of sale, or
  - (b) partition of the land between the co-owners.

**Comment:** Subsection (3) restates current law by allowing co-owners of a legal estate in land to obtain sale or partition as of right, unless justice requires otherwise. Unlike the present *Partition of Property Act*, however, subsection (3) does not treat sale as an exceptional remedy and partition as the normal one. While sale will be the usual remedy sought in the present day, the draft legislation simply treats the two remedies as alternatives. This is nevertheless subject to the co-owners' statutory right of first refusal under the proposed s. 43 below and the requirement under subsection (5) to order sale instead of partition if sale is desired by parties whose individual or combined interests represent 50 % or more of the total interest in the land.

- (4) Subject to subsections (5) and (6) and section 43, on the application of a person referred to in paragraphs (1)(d) to (g), the court may in its discretion make an order directing:
- (a) sale of the land and the distribution of the proceeds of sale; or
  - (b) partition of the land between the co-owners.

**Comment:** Subsection (4) makes sale or partition of co-owned land discretionary remedies in the case of eligible applicants other than co-owners. This is because the other eligible applicants listed in subsection (1)(d) to (g) are seeking a remedy against the entire co-owned land in order to be in a better position to realize their security or, in the case of purchasers, their own fractional interest derived from that of an individual co-owner.<sup>52</sup> While this can sometimes be in the best economic interests of all concerned, it may not necessarily be so in every case. The court should be empowered to assess the reasonableness of the relief sought. The judicial discretion also extends to the issue of whether sale or partition should be granted after a mortgagee or unpaid vendor has obtained only an order *nisi* of foreclosure, or should be forced to re-apply after obtaining the final foreclosure order.

The statutory right of first refusal of co-owners under s. 43 will apply in an application for sale or partition by an applicant listed in paragraphs (1)(d) to (g). The direction to the court under subsection (5) to order sale if interested parties having individually or collectively a half-interest or more in the co-owned land request sale also applies, although this will rarely come into play in an application by a mortgagee or judgment creditor, because these applicants would very seldom request partition instead of sale.

- (5) Subject to subsection (6), the court is not bound in an application under this section by the nature of the relief requested by the applicant and may order either sale or partition, depending on which remedy the court considers to be more beneficial for interested parties and appropriate in the circumstances.

**Comment:** Subsection (5) of the draft legislation allows the court the flexibility to award either sale or partition, regardless of the manner in which the application is framed. Subsection (5) preserves the effect of ss. 3 and 7 of the current *Partition of Property Act*, but without the assumption implicit in the present Act that partition is the usual remedy desired and sale the exception. Under present-day circumstances, the reverse is generally the case.

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52. The inclusion of purchasers under agreements for sale among the classes of eligible applicants to which subsection (4) applies reflects the view of a slight majority amongst the Project Committee. The minority view was that purchasers should be entitled, like co-owners, to partition or sale as of right.

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- (6) If persons interested, individually or collectively, to the extent of 50 per cent or more in the land that is the subject of an application for relief under this section request the court to order a sale of the land and distribution of the proceeds instead of a partition of the land, the court must order a sale and distribution of the proceeds unless the court finds sufficient reason to order partition.

**Comment:** Subsection (6) corresponds to s. 6 of the current *Partition of Property Act*. While sale will generally be the remedy sought by the applicant in any event, subsection (6) requires the court to order sale in a case where the applicant asks for partition, but a substantial proportion of the affected interest holders is in favour of sale instead.

- (7) If the land to which an order under subsections (3) or (4) applies is held in joint tenancy [co-ownership with survivorship], the order severs the joint tenancy [co-ownership with survivorship].

**Comment:** This section preserves the existing rule concerning the effect of an order for partition or sale of land held in joint tenancy, namely that the order operates as a severance. The bracketed term “co-ownership with survivorship” reflects the recommendation in the BCLI *Report on Joint Tenancy* that this term be substituted in legislation and in general usage for “joint tenancy” as a consequence of the implementation of the other recommendations in that report that would have the effect of making the right of survivorship the sole distinction between joint tenancy and tenancy in common.

- (8) Subsection (7) applies despite a binding agreement between the joint tenants [co-owners with survivorship] that the joint tenancy [co-ownership with survivorship] may be severed only with mutual consent, whether or not the agreement is endorsed against the title to the land.

**Comment:** The BCLI *Report on Joint Tenancy* recommends that it be possible for joint tenants (co-owners with survivorship) to agree to make the joint tenancy non-severable by the act of one joint tenant unless the other joint tenants consent, and for such an agreement to be noted on the title to the land. This recommendation is intended to apply to dealings by joint tenants with their individual interests in joint tenancy, but not to affect the ability of co-

owners to obtain the remedies of partition or sale. Subsection (8) accordingly declares that subsection (7) of this draft legislation operates despite such an agreement.

See the commentary to subsection (7) for an explanation of the bracketed terms.

- (9) Subject to the *Supreme Court Civil Rules*, a sale ordered under subsections (3)(a) or (4)(a) and the distribution of the proceeds of sale are under the direction of the court.

**Comment:** Numerous provisions of the existing *Partition of Property Act*, which dates from the mid-19th century, deal with procedural matters that are now covered by rules of court. These include rules for service extending to all proceedings, substitutional service, and the conduct of sale. Rule 13-5 of the *Supreme Court Civil Rules* confers comprehensive powers to give directions for the conduct of a court-ordered sale including valuation, prescribing who may bid, the method of sale, where and to whom the proceeds are to be paid, etc. Subsection (9) affirms that the conduct of a sale ordered under this draft legislation and the distribution of the proceeds of the sale are at the direction of the court, and the relevant *Supreme Court Civil Rules* may be invoked.

### Co-owners' right of first refusal

43. (1) Before making an order under sections 42(3)(a) or 42(4)(a), the court must fix a time not exceeding 14 days within which a co-owner of the land may declare to the court in writing an intention to purchase
- (a) the interest of a co-owner desiring sale of the land, or
  - (b) the interest of a co-owner that is the subject of an application for relief under section 42 by a person referred to in section 42(1)(d) to (g).
- (2) If one or more co-owners declare an intention to purchase the interest within the time fixed under subsection (1), the court must

- (a) determine the value of the interest on evidence that the court considers appropriate and sufficient, and
  - (b) give directions under the *Supreme Court Civil Rules* for the sale of the interest to the co-owner who has declared an intention to purchase and the distribution of the proceeds.
- (3) If the co-owner who has declared an intention to purchase an interest referred to in subsection (1) fails to complete the purchase of the interest, the court must proceed to deal with the application for relief under section 42.
- (4) The failure of a co-owner to declare an intent to purchase or to complete a purchase under this section does not prevent the co-owner from bidding in a sale of the land ordered by the court under sections 42(3) or 42(4).

**Comment:** Section 43 accords a statutory right of first refusal to co-owners to purchase the interest of a co-owner who is seeking sale of the co-owned property. It also allows co-owners a right to purchase the interest of a co-owner in default under a mortgage or a judgment attaching to the co-owner's individual interest, and whose default or judgment debt has prompted the mortgagee or judgment creditor to seek sale of the entire property. Section 43 corresponds in part to s. 8(2) of the current *Partition of Property Act*, but the current right under s. 8(2) does not apply if the court orders sale on its own initiative where partition is the remedy initially sought. Section 43 will apply in all cases.

Section 43 would require that before making an order for sale, the court must allow the other co-owners 14 days to declare an intention to purchase the interest. If one or more co-owners declare an intention to purchase, the court must proceed with a valuation of the interest and give directions for the sale.

If they do not complete the purchase, the court may proceed to order a sale of the entire property on an open market. Failure to take advantage of the statutory right of first refusal or failure to complete a purchase under it would not prevent a co-owner from bidding in the sale of the entire property.

**Partition order deemed a subdivision of land**

44. An order under subsection 42(3)(b) or (4)(b)

(a) is deemed to effect a subdivision as defined in the *Land Title Act*; and

(b) must contain an express declaration that

(i) the execution of the order is stayed pending approval by the approving officer under the *Land Title Act* of a subdivision or reference plan in accordance with the order,

(ii) if the approving officer refuses to approve a subdivision or reference plan in accordance with the order and

(A) the period for appeal from the decision of the approving officer expires without an appeal being taken, or

(B) on appeal from the decision of the approving officer, the approving officer is not directed by the court to approve the plan,

execution of the order is permanently stayed without prejudice to a subsequent application under sections 42(3) or 42(4), and

(iii) if the approving officer approves a subdivision or reference plan in accordance with the order, the registrar is authorized upon deposit of the plan together with a copy of the order to register new indefeasible titles and otherwise amend the records of the land title office in accordance with the terms of the order, and for that purpose section 98 of the *Land Title Act* applies.

**Comment:** Section 44 addresses the interaction between partition orders and the subdivision control provisions of the *Land Title Act*, R.S.B.C. 1996, c. 250. Section 17 of the existing *Partition of Property Act* declares that a partition order creating two or more parcels of land is deemed to effect a subdivision, and the order must declare that it is subject to compliance with the *Land*



*Title Act*. What this means is uncertain. The *Partition of Property Act* contains no clear authority for the land titles registrar to register new titles based on the order. In addition, “compliance with the *Land Title Act*” as required by s. 17 would necessitate approval of the subdivision by the designated approving officer before new titles for the parcels could be registered. (See Part 7, Divisions 2 to 6 inclusive of the *Land Title Act*.) The approving officer may be unable for various reasons to approve the subdivision according to the terms of the partition order. The existing *Partition of Property Act* therefore has the potential to create a conflict between the remedy granted by the court and the ability of the land title and subdivision control systems to implement the remedy.

Requiring an applicant for partition to obtain subdivision approval for the proposed partition before applying to the court is not a practical solution unless the partition is by mutual consent, because all the co-owners would need to sign the subdivision or reference plan. (See ss. 97(1) and 103 of the *Land Title Act*.)<sup>53</sup> This would not be done if one or more co-owners oppose partition.

The approach taken in s. 44 of the draft legislation recognizes that partition may be a highly contentious matter between co-owners. The section would allow a co-owner wanting partition to apply for and obtain the order in the first instance without prior approval of the subdivision that the order contemplates. The order must contain terms that its execution is stayed pending subdivision approval. If that approval is not forthcoming after any appeals from an approving officer’s decision are exhausted, the partition order is permanently stayed without prejudice to another application for sale or partition made at a later time, when circumstances may have changed sufficiently to allow for subdivision approval. Consequential amendments to ss. 97 and 103 of the *Land Title Act* (see below) remove the requirement for the signature of all affected owners to a subdivision plan, reference plan, or explanatory plan related to a partition order.

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53. In the case of a reference plan, which may be used for subdivision approval purposes if the subdivision is of an existing parcel already shown on a deposited subdivision plan, the registrar may dispense with the requirement of signatures by all the landowners who are affected: *Land Title Act*, s. 103. It is unlikely, however, that the approving officer would approve a proposed subdivision plan submitted merely for the purpose of obtaining partition if the partition itself is opposed by one or more co-owners.

### Stay pending division of family assets [family property]

45. (1) If, before a final order is made with respect to land that is the subject of an application under section 42, the land becomes the subject of a proceeding relating to the division of property under Part 5 of the *Family Relations Act* [family property under Part 5 of the *Family Law Act*], the court must stay or adjourn the application under section 42 until the disposition of the proceeding.

(2) The court may adjourn an application under section 42 for a reasonable time to allow a co-owner of the land that is the subject of the application to commence a proceeding for division of property under Part 5 of the *Family Relations Act* [family property under Part 5 of the *Family Law Act*].

**Comment:** Partition or sale of land may be ordered in a proceeding for a division of family assets under Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. Section 69(1) of the *Family Relations Act* provides that in the event of conflict between it and the *Partition of Property Act*, the *Family Relations Act* prevails. Similar provisions are found in the new *Family Law Act*, S.B.C. 2011, c. 25, which will supplant the *Family Relations Act* when it is brought into force. Subsections 45(1) and (2) of the draft legislation are intended to give effect to the legislative intent that matrimonial and family property proceedings are to take precedence over regular proceedings for partition and sale.

### Transitional application of sections 42 to 45

46. (1) Sections 42 to 45 apply with respect to an application under sections 42(3) or 42(4) by
- (a) a co-owner of land whether the co-ownership was formed before, on or after the date on which this section comes into force;
  - (b) a co-lessee whether the lease was executed before, on or after the date on which this section comes into force;

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- (c) a purchaser of the interest of one or more co-owners of land under an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act*, whether the agreement for sale was executed before, on or after the date on which this section comes into force;
  - (d) a mortgagee, a vendor of land under an agreement for sale within the meaning of section 16(1) of the *Law and Equity Act* or a judgment creditor regardless of whether
    - (i) the date of execution of the mortgage or agreement for sale,
    - (ii) the date of a default under a mortgage or agreement for sale,
    - (iii) the date of a judgment, or
    - (iv) the date on which any proceeding or step was commenced or taken
      - (A) in respect of a default under a mortgage or agreement for sale, or
      - (B) to enforce a judgment,occurred before, on or after the date on which sections 42 to 45 and this section come into force.
- (2) If sale is ordered in a proceeding for partition or sale of land pending at the date on which section 43 comes into force, section 43 applies as if the proceeding had been an application under section 42(3) or 42(4).
- (3) Section 44 applies to an order for partition made in a proceeding pending at the date on which section 44 comes into force.

**Comment:** Section 46 is a transitional provision dealing with the application of the draft legislation to proceedings pending at the time it comes into force. Subsection (1) indicates that ss. 42-45 will govern regardless of whether the co-ownership in the land or the leasehold that is the subject of the application came into being before or after the effective date of those sections. It also clarifies that ss. 42 to 45 will govern if an application for partition or sale is made by a mortgagee or a party to an agreement for sale regardless of: the date on which the mortgage or agreement for sale was executed, the date of a default, or the date on which a foreclosure proceeding was commenced. Those sections will similarly apply to an application for partition or sale of co-owned land made by a judgment creditor, even if the date of the judgment or the date on which a step was taken to enforce the judgment precede the date on which they come into force.

Subsection (2) affirms that the statutory right of first refusal under section 43 will apply to partition and sale proceedings pending at the effective date of the section if a sale order is ultimately made in the proceeding. Subsection (3) provides that s. 44 will apply in a proceeding that is pending when it comes into effect if the proceeding culminates in a partition order. As ss. 43 or 44 do not represent a departure from the result under the present *Partition of Property Act*, but merely provide more explicit guidance on procedural matters on which the present Act is silent, their application to pending proceedings is appropriate.

### **2. The *Land Title Act* R.S.B.C. 1996, c. 250 is amended**

#### **(a) by adding the following subsection after section 97(1):**

(1.1) Subsection (1) does not apply to a subdivision plan pursuant to an order for partition of land between co-owners under sections 42(3) or (4) of the *Property Law Act*.

#### **(b) by renumbering section 103 as section 103(1) and adding immediately afterward the the following subsection as section 103(2):**

(2) This section does not apply to a reference or explanatory plan pursuant to an order for division of land between co-owners under sections 42(3) or (4) of the *Property Law Act*.

**Comment:** These consequential amendments dispense with the requirement for the signature of all affected owners to a subdivision, reference or explanatory plan if the plan is in furtherance of a partition order.

**3. The *Partition of Property Act*, R.S.B.C. 1996, c. 347 is repealed.**

**4. The following is added to section 3 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 after “the *Real Property Act, 1845*”: “, *An Act for Joint Tenants & Tenants in Common*, 31 Henry 8, c. 1 and *An Act concerning Joint Tenants for Life or Years*, 32 Henry 8, c. 32.”**

**Comment:** The draft legislation is intended to replace the existing legislation in force in British Columbia with respect to partition and sale in lieu of partition. Section 3 accordingly repeals the present *Partition of Property Act* and s. 4 adds the partition statutes of 1539 and 1540 to the list of imperial statutes declared by s. 3 of the *Law and Equity Act* not to be in force in British Columbia.



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