



**Manitoba Law  
Reform Commission**

# **THE LAW OF PARTITION AND SALE**

**Final Report  
August 2022**



## **THE LAW OF PARTITION AND SALE**

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The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

**Commissioners:** Cameron Harvey, Q.C., President  
Jacqueline Collins  
Michelle Gallant  
Sacha Paul  
Myrna Phillips

**Legal Counsel:** Stefanie Goldberg  
Kristal Bayes-McDonald

**Administrator:** Linda Manson

The Commission offices are located at 432–405 Broadway, Winnipeg, MB R3C 3L6.

**Tel:** (204) 945-2896 **Email:** [mail@manitobalawreform.ca](mailto:mail@manitobalawreform.ca)

**Fax:** (204) 948-2184 **Website:** <http://manitobalawreform.ca>

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Please note that the information provided in this report does not necessarily represent the views of those who have so generously assisted the Commission in this project.

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## EXECUTIVE SUMMARY

Land in Manitoba can be owned solely by one owner or by multiple owners. Where co-owners wish to terminate their co-ownership but cannot agree on the terms of the dissolution, they may seek a judicial order of either partition or sale of the land. Both remedies are provided for in sections 18-26 of *The Law of Property Act*.

Partition refers to the act of physically dividing the land between co-owners resulting in each owner owning a portion of the land outright. An order of sale requires that the co-owned land be sold and the proceeds of the sale be divided among the former co-owners.

In this report, the Manitoba Law Reform Commission (the “Commission”) considers whether the relevant sections of *The Law of Property Act* as well as Court of Queen’s Bench Rule 66 provide adequate direction on partition and sale of land in Manitoba or whether reform is necessary. In contemplating the matter, the Commission examined the current statute law and rules of court in other jurisdictions to determine whether they provided a superior framework for such orders. Additionally, the Commission considered the case law in Manitoba.

Ultimately, the Commission makes 22 recommendations that, if implemented, would modernize the current legislative scheme and would improve the process for co-owners receiving an order of either partition or sale of co-owned property. Among other recommendations, the Commission recommends that the statute should broadly define the class of persons who may bring an application for partition or sale as joint tenants and tenants in common of an estate or interest in land but should exclude from the class certain co-owners. It is also recommended that the relevant sections of the Act be amended to expressly apply to estates and interests that are solely legal or equitable as well as to estates and interests that are both legal and equitable in nature. Additionally, the statutory law should provide clearer guidance on the information required in a notice of application for partition and sale and should be amended to reflect the societal shift resulting in a preference for orders of sale over partition. Finally, the Commission recommends that the terminology used in the Act should be modernized.

Ultimately, it is the Commission’s position that changes to the Act and to Court of Queen’s Bench Rule 66 in line with the recommendations contained in this report would clarify processes and ultimately enhance administration of justice in Manitoba.

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## RÉSUMÉ

Au Manitoba, un bien-fonds peut être la propriété d'une ou de plusieurs personnes. Si des copropriétaires souhaitent mettre fin à leur copropriété mais qu'ils ne s'entendent pas sur les conditions de la dissolution, ils peuvent demander une ordonnance judiciaire pour le partage ou la licitation de leur bien-fonds. Ces deux options sont prévues dans les articles 18 à 26 de la Loi sur les droits patrimoniaux.

Le partage fait référence à la division physique du bien-fonds entre les copropriétaires de sorte que chacun d'eux en possède une partie. Une ordonnance de licitation requiert que la copropriété soit vendue et que les recettes de la licitation soient divisées parmi les anciens copropriétaires.

Dans ce rapport, la Commission de réforme du droit du Manitoba (la Commission) cherche à déterminer si les stipulations de la Loi sur les droits patrimoniaux et de la Règle 66 de la Cour du Banc de la Reine fournissent des indications suffisantes sur le partage et la licitation de bien-fonds au Manitoba, ainsi que sur la nécessité d'une réforme. Pour parvenir à une conclusion, la Commission a étudié la législation et les règlements de tribunaux d'autres administrations pour vérifier l'existence d'un cadre plus adéquat pour ce genre d'ordonnance. De plus, la Commission s'est penchée sur la jurisprudence en la matière au Manitoba.

Ultimement, la Commission a émis 22 recommandations qui, si elles sont mises en œuvre, moderniseront le cadre législatif actuel et amélioreront le processus pour les copropriétaires qui reçoivent une ordonnance de partage ou de licitation de leur copropriété. La Commission recommande d'ailleurs que la loi contienne une définition large de la catégorie de personnes qui peuvent présenter une demande de partage ou de licitation à des propriétaires conjoints et des propriétaires communs d'un domaine ou d'un intérêt existant sur les biens-fonds; définition qui devrait exclure certaines catégories de copropriétaires. Elle recommande également que certains articles de la Loi soient modifiés pour qu'ils s'appliquent expressément aux droits de tenure et autres droits fondés uniquement sur la common law ou sur l'equity, de même qu'aux droits de tenure et autres droits fondés à la fois sur la common law et l'equity. En outre, la Loi devrait être plus précise quant aux renseignements requis dans un avis de demande de partage ou de licitation et refléter davantage les changements sociaux qui entraînent une préférence pour les ordonnances de licitation au lieu des ordonnances de partage. Enfin, la Commission recommande que la terminologie utilisée dans la Loi soit modernisée.

En conclusion, la Commission est d'avis que modifier la Loi et la Règle 66 de la Cour du Banc de la Reine conformément aux recommandations présentées dans son rapport clarifiera les processus judiciaires au Manitoba et, ultimement, améliorera l'administration de la justice dans la province.



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## CHAPTER 1: INTRODUCTION

When co-owners<sup>1</sup> of Manitoba land need or want to terminate their co-ownership, but they cannot agree on the dissolution of their co-ownership, ss. 18-26 of *The Law of Property Act*<sup>2</sup> provides two potential remedies: partition, a judicial order physically dividing the co-owned land between the co-owners, and sale, a judicial order of sale of the co-owned land and division of the proceeds of sale between the co-owners.

Initially, by common law, only co-parceners could sue for an order of partition, and only partition, not for an order of sale. The origins of ss. 18-26 date back to three statutes passed by the Parliament of England; the first in 1539,<sup>3</sup> followed by a second in 1540,<sup>4</sup> and a third in 1868.<sup>5</sup> All three English statutes were components of the received English law of Manitoba,<sup>6</sup> until 1878, when the Legislative Assembly of Manitoba enacted *The Partition of Real Estate in Manitoba Act* (the “*Partition Act* of 1878”).<sup>7</sup> This statute underwent a number of legislative changes over the next several decades, including a repeal and amendment of the legislation in 1939,<sup>8</sup> which introduced the provisions that are now in ss. 18-26 of *The Law of Property Act*.

A comparison of the *Partition Act* of 1878, contained in Appendix A, and the current sections of *The Law of Property Act*, ss. 18-26, reveals sweeping changes having been made to the legislation over the years. Gone are the sections of the 1878 Act dealing with procedure,<sup>9</sup> costs,<sup>10</sup> practice,<sup>11</sup>

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<sup>1</sup> Historically, there were four types of co-ownership of land: co-parcenary, tenancy by the entirety, joint tenancy, and tenancy in common. Co-parcenary co-ownership occurs or occurred when, by the rules of male primogeniture or custom-based local rules, in the absence of a male heir, land descended to two or more persons, who were usually daughters. See John Irvine, “A House Divided: Access to Partition and Sale under the Laws of Ontario and Manitoba” (2011) 35:1 Man L J 217 at 219.

Tenancy by the entirety “arises or arose by a conveyance to persons who are husband and wife”, and may be described as “an unbreakable joint tenancy.” See Institute of Law Research and Reform, University of Alberta, *Partition and Sale*, Report #23 (1977), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/fr023.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr023.pdf)> [AB Report]. See also Robert Megarry & Sir William Wade, *The Law of Real Property*, 2nd ed (London: Stevens and Sons Ltd., 1959) at 432-433.

Rights to freehold or leasehold estates can also be shared concurrently, with two or more people sharing them, via a joint tenancy or tenancy in common. See Robert Chambers, *The Essentials of Canadian Law: The Law of Property* (Toronto: Irwin Law Inc., 2021) at 83.

While co-parcenary and tenancy by the entirety co-ownership may be possible in Manitoba, as far as the Commission has been able to determine, no land has ever been so co-owned. Joint tenancy and tenancy in common co-ownership, remain commonplace.

<sup>2</sup> RSM 1987, c L90 [MB LPA].

<sup>3</sup> *An Act for Joint Tenants and Tenants in Common* (UK), 1539, 31 Henry VIII, c 1, which extended the right of an order of partition to fee simple joint tenancy, and tenancy in common co-owners.

<sup>4</sup> *Joint Tenants for Life or Years* (UK), 1540, 32 Henry VIII, c 32, which extended the right of partition to co-owners of a life estate or a leasehold estate.

<sup>5</sup> *An Act to amend the Law relating to Partition* (UK), 1868, 31, 32 Vict, c 40, which added the remedy of sale.

<sup>6</sup> The cut-off date for the reception of English law by Manitoba is July 15, 1870. See J.E. Cote, “The Reception of English Law” (1977) 15:1 Alta L Rev 29 at 90.

<sup>7</sup> SM 1878, c 6 [Partition Act, 1878].

<sup>8</sup> *An Act to amend “The Law of Property Act”*, SM 1939, c 50.

<sup>9</sup> *Partition Act*, 1878, *supra* note 7, ss. IV-VII, XI-XVIII.

<sup>10</sup> *Ibid*, s XXVI.

<sup>11</sup> *Ibid*, s XXV.

and the effect of the court order of partition or sale.<sup>12</sup> Two of the key sections of the 1878 Act, which established the Court's authority to compel partition or sale,<sup>13</sup> and the right of persons interested in land to seek an order of partition or sale from the Court,<sup>14</sup> remain largely intact in current ss. 19(1) and 20(1) (although with a significant change in s. 19(1), which is addressed in Chapter 3 of this Paper).

Sections 18-26 of *The Law of Property Act* provide:

### **Definitions**

18 In sections 19 to 26

"**action**" means a civil proceeding commenced by a statement of claim or in such other manner as is prescribed by the rules of the court;

"**court**" means the Court of Queen's Bench;

"**land**" includes lands, tenements and hereditaments and all estates and interest therein.

### **Who may be compelled to make partition or sale**

19(1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

### **Partition or sale without Homesteads Act consents**

19(2) Where a person to whom subsection (1) applies is a married person or a person who is a common-law partner, an action for partition or sale of the land may be brought by or against him or her; and

(a) partition; or

(b) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition;

may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse or common-law partner having been obtained as provided in *The Homesteads Act*.

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<sup>12</sup> *Ibid*, ss XX-XXIV.

<sup>13</sup> *Ibid*, s III.

<sup>14</sup> *Ibid*, s V.

### **Who may take proceedings for partition**

20(1) Any person interested in land in Manitoba, or the guardian of the estate of an infant entitled to the immediate possession of any estate therein, may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested.

### **When proceedings may be commenced**

20(2) Where the land is held in joint tenancy or tenancy in common by reason of a devise or an intestacy, no action shall be commenced until one year after the decease of the testator or person dying intestate in whom the land was vested.

### **Appointment of guardian to estate of person unheard of for three years**

21(1) Where any person interested in the land has not been heard of for three years or upwards, and it is uncertain whether that person is living or dead, the court upon the application of any one interested in the land, and whether an action for the partition or sale of the land has been commenced or not, may appoint a guardian to take charge of the interest of that person and of those who, in the event of his being dead, are entitled to his share or interest in the land.

### **Powers of such guardian**

21(2) The guardian shall, in the action, represent the absent person and those who, should he be dead, are entitled to his share or interest in the land, and whether they or any of them are infants or otherwise under disability, and his acts in relation to that share or interest are binding on the absent person and all others claiming or entitled to claim under or through him, and are as valid as if done by him or them.

### **Power of the court to deal with estate**

21(3) The court upon such proof of the absence of the person as affords reasonable ground for believing him to be dead, upon the application of the guardian, or anyone interested in the estate represented by the guardian, may deal with the estate or interest of the person, or the proceeds thereof, and may order payment of the proceeds, or the income or produce thereof, to the person who, in the event of the absent person being dead, appears to be entitled thereto.

### **Order for execution of conveyance or transfer**

22(1) Where partition or sale is ordered, the court may order the execution of a conveyance, transfer or other document by all the proper parties thereto to give effect to the sale or partition of the land.

### **Execution where party under disability**

22(2) Where a party is an infant, a person of unsound mind or a mentally incompetent person, the court may order that the conveyance, transfer or other document be executed by his or her guardian, committee, administrator, or substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*.

### **Execution where section 21 applies**

22(3) Where a party is a person or guardian mentioned in section 21, the court may order that the conveyance, transfer or other document be executed by the guardian.

### **Sales, including estates for life**

23(1) In an action for partition or administration, or in an action in which a sale of land in lieu of partition is ordered, and in which the estate of any tenant for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold; and in making the determination regard shall be had to the interests of all the parties.

### **What to pass to purchaser**

23(2) Where a sale is ordered including such an estate, all the estate and interest of the tenant passes thereby, and no conveyance or release to the purchaser is required from the tenant, and the purchaser holds the premises freed and discharged from all claims by virtue of the estate or interest of the tenant, whether it is to an undivided share or to the whole or any part of the premises sold.

### **Compensation to owners of particular estate**

23(3) The court may direct the payment of such sum in gross out of the purchase money to the person entitled to the estate for life, as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for the estate; or may direct the payment to the person entitled of an annual sum or of the income or interest to be derived from the purchase money or any part thereof, as may seem just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as may be necessary.

### **Value of inchoate homestead right and payment thereof**

24 Where a person is a party to the action, the court shall, in case of sale, determine the value of any rights under *The Homesteads Act* of his or her spouse or common-law partner according to the principles applicable to deferred annuities and survivorships, and shall order the amount of that value to be paid out of the share of the purchase money to which the person is entitled, or shall order the payment to the spouse or common-law partner of the person out of the share of the purchase money to which the person is entitled, of an annual sum, or of such income or interest as is provided in section 23; and the payment shall be a bar to any right or claim under *The Homesteads Act*.

### **Effect upon persons under a disability**

25 A partition or sale made by the court is as effectual for the apportioning or conveying away of the estate or interest of any infant, person of unsound mind, or mentally incompetent person, party to the action by which the sale or partition is made or declared, as of a person competent to act for himself.

### **Power of court to allow any of the parties interested to bid at the sale**

26 On any sale under this Act, the court may, if it thinks fit, allow any of the parties interested in the land to bid at the sale, on such terms as to non-payment of deposit, or as to setting-off or accounting for the purchase money or any part thereof, instead of paying it, or as to any other matters, as to the court seems reasonable.

Complementing ss. 18-26 is Rule 66 of the Court of Queen’s Bench Rules (“QBRs”):

#### **Notice of application**

66.01(1) A proceeding for partition or sale of land under *The Law of Property Act* may be commenced by notice of application by any person who is entitled to compel partition.

#### **By minor**

66.01(2) A proceeding for partition or sale by or on behalf of a minor shall be on notice to the Public Guardian and Trustee.

#### **Service on mortgagee**

66.01(3) A party who applies for partition or sale of land shall serve a copy of the document by which the proceedings are commenced on every person with a registered interest in the land.

#### **FORM OF JUDGMENT**

66.02 A judgment for partition or sale shall be in Form 66A.

#### **PROCEEDS OF SALE**

66.03 All money realized in a partition proceeding from a sale of land shall forthwith be paid into court, and no money shall be distributed or paid out except by order of a judge.

In its Consultation Paper, the Commission considered whether ss. 18-26 of *The Law of Property Act* and QBR 66 adequately address the partition and sale of land in Manitoba, or whether they are in need of reform. The Commission took into account the statutory legislation<sup>15</sup> and court rules<sup>16</sup> of the other provinces and territories of Canada, as well as three relatively recent law reform reports dealing with partition and sale in Alberta, Saskatchewan and British Columbia: *Partition and Sale*, Report No. 23, published by the Institute of Law Research and Reform, University of Alberta,<sup>17</sup> (the “AB Report”), *Proposals for a New Partition and Sale Act*, published by the Law Reform

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<sup>15</sup> See Appendix B.

<sup>16</sup> See Appendix B.

<sup>17</sup> AB Report, *supra* note 1.

Commission of Saskatchewan,<sup>18</sup> (the “SK Report”), and *Report on Partition of Property Act*, Report No. 68, published by the British Columbia Law Institute<sup>19</sup> (the “BC Report”). With reference to these reports and the legislation in other provinces, the Commission considered in its Consultation Paper whether *The Law of Property Act* of Manitoba and QBR 66 can be improved.

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<sup>18</sup>The Law Reform Commission of Saskatchewan, *Proposals for a New Partition and Sale Act* (June 2001), online (pdf): <[http://lawreformcommission.sk.ca/Partition\\_and\\_Sale\\_Proposals.pdf](http://lawreformcommission.sk.ca/Partition_and_Sale_Proposals.pdf)> [SK Report].

<sup>19</sup> British Columbia Law Institute, *Report on the Partition of Property Act*, Report #68 (March 2012), online (pdf): <[www.bcli.org/sites/default/files/report\\_68\\_partition\\_of\\_property\\_act.pdf](http://www.bcli.org/sites/default/files/report_68_partition_of_property_act.pdf)> [BC Report].

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## CHAPTER 2: PARTITION AND SALE LEGISLATION ACROSS CANADA

While all of the provinces and the three territories of Canada have partition and sale court rules,<sup>20</sup> not all have partition and sale statutory legislation. The outliers in Canada without such legislation are Saskatchewan, Quebec, New Brunswick and the territories.

Despite the Saskatchewan Law Reform Commission recommending the enactment of partition and sale statutory legislation in the SK Report in 2001, the statute law governing partition and sale in Saskatchewan continues to be the English statutes of 1539, 1540 and 1868. According to the SK Report, these statutes, “continue to be held to be in force by the Saskatchewan courts, and are in fact among the received statutes most often applied in the province.”<sup>21</sup> Similarly, the Northwest Territories and Nunavut rely on the three English Acts as received law, as is demonstrated in the case law of the Northwest Territories, which states that *The Partition Act*, 1868 is in force in that territory, and is the statutory basis for an application of partition or sale.<sup>22</sup> Presumably, the same is true for Yukon<sup>23</sup> and Nunavut.

Partition and sale proceedings are governed in Quebec by a broader, local legislative scheme which is not dedicated strictly to property or partition and sale-related laws. Specifically, in Quebec, the partition or sale of “undivided property”, or co-owned property, is governed by articles 838 and 1037 of the Civil Code of Quebec (“CCQ”).<sup>24</sup>

Like Saskatchewan and the territories, the 1539 and 1540 Acts of the English legislature are received English law in New Brunswick. However, the 1868 Act is not, given that New Brunswick’s cut-off date for the reception of English Law is October 3, 1758.<sup>25</sup> *McQuaid v. Underbill*<sup>26</sup> and *McKellar v. Buxton*<sup>27</sup> indicate that New Brunswick courts rely on their Court Rule 67 for their partition and sale jurisdiction.

The remaining provinces, British Columbia, Alberta, Ontario, Nova Scotia, Prince Edward Island and Newfoundland and Labrador, each has legislation more or less similar to ss. 18-26 of *The Law of Property Act* of Manitoba, governing partition and sale.<sup>28</sup> Like ss. 18-26, the statutory legislation in these other provinces outline matters such as who may bring a proceeding for partition or sale, when a proceeding may be commenced, the treatment of parties under disability, missing or deceased interested persons, the Court’s powers regarding sales, etc. These Acts and their

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<sup>20</sup> See Appendix C.

<sup>21</sup> SK Report, *supra* note 18 at 3.

<sup>22</sup> See e.g. *Moss v Zorn*, [1991] NWTR 141 at 2, [1991] NWTJ No 31 and *Bergman-Illnik v Illnik*, [1998] NWTR 131 at para 23, [1997] NWTJ No 93. In accordance with the *Nunavut Act*, SC 1993, s 29(1), the ordinances and laws of the Northwest Territories apply equally in Nunavut.

<sup>23</sup> See *Jones v Duval*, 2018 YKSC 33 at para 1, [2018] YJ No 77.

<sup>24</sup> Further see *Pavlakidis v. Pavlakidis*, 2020 QCCS 4387, [2020] Q.J. No. 12567.

<sup>25</sup> See John Delatre Falconbridge, *Banking and Bills of Exchange*, 6th ed. (Toronto: Canada Law Book Company Ltd, 1956) at 11-12. October 3, 1758 was the date of meeting of the first general assembly of Nova Scotia (which then included New Brunswick); see also, Cote, J.E., “The Introduction of English Law into Alberta” (1964) 3 Alberta Law Review, 262-263.

<sup>26</sup> 2014 NBQB 87 at paras 58-59.

<sup>27</sup> 2020 NBQB 9 at para 1.

<sup>28</sup> See Appendix B.

supporting rules of court contain certain nuances and additional provisions which help to guide parties and interested persons through the partition and sale processes of the respective provinces. Many of these provisions are not found in Manitoba's *Law of Property Act* or QBR 66, and a number of the comparable provisions in Manitoba's legislation differ from those in these other provinces in ways that might detract from the overall effectiveness of Manitoba's legislation.



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## CHAPTER 3: REFORM

Further specification, elaboration, modernization, and simplification of Manitoba's statutory and QBR 66 partition and sale legislation will result in a partition and sale regime which will more effectively inform Manitobans.

### 1. Specification

Currently, several of the provisions of *The Law of Property Act*, by their broad language or punctuation, leave room for multiple interpretations. There are also several areas of partition and sale which are not explicitly covered by our Act or court rules, but which are addressed in the legislation or court rules of other Canadian provinces, leading to more questions, more competing interpretations and more confusion in Manitoba partition and sale proceedings.

Particularly, the Commission notes confusion surrounding who has standing to bring a partition or sale application, how partition or sale orders affect collateral estates and interests, and the ramification of a partition or sale application in some circumstances.

#### a. Who should have standing to bring an application for partition or sale under the Act?

Historically, only co-parceners<sup>29</sup> had standing to sue for partition, until the 1539 and 1540 English statutes extended the remedy to joint tenants and tenants in common enjoying a fee simple estate, a life estate, or a leasehold estate. By virtue of the 1868 English statute, these co-owners were able to seek alternatively the remedy of sale. Subsequent judicial decisions interpreted the legislation to include the availability of the remedies to anyone with concurrent estates or interests in a parcel of land,<sup>30</sup> entitling them to possession or an immediate right to possession of the subject land.<sup>31</sup> Apparently, these combined stipulations of concurrent interests/estates and possession or an immediate right to possession, deny the remedies of partition and sale to co-owning landlords of leased land, co-owners of a remainder or reversionary estate, and persons with an interest, such as a mortgage, judgment debt, charge, or lien.<sup>32</sup> This is the case given that co-owning landlords of

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<sup>29</sup> *Supra* note 1.

<sup>30</sup> Take, for example, a profit à prendre, examples of which being mineral, sand, and gravel extraction agreements and timber harvesting licences. Such interests are endorsed by the AB Report, *supra* note 1 at 22-23 and 24-25, the BC Report, *supra* note 19 at 19, and the SK Report, *supra* note 18 at 7 and 11. Co-owned fee simple, life, and leasehold estates are concurrent estates, as are co-owned remainder and reversionary fee simple estates. A life estate coupled with a remainder or reversionary fee simple estate are not concurrent estates; they are consecutive (successive) estates.

<sup>31</sup> See e.g. *Evans v Bagshaw*, (1870), 5 LR 5 Ch App 340.

<sup>32</sup> See e.g. *Mulligan v. Hendershott*, [1896] OJ No 228, 17 PR 227, the AB Report, *supra* note 1 at 21-22, the SK Report, *supra* note 18 at 7, and *Confab Laboratories Inc. v Wilding*, 2006 MBQB 197. Although neither mortgagees, nor creditors having a lien, charge, or registered judgment against a parcel of land, nor a sheriff pursuant to a writ of execution have a "sufficient interest" to apply for a sale of the land pursuant to *The Law of Property Act*, they must be given notice of, and an opportunity to be heard on, any partition or sale application of land affecting their interest. See Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, r 66.01(3), *Kluss v Kluss*, [1947] MJ No 16, [1947] 2 WWR 379, *Winspear Higgins Stevenson v Friesen*, [1978] 5 WWR 337, and *Jesmer v. Jesmer*, [1986] MJ No 473.

The BC Report at 14 and 32-33 recommends statutorily superseding the requirement of co-owners being either in possession or having an immediate right to possession, thus making available the remedies of partition and sale to

leased land, co-owners of a remainder or reversionary fee simple estate (which, by definition, is subject to a life estate), and mortgagees, judgement creditors and the like, are not in possession or entitled to the immediate possession of the land in which they have an estate or interest.

While this interpretation of the legislation made relatively clear who did and who did not have standing to apply for partition or sale, the same cannot be said of recent interpretations of *The Law of Property Act*.

Section 20(1) of *The Law of Property Act* provides:

20(1) Any person interested in land in Manitoba, or the guardian of the estate of an infant entitled to the immediate possession of any estate therein, may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested.

The wording and punctuation of this section may be contrary to the stipulations above, which, in essence, made possession or a right to possession an essential condition for standing for any co-owner to apply for an order of partition or sale. Without a comma following the word “infant” in s. 20(1), the words “entitled to the immediate possession of any estate therein” could be interpreted to modify or qualify only the immediately preceding wording “or the guardian of the estate of the infant” and not also the opening words “Any person interested in land in Manitoba.” Based on this wording and punctuation, one could argue that only the guardian of the estate of an infant is required to have both a co-ownership of concurrent estate or interest and an entitlement to immediate possession of the subject land in order to bring an application for partition or sale, whereas all other persons interested in land in Manitoba need only to have a concurrent estate or interest in the subject land. Accordingly, the remedies of partition and sale would be available to co-owners who have traditionally been denied standing, like, for instance, co-owners of a remainder fee simple estate. This interpretation was adopted by the Court of Appeal in *Chupryk v. Haykowski*.<sup>33</sup>

Mrs. Haykowski and Mr. Chupryk co-owned the remainder fee simple estate in a parcel of land. Mr. Chupryk was also the life estate tenant in possession. Mr. Chupryk applied to the Court of Queen’s Bench for an order to permit borrowing money on the security of the property, against not only his estates, but also Mrs. Haykowski’s estate for the purpose of effecting capital improvements to the property. Mrs. Haykowski, as a remainder co-owner of the fee simple estate, opposed Mr. Chupryk’s application and applied for an order of sale pursuant to s. 20(1) of *The Law of Property Act*. While the Court of Queen’s Bench essentially granted Mr. Chupryk’s application and dismissed Mrs. Haykowski’s, this decision was reversed on appeal. The Court of Appeal denied Mr. Chupryk’s application and granted Mrs. Haykowski’s application for an order of sale, in effect holding that a remainderman may obtain an order of partition or sale before the remainder has fallen into possession and without the consent of a prior life tenant. In other words, it held that concurrency of estates and possession or a right to immediate possession are not essential conditions for standing to apply for an order of partition or sale. This decision is contrary

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co-owners of leased land, to co-owners of a reversionary or remainder estate with respect to their estate, but not affecting the life estate, and to interests, including mortgages, judgment debts, charges, and liens.

<sup>33</sup> (1980) 3 Man R (2d) 216, [1980] MJ No 133 [*Chupryk*].

to all the current English and Ontario jurisprudence<sup>34</sup> and ultimately proposes that “only a sole fee simple owner [...] will be immune from the efforts of other interest-holders (however small and however distantly suspended in futurity their interests may be) to unseat them.”<sup>35</sup>

*Chupryk* has been referenced in two Ontario cases, *Morris v. Howe*<sup>36</sup> and *Dwyer v. Dwyer*.<sup>37</sup> While the *Dwyer* reference is of no consequence, *Morris* is noteworthy in that it rejects the notion established by the Court of Appeal in *Chupryk* that “a life tenant may obtain sale of land over the opposition of a remainderman, or that one of several remainderman may obtain partition [...] of the lands before the remainder has fallen into possession and without the consent of a prior life tenant.”<sup>38</sup> *Morris* involved an application by a life estate tenant for an order of sale, the remainder fee simple estate owner opposing. In support of his application, the life tenant relied upon, *inter alia*, *Chupryk*, which the Court rejected. It held that where land is subject to consecutive interests of a sole life tenant and a remainderman, the Court should not “grant the life tenant an order the effect of which will be to defeat the remainderman's interest in the lands without his consent and against his reasonable opposition.”<sup>39</sup>

In British Columbia, on the other hand, in the decision of *Aho v. Kelly*,<sup>40</sup> *Chupryk* was referenced with approval. In that case, the applicant, Mrs. Aho, enjoyed a life estate and a one-third tenancy in common remainder fee simple estate in the subject land, like Mr. Chupryk. However, unlike in *Chupryk*, it was Mrs. Aho, the life tenant, as opposed to one or both of the other remainderers, who petitioned for the order of sale. The other remainderers did not oppose the sale, but did not agree with Mrs. Aho's proposed disposition of the proceeds of the sale. The Court, relying, in part, on *Chupryk*, asserted that Mrs. Aho's “independent capacity as a tenant in common” co-owner of the remainder fee simple estate afforded her standing to petition for the order of sale.

Complicating these issues surrounding standing even more is s. 23(1) of *The Law of Property Act*, which makes specific mention of the treatment of life tenants in actions for partition or sale:

23(1) In an action for partition or administration, or in an action in which a sale of land in lieu of partition is ordered, and in which the estate of any tenant for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold; and in making the determination regard shall be had to the interests of all the parties.

Section 23 was added to *The Law of Property Act* in 1940, copied from s. 5 of the *Partition Act* of Ontario. It was addressed by the Manitoba Court of Queen's Bench and Court of Appeal in *Siwak v. Siwak*,<sup>41</sup> a case which dealt with an application for an order of sale brought against a homestead life estate owner. Mr. and Mrs. Siwak owned their marital home as joint tenants until they

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<sup>34</sup> Irvine, *supra* note 1 at 228-41. Section 20(1) of *The Law of Property Act* of Manitoba and s 3(1) of the *Partition Act* of Ontario are identical.

<sup>35</sup> *Ibid* at 246.

<sup>36</sup> (1983) 38 OR (2d) 480 (H Ct J) [*Morris v Howe*].

<sup>37</sup> [1988] OJ No 1851.

<sup>38</sup> *Morris v Howe*, *supra* note 36 at 484.

<sup>39</sup> *Ibid*.

<sup>40</sup> (1998) 57 BCLR (3d) 369 at para 35, [1998] BCJ No 1400.

<sup>41</sup> *Siwak v Siwak*, 2018 MBQB 9, *aff'd Siwak v Siwak*, 2019 MBCA 60.

separated, at which point Mrs. Siwak continued as the sole occupant of the marital home. In the process of separating and dividing their assets, which severed their joint tenancy ownership of the marital home into a tenancy in common,<sup>42</sup> Mrs. Siwak died. After her death, Mr. Siwak resumed residency of the marital home. The Court decision addresses the application made by the Estate of Mrs. Siwak for an order of the sale of the home, which was opposed by Mr. Siwak, who claimed a homestead life estate in the property. While the Court agreed with Mr. Siwak's homestead life estate claim, it granted the Estate the order for sale pursuant to s. 23 of *The Law of Property Act*. It did so even though the Estate was neither in possession nor entitled to possession of the property.<sup>43</sup>

If possession or an immediate right to possession is to be considered an essential condition for standing to apply for an order of partition or sale under s. 20(1) of the Act, when does s. 23 come into play? If such a requirement is the law and a life estate exists, there can be no application by remainderers or reversioners to which the life tenant in possession would be a party, given that remainderers or reversioners do not have a right to possession until the death of the life tenant. If, however, possession or a right to possession is not an essential condition for standing, s. 23 does have a purpose, in that in addition to s. 20(1), it empowers the Court to order a sale pursuant to an application by remainderers or reversioners, against the wishes of a life tenant, as the Court did in *Siwak*.

Collectively, the wording and punctuation of s. 20(1), s. 23, and the *Chupryk* and *Siwak* decisions lead to the conclusion that standing to bring a partition or sale application is not restricted to co-owners of concurrent estates or interests, who are also in possession or have an immediate right to possession of the subject land. This is contrary to the legislation of both Nova Scotia<sup>44</sup> and Prince Edward Island,<sup>45</sup> and the proposed Act in the SK Report,<sup>46</sup> which specifically include the requirement of entitlement to possession and which specifically exclude remainderers and reversioners from the list of individuals who may bring partition or sale applications. Specifically, both the *Partition Act* of Nova Scotia and the *Real Property Act* of Prince Edward Island state that a partition or sale application “may be maintained by any person who has an estate in possession, but not by one who is entitled only to any remainder or reversion.”<sup>47</sup> Similarly, the proposed Act in the SK Report restricts standing to co-owners, who are defined as:

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<sup>42</sup> *Siwak v Siwak*, 2016 MBQB 61.

<sup>43</sup> There have been two cases involving s. 5 of the *Partition Act* of Ontario, which is identical to s. 23 of the Manitoba Act: *Rolston v Rolston*, 2016 ONSC 2937, and *S.B. v W.B.*, 2020 ONSC 5023 [S.B.]. *Rolston* involved an application for an order of sale by a life tenant against the opposition of the co-owners of the remainder estate. While the court in that case held that the life tenant had standing to apply pursuant to ss. 3(1) (identical to s. 20(1) of the Manitoba Act) and s. 5 of the Ontario *Partition Act*, (identical to s. 23 of the Manitoba Act), the court dismissed the application. *S.B.* involved an application for sale by one of the joint tenancy, occupying remainderers, opposed by the life tenant, who was not in occupation of the property. Referring to s. 5 and *Morris*, *supra* note 36, the court stated that *Morris* “determined that partition and sale may occur where there is a life tenancy interest that runs concurrently with other interests... [but] partition and sale cannot occur if the life tenancy runs consecutively with other interests.” In *S.B.*, the “life interest [ran] concurrently” (see *S.B.* at paras 39-40).

<sup>44</sup> *Partition Act*, RSNS 1989, c 333, s 6 [NS PA] (Appendix B).

<sup>45</sup> *Real Property Act*, RSPEI 1998, c R-3, s. 20(2) [PEI RPA] (Appendix B).

<sup>46</sup> SK Report, *supra* note 18 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a), Appendix B).

<sup>47</sup> NS PA, *supra* note 44 at s 6, and PEI RPA, *supra* note 45 at s 20(2).

[owners] of an interest in land by two or more persons as joint tenants or tenants in common, **but does not include any future interest in land or any other interest in land that does not give the owner a right of possession in the land**, and does not include any interest in land held beneficially for others.<sup>48</sup>

In a similar vein, *The Law of Property Act* does not specify the significance, if any, of a legal versus a beneficial (equitable) estate or interest in land on a co-owner's standing to bring an application for partition or sale. For example, it does not specify whether the remedies of partition and sale are available to (1) a co-owner who is a legal, but not a beneficial, owner of a co-owned estate; (2) a vendor or purchaser of a long-term agreement for sale, pursuant to which the title of the subject land continues in the vendor until the completion of scheduled payments of the purchase price; and (3) a trustee or beneficiary of an *inter vivos* or testamentary trust. This issue was touched upon briefly by the Manitoba Court of Queen's Bench in *Anderson v. Von Stein*,<sup>49</sup> a case involving an application by Ms. Anderson against Mr. Von Stein for the sale of their jointly held home.

Relying on the argument that Ms. Anderson actually held title to the subject land in trust for him and was thus not entitled, as of right, to bring an application for partition and sale of the property, Mr. Von Stein filed a statement of claim seeking a declaration to this effect, and an adjournment of Ms. Anderson's application until this issue could be properly dealt with by the Court. Ultimately, the Court granted Mr. Von Stein's request for an adjournment to allow for a trial of the issue of Ms. Anderson's ownership of her joint interest, holding that Ms. Anderson's entitlement to an order for sale of the property "assumes that she is both the legal and the beneficial owner of her joint interest."<sup>50</sup> Because Mr. Von Stein had called into question Ms. Anderson's entitlement to a beneficial interest in the property, and because no evidence had been presented by Ms. Anderson to the Court to rebut the allegations that her interest in the title was subject to either a resulting or constructive trust, the Court held that it could not yet decide the issues related to the sale of the property. Accordingly, it appears that the Court was of the opinion that a co-owner must possess both legal and beneficial title to property in order to have standing to bring a partition or sale application in respect of that property. Recommendations in both the SK Report and AB Report reflect these sentiments.

The Draft Saskatchewan *Partition and Sale Act*, included in the SK Report, provides in s. 2 that co-owners may apply to the Court for an order of partition or sale of land. In addition to the specific disenfranchisement of remainderers and reversioners from its definition of "co-ownership," s. 1 of the draft Act also defines "co-ownership" so as to specifically exclude those with an interest in land held beneficially for others. Specifically, it states that co-ownership "does not include any interest in land held beneficially for others."<sup>51</sup>

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<sup>48</sup> SK Report, *supra* note 18 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a), Appendix B) [emphasis added].

<sup>49</sup> [1994] MJ No 411, 49 ACWS (3d) 1273.

<sup>50</sup> *Ibid* at para 10.

<sup>51</sup> SK Report, *supra* note 18 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a), Appendix B).

The AB Report deals specifically with the availability of the remedies of partition and sale to trustees and beneficiaries of an *inter vivos* or testamentary trust, ultimately concluding that these remedies should not be made available to either. The Report explains that where beneficiaries are not entitled to acquire legal title to trust property, it is more appropriate for such trust property to be dealt with under the law of trusts as opposed to the law of partition and sale. The AB Report ultimately recommends that “co-owners holding in trust for common beneficiaries have no right to apply for termination of co-ownership as amongst themselves.”<sup>52</sup> We agree.

The Commission is of the opinion that standing to apply for an order of partition or sale should be restricted to co-owners of concurrent estates or interests, in such a way as to supersede the *Chupryk* and *Siwak* decisions. Possession or the right to immediate possession should not be a component of the articulation of standing, as it could involve for the standing of co-owners of a profit à prendre or an easement quibbling over possession compared to use, and disenfranchisement of standing for co-owners who have granted a profit à prendre or a lease.

In the Consultation Paper published by the Commission in connection with this project, the Commission posed as Issue for Discussion 1:

**ISSUE FOR DISCUSSION 1:**

- (a) To alleviate confusion with respect to who is entitled to bring an action for partition or sale under The Law of Property Act, should s. 20(1) of the Act be repealed and replaced with a section that lists specifically who does and who does not have standing to apply for an order of partition or sale?
- (b) If yes, who of the following should have standing to apply for an order of partition or sale, in addition to fee simple and life estate joint tenants, tenants in common, and co-leaseholders:
  - Co-owners of a profit à prendre;
  - Co-owners who have granted a profit à prendre;
  - Co-owners who have leased their land;
  - Remainderers or reversioners, either affecting the estate of the life tenants, as in *Chupryk* and *Siwak*, or just insofar as their own estates are concerned, not affecting life tenants;
  - Sole life tenants, affecting the estates of remainderers or reversioners;
  - Mortgagees, judgment creditors, and claimants of interests such as a charge and a lien;
  - Joint tenants or tenants in common, who co-own in trust for the other co-owner;
  - Vendors and purchasers of a long-term agreement for sale;
  - Trustees or beneficiaries of a trust?
- (c) If yes, who of the abovementioned co-owners, if any, should be denied standing to apply for an order of partition or sale?

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<sup>52</sup> AB Report, supra note 1 at 18. Only the second part of Recommendation #13 has been implemented; see *Law of Property Act*, RSA 2000, c L-7, s 14(a) [AB LPA] (Appendix B).

An alternative to a section which lists specifically who has standing to apply for an order of partition or sale, borrowing from *Law of Property Act* of Alberta, is to enact a definition of co-owners, “co-owners means joint tenants and tenants in common of an estate or interest in land”, and replace s. 20(1) with a section worded like s. 15(1) of the *Law of Property Act* of Alberta, “A co-owner may apply for an order of partition or sale of the estate or interest in land in which the co-owner is a co-owner.” Upon reflection, the Commission has concluded to recommend this alternative:

**RECOMMENDATION 1:**

**To alleviate confusion with respect to who is entitled to make an application for partition or sale pursuant to *The Law of Property Act*,**

**(a) A definition of “co-owners” should be added to s. 18:**

**“co-owners” means joint tenants and tenants in common of an estate or interest in land;**

**(b) Section 20 of *The Law of Property Act* should be repealed and replaced with a section which reads:**

**20(1) A co-owner may apply for an order of partition or sale of the estate or interest in land in which the co-owner is a co-owner.**

**(c) Section 20(2) should state expressly that the following do not have standing to bring an application for partition or sale:**

- a co-owner who co-owns the legal title, but not the beneficial (equitable) title
- Neither the vendor nor the purchaser of a purchase and sale agreement, pursuant to which the legal title continues in the vendor until the purchaser completes scheduled payments of the purchase price;
- neither the trustee nor a beneficiary of an *inter vivos* or testamentary trust; and
- mortgagees, judgment creditors, and claimants of interests such as a charge and a lien.

**(d) Current s. 20(2) should be continued as s. 20(3).**

If Recommendation 1 is implemented, co-owning reversioners or remainderers will have standing to apply for an order of partition or sale, but only in respect of their co-owned reversionary or remainder estates and not affecting the life estate. Thus, there will be no continuing purpose served by s. 23.

**RECOMMENDATION 2: If Recommendation 1(a) is implemented, s. 23 of *The Law of Property Act* should be repealed.**

**b. Should s. 19(1) of *The Law of Property Act* be amended to specify clearly that it applies to both legal and equitable estates and interests?**

Section 19(1) of *The Law of Property Act* outlines who may be compelled to partition or sell their land in Manitoba. This section provides:

19(1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

This section is relatively specific and comparable to the analogous legislative provisions in British Columbia, Ontario, Nova Scotia, Prince Edward Island and Newfoundland and Labrador. However, it does not specify, as does the legislation of Ontario and British Columbia, whether an estate or interest is legal or equitable in nature.

The *Partition Act* of Ontario states:

2 All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, **whether the estate is legal and equitable or equitable only** [emphasis added].

Similarly, ss. 2(1) and 2(2) of the *Partition of Property Act* of British Columbia states:

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) **Subsection (1) applies whether the estate is legal or equitable or equitable only** [emphasis added].

While standing to apply for an order of partition or sale should not be available to a co-owner whose estate is only legal and not also beneficial, the Commission is of the opinion that such an owner's title should be subject to an order of partition or sale.

**RECOMMENDATION 3: Section 19(1) of *The Law of Property Act* should be amended to include the wording providing “whether the estate or interest is legal only, or legal and equitable, or equitable only.”**

Although the Commission defers to the office of the Legislative Counsel respecting drafting, the Commission offers the following suggestions:

1. Section 19(1) might be re-worded:

19(1) All persons with an estate or interest in any land, whether the estate or interest is legal only, or legal and equitable, or equitable only, including joint tenants, tenants in common, life tenants, leaseholders, holders of a profit à prendre, mortgagees, judgment



creditors, and claimants of interests such as a charge or lien, may be compelled to make or suffer partition or sale of the land or any part thereof.

2. The numerical order of revised ss. 19 and 20 might be reversed.

**c. Should *The Law of Property Act* be amended to state clearly what is the effect of a partition or sale application or order on a joint tenancy?**

Currently, as is the case for most other Canadian legislation addressing partition and sale, *The Law of Property Act* makes no mention of the impact that an application or an order for partition or sale has on the co-ownership status of land owned in joint tenancy. This is an important factor, given the right of survivorship unique to a joint tenancy.

When a joint tenant dies, their joint tenancy estate accrues to the surviving joint tenant(s). When a tenant in common dies, their tenancy in common estate does not accrue by survivorship to the surviving tenant(s) in common; it becomes an asset of the estate of the deceased tenant in common. By common law, joint tenants can deal with their estates in such a way as to result in a severance of the joint tenancy, changing it into a tenancy in common. Where a joint tenancy is severed into a tenancy in common there is no longer a right of survivorship. This raises the question of whether the commencement of a partition or sale application is an act by a joint tenant which severs the joint tenancy into a tenancy in common, thus extinguishing the right of survivorship and the accrual of a party's joint tenancy estate to surviving joint tenant(s).

Severance of a joint tenancy into a tenancy in common can occur in three ways, known as the three rules:

- 1) through the unilateral action of a joint tenant, such as selling or encumbering his or her estate;
- 2) through an express agreement of the joint tenants to sever; and
- 3) through a course of dealing between the joint tenants sufficient to indicate an implied agreement to sever.

These three rules were first articulated in *Williams v. Hensman*.<sup>53</sup> While the Commission has found no case deciding that an application by a joint tenant for an order of partition or sale comprises a unilateral act severing a joint tenancy into a tenancy in common, and no case which explicitly states that such an application, together with a prior course of dealings, comprises an implied agreement of the joint tenants to sever,<sup>54</sup> the Commission believes that a court could conclude the latter to be the case.

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<sup>53</sup> (1861) 70 ER.862. Regarding the third rule, see *Ginn v. Armstrong* [1969] BCJ No 400 (QL), *Re Walters and Walters* (1978) 17 O.R. (2d) 592, *McNaughton v. McNaughton* (1999) AB QB 77, *Walker v. Dubord* (1999), 67 B.C.L.R. (2d) 302, *McKerr (litigation Representative of) v. Flock* (2021) A.J. No 903.

<sup>54</sup> In *Sorensen v. Sorensen* (1977) 90 D.L. R. (3d) 26, at 39, the court held that an application for partition of several lots held in joint tenancy did not sever.

This question is briefly addressed by the Alberta Institute of Law Research and Reform in the AB Report:

...we think that it is the order [, not the commencement of a partition or sale action,] which should sever the joint tenancy. We think that it should have that effect even though the partition or sale has not been carried out or the proceeds of sale distributed.<sup>55</sup>

This opinion resulted in s. 19 of the *Law of Property Act* of Alberta, a provision unique to that province, which states:

**Severance of joint tenancy**

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

We agree and s. 19 leaves open the door to a court concluding that an application, together with a prior course of dealing, comprises an implied agreement to sever.

**RECOMMENDATION 4: *The Law of Property Act* should be amended to include a section like s. 19 of the *Law of Property Act* of Alberta.**

**d. Should *The Law of Property Act* be amended to specify powers and duties of the Court in additional circumstances under which partition or sale proceedings may be brought?**

**i. Where encumbrances are involved**

An encumbrance is defined in the AB Report as “any charge on or claim against land created or effected for any purpose whatever, and appearing on the title or in the general register inclusive of easements, restrictive covenants, profits à prendre, leases, mortgages, builders' liens, and executions against lands.”<sup>56</sup> The Alberta *Law of Property Act* defines encumbrance in simpler terms, as “any interest in land other than a fee simple estate.”<sup>57</sup> Unlike the legislation of Alberta, Nova Scotia and Prince Edward Island, ss. 18-26 of *The Law of Property Act* of Manitoba make no specific mention of how courts are to treat applications for partition or sale involving owners with an interest in land other than a fee simple estate, such as leaseholders, owners of a profit à prendre, mortgagees, judgment creditors, and claimants of interests, such as a charge and a lien. Noteworthy provisions from Alberta, Nova Scotia and Prince Edward Island include the following:

The *Law of Property Act* of Alberta provides:

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

[...]

<sup>55</sup> AB Report, *supra* note 1 at 36. See also s.6 of the Draft Saskatchewan Partition and Sale Act. (Appendix B)

<sup>56</sup> *Ibid* at 23-24.

<sup>57</sup> See *AB LPA*, *supra* note 52, s 14(b) (Appendix B).

**22** Notwithstanding section 15(2) [, which outlines the types of partition and sale orders a court may make upon receipt of applications for the termination of co-ownership], if an application for an order is made with respect to an interest in land other than a fee simple estate, the Court may refuse to allow the application if the order would unduly prejudice the grantor of that interest.

The *Partition Act* of Nova Scotia states:

**7** When two or more persons hold jointly or in common, as tenants for any term of years, any of them may bring such action against his co-tenants in the same manner as if they had all been tenants of the freehold.

**8** No tenant for any term of years, unless twenty years at the least remain unexpired, shall maintain such an action against any tenant of the freehold.

Finally, the *Real Property Act* of Prince Edward Island provides:

**20. (1)** [...]

**(3)** No tenant for any term of years, unless twenty thereof, at the least, remain unexpired, shall maintain such a petition against any tenant of the freehold; but when two or more persons hold jointly or in common, as tenants for any term of years, either of them may have his share set off and divided from the others, in the same manner as if they had all been tenants of the freehold.

**(4)** The partition between two or more tenants for years continues in force only so long as their estates endure, and shall not affect the premises when they revert to the respective landlords or reversioners.

In essence, these provisions recognize and prioritize the rights of the fee-simple estate holders who have granted estates or interests to co-owners such as co-leaseholders and co-owners of a profit à prendre. Alberta does this, for example, by empowering the courts, in granting orders of partition or sale to these types of co-owners, to impose any terms or conditions necessary to ensure that these co-owners maintain their obligations to the fee simple owners controlling their interests (e.g. payment of rents and royalties and performance of covenants so that the lease or profit is not terminated for default).<sup>58</sup> It also protects the grantors of the interest by empowering the courts to refuse partition or sale applications where to do so would cause prejudice to them. In Nova Scotia and Prince Edward Island, on the other hand, the legislation prioritizes and protects fee-simple estate holders who have granted interests to co-owners such as co-leaseholders and co-owners of a profit à prendre by restricting the ability of these co-owners from bringing partition or sale actions against them. In accordance with Nova Scotia's and Prince Edward Island's legislation, co-leaseholders and co-owners of a profit à prendre are typically only able to bring partition or sale proceedings against other such co-owners and not against any tenant of the freehold at issue.

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<sup>58</sup> AB Report, *supra* note 1 at 23.

**RECOMMENDATION 5: *The Law of Property Act* should be amended to include sections like the sections in the legislation of Alberta, Nova Scotia and Prince Edward Island, described above, specifically governing partition or sale proceedings involving leaseholders, holders of a profit à prendre, or an easement, and other persons with an interest in land other than a fee simple estate.**

Furthermore, the AB Report<sup>59</sup> and the resulting provisions of the Alberta *Law of Property Act* deal with the situations of encumbrance-holders and co-owners of land subject to encumbrances in further detail. Ultimately, the AB Report recommended that situations in which encumbrances affect the shares of all of the co-owners in a partition and sale proceeding be treated differently than situations in which encumbrances affect the shares of only one or some of the co-owners. Specifically, it recommended the following:

- 1) *Where the shares of all the co-owners are affected*, the holder of the encumbrance should not be involved in the proceedings for termination of the co-ownership, and the encumbrance should simply be carried forward after the partition or sale, unaffected by it.
- 2) *Where the shares of only one or some of the co-owners are affected, and an order for **physical partition** of the co-owned land is granted*, the encumbrance should be carried forward on the title to the property received by the co-owner or co-owners whose shares were subject to the encumbrance, while being discharged from the shares of the co-owner or co-owners which were not subject to the encumbrance.
- 3) *Where the shares of only one or some of the co-owners are affected, and an order for the **sale** of the co-owned land is granted*, the encumbrance should be discharged and the encumbrance-holder should have a claim for its value against the portion of the sale proceeds which will go to those co-owners whose shares were affected by the encumbrance.
- 4) *Where the shares of only one or some of the co-owners are affected, and the **interest affected by the encumbrance is ordered to be sold** to the other co-owner/co-owners*, the encumbrance should be discharged and the encumbrance-holder should have a claim against the sale proceeds.

These recommendations have been implemented in Alberta's *Law of Property Act*, ss. 23-24, which state:

**23(1)** An order does not affect an encumbrance registered against the entire interest in land in respect of which the order is made.

**(2)** If an encumbrance is registered against the entire interest in land in respect of which an order is made and under the order the interest of a co-owner is to be sold to another co-owner, the Court may direct that compensation for the vendor's liability under the

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<sup>59</sup> *Ibid* at 23-24.

encumbrance in an amount determined by the Court be paid to the purchaser of the interest from the proceeds of the sale.

**24** If an encumbrance is registered against an interest in land other than the entire interest in the land in respect of which the order is made then

- (a) if the land is to be physically divided between the co-owners, the Court may direct that the encumbrance on the land being divided be registered only against the land allotted to the co-owner in respect of whose interest the encumbrance was registered,
- (b) if the land or part of it is to be sold and proceeds of the sale are to be distributed between the co-owners, the Court may direct that the encumbrance on the land being sold be discharged as against that land and compensation in an amount determined by the Court be paid to the encumbrancee from the proceeds accruing to the co-owner in respect of whose interest the encumbrance was registered, or
- (c) if the interest of a co-owner is to be sold to another co-owner, the Court may direct that the encumbrance on the interest being sold be discharged as against that land and compensation for the vendor's liability under the encumbrance in an amount determined by the Court be paid to the encumbrancee from the proceeds accruing to the vendor of the interest, if the interest sold was the interest in respect of which the encumbrance was registered.

The SK Report and the BC Report differ in terms of their treatment of encumbered land. The SK Report contains no recommendations dealing with mortgaged lands, given that mortgagees under Saskatchewan's land titles system have an equitable rather than legal interest in the property, making them "unnecessary parties" to partition proceedings.<sup>60</sup> The SK Report does, however, endorse British Columbia's suggested approach for the treatment of encumbrances in partition and sale applications over Alberta's approach. Arguing that the recommendations of the AB Report and resulting legislative provisions perhaps provide an unnecessary degree of protections to third parties to partition and sale proceedings such as mortgagees, the SK Report endorses British Columbia's recommendation of paying down mortgages and encumbrances out of the proceeds of a sale of a mortgagor's or encumbrancer's interest.<sup>61</sup> The SK Report states:

In our view, protection [for third parties] is appropriate, but it should be modest. The hazards created by partition and sale are not outside the range of risks which any landlord, mortgagee or encumbrancer faces in the ordinary course of affairs. Thus we prefer the British Columbia Commission's approach to that of the Alberta Institute.<sup>62</sup>

**RECOMMENDATION 6: There should be added to *The Law of Property Act* the definitions of "encumbrance" and "encumbrancee" and sections like ss. 23-24 contained in the *Law of Property Act of Alberta*.**

<sup>60</sup> SK Report, *supra* note 18 at 16.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

**ii. Where the parties have contracted out of the right to apply for partition and sale**

Occasionally, co-owners contract out of their right to apply for partition or sale by agreeing not to make such an application. This is a circumstance not currently addressed in ss. 18-26 of *The Law of Property Act* of Manitoba, raising the question: should such an agreement be a bar to partition or sale proceedings? Bruce Ziff, in *Principles of Property Law*<sup>63</sup> indicates that “[M]odern Canadian cases state that a contractual bar will normally serve to convince a court that it should exercise its discretion not to grant partition or sale.” The Alberta Institute of Law Research and Reform in the AB Report, however, thought otherwise,<sup>64</sup> resulting in a recommendation to that effect and s. 27 of the Alberta *Law of Property Act*, which states:

**27** Notwithstanding any agreement between co-owners of land, the Court may make an order terminating the co-ownership, if the continuance of the co-ownership will cause undue hardship to one or more of the co-owners.

We agree with the conclusion of the Alberta Institute of Law Research and Reform.

**RECOMMENDATION 7: *The Law of Property Act* should be amended to include a section like s. 27 of the *Law of Property Act* of Alberta, providing that the Court has discretionary jurisdiction to over-ride a contracting out of the right to apply for a partition or sale.**

**iii. Where a disposition is pending in parallel proceedings under *The Family Property Act* or *The Family Maintenance Act***

As will be discussed in further detail later on in this Report, Alberta’s legislation uniquely gives co-owners a right to an order of partition or sale, subject to four exceptions. One of these exceptions, contained in s. 21,<sup>65</sup> vests the Court with a discretion to stay an application pending the disposition of an application made pursuant to Acts equivalent to *The Family Property Act* of Manitoba<sup>66</sup> and s. 10(1)(b. 2) and (5) of *The Family Maintenance Act* of Manitoba.<sup>67</sup> Specifically, s. 21 of the Alberta Act states:

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<sup>63</sup> Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto, ON: Thomson Reuters Canada, 2018) at 392-93. See also *Fergus v. Fergus*, (1997) 118 Man R (2d) 107, [1997] MJ No 348 (Appendix D).

<sup>64</sup> AB Report, *supra* note 1 at 17-78. The Saskatchewan Law Reform Commission disagrees, with a qualification (Draft Saskatchewan Partition and Sale Act, s. 2(4), Appendix B).

<sup>65</sup> See Appendix B.

<sup>66</sup> RSM 1987, c M45.

<sup>67</sup> RSM 1987, c F20. These sections state:

10(1) Upon an application under this Part, a court may make an order continuing any one or more of the following provisions and may make any provision in the order subject to such terms and conditions as the court deems proper [...]

(b.2) That one of the spouses or common-law partners has the right to continue occupying this family residence for such length of time as the court may order, notwithstanding that the other spouse or common-law partner alone is the owner or lessee of the residence or that both spouses or common-law partners are the owners or lessees of the residence [...]

21 Notwithstanding section 15(2), the Court may, with respect to land that comprises a family home as defined in the *Family Property Act* or a family home as defined in the *Family Law Act*, stay proceedings under this Part

- (a) pending the disposition of an application made under the *Family Property Act* or section 68 of the *Family Law Act*, or
- (b) while an order made under the *Family Property Act* or section 68 of the *Family Law Act* remains in force.

For Manitoba, QBR 70.03(2) apparently deals with this situation:

70.03 (2) A family proceeding in which a divorce is not claimed and in which the petitioner claims relief under [...]

(e) *The Law of Property Act* for partition or sale of land as between spouses, former spouses, common-law partners as defined in that Act or former common law partners;

[...]

alone or in conjunction with other relief shall be commenced by filing a petition in Form 70B.

As well, s. 19(1) of Manitoba's *The Law of Property Act*, which will be discussed in further detail later in this Report, vests the Court with a discretionary jurisdiction to grant orders of partition or sale. Nonetheless, while it may not be necessary to include in Manitoba's legislation a section comparable to s. 21 of the Alberta *Law of Property Act*, given QBR 70.03(2) and that the Court has the discretion to refuse an application, the Commission is of the opinion that it would be helpful to include such a section as a reminder to the parties and the Court of QBR 70.03(2) and those other Acts when the family residence is involved.

**RECOMMENDATION 8: *The Law of Property Act* should be amended to include a section referring to *The Family Property Act*, *The Family Maintenance Act*, and QBR 70.03(2) expressly empowering the Court to stay an application pending the disposition of an application made pursuant to the relevant sections of those Acts and QBR 70.03(2).**

**iv. Where a partition order will result in a subdivision for which approval is necessary**

Similarly, one of the other exceptions in the Alberta *Law of Property Act*, obliging the Court to stay proceedings, is when a partition order will result in a subdivision of a parcel of land for which

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(5) Where under this Part a court makes an order containing a provision under clause (1)(b.2), it may include in the order a provision that such rights as the other spouse or common-law partner may have as owner or lessee to apply for partition and sale or to sell or otherwise dispose of the residence be postponed subject to the right of occupancy contained in the order.

approval is necessary under Alberta's *Municipal Government Act*.<sup>68</sup> The comparable Manitoba legislation is *The Planning Act*,<sup>69</sup> which, in s. 121(1), states:

121(1) A distinct registrar may not accept for registration any instrument that has the effect, or may have the effect, of subdividing a parcel of land, including

[...]

(c) an order or judgment of a court [...]

unless the subdivision has been approved by the approving authority.

Again, given the discretionary jurisdiction provided in s. 19(1) of *The Law of Property Act*, which has been utilized by the Manitoba Court of Appeal to stay a partition application under these particular circumstances,<sup>70</sup> it is not absolutely necessary to include a section comparable to s. 26 of the Alberta *Law of Property Act*. However, the Commission considers that a comparable section will be a useful addition to *The Law of Property Act*.

**RECOMMENDATION 9: *The Law of Property Act* should be amended to include a section referring to *The Planning Act*, s. 121(1), expressly obliging the Court to stay an application when a partition order would result in a subdivision of a parcel of land for which approval under that Act is necessary.**

## 2. Elaboration

Certain provisions in *The Law of Property Act* and QBRs contain fewer details than the equivalent legislative provisions and court rules in other Canadian jurisdictions. This is particularly true of those provisions and rules dealing with the procedural aspects of partition and sale proceedings. In this section, the Commission examines these provisions and rules and their Canadian counterparts to determine whether Manitobans applying for partition or sale would benefit from further elaboration on these points in our Act.

### a. Should *The Law of Property Act* or QBR 66 be amended to elaborate further on court procedure respecting a partition or sale application?

While QBR 66.01(1) provides that a partition or sale proceeding “may be commenced by a notice of application,” neither QBR 66 nor *The Law of Property Act* elaborates further on this, outlining, for example, the required content of the notice of application for partition or sale, as do s. 9 of the *Partition Act* of Nova Scotia and ss. 21(1) and 22(1) of the Prince Edward Island *Real Property Act*.<sup>71</sup> These sections state:

*Partition Act*, Nova Scotia:

<sup>68</sup> See AB *LPA*, *supra* note 52, s 26 (Appendix B).

<sup>69</sup> SM 2005, c 30, s 121(1)(c).

<sup>70</sup> See *Crawford v Durant*, (1998) 123 Man R (2d) 262, [1998] M.J. 27.

<sup>71</sup> See Appendix B.



### **Statement of claim**

**9 (1)** The statement of claim shall set forth the rights and titles, so far as known to the plaintiff, of all persons interested in the land who would be bound by the partition, whether they have an estate of inheritance, or for life, or years, or whether it is an estate in possession, or in remainder, or reversion, and whether vested or contingent.

**(2)** If the plaintiff holds an estate for life, or years, the person entitled to the remainder or reversion, after his estate, shall be considered as one of the persons so interested.

*Real Property Act*, Prince Edward Island:

#### **21. Petition, contents**

**(1)** Every petition for partition shall set forth the rights and titles, so far as known to the petitioner, of all persons interested in the premises, who would be bound by the partition, whether they have an estate of inheritance, or for life or years, and whether it is an estate in possession or in remainder or reversion, and whether vested or contingent; and if the petitioner holds an estate for life or years, the person entitled to the remainder or reversion, after his estate, shall be considered as one of the persons so interested, and shall be entitled to notice accordingly.

#### **22. Verification of petition**

**(1)** The petition shall be verified by the oath of the petitioner, according to the best of his knowledge, information and belief.

The Commission is of the view that *The Law of Property Act* of Manitoba or the QBRs ought to elaborate further on procedure to provide more certainty to parties and to the Court and to facilitate a more efficient process.

**RECOMMENDATION 10: *The Law of Property Act* or QBR 66 should be amended to include sections like s. 9 of the *Partition Act* of Nova Scotia, and ss. 21(1) and 22(1) of the *Real Property Act* of Prince Edward Island, outlining the details to be set out by applicants in a notice of application for partition or sale, and other related requirements.**

The Consultation Paper dealt with what, naively, the Commission perceived to be a dearth of Manitoba legislation concerning service and publication of a notice of application for partition or sale, compared to the partition and sale statutory legislation of British Columbia, Nova Scotia, and Prince Edward Island. Suffice it to say, that the Commission has been made aware that the Manitoba QBRs, other than QBR 66, which deal with service and publication of originating processes, apply to a notice of application for partition or sale and are comparable to the legislation of the three aforementioned provinces, except regarding two matters. These two matters are provided in s. 11 of the *Partition Act* of Nova Scotia, and s. 24 of the *Real Property Act* of Prince Edward Island.

*Partition Act of Nova Scotia:*

**Failure to appear**

**11** If any person entitled to notice fails to appear, and if the service of the originating notice or other notice to him appears to the Court or the judge to have been insufficient, the Court or a judge may order such further notice as is thought proper.

*Real Property Act of Prince Edward Island:*

**24. Continuation of proceedings where interested person outside province**

If in any stage of the proceedings it appears to the court or judge that any person interested, whether named in the petition or not, is outside the province, and has not had opportunity to appear and answer to the petition, it shall be continued, from time to time, until sufficient time has been allowed to enable him to appear and answer thereto; and the court or judge may, in its or his discretion, make an order to amend the said petition by inserting the name of the absent person.

**RECOMMENDATION 11: *The Law of Property Act* or the QBRs should be amended to include provisions like s. 11 of the *Partition Act* of Nova Scotia and s. 24 of the *Real Property Act* of Prince Edward Island.**

**b. Should *The Law of Property Act* or QBRs be amended to elaborate further on a sale application?**

The legislation and court rules of other provinces elaborate quite extensively on the powers, duties, and overall role of the court in an application for sale, as opposed to partition, of property.<sup>72</sup> For instance, both British Columbia and Prince Edward Island, in their respective partition and sale legislation, indicate that the court *must* direct a sale of the property upon the request of a party unless it sees “good reason to the contrary.”<sup>73</sup> Moreover, both Acts indicate that the court *may* grant an order for sale of the property on the request of any of the interested parties, despite the dissent or disability of any other interested party, where it finds that a sale would be more beneficial for the interested parties than a division of the property.<sup>74</sup> The courts in both British Columbia and Prince Edward Island may not, however, grant an order for sale, where other parties interested in the property undertake to purchase the share of a party who is requesting a sale.<sup>75</sup> Where such an undertaking is given, the courts in British Columbia and Prince Edward Island are empowered by their respective legislation to order a valuation of the share of the party requesting a sale in the manner the court thinks fit.<sup>76</sup>

<sup>72</sup> See Appendix B and Appendix C.

<sup>73</sup> RSBC 1996, c 347, s 6 [BC PPA], and PEI RPA, *supra* note 45, s 39(1)(b) (Appendix B).

<sup>74</sup> *Ibid*, BC PPA, s 7 and PEI RPA, s 39(1)(a) (Appendix B).

<sup>75</sup> *Ibid*, BC PPA, s 8(2) and PEI RPA, s 39(1)(c) (Appendix B).

<sup>76</sup> *Ibid*, BC PPA, s 8(3) and PEI RPA, s 39(1)(c) (Appendix B).

The legislation and court rules of British Columbia and the legislation of Alberta and Nova Scotia each indicate a number of other powers granted to courts in administering orders for the sale of property.<sup>77</sup> These include the power of the courts to appoint the person who is to have conduct of the sale, to fix the manner of sale and the minimum sale price, to define the rights of persons to bid or make offers at the sale, to settle the particulars or conditions of sale, etc.<sup>78</sup> These Acts also empower courts to make particular orders and directions respecting the payment of sale proceeds into court, the distribution of sale proceeds out of court, and the application of sale proceeds for various purposes, such as discharging or redeeming any encumbrance affecting the property in respect of which the money was paid. Other matters outlined in these legislative schemes include specific requirements for sales in cases where an order has been made dispensing with service of notice on any person<sup>79</sup>; requirements for the distribution of sale proceeds in cases involving unequal divisions of the property<sup>80</sup>, and requirements for persons having conduct of a sale to file reports on the sale with the court.<sup>81</sup>

Comparatively, *The Law of Property Act* and QBR 66 of Manitoba offer only minimal direction in this regard. Regarding an order of sale, generally, *The Law of Property Act* provides:

26 On any sale under this Act, the court may, if it thinks fit, allow any of the parties interested in the land to bid at the sale, on such terms as to non-payment of deposit, or as to setting-off or accounting for the purchase money or any part thereof, instead of paying it, or as to any other matters, as to the court seems reasonable.

QBR 66.03 provides:

66.03 All money realized in a partition proceeding from a sale of land shall forthwith be paid into court, and no money shall be distributed or paid out except by order of a judge.

**RECOMMENDATION 12: *The Law of Property Act* or QBR 66.03 should be amended to elaborate further on orders for sale, as the other Canadian provinces do in their statutory legislation and court rules.**

### 3. Modernization

Given that ss. 18-26 of *The Law of Property Act* have remained largely unchanged since their introduction some 80 years ago, certain aspects of these provisions are inconsistent with current law, legal systems, and society generally. For instance, some provisions contain antiquated terms which are inconsistent with other Manitoba legislation, and some are based on outdated concepts which do not reflect amendments made to other Manitoba legislation. Furthermore, *The Law of Property Act* appears less modern in certain respects in comparison to some other Canadian partition and sale legislation, which include additional provisions which acknowledge the effect

<sup>77</sup> See Appendix B and Appendix C.

<sup>78</sup> See BC, *Supreme Court Civil Rules*, BC Reg 168/2009 and BC, *Supreme Court Family Rules*, BC Reg 169/2009 (Appendix C).

<sup>79</sup> See BC *PPA*, *supra* note 73, s 14 (Appendix B).

<sup>80</sup> See AB *LPA*, *supra* note 52, s 17 (Appendix B).

<sup>81</sup> See *Nova Scotia Civil Procedure Rules*, r 74.08 (Appendix C).

of societal shifts on their legislation. In this section, the Commission highlights these aspects of Manitoba’s legislation as well as statutory provisions of other Canadian provinces not present in our Act, leading to the conclusion that Manitoba’s Act should be updated to better reflect modern Manitoba.

**a. “Registered” Interest**

For instance, QBR 66.01(3) provides for service of a notice of application for an order of partition or sale “upon every person with a registered interest in the land.” The legislation of the other provinces does not include the modifier “registered.” In the Land Titles system of Manitoba, not all claimed interests can be registered. Rather, some interests can be claimed only by filing a caveat. Although by case law,<sup>82</sup> “registered interests in land” include caveats among other things, it might be in order to delete “registered” from QBR 66.01(3).

**RECOMMENDATION 13:** The word “registered” should be deleted from QBR 66.01(3) so that it reads:

**66.01(3) A party who applies for partition or sale shall serve a copy of the document by which the proceedings are commenced on every person with an interest in the land.**

**b. Claiming Sale in lieu of “Partition and Sale”**

Historically, the only remedy for the termination of co-ownership was partition, until the enactment of the English Act of 1868, which empowered the Court to order a sale instead of partition where it saw no good reason to the contrary. Subsequently, it became *de rigueur* for an applicant to apply for an order of partition or sale. With the passage of time and changing societal conditions, sale has become the only remedy usually sought by applicants. This shift also occurred elsewhere in Canada, including in British Columbia, which has reflected this shift in s. 3 of British Columbia’s *Partition of Property Act*:

**Pleadings**

**3** In a proceeding for partition it is sufficient to claim a sale and distribution of proceeds, and it is not necessary to claim a partition.

**RECOMMENDATION 14:** *The Law of Property Act* or QBR 66.03 should be amended to include a section like s. 3 of the *Partition of Property Act* of British Columbia.

**c. Persons “under disability”**

Another aspect of *The Law of Property Act* that may benefit from modernization are the sections addressing “persons under disability.” The term “disability” is defined in the QBRs as a person or party who is “(a) a minor, or (b) mentally incompetent or incapable of managing his or her affairs, whether or not so declared by a court.”<sup>83</sup> This definition is no doubt informed by Manitoba

<sup>82</sup> *Hildebrandt v. Hildebrandt*, 2009 MBQB 52 at paras 38, 70 and *Fougere v. Lac du Bonnet (Rural Municipality of)*, 2019 MBQB 33 at para 43.

<sup>83</sup> MB, *Court of Queen’s Bench Rules*, Man Reg 553/88, r 1.03.

legislation governing the rights of children, youth, and persons who, due to mental disorder, disability, or infirmity, are incapable of and in need of assistance to manage their own affairs. Such legislation includes *The Child and Family Services Act* (“*The CFSA*”),<sup>84</sup> *The Advocate for Children and Youth Act* (“*The ACYA*”),<sup>85</sup> *The Mental Health Act* (“*The MHA*”),<sup>86</sup> *The Vulnerable Persons Living with a Mental Disability Act* (“*The VPA*”),<sup>87</sup> *The Public Guardian and Trustee Act* (“*The PGTA*”)<sup>88</sup> and *The Powers of Attorney Act* (“*The POA*”),<sup>89</sup> among others. *The Law of Property Act* currently uses the terms “infant” in ss. 20(1), 22(2), 25, and “person of unsound mind or a mentally incompetent person” in ss. 22(2), 25.

### i. “Infant”

Both *The CFSA* and *The ACYA* use the term “child” or “children” to describe individuals under the age of majority in Manitoba (18 years old). Specifically, *The CFSA* defines “child” as “a person under the age of majority,”<sup>90</sup> and *The ACYA* defines child as “a person under the age of 18 years [...] includ[ing] a youth.”<sup>91</sup> Neither Act uses the word “infant” to describe this group of individuals. *The PGTA* uses “minor.”

**RECOMMENDATION 15:** *The Law of Property Act* should be amended to substitute “minor” for “infant.”

### ii. “Persons of Unsound Mind or Mentally Incompetent Persons”

*The MHA*, *The VPA*, *The PGTA* and *The POA* use various terms, including “incapable person,” “incapable adult,” “not mentally competent,” “mentally disordered,” and “mentally incapable.” None of the statutes uses the term “person of unsound mind.”<sup>92</sup>

**RECOMMENDATION 16:** *The Law of Property Act* should be amended to eliminate the term “person of unsound mind” from the couplet “person of unsound mind or mentally incompetent person.”

### iii. Representatives

Section 20(1) of *The Law of Property Act* makes specific reference to the standing of “the guardian of the estate of an infant”:

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<sup>84</sup> SM 1985-86, c 8 [*CFSA*].

<sup>85</sup> SM 2017, c 8 [*ACYA*].

<sup>86</sup> SM 1998, c 36 [*MHA*].

<sup>87</sup> SM 1993, c 29 [*VPA*].

<sup>88</sup> SM 2013, c. 46 [*PGTA*].

<sup>89</sup> SM 1996, c. 62 [*POA*].

<sup>90</sup> *CFSA*, *supra* note 84, s 1(1).

<sup>91</sup> *ACYA*, *supra* note 85, s 1.

<sup>92</sup> Incidentally, *The Real Property Act*, *The Suitors’ Money Act*, *The Partnership Act*, *The Legal Profession Act*, *The Cooperatives Act*, and *The Law Society of Manitoba Act* use “person of unsound mind.”

20(1) Any person interested in land in Manitoba, **or the guardian of the estate of an infant** entitled to the immediate possession of any estate therein, may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested [emphasis added].

Is it necessary or beneficial for *The Law of Property Act* to provide expressly for the guardian of a minor co-owner to have standing to commence such an action? Does standing not exist without expressly so providing?

Although it may not be necessary for the Act to provide expressly for the guardian of a minor to have standing, the Commission thinks that so providing is beneficial, but in a discrete section, including standing also for the representative of a mentally incompetent, insolvent, or bankrupt person,<sup>93</sup> who may be involved in a partition or sale application, and not just such a co-owner initiating or responding to an application for partition or sale.

**RECOMMENDATION 17:** *The Law of Property Act, in a discrete section, should provide standing, respecting any person involved in a partition or sale application, for the guardian of a minor, a substitute decision maker pursuant to *The Vulnerable Persons Living with a Disability Act*, a committee appointed pursuant to *the Mental Health Act*, an attorney appointed in a enduring or springing power of attorney made in accordance with *The Powers of Attorney Act*, and a receiver or trustee appointed pursuant to the *Bankruptcy and Insolvency Act*.*

Sections 22(2) and 25 of *The Law of Property Act* provide:

**Execution where party under disability**

22(2) Where a party is an infant, a person of unsound mind or a mentally incompetent person, the court may order that the conveyance, transfer or other document be executed by his or her guardian, committee, administrator, or substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act*.

**Effect upon persons under a disability**

25 A partition or sale made by the court is as effectual for the apportioning or conveying away of the estate or interest of any infant, person of unsound mind, or mentally incompetent person, party to the action by which the sale or partition is made or declared, as of a person competent to act for himself.

**RECOMMENDATION 18:** *Sections 22(2) and 25 of *The Law of Property Act* should be amended to:*

<sup>93</sup> Upon the appointment of a receiver or a declaration of bankruptcy, the assets of the subject person vest in the receiver or the trustee in bankruptcy, whose dealings with the debtor's assets might involve an application for an order of partition or sale.

**(a) Reflect Recommendations 15, 16 and 17; and**

**(b) Delete from their headnotes the words “under a disability” and to substitute therefor the words “minor, mentally incompetent, insolvent or bankrupt”.**

**d. Section 21 of *The Law of Property Act* and *The Presumption of Death and Declaration of Absence Act***

Section 21 of *The Law of Property Act*, which addresses interested persons in a partition and sale application who have not been heard of for three years or more, does not reflect recent amendments made to other Manitoba legislation. In 2019, in response to the Commission’s 2015 Report, *Improving Manitoba’s Presumption of Death Act*, Report #131, *The Presumption of Death Act* was repealed and replaced with *The Presumption of Death and Declaration of Absence Act* (“*The PDDAA*”).<sup>94</sup> *The PDDAA* provides in s. 5(1) that the Court may “declare a person to be absent and appointing a committee to administer the person’s property” with no prerequisite minimum period of absence. Despite this change to *The PDDAA*, s. 21 of *The Law of Property Act* continues to prescribe a minimum period of absence for an absent interested party, and for a guardian, as opposed to a committee, to take charge of the interest of that absent person. Specifically, s. 21(1) of *The Law of Property Act* provides:

**Appointment of guardian to estate of person unheard of for three years**

21(1) Where any person interested in the land has not been heard of for three years or upwards, and it is uncertain whether that person is living or dead, the court upon the application of any one interested in the land, and whether an action for the partition or sale of the land has been commenced or not, may appoint a guardian to take charge of the interest of that person and of those who, in the event of his being dead, are entitled to his share or interest in the land.

**RECOMMENDATION 19: Given s. 5(1) of *The Presumption of Death and Declaration of Absence Act*,**

**(a) Section 21(1) of *The Law of Property Act* should be amended to delete the prescribed waiting period of three years; and**

**(b) Section 21(1) of *The Law of Property Act* should be amended to incorporate the appointment of a committee, as opposed to a guardian, pursuant to *The Presumption of Death and Declaration of Absence Act*.**

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<sup>94</sup> SM 2019, c. 20 [*PDDAA*].

#### e. Abolition of Co-Parcenary and Tenancy by the Entireties Co-Ownership

Co-parcenary and tenancy by the entireties co-ownership are archaic forms of co-ownership, which, as far as the Commission is aware, have never occurred in Manitoba.<sup>95</sup> Whether they are or ever were a type of co-ownership in Manitoba law is, in the opinion of the Commission, an open question. Yes, British Columbia, Ontario, Nova Scotia and Prince Edward Island continue to recognize and include co-parcenary co-ownership in their respective partition and sale legislation, and yes, at one point, the legislators of Manitoba recognized co-parcenary co-ownership under Manitoba law.<sup>96</sup> However, co-parceners were not included in the transfer of *The Partition Act* into *The Law of Property Act* in 1939. Moreover, pursuant to the doctrine of reception of English law, the Commission has reason to believe that co-parcenary co-ownership may never have been a type of co-ownership in Manitoba law. This doctrine holds that “settled colonies” received English law “only to the extent that they were suited to the circumstances of the colony,”<sup>97</sup> and the Commission is of the opinion that the “circumstances” of the Red River Settlement pre-1870 and of Manitoba post-1870 were and are such as to make co-parcenary co-ownership irrelevant.

With respect to the existence of tenancy by the entireties co-ownership, the Institute of Law Research and Reform of Alberta has expressed similar doubts. The AB Report commented:

A tenancy by the entireties is an anomaly that has come down from the time when husband and wife were considered as one. Rather than make special provision in the proposed Act for a form of tenancy which does not so far as we know exist in Alberta, and which is not necessary or desirable, we recommend that tenancy by the entireties be abolished.<sup>98</sup>

The SK Report states that co-parcenary and tenancy by the entireties are extinct in Saskatchewan.<sup>99</sup>

**RECOMMENDATION 20: *The Law of Property Act* should be amended to abolish co-parcenary and tenancy by the entireties co-ownerships.**

#### 4. Simplification

In this section, the Commission considers whether certain changes could be made to *The Law of Property Act* to simplify the process for Manitobans to seek partition or sale of co-owned land. In particular, the Commission focuses on the potential simplification of the process to determine whether a party is entitled to an order of partition or sale in Manitoba, and on the potential creation of a discrete legislative scheme in Manitoba which deals exclusively with partition and sale matters.

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<sup>95</sup> See note 1.

<sup>96</sup> *The Partition of Real Estate in Manitoba Act*, enacted in 1878, in s. III included “co-partners” (See Appendix A), which was corrected in its 1880 re-enactment to “co-parceners” and dropped from the 1939 re-enactment.

<sup>97</sup> See *Cote*, *supra*, note 6 at 62-63. This qualification is reflected in *The Court of Queen's Bench Act*, SM 1988-89, c 4, s 33(1), and the *Manitoba Supplementary Provisions Act*, RSC 1927, c 124, s. 4.

<sup>98</sup> AB Report, *supra* note 1 at 17. The AB Report does not recommend abolition of co-parcenary co-ownership, because at page 1 the Report asserts that it is “extinct” in Alberta.

<sup>99</sup> SK Report, *supra* note 18 at 2, note 4.



### a. Statutory Entitlement versus Judicial Discretion

One component of partition and sale proceedings under *The Law of Property Act*, which has been at the centre of a considerable number of judicial decisions, and which has sparked a substantial amount of judicial debate, is the matter of judicial discretion to grant or refuse an order of partition or sale. Historically, the Court had no discretionary jurisdiction to dismiss an application for partition or sale, given the particular wording included in the predecessor provisions to current section 19(1) of *The Law of Property Act*, which outlines who may be compelled to make partition or sale in Manitoba. Section III of *The Partition Act* of 1878 of Manitoba stated:

**III.** All joint tenants, tenants in common, and co-partners; all persons or parties entitled to any estate or interest by the courtesy or as mortgagees, execution or judgment creditors, by lien, conveyance, devise inheritance, or howsoever otherwise, in possession, reversion, remainder or expectancy, or in any way or manner otherwise in any lands in this Province, **shall and may**, by the decree or order of the Court of Queen's Bench, be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as in this Act provided [emphasis added].

The use of the words “shall and” in this section caused the courts to interpret the section to mean that an order of partition or sale was a matter of right and that the courts had no discretionary jurisdiction to dismiss an application. The words “shall and” were deleted in the 1939 incorporation of *The Partition Act* of 1878 into *The Law of Property Act*, leaving only the word “may”, thus creating a general discretionary jurisdiction to grant or dismiss an application for partition or sale.<sup>100</sup> This wording remains in current s. 19(1), which states:

19(1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, **may** be compelled to make or suffer partition or sale of the land or any part thereof [emphasis added].

The comparable section in all the other Canadian legislation other than Alberta's is worded so as to create a judicial discretion to grant or refuse an order of partition or sale. The Alberta Institute of Law Research and Reform, in the AB Report, concluded that a co-owner should be entitled as of right to have their co-ownership terminated and to have their co-owned estate or interest partitioned or sold.<sup>101</sup> It stated:

... should a co-owner be entitled as of right to have the co-ownership terminated? Our answer is that he should. The interest of co-owners, as a class, in being able to bring unsatisfactory relationships to an end, and the public interest in providing a means to bring them to an end, appear to us to outweigh the interest of a co-owner who, in a particular case, may have reason for wanting the relationship to continue. There are, however, some exceptional circumstances...

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<sup>100</sup> See Irvine, *supra* note 1 at 225-227.

<sup>101</sup> AB Report, *supra* note 1 at 7. The SK Report agrees; see SK Report, *supra* note 18 at 4-5, 10.

In accordance with the recommendation of the AB Report, Alberta has utilized the word “shall” in s. 15(2) of its *Law of Property Act*, establishing an applicant’s statutory entitlement to partition or sale, subject to only four exceptions that are explicitly provided in ss. 16, 21, 22 and 26 of the Act:

**15(1)** A co-owner may apply to the Court for an order terminating the co-ownership of the interest in land in which the co-owner is a co-owner.

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

- (a) a physical division of all or part of the land between the co-owners,
- (b) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
- (c) the sale of all or part of the interest of one or more of the co-owners’ interests in land to one or more of the other co-owners who are willing to purchase the interest [emphasis added].

[...]

**16** Notwithstanding section 15(2), if an order is made under section 15(2)(b) and the highest amount offered for the purchase of the interest in the land is less than the market value of the interest, the Court may

- (a) refuse to approve the sale, and
- (b) make any further order it considers proper.

[...]

**21** Notwithstanding section 15(2), the Court may, with respect to land that comprises a family home as defined in the *Family Property Act* or a family home as defined in the *Family Law Act*, stay proceedings under this Part

- (a) pending the disposition of an application made under the *Family Property Act* or section 68 of the *Family Law Act*, or
- (b) while an order made under the *Family Property Act* or section 68 of the *Family Law Act* remains in force

[...]

**22** Notwithstanding section 15(2), if an application for an order is made with respect to an interest in land other than a fee simple estate, the Court may refuse to allow the application if the order would unduly prejudice the grantor of that interest.

[...]

**26** Notwithstanding section 15(2), if an order has or may have the effect of subdividing a parcel to which Part 17 of the *Municipal Government Act* applies, the Court shall

- (a) stay the proceedings under this Part until the requirements of Part 17 of the *Municipal Government Act* have been complied with, or

(b) make the order subject to the requirements of Part 17 of the Municipal Government Act being complied with.<sup>102</sup>

Although the deletion of “shall and” and the retention of the word “may” in current s. 19(1) of *The Law of Property Act* of Manitoba created a discretionary jurisdiction for the Court to grant or dismiss an application for partition or sale, there has evolved by subsequent judicial decisions the principles that an applicant for partition or sale in Manitoba has a “prima facie right” to an order for partition or sale, and that the Court’s discretion to grant or refuse such an order is a “limited” or “judicial” discretion to be exercised pursuant to “certain rules.”<sup>103</sup> Most notably, these rules dictate that the right to an order for partition or sale may be denied if the respondent satisfies the Court that the application is vexatious or oppressive, or that the applicant does not come to court with “clean hands.”<sup>104</sup> These and other common-law principles in Manitoba pertaining to the judicial discretion to grant or refuse partition or sale<sup>105</sup> make the state of Manitoba statute and case law essentially the same as the law of Alberta in terms of a presumptive entitlement to partition or sale, albeit in a more complicated, roundabout way. Discovering and understanding the pertinent Manitoba case law is a task fraught with considerable difficulty. Although Appendix D of this Report will be of considerable assistance, if the discretionary jurisdiction of the Court is continued, the Commission thinks that the enactment of a legislative regime, based upon the *Law of Property Act* of Alberta, of a right to an order of partition or sale, subject to four exceptions, would be a worthwhile improvement.

**RECOMMENDATION 21: *The Law of Property Act* should be amended to include sections comparable to ss. 15(2), 16 21, 22 and 26 of the *Law of Property Act* of Alberta.<sup>106</sup>**

#### **b. Discrete Partition and Sale Legislation**

Until 1931, the statutory law governing partition and sale in Manitoba was contained in discrete legislation pertaining only to partition and sale. From that point on, partition and sale is addressed in *The Law of Property Act*, which deals with several miscellaneous aspects of the law of property. Currently, British Columbia, Ontario and Nova Scotia’s partition and sale law is governed by the type of discrete legislation which once existed in Manitoba, while the partition and sale law of Alberta, Prince Edward Island and Newfoundland and Labrador is contained in broader property-related legislation like *The Law of Property Act* of Manitoba. The Commission thinks that standalone legislation dealing only with partition and sale creates a partition and sale regime for Manitoba that is more easily accessed and understood.

**RECOMMENDATION 22: The legislation governing partition and sale should be re-enacted in a discrete *Partition and Sale Act***

<sup>102</sup> See similarly the Draft Saskatchewan Partition and Sale Act, ss 2(2), 2(4), 7 and 8 (Appendix B).

<sup>103</sup> See Appendix D.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> The sections recommended for inclusion in *The Law of Property Act* in earlier Recommendations 8 and 9 are comparable to ss. 21 and 26 of the *Law of Property Act* of Alberta.

This is a report pursuant to section 15 of the *Law Reform Commission Act*, C.C.S.M. c. L95, signed this 18<sup>th</sup> day of July, 2022.

**“Original Signed by”**

Cameron Harvey, President

**“Original Signed by”**

Jacqueline Collins, Commissioner

**“Original Signed by”**

Michelle Gallant, Commissioner

**“Original Signed by”**

Myrna Phillips, Commissioner

**“Original Signed by”**

Sacha Paul, Commissioner

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## CHAPTER 4: RECOMMENDATIONS

**RECOMMENDATION 1:** To alleviate confusion with respect to who is entitled to make an application for partition or sale pursuant to *The Law of Property Act*,

(a) A definition of “co-owners” should be added to s. 18:

“co-owners” means joint tenants and tenants in common of an estate or interest in land;

(b) Section 20 of *The Law of Property Act* should be repealed and replaced with a section which reads:

20(1) A co-owner may apply for an order of partition or sale of the estate or interest in land in which the co-owner is a co-owner.

(c) Section 20(2) should state expressly that the following do not have standing to bring an application for partition or sale:

- A co-owner who co-owns the legal title, but not the beneficial (equitable) title
- Neither the vendor nor the purchaser of a purchase and sale agreement, pursuant to which the legal title continues in the vendor until the purchaser completes scheduled payments of the purchase price;
- Neither the trustee nor a beneficiary of an *inter vivos* or testamentary trust;
- Mortgagees, judgment creditors, and claimants of interests such as a charge and a lien

(d) Current s. 20(2) should be continued as s. 20(3). (p. 15).

**RECOMMENDATION 2:** If Recommendation 1(a) is implemented, s. 23 of *The Law of Property Act* should be repealed. (p. 16).

**RECOMMENDATION 3:** Section 19(1) of *The Law of Property Act* should be amended to include the wording providing “whether the estate or interest is legal only, or legal and equitable, or equitable only.” (p. 16.)

**RECOMMENDATION 4:** *The Law of Property Act* should be amended to include a section like s. 19 of the *Law of Property Act* of Alberta. (p. 18).

**RECOMMENDATION 5:** *The Law of Property Act* should be amended to include sections like the sections in the legislation of Alberta, Nova Scotia and Prince Edward Island, described above, specifically governing partition or sale proceedings involving leaseholders, holders of a profit à prendre, or an easement, and other persons with an interest in land other than a fee simple estate. (p. 20).

**RECOMMENDATION 6:** There should be added to *The Law of Property Act* the definitions of “encumbrance” and “encumbrancee” and sections like ss. 23-24 contained in the *Law of Property Act* of Alberta.

**RECOMMENDATION 7:** *The Law of Property Act* should be amended to include a section like s. 27 of the *Law of Property Act* of Alberta, providing that the Court has discretionary jurisdiction to over-ride a contracting out of the right to apply for a partition or sale. (p. 22).

**RECOMMENDATION 8:** *The Law of Property Act* should be amended to include a section referring to *The Family Property Act*, *The Family Maintenance Act*, and QBR 70.03(2) expressly empowering the Court to stay an application pending the disposition of an application made pursuant to the relevant sections of those Acts and QBR 70.03(2). (p. 24).

**RECOMMENDATION 9:** *The Law of Property Act* should be amended to include a section referring to *The Planning Act*, s. 121(1), expressly obliging the Court to stay an application when a partition order would result in a subdivision of a parcel of land for which approval under that Act is necessary. (p. 24).

**RECOMMENDATION 10:** *The Law of Property Act* or QBR 66 should be amended to include sections like s. 9 of the *Partition Act* of Nova Scotia, and ss. 21(1) and 22(1) of the *Real Property Act* of Prince Edward Island, outlining the details to be set out by applicants in a notice of application for partition or sale, and other related requirements. (p. 25).

**RECOMMENDATION 11:** *The Law of Property Act* or the QBRs should be amended to include provisions like s. 11 of the *Partition Act* of Nova Scotia and s. 24 of the *Real Property Act* of Prince Edward Island. (p. 26).

**RECOMMENDATION 12:** *The Law of Property Act* or QBR 66.03 should be amended to elaborate further on orders for sale, as the other Canadian provinces do in their statutory legislation and court rules. (p. 27).

**RECOMMENDATION 13:** The word “registered” should be deleted from QBR 66.01(3) so that it reads:

66.01(3) A party who applies for partition or sale shall serve a copy of the document by which the proceedings are commenced on every person with an interest in the land. (p. 28).

**RECOMMENDATION 14:** *The Law of Property Act* or QBR 66.03 should be amended to include a section like s. 3 of the *Partition of Property Act* of British Columbia, acknowledging the societal shift which has resulted in the tendency towards sale, over partition applications. (p. 29).

**RECOMMENDATION 15:** *The Law of Property Act* should be amended to substitute “minor” for “infant.” (p. 29).

**RECOMMENDATION 16:** *The Law of Property Act* should be amended to eliminate the term “person of unsound mind” from the couplet “person of unsound mind or mentally incompetent person.” (p. 30).

**RECOMMENDATION 17:** *The Law of Property Act*, in a discrete section, should provide standing, respecting any person involved in a partition or sale application, for the guardian of a minor, a substitute decision maker pursuant to *The Vulnerable Persons Living with a Disability Act*, a committee appointed pursuant to *the Mental Health Act*, an attorney appointed in a enduring or springing power of attorney made in accordance with *The Powers of Attorney Act*, and a receiver or trustee appointed pursuant to the *Bankruptcy and Insolvency Act*. (p. 30).

**RECOMMENDATION 18:** Sections 22(2) and 25 of *The Law of Property Act* should be amended to:

- (a) Reflect Recommendations 15, 16 and 17; and
- (b) Delete from their headnotes the words “under a disability” and to substitute therefor the words “minor, mentally incompetent, insolvent or bankrupt”. (p. 31).

**RECOMMENDATION 19:** Given s. 5(1) of *The Presumption of Death and Declaration of Absence Act*,

- (a) Section 21(1) of *The Law of Property Act* should be amended to delete the prescribed waiting period of three years; and
- (b) Section 21(1) of *The Law of Property Act* should be amended to incorporate the appointment of a committee, as opposed to a guardian, pursuant to *The Presumption of Death and Declaration of Absence Act*. (pp. 31-32).

**RECOMMENDATION 20:** *The Law of Property Act* should be amended to abolish co-parcenary and tenancy by the entireties co-ownerships. (p. 32)

**RECOMMENDATION 21:** *The Law of Property Act* should be amended to include sections comparable to ss. 15(2), 16 21, 22 and 26 of the *Law of Property Act* of Alberta. (p. 35).

**RECOMMENDATION 22:** The legislation governing partition and sale should be re-enacted in a discrete *Partition and Sale Act*. (p. 36).

APPENDIX A: THE PARTITION ACT, S.M. 1878, c. 6

CAP. VI.

An Act respecting the partition of, and sale of real estate in the Province of Manitoba.

[Assented to 2nd February, 1878.]

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

Preamble.

I. In this Act "lands" and "land" shall mean and include lands, tenements, hereditaments and all interest and estates therein; "partition" and "plaintiff" and "defendant" shall mean and include all parties interested in any proceedings under this Act; and all parties interested in any proceedings under this Act, other than the plaintiff, shall be a defendant.

Interpretation.

II. Every partition of lands, voluntarily made by the parties thereto, shall be made by deed; otherwise the same shall be void, except the same be accompanied and followed by facts and circumstances which render the transaction binding in Equity.

Partition of lands how to be made.

III. All joint tenants, tenants in common, and co-partners; all persons or parties entitled to any estate or interest by the courtesy or as mortgagees, execution or judgment creditors, by lien, conveyance, devise or inheritance, or howsoever otherwise, in possession, reversion, remainder or expectancy, or in any way or manner otherwise in any lands in this Province, shall and may, by the decree or order of the Court of Queen's Bench, be compelled to make or suffer partition or sale of the said lands, or any part or parts thereof, as in this Act provided.

Parties entitled to estate may be compelled to make partition.

IV. The proceedings for the partition or sale of such lands shall be instituted in the Court of Queen's Bench on its Equity side.

Proceedings to be instituted in Court of Q. B.

V. Any person interested in any lands situate in this Province, or the duly authorized agent of such person,





1. The interest or estate of the plaintiff and of the defendant therein as accurately and concisely as possible ;

2. The places of residence or domicile, and occupation, if any, of each person, plaintiff and defendant ;

3. The interest, estate, right and title of every person, plaintiff and defendant therein, in any wise whatsoever, so far as the same may be known or can be ascertained ;

4. In case any one or more of such persons, or the share or extent of interest or estate in said lands of any person interested be unknown, the facts in respect thereof shall be set forth as far as known or that can be ascertained.

VIII. In case any of the persons interested be an infant or minor, not having a legal guardian, the court or any judge may at any time before or after the bill filed, upon proof that such infant or minor has been served with notice of the application, a reasonable time before application, whether the said infant or minor is within or without this Province, appoint a suitable and discreet person to be guardian for such infant or minor, for the special purpose of taking charge of the interest of such infant or minor in the proceedings to be taken on the bill in respect of the partition or sale of the said lands.

When an infant or minor is interested, court may appoint a guardian.

IX. Every guardian so appointed, and every other guardian, shall at any time when thereunto required by the direction or order of the court or judge, execute to the clerk of the court, or to the infant or minor, or to such other person or persons as the judge or court shall direct, according to the direction of the court or judge, a bond with or without sureties, as shall be directed, to be allowed by the clerk of the court upon proper proof of the sufficiency thereof, conditioned for the faithful discharge of the trust committed to him as such guardian, and to render a just account of the guardianship when required by the court or a judge, and upon such further condition as may be directed ; and every guardian in the proceedings on any bill or other proceedings as aforesaid, or in any matter connected therewith

Every guardian so appointed to execute a bond,

and may be subject to process for disobedience of order.

therewith or growing thereout, shall, in addition to all other remedies against him, be subject to have the process of the court by way of attachment or otherwise, on disobedience to, or non-compliance with, any rule, order, or direction of the court or judge, to be issued against him by the court or a judge, as for a contempt of court; and the court or a judge shall have power and authority to order the issue of any such process of attachment for the causes aforesaid, any law, usage or custom to the contrary notwithstanding.

Acts of guardian shall be binding on infant.

X. The guardians aforesaid shall represent the infants or minors in the proceedings upon the bill; and their acts therein and in relation thereto shall be binding on the infants and minors, and shall be as valid and effectual as if done by such infants or minors after having arrived at the full age of twenty-one years.

Persons having a lien on the lands may not be a party to proceedings.

XI. It shall not be compulsory, in the first instance, to make any person having a lien or incumbrance on the lands or estate, or any part thereof, a party to the proceeding; but the plaintiff in the bill may make such incumbrancers parties to the bill, and set forth the lien or incumbrance; or such incumbrancers may subsequently be made parties to the proceedings in the master's office, or otherwise, by an order of the court or judge, or by an order of the master; and in such case they shall be bound by all the proceedings the same as if they had been made parties in the first instance; and if any lien or incumbrance is on the undivided share or estate of any of the parties or persons to the bill, it shall be a lien only on such share or estate; and such share or estate, as the case may be, shall be first charged with its due proportion of the cost of the proceedings in partition or sale, in priority to any such lien: Provided always, that if the person having such lien shall not, in the first instance or subsequently, be made a party to the proceedings, his lien shall not be impaired or affected by the proceedings: and provided further, that in any stage of the proceedings any amendments may be made by the omission or addition of persons or parties, or otherwise, as necessity or occasion shall arise, upon such terms as the court or a judge shall impose.

PROVISO.

Where parties

XII. In cases where all the parties interested or supposed

posed to be interested in the lands, and their residence are unknown, an office copy of the bill with the requisite notices and endorsements thereon, according to the general orders of the court in ordinary bills and cases, shall be served on all the persons, parties defendant thereto, whether infants or minors or not, and whether married women, or sole and unmarried or not, who are interested in the said lands and estate in question, or on any authorized agent, guardian, or attorney, or solicitor of any of the said parties defendant; service either upon the infant or minor, or upon the guardian, shall be sufficient, except there shall be some special reason for holding otherwise.

interested are unknown, copy of the bill with notices to be served on all the parties defendant.

XIII. The court, or a judge in any case, may order substitutional or other service of the bill of complaint or any proceedings, upon any of the parties interested, or service by publication of a concise statement of the substance of the bill, or the whole bill, together with the notices and indorsements thereon, in the *Manitoba Gazette*, and in some newspaper published in or near the city of Winnipeg, in one or both, for such time and in such manner, and in such language, either the English or the French language, as the court or judge shall in such order direct; or may order that any service of any bill, proceeding or notice may be served by enclosing the same to any person in an envelope properly addressed and deposited in the post office in Winnipeg, with postage prepaid, in manner and form as shall in the said order be expressed; or may order the service of any bill, proceeding or notice in any manner otherwise, as to the court or judge shall seem proper; and all services made in pursuance of any such orders shall be good and effectual, and shall bind the parties so served, their estate and interest, as effectually as if personal service had been made; but in all such services regard shall be had to the time for answering or appearing to the same.

Court may order substitutional service by publication of the bill in "Manitoba Gazette" or other paper.

XIV. In case answers are not filed pursuant to the practice of the court, the bill may be taken *pro confesso* in respect of any party defendant failing to answer; and the case, when ripe for hearing, may be set down and heard as any ordinary case on the equity side of the court, and thereupon the case shall be heard on bill and answer, or *pro confesso*, or affidavits and *viva voce*

When answers not filed, bill may be taken *pro confesso*, and case may be heard on *viva voce* evidence

*voce* evidence, one or both, and the court shall pronounce such decree or order as the law and justice of the case shall demand.

On hearing parties shall establish their respective titles in the land.

XV. On the hearing, the several parties shall establish to the satisfaction of the court their respective estates, interests and titles to and in the said lands, and also the estate, interest and title of any person or persons who are unknown, or who are not a party to the suit; and the decree or order, if made, shall either define specially the respective estates, interests and rights of all parties interested in the said lands or any part thereof, so that the same may be readily distinguished and known, including (if any) the estates or interests of any persons unknown and not ascertained; and if a partition be decreed or ordered, define and designate by metes and bounds the several parcels or parts or portions allotted to each, so that the same may be distinguished and known from all other parcels, parts or portions; or refer to the master or some other person to inquire and report upon all and singular the premises, and reserve further consideration until after the master or other person shall have made his report; and after the said report shall have become absolute, by a subsequent decree or order, or decrees or orders, finally dispose of all and singular the premises in the manner aforesaid.

Court may employ a surveyor to assist in dividing the several shares, etc.

XVI. In the case of a partition, the court or the master may, if necessary, employ a surveyor to assist the court or the master in dividing and designating the several shares, parcels or parts, by actual survey, and who shall place posts, stones or monuments to point out and define the same, and make an accurate map or plan and field book of the whole land and the several divisions thereof, and shall describe particularly the metes and bounds of the same.

Report may be accepted or sent back.

XVII. The report, as in ordinary cases, may be accepted to, or the court, without exceptions, may order it to be sent back to be reviewed or amended.

Decree of the court shall be binding.

XVIII. The decree or order of the court confirming the said report and finally disposing of the case, whether in the case of partition or sale, shall be binding and conclusive on all parties named in the cause and made parties

parties thereto, and on all persons claiming by, through or under them or any of them; but such decree or order, if it be on partition, shall not affect any person being a tenant, or tenant in dower, or tenant by courtesy, or tenant for life, of the lands or any part thereof which form the subject of a partition, nor of any person, whether such decree or order be on partition or sale, not named in the bill of complaint originally, or by amendment, nor subsequently made a party to the proceedings as hereinbefore provided.

But shall not affect any tenant for life.

XIX. Either in the decree or order first made, or after decree or order for partition, if by any means it shall under the circumstances appear to be advisable, in a subsequent decree or order reciting the former decree or order, and the reason for a sale instead of a partition, the court may order the sale of the estate, lands and premises, if deemed prudent so to do, or any part thereof, or any estate or interest therein or in any part thereof, at a public or private sale, on such terms and conditions, and on credit or for cash, as to the whole or part of the purchase money, as to the court shall seem expedient.

If advisable, the court may order sale of the estate.

XX. In all cases, any decree, order and report confirmed by which partition or sale is declared or effected, or any deed executed by the master of the court, to give effect to such partition or sale, shall be valid and binding, both at law and in equity.

Deed executed by the master shall be valid and binding.

XXI. Any partition or sale made under this Act shall be as effectual to all intents and purposes for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the partition or sale is declared or made, as of any person fully competent in law to act himself

Any sale under this Act to be as effectual as of any person fully competent.

XXII. In cases where a sale is ordered, it shall be lawful and competent for the court to order that all the lands shall be sold freed and discharged from all incumbrances, if it shall under the circumstances see fit so to do; and the purchaser shall take title accordingly; and upon sale, to order that all proper parties shall join in the deed of conveyance, and to enforce compliance with such order; or to direct the master of the court

When a sale is ordered court may free lands from all incumbrances.

In certain cases conveyance to have same force and effect as if executed under proper hand and seal of party named.

court or some other person to execute the deed of conveyance, in case any party thereto is absent or of tender years, or from any other cause, it is convenient so to do ; and any deed of conveyance so executed shall have the same force and effect as if executed under the proper hand and seal of the said party named in the said conveyance ; and in case of infants, as if of the full age of twenty-one years ; and in the case of married women, as if they were sole and unmarried ; or the court may convey the lands to the purchaser thereof by a vesting order of the court, which shall have the same force and effect as a formal deed of conveyance would have, duly executed by all the parties having any estate or interest to convey, and fully competent in law to make and execute such conveyance.

Proceeds, how to be disposed of.

XXIII. The proceeds of any sale, whether it be money, mortgages, or security, or partly one and partly the other, shall stand in the place of and represent the said lands, and be impressed with the same trusts and incidents, and subject to the same incumbrances, that the lands were before sale and conveyance ; and the court shall pay out, apportion and dispose thereof, according to the estate, interest and rights of the parties therein and thereto, according to law ; and in doing so shall fix the value of any inchoate, or unliquidated, or uncertain estate or interest therein or thereto, and deal with the same according to law, dealing with all liens and incumbrances according to their legal priority, or *pari passu* where no priority exists.

Office copy of decree to be sufficient evidence of partition.

XXIV. An office copy of any decree, or order or report confirmed for a partition or sale under this Act, shall be sufficient evidence in all courts of the partition thereby declared, and of the sale thereby made, of the several holdings by the parties of the shares allotted to them, and of the title of the purchaser to the land sold to him.

Practice to be followed.

XXV. In all matters arising in proceedings under this Act in respect of which the practice is not provided for, the principles of the practice of the Court of Queen's Bench, on its equity side, shall, as near as may be, be followed ; and in cases on points of practice not therein provided for, the court may make general rules or orders, or may make any special order in any case  
as

as necessity or occasion shall require, not inconsistent with this Act nor contrary to law.

XXVI. As a rule, the costs in proceedings under this <sup>Costs to be paid out of estate.</sup>  
Act shall be paid to all parties out of the estate and  
shall form a first charge thereon ; but the court shall  
in all cases have absolute discretionary power over all  
costs.



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**APPENDIX B: LEGISLATION, OTHER CANADIAN PROVINCES**

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## **1. PARTITION OF PROPERTY ACT, BRITISH COLUMBIA**

### **Definitions**

**1** In this Act:

"court" means the Supreme Court;

"land" includes special timber licences, and all estates and interests in them;

"proceeding for partition" includes a proceeding for sale and distribution of the proceeds.

### **Parties may be compelled to partition or sell land**

- 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) Subsection (1) applies whether the estate is legal or equitable or equitable only.
- (3) In order to achieve partition, special timber licences may be assigned to any of the interested parties.
- (4) Despite subsection (3), a special timber licence must not be partitioned and any special timber licences left over after the others have been assigned, must be ordered to be sold and the proceeds distributed among the interested parties in order to achieve partition.

### **Pleadings**

- 3** In a proceeding for partition it is sufficient to claim a sale and distribution of proceeds, and it is not necessary to claim a partition.

### **Parties to proceeding and persons entitled to notice**

- 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.
- (2) The court may order inquiries as to the nature of the property, the persons interested in it and other matters it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration, but all persons who, if this Act had not been passed, would have been necessary parties to the proceeding must be served with a notice of the order.

(3) Persons served with notice under subsection (2)

- (a) are bound by the proceeding as if they had been originally parties to the proceeding,
- (b) may participate in the proceeding, and
- (c) may apply to the court to amend the order.

### **Proceedings if parties cannot be served**

**5** (1) If in a proceeding for partition it appears to the court that a copy of an order under section 4 cannot be served on the interested parties, or cannot be served without expense disproportionate to the value of the property involved, the court may, if it thinks fit, on the request of any of the interested parties and despite the dissent or disability of any of them

- (a) dispense with service on any person or class of persons specified in the order, and
- (b) order that notice of the order be published at the times and in the manner the court thinks fit, calling on all persons interested in the property who have not been served to apply to establish their claims before the court within a period specified in the order.

(2) After the period specified in an order under subsection (1),

- (a) all persons who have not applied to establish their claims, whether they are in or out of the jurisdiction of the court, including persons under any disability, are bound by the proceedings as if on the day of the date of the order dispensing with service they had been served with a copy of the order under section 4,
- (b) the powers of the court under the *Trustee Act* extend to the interests of persons referred to in paragraph (a) in the property involved as if they had been parties, and
- (c) the court may order a sale of the property and give directions.

### **Sale of property where majority requests it**

**6** In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the

court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

### **Sale in place of partition**

- 7 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to the court that because of the nature of the property involved, or of the number of parties interested or presumptively interested in it, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the interested parties than a division of the property, the court may
- (a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and
  - (b) give directions.

### **Purchase of share of person applying for sale**

- 8 (1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, then if any party interested in the property involved requests the court to order a sale of the property and a distribution of the proceeds instead of a division of the property, the court may order a sale of the property and give directions.
- (2) The court may not make an order under subsection (1) if the other parties interested in the property, or some of them, undertake to purchase the share of a party requesting a sale.
- (3) If an undertaking is given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give directions.

### **Persons under disability**

- 9 (1) In a proceeding for partition, a request for sale may be made or an undertaking to purchase given on the part of an infant, of an adult who is incapable of making decisions relating to the adult's financial affairs or of a person under any other disability, by
- (a) the infant's litigation guardian or guardian,
  - (b) and (c) [Not in force.]
  - (d) the adult's attorney under an enduring power of attorney.

- (2) The court is not bound to comply with the request or undertaking on the part of an infant unless it appears that the sale or purchase will be for the infant's benefit.

### **Court may allow interested parties to bid**

- 10** On a sale under this Act the court may allow any of the interested parties to bid at the sale on the terms as to nonpayment of deposit, or setting off or accounting for the purchase money instead of paying it, or as to any other matter that seems reasonable to the court.

### **Money arising from sale subject to court order**

- 11** (1) All money to be received on any sale under this Act, or to be set aside out of the rents or payments reserved, on any lease of earth, coal, stone or minerals may, if the court orders, be paid to any trustees approved by the court.
- (2) If no order is made under subsection (1), the money must be paid into a chartered bank as the court directs, to the account of the registrar of the court in the matter of this Act.
- (3) Money paid under subsection (1) or (2) must be applied, as the court directs, to one or more of the following purposes:
- (a) the discharge or redemption of any encumbrance affecting the property in respect of which the money was paid, or affecting any other property, subject to the same uses or trusts;
  - (b) the purchase of other property to be settled in the same manner as the property in respect of which the money was paid;
  - (c) the payment to any person becoming absolutely entitled.

### **Application of money without court order**

- 12** The application of money referred to in section 11 may, if the court so orders, be made by the trustees, if any, without application to the court, or otherwise on an order of the court, on the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

### **Investment of money**

- 13** (1) Until the money can be applied as required under this Act, it must be invested as the court thinks fit.

- (2) The interest and dividends of the investment must be paid to the persons who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

### **Interests of persons if service of notice dispensed with**

- 14** (1) If an order is made under this Act dispensing with the service of notice on any person or classes of persons, and property is sold by order of the court, the following provisions apply:
- (a) the proceeds of the sale must be paid into court to await the further order of the court;
  - (b) the court must, by order, set a time after which the proceeds will be distributed, and may by further order extend that time;
  - (c) the court must order notice to be given by advertisements or otherwise to any persons on whom service is dispensed with who may not have previously come in and established their claims, notifying them of
    - (i) the fact of the sale,
    - (ii) the time of the intended distribution, and
    - (iii) the time within which a claim to participate in the proceeds must be made;
  - (d) if at the end of the time set or extended the interests of all the persons interested have been ascertained, the court must distribute the proceeds in accordance with the rights of those persons;
  - (e) if at the end of the time set or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court must distribute the proceeds
    - (i) in the manner that appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and
    - (ii) with the reservations, if any, the court sees fit in favour of any other persons, whether ascertained or not, who may appear from the evidence before the court to have any clear rights that ought

to be provided for, although those rights may not have been fully established.

- (2) If an order is made under subsection (1) (e), all other persons are excluded from participation in those proceeds.
- (3) Despite a distribution under subsection (1) of the proceeds of a sale, any person excluded under subsection (2) may recover from any participating person any portion received by that person of the excluded person's share.

### **Abatement in favour of parties previously excluded**

- 15** If 2 or more sales are made in a proceeding for partition and any person who has been excluded under this Act from participation in the proceeds of any of those sales establishes a claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale
  - (a) abate to the extent, if any, to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and
  - (b) must to that extent be applied in payment to that person of the share to which the person would have been entitled in the proceeds of the previous sale if the claim to it had been established in time.

### **Costs**

- 16** In a proceeding for partition the court may make an order it thinks just respecting costs up to the time of hearing.

### **Application of *Land Title Act***

- 17** An order for the partition of land into 2 or more parcels is deemed to effect a subdivision as defined in the *Land Title Act* and must contain an express declaration that the order is subject to compliance with that Act.

## 2. LAW OF PROPERTY ACT, ALBERTA

### Part 3 Partition and Sale

#### Definitions

14 In this Part,

- (a) “co-owners” means joint tenants or tenants in common of an interest in land but does not include joint tenants or tenants in common of an interest in land who are holding the interest for common beneficiaries;
- (b) “encumbrance” means any interest in land other than a fee simple estate;
- (c) “encumbrancee” means an owner of an encumbrance;
- (d) “homestead” means a homestead as defined in the *Dower Act*;
- (e) “land” means land as defined in the *Land Titles Act* and includes a profit a prendre;
- (f) “local authority” means
  - (i) the council of a city, town, village or municipal district,
  - (ii) the Minister responsible for the *Municipal Government Act*, in the case of an improvement district, or
  - (iii) the Minister responsible for the *Special Areas Act*, in the case of a special area;
- (g) “order” means an order made under this Part;
- (h) “parcel” means a parcel of land as defined in Part 17 of the *Municipal Government Act*;
- (i) “registered” means registered under the *Land Titles Act*.

#### Application for termination of co-ownership

**15(1)** A co-owner may apply to the Court for an order terminating the co-ownership of the interest in land in which the co-owner is a co-owner.

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



- (a) a physical division of all or part of the land between the co-owners,
- (b) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
- (c) the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest.

**(3)** A sale under subsection (2)(b) or (c) and the distribution of the proceeds of the sale shall be under the direction of the Court.

**(4)** In making an order under subsection (2)(c), the Court shall fix the value of the land sold and the terms of the sale.

### **Refusal to approve sale of interest in land**

**16** Notwithstanding section 15(2), if an order is made under section 15(2)(b) and the highest amount offered for the purchase of the interest in the land is less than the market value of the interest, the Court may

- (a) refuse to approve the sale, and
- (b) make any further order it considers proper.

### **Accounting, contribution and adjustment**

**17(1)** In making an order, the Court may direct that

- (a) an accounting, contribution and adjustment, or any one or more of them, take place in respect of the land, and
- (b) compensation, if any, be paid for an unequal division of the land.

**(2)** In determining if an accounting, contribution or adjustment should take place or compensation be paid for an unequal division of the land, the Court shall, without limiting itself from considering any matter it considers relevant in making its determination, consider whether

- (a) one co-owner has excluded another co-owner from the land;
- (b) an occupying co-owner was tenant, bailiff or agent of another co-owner;
- (c) a co-owner has received from third parties more than the co-owner's just share of the rents from the land or profits from the reasonable removal of its natural resources;

- (d) a co-owner has committed waste by an unreasonable use of the land;
- (e) a co-owner has made improvements or capital payments that have increased the realizable value of the land;
- (f) a co-owner should be compensated for non-capital expenses in respect of the land;
- (g) an occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent;
- (h) a co-owner has at the time the application is made under this Part rights in the land for which the co-owner would receive compensation under the *Dower Act* if an order had been made under that Act dispensing with that co-owner's consent to the disposition of that land.

### **Ensurance that obligations performed**

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

### **Severance of joint tenancy**

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

### **Homestead**

**20(1)** A termination of co-ownership under this Part is not a disposition under the *Dower Act*.

**(2)** On termination of co-ownership under this Part, the land that was co-owned ceases to be a homestead as between the parties to the action who were the co-owners immediately prior to the order being made.

**(3)** An order made under this Part terminating the co-ownership of land by two spouses dispenses with consent under the *Dower Act* by those spouses to a disposition of land that is subject to that order.

### **Application of the Family Property Act and Family Law Act**

**21** Notwithstanding section 15(2), the Court may, with respect to land that comprises a family home as defined in the *Family Property Act* or a family home as defined in the *Family Law Act*, stay proceedings under this Part

- (a) pending the disposition of an application made under the *Family Property Act* or section 68 of the *Family Law Act*, or
- (b) while an order made under the *Family Property Act* or section 68 of the *Family Law Act* remains in force.

### **Refusal to allow application**

**22** Notwithstanding section 15(2), if an application for an order is made with respect to an interest in land other than a fee simple estate, the Court may refuse to allow the application if the order would unduly prejudice the grantor of that interest.

### **Encumbrances against the entire interest**

**23(1)** An order does not affect an encumbrance registered against the entire interest in land in respect of which the order is made.

**(2)** If an encumbrance is registered against the entire interest in land in respect of which an order is made and under the order the interest of a co-owner is to be sold to another co-owner, the Court may direct that compensation for the vendor's liability under the encumbrance in an amount determined by the Court be paid to the purchaser of the interest from the proceeds of the sale.

### **Encumbrances against particular interest**

**24** If an encumbrance is registered against an interest in land other than the entire interest in the land in respect of which the order is made then

- (a) if the land is to be physically divided between the co-owners, the Court may direct that the encumbrance on the land being divided be registered only against the land allotted to the co-owner in respect of whose interest the encumbrance was registered,
- (b) if the land or part of it is to be sold and proceeds of the sale are to be distributed between the co-owners, the Court may direct that the encumbrance on the land being sold be discharged as against that land and compensation in an amount determined by the Court be paid to the encumbrancee from the proceeds accruing to the co-owner in respect of whose interest the encumbrance was registered, or
- (c) if the interest of a co-owner is to be sold to another co-owner, the Court may direct that the encumbrance on the interest being sold be discharged as against that land and compensation for the vendor's liability under the encumbrance in an amount determined by the Court be paid to the encumbrancee from the proceeds accruing to the vendor of the interest, if

the interest sold was the interest in respect of which the encumbrance was registered.

### **Service of application**

**25(1)** A co-owner commencing an application for an order shall, not less than 10 days before the application is to be heard, serve a copy of the application on

- (a) the other co-owner,
- (b) any encumbrancee who has an encumbrance registered against an interest in the land, and
- (c) any other person that the Court may direct.

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

**(3)** An encumbrancee who

- (a) holds an unregistered encumbrance against land that is the subject of an application for an order, and
- (b) is not a party to the action,

may apply to the Court to be made a party to the action and the Court may make that encumbrancee a party to the action on any terms the Court considers proper.

### **Application of Part 17 of the Municipal Government Act**

**26** Notwithstanding section 15(2), if an order has or may have the effect of subdividing a parcel to which Part 17 of the *Municipal Government Act* applies, the Court shall

- (a) stay the proceedings under this Part until the requirements of Part 17 of the *Municipal Government Act* have been complied with, or
- (b) make the order subject to the requirements of Part 17 of the *Municipal Government Act* being complied with.

### **Termination of co-ownership**

**27** Notwithstanding any agreement between co-owners of land, the Court may make an order terminating the co-ownership, if the continuance of the co-ownership will cause undue hardship to one or more of the co-owners.

## Validity of previous partition orders

**28** A partition order registered in a land titles office before May 20, 1976 is valid notwithstanding that the order was not approved under the *Planning Act* then in force

## Planning requirements

**29(1)** In this section and in sections 30 and 31, “planning requirements” means those requirements contained in sections 25 and 26 of *The Planning Act*, RSA 1970 c276, and the regulations referred to in section 25 of that Act as those sections and regulations read on May 20, 1976.

**(2)** A person

- (a) who was a co-owner of land that was subject to a partition order referred to in section 28 immediately prior to that partition order being made, and
- (b) who was, on November 12, 1979, the owner of that land or a part of it, shall, on being served with a written notice to do so by the local authority having jurisdiction over the area within which the land is located, comply with the planning requirements in the same manner as if that land was the subject of a proposed subdivision under *The Planning Act*, RSA 1970 c276.

**(3)** A local authority shall not serve a written notice under subsection (2) after June 30, 1980.

## Appeal

**30(1)** A person served with a written notice under section 29(2) who alleges that it will cause the person hardship to comply with the planning requirements may appeal to an appeal board to have the planning requirements reduced or waived.

**(2)** A person served with a written notice under section 29(2) or the local authority on whose behalf the written notice was served may appeal to an appeal board for directions as to how the planning requirements are to be complied with.

**(3)** An appeal under this section shall be commenced within 6 months from the day that the local authority served the written notice under section 29(2).

**(4)** An appeal under this section may be commenced by serving on the Minister responsible for this Act a notice of appeal setting out the reasons for the appeal and the remedy sought.

## Appeal board

**31(1)** Within 60 days after being served with a notice of appeal under section 30, the Minister responsible for this Act shall cause an appeal board to be established consisting of

- (a) one member, to be chair of the appeal board, appointed by the Minister responsible for this Act,
- (b) one member appointed by the person who was served with a written notice under section 29(2), and
- (c) one member appointed by the local authority on whose behalf the written notice was served.

(2) If a party to an appeal fails to appoint a member to the appeal board, the chair of the appeal board and the other member of the appeal board may hear the appeal, the chair having a casting vote in the event of a tie vote respecting any matter being heard by the appeal board.

(3) In hearing a matter referred to it, the appeal board may consider any matter it considers relevant.

(4) On hearing the matter the appeal board may make an order

- (a) reducing the planning requirements;
- (b) waiving the planning requirements;
- (c) directing how the planning requirements are to be complied with;
- (d) dismissing the appeal.

(5) An order made under subsection (4) may be registered.

(6) The chair of the appeal board has the same powers as a commissioner under the *Public Inquiries Act*.

(7) Section 55 of the *Arbitration Act* applies to a matter heard under this section in the same manner as if the members of the appeal board were arbitrators under the *Arbitration Act*.

(8) The appeal board shall hear the matter being appealed and make its decision within 6 months from the day that the appeal is commenced.

(9) Notwithstanding subsection (8), on the request of the chair of the appeal board, the Minister responsible for this Act may extend the time within which the appeal board shall hear the matter being appealed and make its decision.

(10) Any decision, purported decision or proceeding of the appeal board is final and shall not be questioned, reviewed or restrained by injunction, prohibition, mandamus, quo

warranto proceedings or other process or proceedings in any court or be removed by certiorari or otherwise into any court.

### **Service of documents**

**32** A written notice under [section 29](#), a notice of appeal under [section 30](#) or any other document issued in respect of an appeal commenced under [section 30](#) may be served by personal service or by registered or certified mail.

### **3. PARTITION ACT, ONTARIO**

#### **Definitions**

**1** In this Act,

“court” means the Superior Court of Justice; (“tribunal”)

“land” includes lands, tenements, and hereditaments, and all estate and interests therein.  
 (“bien-fonds”)

#### **Who may be compelled to make partition or sale**

**2** All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

#### **Who may bring action or make application for partition**

**3** (1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

#### **When proceedings may be commenced**

(2) Where the land is held in joint tenancy or tenancy in common or coparcenary by reason of a devise or an intestacy, no proceeding shall be taken until one year after the decease of the testator or person dying intestate in whom the land was vested.

#### **Appointment of guardian to estate of person unheard of for three years**

**4** (1) Where a person interested in the land has not been heard of for three years or upwards and it is uncertain whether such person is living or dead, the court upon the application of any one interested in the land may appoint a guardian to take charge of the interest of such person and of those who, in the event of his or her being dead, are entitled to his or her share or interest in the land.

#### **Powers of such guardian**

(2) The guardian shall, in the proceeding, represent the absent person and those who, if he or she is dead, are entitled to his or her share or interest in the land, and whether they or any of them are minors or otherwise under disability, and his or her acts in relation to such share or interest are binding on the absent person and all others claiming or entitled to claim under or through him, and are as valid as if done by him or her or them.



### **Power of the court to deal with the estate**

(3) The court upon proof of such absence of such person as affords reasonable ground for believing such person to be dead, upon the application of the guardian, or any one interested in the estate represented by the guardian, may deal with the estate or interest of such person, or the proceeds thereof, and may order payment of the proceeds, or the income or produce thereof, to the person who, in the event of the absent person being dead, appears to be entitled to the same.

### **Sales including estates in dower or by the curtesy or for life**

**5** (1) In a proceeding for partition or administration, or in a proceeding in which a sale of land in lieu of partition is ordered, and in which the estate of a tenant in dower or tenant by the curtesy or for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold, and in making such determination regard shall be had to the interests of all the parties.

### **What to pass to purchaser**

(2) If a sale is ordered including such estate, all the estate and interest of every such tenant passes thereby, and no conveyance or release to the purchaser shall be required from such tenant, and the purchaser, the purchaser's heirs and assigns, hold the premises freed and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share or to the whole or any part of the premises sold.

### **Compensation to owners of particular estates**

(3) The court may direct the payment of such sum in gross out of the purchase money to the person entitled to dower or estate by the curtesy or for life, as is considered, upon the principles applicable to life annuities, a reasonable satisfaction for such estate, or may direct the payment to the person entitled of an annual sum or of the income or interest to be derived from the purchase money or any part thereof, as seems just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as is necessary.

### **Effect upon persons under a disability**

**6** A partition or sale made by the court is as effectual for the apportioning or conveying away of the estate or interest of a party to the proceedings by which the sale or partition is made or declared who is a minor or is incapable as defined in the *Substitute Decisions Act, 1992*, as of a party who is competent to act.

### **Appeal**

**7** An appeal lies to the Divisional Court from any order made under this Act.

## **4. PARTITION ACT, NOVA SCOTIA**

### **Short title**

1 This Act may be cited as the Partition Act.

### **Interpretation**

2 In this Act, "land" includes mining areas.

### **Jurisdiction of Supreme Court preserved**

3 The provisions of this Act shall not restrict the jurisdiction and powers of the Supreme Court, possessing the jurisdiction and powers of the former Court of Chancery in England as to the partition of land, but shall be construed as enlarging the same.

## LAND SUBJECT TO PARTITION

### **Land subject to partition**

4 All persons holding land as joint tenants, co-parceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act.

### **Right of action**

5 Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled.

### **Persons entitled to maintain action**

6 Such action may be maintained by any person who has an estate in possession, but not by one who is entitled only to any remainder or reversion..

### **Tenant jointly or in common for term**

7 When two or more persons hold jointly or in common, as tenants for any term of years, any of them may bring such action against his co-tenants in the same manner as if they had all been tenants of the freehold.

### **Restriction on action of tenant for term**

8 No tenant for any term of years, unless twenty years at the least remain unexpired, shall maintain such an action against any tenant of the freehold.

## PARTIES AND SERVICE

### **Statement of claim**

9 (1) The statement of claim shall set forth the rights and titles, so far as known to the plaintiff, of all persons interested in the land who would be bound by the partition, whether they have an estate of inheritance, or for life, or years, or whether it is an estate in possession, or in remainder, or reversion, and whether vested or contingent.

(2) If the plaintiff holds an estate for life, or years, the person entitled to the remainder or reversion, after his estate, shall be considered as one of the persons so interested.

### **Unknown interested person**

10 If there are any persons interested in the land whose names are unknown to the plaintiff, the Court or judge may, if, having regard to the nature and extent of the interests of such persons, it appears expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such persons whose names are unknown to the plaintiff, and the judgment or order of the Court shall be binding on the persons so represented, subject to this Act.

### **Failure to appear**

11 If any person entitled to notice fails to appear, and if the service of the originating notice or other notice to him appears to the Court or the judge to have been insufficient, the Court or a judge may order such further notice as is thought proper.

### **Right of interested person out of Province to appear**

12 If, in any stage of the action, it appears to the Court that any person interested, whether a party or not, is out of the Province and has not had an opportunity to appear in the action, it may be adjourned until sufficient time is allowed to enable him to appear.

### **Party to action by leave**

13 Any person who is not a party may be made a party by leave of the Court or a judge, on filing an affidavit showing that he is entitled to a share in the land, and in all subsequent proceedings he shall be named as a party to the action.

### **Guardian**

14 The Court or a judge may assign a guardian for the suit for any infant or incompetent person who is interested in the premises, in the same manner as a guardian is admitted for an infant plaintiff or defendant in any other action, and the judgment or order of the Court shall be binding on the persons so represented, subject to this Act.

## PLEADINGS

### **Statement of defence**

15 The defendant, in his statement of defence, may plead any matter tending to show that the plaintiff ought not to have partition, either in whole or in part.

### **Amendment of statement of claim**

16 If any person was made a party by leave of the Court or a judge, the plaintiff may, without leave, amend his statement of claim and plead, or he may reply that such person has no estate or interest in the land.

## ORDER FOR PARTITION

### **Order for partition**

17 If the defendant fails to appear or to deliver a defence, or if, after a trial, it appears that partition should be made, the Court or a judge shall make an order for the partition of the land, which shall specify the persons entitled to share in the partition ordered and the share to which each is respectively entitled.

## COMMISSIONERS AND THEIR DUTIES

### **Commissioners**

18 When such order passes, unless it appears to the Court or judge that a sale of the land is necessary under the provisions of this Act, the Court or judge may appoint three disinterested persons as commissioners, to make partition and to set off to the parties their respective shares.

### **Oath**

19 The commissioners, before proceeding to the execution of their duties, shall be sworn before any justice of the peace faithfully and impartially to perform the same, a certificate of which oath shall be made on the order for partition by the person who administered it. *R.S., c. 333, s. 19.*

### **Notice of right to be present**

20 The commissioners shall give notice of the time and place appointed for making the partition to all persons interested therein who have appeared, or who are known and within the Province, that they may be present if they see fit.

### **Evidence and subpoena**

21 (1) The commissioners may take evidence, and if it is desired by any of the parties interested in the partition to produce witnesses before the commissioners, such party may obtain subpoenas from the prothonotary for such witnesses, and disobedience of any such subpoena shall be deemed a contempt of court.

(2) The person served with a subpoena shall be entitled to be paid the same fees as for attendance at an ordinary trial.

### **Division of land**

22 (1) The commissioners shall divide the land and allot the several shares thereof to the respective parties mentioned in the order, designating the several shares by sufficient monuments.

(2) The shares of any two or more parties may be allotted to them in common, upon their expressing their consent to that effect in writing, addressed to the commissioners.

### **Validity of report**

23 The report of the commissioners shall be valid if at least two of the commissioners concur therein.

## **LAND INCAPABLE OF DIVISION**

### **Set off of land**

24 (1) When the land, of which partition is sought, cannot be divided without prejudice to the owners, or when any specific part thereof is of greater value than the share of any party and cannot be divided without prejudice to the owners, the whole land, or the part so incapable of division, may be set off to any one of the parties who will accept it, upon payment by him to any one or more of the others of such compensation as the commissioners determine.

(2) The partition in such case shall not be confirmed by the Court or judge until all the sums so awarded are paid to the parties entitled thereto, or secured to their satisfaction.

### **Alternate occupation**

25 The commissioners, instead of setting off the land or a part thereof, in the manner provided in Section 24, may assign the exclusive occupancy and enjoyment of the whole or the part, as the case may be, to each of the parties alternately, for certain specified times, in proportion to their respective interests therein.

## **Liability of occupier**

26 When the whole, or any specific part of the land is assigned in the manner provided in Section 25, the person entitled for the time being to the exclusive occupancy shall be liable to the other parties for any injury to the premises occasioned by his misconduct, in like manner and to the like extent as a tenant for years under a common lease without express covenants would be liable to his landlord, and the other parties shall have their remedy therefor against him by action, either jointly or severally, at their election.

## **Remedy for trespass**

27 While any land is so in the exclusive occupancy of any such party, he shall be entitled to the same remedy against any person who trespasses upon or otherwise injures the land as if he held the same under a lease for the term of his exclusive occupancy, and he and all the other parties shall also be entitled to recover against the wrong-doer such other and further damages as they have sustained by the same trespass or injury, in like manner as if the land had been leased by them for such term, and all joint damages recovered by any such parties shall be apportioned and divided among them, according to their respective rights, by the court in which the judgment is recovered.

## **SALE OF LAND**

### **Sale of land**

28 (1) Where

- (a) the land, or any part thereof, cannot be divided without prejudice to the parties entitled; or
- (b) any party is, by reason of infancy, insanity or absence from the Province, prevented from accepting such land, or part thereof, incapable of division under this Act,

the Court or a judge may order that such land shall be sold after such notice and in such manner as the Court or judge directs, and that the net proceeds of such sale shall be divided among the parties entitled.

(2) Such order may be made instead of an order appointing commissioners for the division of the land, or may be made at any time subsequent to such an order.

(3) Every person interested, and every encumbrancer, shall have at least two days notice of the application for the sale of such land, but if from infancy, insanity or absence from the Province, or other cause, actual notice cannot be given, the Court or judge shall direct such notice to be given by service on a guardian, or by publication, or otherwise, as is deemed best.

(4) Such sale may be made and the deed executed by the sheriff of the county in which the land lies, or by an auctioneer, or such other person as is mentioned in the order, or the land may be conveyed to the purchaser by a vesting order to be made by the Court or a judge, and the

purchaser of the land shall acquire, by such deed or vesting order, all the interest and title of all persons interested in the said land, and of all such encumbrancers.

(5) Where the share of any person interested in such land, so ordered to be sold, is subject to dower or to encumbrances, appearing from the certificate of the registrar of deeds for the registration district in which the land lies, or where any person entitled to a share is an unknown person, an infant or insane person or is absent from the Province, and was not personally served, the share of any such person in the proceeds of the sale shall be paid into court, or to such persons and according to such priorities, and in such amounts, as the Court or judge directs.

## REPORT AND CONFIRMATION

### **Report of commissioners**

29 The commissioners shall make a report of their proceedings under their hands and return the same, together with the order for partition, to the Court, and the report may be confirmed by the Court or a judge, whereupon the partition so made shall be final.

### **Powers of Court respecting report**

30 The Court or a judge, for any reason, may vary or set aside the report or may remit the same to the commissioners, or may appoint other commissioners to divide the land.

### **Effect of confirmation of partition**

31 The order confirming the partition shall be conclusive as to all rights, both of property and possession, of all parties to the action and privies, and except as provided hereinafter, all persons who are represented under the provisions of this Act.

### **Registration and confirmation of report**

32 (1) A certified copy of the report of the commissioners shall be registered in the registry of deeds for the registration district in which the land is situated.

(2) In case of a sale the report of the person making the sale shall be subject to confirmation, as in case of other sales by the Court or a judge.

## OPENING OF PARTITION

### **Application for new partition**

33 If any person who was a part owner with the plaintiffs and for whom a share was assigned upon the partition, was described as an unknown person, and there was not personal service of, or appearance to, the originating notice or notice to him, he may, at any time within three years after the final judgment, apply to the Court for a new partition of the premises.

### **New order for partition**

34 After hearing the parties interested, if it appears to the Court that the share assigned for the applicant was less than he was entitled to, or that such share was not at the time of the partition equal in value to his proper share of the land, the Court may order a new partition thereof.

### **Method of new partition**

35 In such new partition the commissioners shall not be required to make a new division of the whole land, but they may take from any one share or shares and add to any other or others so much as is, in their judgment, necessary to make the partition just and equal, estimating the whole as in the state in which it was when first divided, or if an equal partition of the land cannot be made without inconvenience to the owners, the commissioners may award compensation to be paid by one party to another to equalize the shares.

### **Compensation for improvements**

36 If, after the first partition, any improvement has been made on any part of the land which, by the new partition, is taken from the share of the person who made the improvements, he shall be entitled to compensation therefor, to be estimated and awarded by the commissioners and to be paid by the person to whom such part of the land is assigned on the new partition.

## **EFFECT OF JUDGMENT FOR PARTITION IN CERTAIN CASES**

### **Action for land by non-party after judgment**

37 If any person who was not made a party or was not served, claims to hold in severalty the land, or any part thereof, he shall not be concluded by the judgment for partition, but may bring his action for the land claimed by him against any or all of the plaintiffs or defendants, or of the persons holding under them, as the case requires, within the same time in which he might have brought it if no such judgment for partition had been given.

### **Action for assigned share by non-party after judgment**

38 When any person, who was not made a party, claims the share that was assigned to any supposed part owner in the judgment for partition, he shall be concluded by the judgment so far as it respects the partition and the assignment of the shares, in like manner as if he had been a party to that action, but he shall not be prevented thereby from bringing his action for the share claimed by him against the person to whom it was assigned.



### **Style of action under Section 38 and time limit**

39 In such case the action shall be brought by him against the tenant in possession in like manner as if the plaintiff had originally claimed the specific piece of land demanded, instead of an undivided part of the whole land, and it may be brought within the same time in which it might have been brought if no judgment for partition had been given.

### ***More than one claimant for same share of land***

40 If two or more persons appear as defendants, claiming the same share of the land to be divided, it shall not be necessary to decide upon their respective claims, except only for the purpose of determining which of them shall be admitted to defend in the action, and if partition is made, the share so claimed shall be assigned to the party who is determined to be entitled to it, in an action to be thereafter brought between them.

### **Application of Section 40**

41 If in such a case it is decided in the original action for partition, upon the reply of the plaintiffs, or otherwise, that either of the defendants is not entitled to the share that he claims, he shall be concluded by the judgment, so far as it respects the partition and the assignment of the shares, but he shall not be prevented thereby from bringing his action for the share claimed by him against the other claimant thereof in the manner provided in Section 40.

### **Action by non-party part owner after judgment**

42 (1) If any person who was not made a party, or was not served, claims any part of the land as a part owner with those who were parties to that action, or any of them, and if the part or share so claimed was not known or not allowed and left for him in the partition, he shall be concluded by the judgment so far as it respects the partition, but he shall not be prevented thereby from bringing an action for the share or proportion claimed by him against each of the persons who hold any part of the land under the judgment for partition.

(2) If the plaintiff prevails in such case last mentioned, he shall not be entitled to demand a new partition of the whole land, but he shall recover against each of the persons holding under the judgment for partition the same proportion or share of the part held by him that the plaintiff was entitled to out of the whole land before the partition thereof.

### **Claim by heir or devisee**

43 If, after the making of partition, it appears that any person for whom a share was left, or to whom a share was assigned, died before such partition was made, and the proper representatives of such person were not added as parties, the heir or devisee of such deceased person shall not, by reason of such heir or devisee having been a party to the action, either as a plaintiff or as a defendant, be barred from claiming the share that belonged to the deceased person, but the heir or devisee in such case shall have the same rights and the same remedies in all respects as if such heir or devisee had not been a party to the action and had no notice of the pendency thereof.

### **New partition resulting from eviction**

44 If any person to or for whom any share is assigned or left upon any judgment for partition, is evicted thereof, by any person who, at the time of the partition, had a title thereto paramount to the title of those among whom partition was made, the person so evicted shall be entitled to a new partition of the residue, in like manner as if the former partition had not been made.

### **Effect of partition on lien**

45 Any person having a mortgage, attachment or other lien upon the share of any part owner, shall be concluded by the judgment so far as it respects the partition and the assignment of the shares, but his lien shall remain in full force upon the part that is assigned or left for such part owner.

## DEATH OF PARTIES

### **Death of party**

46 In the case of the death of any party in an action for partition, the action shall not abate, but may be conducted and prosecuted to final judgment and the Court or judge may make such order to bring in the heirs or representatives of the deceased party, or other person to represent him, and make them parties to the action, as such Court or judge thinks proper under the rules of the Supreme Court.

## COSTS

### **Costs**

47 (1) The costs of the trial of any issues or the costs of any contested matter shall be in the discretion of the judge.

(2) All the other costs of the proceedings and the expenses and charges of the commissioners shall be taxed in the usual manner, and shall be paid by the parties in proportion to their respective shares or interests in the premises.

## GENERAL PROVISIONS

### ***Status of title held under partition***

48 Every person holding any land under a partition made by virtue of this Act shall be considered as holding it under an apparently good title, and in case of eviction, he shall, as against the person evicting him, be entitled to compensation for any improvements made thereon.

### **Land in different counties**

49 Where the land to be divided is situated in different counties, the whole of such land may be included in one action, and the Court or judge may appoint three commissioners in each county in which any part of such land lies, or may appoint three commissioners to divide all the land wheresoever situated.

## **5. REAL PROPERTY ACT, PRINCE EDWARD ISLAND**

### **PART III — PARTITION**

#### **18. Definitions**

In this Part, “court” means the Supreme Court of Prince Edward Island and “judge” means a judge thereof.

#### **19. Partition of lands held in common**

All persons holding lands as joint tenants, tenants in common, or coparceners, may be compelled to divide the lands in manner provided in this Part.

#### **20. Joint tenants, tenants in common, coparceners, application for partition**

- (1) Except as mentioned in this section, any one or more of the persons holding lands as joint tenants, tenants in common or coparceners may apply by petition to the court or a judge, for a partition of the lands; and the court or judge may cause partition to be made accordingly and the shares of the petitioners shall be set off and assigned to them, and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition among them, if there is more than one person so entitled.

##### **Entitlement to petition, who is**

- (2) The petition may be maintained by any person who has an estate in possession, but not by one who is entitled only to a remainder or reversion.

##### **Tenants, partition among**

- (3) No tenant for any term of years, unless twenty thereof, at the least, remain unexpired, shall maintain such a petition against any tenant of the freehold; but when two or more persons hold jointly or in common, as tenants for any term of years, either of them may have his share set off and divided from the others, in the same manner as if they had all been tenants of the freehold.

##### **Duration of partition among tenants**

- (4) The partition between two or more tenants for years continues in force only so long as their estates endure, and shall not affect the premises when they revert to the respective landlords or reversioners.

##### **Heirs or next-of-kin, entitlement to petition**

- (5) Heirs or next-of-kin of an intestate shall be deemed to be parties entitled to apply for partition under this Part, if they elect to avail themselves of its provisions.

## **21. Petition, contents**

- (1) Every petition for partition shall set forth the rights and titles, so far as known to the petitioner, of all persons interested in the premises, who would be bound by the partition, whether they have an estate of inheritance, or for life or years, and whether it is an estate in possession or in remainder or reversion, and whether vested or contingent; and if the petitioner holds an estate for life or years, the person entitled to the remainder or reversion, after his estate, shall be considered as one of the persons so interested, and shall be entitled to notice accordingly.

### **Amending petition**

- (2) The petition, or any subsequent proceedings had thereon, may be amended at any time upon such terms as the court or a judge may impose.

## **22. Verification of petition**

- (1) The petition shall be verified by the oath of the petitioner, according to the best of his knowledge, information and belief.

### **Order to appear and answer petition**

- (2) The court or judge shall grant an order to appear and answer the petition, and may make the same returnable either at court or in chambers.

### **Service of order**

- (3) A copy of the order shall be served on each of the parties within the province named in the petition as interested in the land, at least twenty days before the return thereof.

## **23. Notice to absent or unknown persons interested**

If any of the persons named as interested is outside the province, or if there are persons interested in the premises, and who would be bound by the partition, whose names are unknown to the petitioner, the court or judge shall order notice to be given to the absent or unknown parties interested, by a publication of the petition, or of the substance thereof, with the order of the court or judge thereon, in one or more newspapers to be designated in the order, or by personal service upon such absent party of the petition and order, or in such other manner as the court or judge considers to be most proper and effectual.

## **24. Continuation of proceedings where interested person outside province**

If in any stage of the proceedings it appears to the court or judge that any person interested, whether named in the petition or not, is outside the province, and has not opportunity to appear and answer to the petition, it shall be continued, from time to time, until sufficient time has been allowed to enable him to appear and answer thereto; and the court or judge may, in its or his discretion, make an order to amend the said petition by inserting the name of the absent person.

**25. Failure to appear, further notices**

If any person entitled to notice fails to appear, and if the service of the order or other notice to him appears to the court or judge to have been insufficient, the court or judge may order such further notice as may be thought proper.

**26. Litigation guardian**

The court or judge may assign a litigation guardian for any infant or mentally incompetent person who is interested in the premises.

**27. Showing cause why partition should not be granted**

Any person interested in the premises, of which partition is prayed for, may appear and answer to the petition, either in person or by solicitor or counsel, and show cause, on affidavit, why the petitioner ought not to have partition as prayed for, either in whole or in part; and the court or judge may, on all occasions where considered just and necessary, and where it is demanded by either party, give leave to file affidavits or supplementary affidavits, as the case may be, in support of the petition, or in opposition thereto, and adjourn the further hearing for that purpose for such time as in the opinion of the court or judge may be necessary.

**28. Evidence**

The court or judge may receive evidence, and hear witnesses, orally, on oath or otherwise, as well as by affidavit, in any stage of the case, and in such way, and subject to such rules and regulations as the court or judge may ordain and appoint.

**29. Service of affidavits**

Each party petitioning or opposing shall serve on the other party, or his attorney, copies of all affidavits intended to be made use of, at any hearing hereunder, seven days before such hearing.

**30. Person not named in petition, appearance to object**

If any person, not named in the petition, appears and opposes the partition prayed for, or otherwise shows cause against the prayer of the petition, the petitioner may object that the person has no estate or interest in the lands described in the petition, and if, upon investigation of the case by the court or judge, it appears that the person so appearing or opposing has no estate or interest in the lands, the matter of his objection or opposition shall be no longer or further enquired of.

**31. Judgment or order for partition**

If upon the hearing it appears that the petitioner is entitled to have partition as prayed for, judgment may be entered or an order made for the petitioner to have partition, and to have assigned to him such part of the premises, if any, as he is entitled to, with costs, and costs may be awarded against an unsuccessful petitioner.

**32. Jurisdiction to grant order for partition**

Where there is no opposition to the petition, or where upon hearing, the opposer makes default, or it otherwise appears that the petitioner is entitled to have partition, whether for the share or proportion claimed in his petition, or for a less share, an order that partition be made shall be granted by the court or judge but the court or judge may set aside defaults, or grant hearings over again, on such terms as to time or costs, or otherwise, as seem fit.

**33. Appraisal and description of partitioned land**

When the order has been granted, the court or judge shall order the lands to be appraised, partitioned and set off by metes and bounds in such manner as the court or judge shall direct, subject to confirmation and final judgment by the court.

**34. Method of partition**

Several petitioners may have their shares set off together; or the share of each one may be set off in severalty at their election.

**35. Shares unequal, or damage to one part, compensation by recipient**

When the premises of which partition is demanded are such as cannot be divided without damage to the owners, or when any specific part of the estate is of greater value than either party's share, and can be divided without damage to the owners, the whole estate, or the part thereof so incapable of division may be set off to any one of the parties who will accept it, he paying or securing to any one or more of the others such sums of money as the court or judge shall award, to make the partition just and equal, but the partition in such case shall not be established by the court or judge until all the sums so awarded be paid to the parties entitled thereto, or secured to their satisfaction.

**36. Alternative to s.35**

In the case mentioned in section 35, the court or judge, instead of setting off the premises, or a part thereof, in the manner therein provided, may assign the exclusive occupancy and enjoyment of the whole or part, as the case may be, to each of the parties alternately, for certain specified times, in proportion to their respective interests therein.

**37. Liability to co-tenants for damages**

When the whole or any specific part of the premises is assigned, in the manner provided in section 36, the person entitled, for the time being, to the exclusive occupancy, shall be liable to his co-tenants for any injury to the premises occasioned by his misconduct, in like manner and to the like extent as a tenant for years under a common lease without express covenants, would be to his landlord; and the other tenants in common may have their remedy therefor against him either jointly or severally, at their election.

### **38. Remedies for trespass or damage to premises by co-tenant**

While any estate is in the exclusive occupancy of any co-tenant, under such an assignment, he is entitled to the same remedy against any person who trespasses upon or otherwise injures the premises, as if he held it under a lease for the same term for which they were assigned to him and he and all the other tenants in common shall also be entitled to recover against the wrongdoers such other and further damages as they have sustained by the same trespass or injury, in like manner as if the premises had been leased by them for the term; and all joint damages recovered by the tenants in common shall be appointed and divided among them, according to their respective rights, by the court in which the judgment is recovered.

### **39. Partition, powers of court re**

- (1) In a petition for partition where an order for partition might be made, then
  - (a) if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary directions;
  - (b) if the party or parties interested, individually or collectively to the extent of one part or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary directions;
  - (c) if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court may, unless the other parties interested in the property or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary directions; and where the undertaking is given, the court may order a valuation of the share of the party requesting a sale, and may give all necessary directions.

### **Partition of lands of a deceased person**

- (2) The real or personal property of any deceased person may be administered and a partition of his lands may be made in one action, and an action for the administration and for partition of the lands of any deceased person shall not be considered multifarious; nor shall an action in which partition is in issue be considered multifarious, though distinct and independent matters may be joined therein, nor although the action may be in several distinct and separate matters with which one or more of the defendants have no concern.

### **40. Dower, curtesy, liens & charges re order for sale of land**

- (1) In any case in which a sale of land is ordered, whether belonging to an infant or otherwise, and in which the estate of any tenant for life is established, or on which there is any rent, charge, annuity or other lien or charge found to exist, if the person entitled to the estate, charge, annuity or lien, is a party, the court or judge shall determine whether the estate,



charge, annuity or lien ought to be exempted from the sale or whether the same should be sold, and in making the sale regard shall be had to the interests of all parties.

Effect of order to sell subject to encumbrances

**Effect of order to sell subject to encumbrances**

- (2) If a sale is ordered including the estate, charge, annuity or lien, all the estate and interest of any tenant or person entitled to the charge, annuity or lien passes thereby and no conveyance or release to the purchaser is required from such tenant or person entitled to the charge annuity or lien, and the purchaser, his heirs and assigns shall hold the premises freed and discharged from all claims by virtue of the estate or interest of any such tenant or person entitled to such charge, annuity or lien whether it is to any individual share or to the whole or any part of the premises sold.

**Payment of charges from proceeds of sale**

- (3) In case of a sale referred to in subsection (2) the court may direct the payment of such sum in gross out of the purchase money to the person entitled to life fee or charge, annuity or lien as may be deemed, upon the principles applicable to life annuities, a reasonable satisfaction for such estate or charge, annuity or lien, or may direct the payment to the person entitled of an annual sum, or of the income or interest to be derived from the purchase money or any part thereof as may seem just, and for that purpose may make an order for the investment or other disposition of the purchase money or any part thereof.

**41. Final judgment, conclusive as to**

The final judgment, confirming and establishing the partition, shall be conclusive as to all rights, both of property and possession, of all parties and privies to the judgment, including all persons who might by law have appeared and answered to the petition, except as hereinafter provided, and the Prothonotary may be directed to convey the lands, vesting them in the parties entitled thereto.

**42. Exception**

If any person who has not appeared and answered to the petition for partition claims to hold in severalty the premises therein mentioned, or any part thereof, he shall not be concluded by the judgment for partition, but may bring his action for the land claimed by him against any or all of the petitioners or defendants or of the persons holding under them, as the case may require within the same time in which he might have brought it, if no such judgment for partition had been rendered.

**43. Action against assignee of part owner**

- (1) When any person who has not appeared and answered to the petition claims the share that was assigned to, or left for any of the supposed part owners in the judgment for partition, he shall be concluded by the judgment, so far as it respects the partition and the assignment of the shares, in like manner, as if he had been a party to the suit; but he shall not be prevented thereby from bringing his action for the share claimed by him against the person to whom it was assigned, or for whom it was left.

**Action lies against tenant in possession**

- (2) The action in such case shall be brought against the tenant in possession, in like manner, as if the plaintiff had originally claimed the specific piece of land demanded, instead of an undivided part of the whole land; and it may be brought within the same time in which it might have been brought if no such judgment for partition had been rendered.

**44. Defendants, two or more, deciding respective claims**

If two or more persons appear as defendants, claiming the same share of the premises to be divided, it is not necessary to decide upon their respective claims, except only for the purpose of determining which of them shall be admitted to appear and plead in the suit; and if partition is made, the share so claimed shall be left for whichever of the parties proves to be entitled to it, in a suit to be thereafter brought between themselves.

**45. Neither defendant entitled to share, action by one against the other**

If in such a case, it is decided in the original suit for partition, upon the application of the petitioners or otherwise, that either of the defendants is not entitled to the share that he claims he is concluded by the judgment, so far as it respects the partition and the assignment of the shares; but he is not prevented from bringing his action for the share claimed by him against the other claimant thereof, in the manner provided in sections 43 and 44.

**46. Part owner fails to answer claims, remedy**

If any person who has not appeared and answered as aforesaid claims any part of the premises mentioned in the petition, as a part owner with those who were parties to that suit, or any of them, and if the part or share so claimed was not known or not allowed, and left for him in the process for partition, he is concluded by the judgment so far as it respects the partition; but he shall not be prevented thereby from bringing an action for the share or portion claimed by him against each of the persons who shall hold any part of the premises under the judgment for partition.

**47. New partition not allowed, damages only**

If the plaintiff prevails in the case referred to in section 46 he is not entitled to demand a new partition of the whole premises, but shall recover against each of the persons holding under the judgment for partition the same proportion of shares of the part held by him that the plaintiff was entitled to, out of the whole premises, before the partition thereof.

**48. Death of a person entitled to share**

If, after partition, it appears that any person for whom a share was left, or to whom a share was assigned, had died before the partition was made, the heir or devisee of the deceased person is not, by reason of the heir or devisee having been a party to the suit, either as a petitioner or as a defendant, barred from claiming the share that belonged to the deceased person; but the heir or devisee in such case has the same rights and the same remedies in all respects, as if the heir or devisee had not been a party to the suit, and had not notice of the pending thereof.

**49. Eviction of person entitled to share, new partition**

If a person to or for whom a share has been assigned or left upon any judgment for partition, is evicted thereof by any person who, at the time of the partition, had a title thereto paramount to the title of those who were parties to the suit for partition, the person so evicted is entitled to a new partition of the residue, in like manner as if the former partition had not been made.

**50. Mortgage or lien upon a share, concluded by judgment**

A person having a mortgage, attachment or other lien upon the share of a part owner is concluded by the judgment, so far as it respects the partition and the assignment of the shares, but his lien shall remain in full force upon the part assigned or left for such part owner.

**51. Death of party to petition, effect of**

In case of the death of any party in a petition for partition, the suit need not abate, but may be conducted and prosecuted to final judgment, under such rules and orders for bringing in the heirs or representatives of the deceased party, as the court or judge may think proper, for making them parties to the suit and regulating the proceedings accordingly.

**52. Holding lands under partition, effect re eviction**

A person holding lands under a partition made by virtue of this Act, shall be considered as holding them under an apparently good title; so that, in case of eviction, he is entitled to compensation for any improvements made thereon.

**53. Rules of court re partitions**

Where any difficulties arise, either in practice or otherwise, in carrying out proceedings for partitions under this Act, the court may make rules, either specially, for the purpose of any particular application, or generally with respect to all applications for partition.

## **6. CONVEYANCING ACT, NEWFOUNDLAND AND LABRADOR**

### **Claim for partition**

**46.** Where property is held in joint tenancy or tenancy in common, a person who has joint title or possession of the property may start a proceeding claiming a partition of the property against all persons who have a joint title or title in common with that person of the property and refuse to make a fair partition of it.

### **Procedure**

**47.** (1) A person who may maintain a proceeding for partition may proceed against 1 or more of the parties interested in the property without serving the other parties and the defendant to such a proceeding may not object to the proceeding for lack of parties.

(2) At the hearing of the proceeding the judge may direct inquiries as to the nature of the property, the persons interested in the property, and other matters that the judge thinks necessary with a view to an order for partition and sale to be made on further examination by the judge.

(3) All persons determined by the judge to be interested in a partition proceeding under subsection (2) shall be served with notice by the plaintiff following completion of the initial hearing under subsection (1).

(4) The parties to whom notice is given are bound by the order as if they had been parties to the proceeding and may attend the proceedings as parties.

### **Where titled denied**

**48.** Where the defendant to a partition proceeding pleads that the plaintiff does not hold the property jointly or in common with the defendant, the judge shall decide that issue before proceeding to an order for partition.

### **Partition order**

**49.** (1) The judge may proceed to examine into the title of the plaintiff and the quantity or proportion of the property to which the plaintiff is entitled and give an order for partition where,

- (a) the judge makes a decision under section 48 that the plaintiff holds the property jointly or in common with the defendant;
- (b) the defendant does not file a defence; or
- (c) the defendant admits that the plaintiff holds the property jointly or in common with him or her.

(2) A partition order may be directed to the sheriff or a referee to ascertain, assign or deliver the several parts or shares of the property in the manner that the judge directs.

### **Final judgment**

**50.** (1) Upon the execution of the partition order and 8 days after notice has been served upon the occupier or tenant of the property the judge may enter final order in the proceeding.

(2) A final order entered under subsection (1) binds all persons, whatever right or title they may have in the property, unless the occupier, tenant, or other person interested in the property

(a) within 3 months; or

(b) within 1 year of the return or termination of the disability in the case of a person who is under 19 years of age, mentally incapacitated or absent from the province,

applies to the court and shows cause why the final order and order of partition should not stand.

(3) Where the judge finds that the final order should be set aside, the proceeding is to proceed as if the final order had not been given.

(4) Where the judge finds that the final order should not be set aside, it is confirmed as against the person who has applied to the court under subsection (2) but not as against another person who is absent or under a disability and the person who has applied shall pay the costs of the proceeding.

(5) Where a person applies under subsection (2) and shows an inequality in the partition, the judge may award a new partition that binds the person applying but does not bind another person who is absent or under a disability.

### **Joining of guardian**

**51.** (1) Where a person who is mentally incapacitated or is under the age of majority has an interest in property that is the subject of a partition proceeding, the judge

(a) may of his or her own motion;

(b) may upon the motion of a party to the proceeding; or

(c) may upon the motion of a guardian or next friend of that person,

direct the guardian or next friend to be made a party to the proceeding.

(2) Where a guardian or next friend is made a party to a proceeding, the final order is binding on the person represented by the guardian or next friend.

(3) Where there is no guardian, the judge may appoint a guardian to represent the person under a disability.

### **Registration of judgment**

**52.** (1) The court shall register a certified copy of the final order in a partition proceeding in the Registry of Deeds.

(2) The fee payable to the court for the certified copy of the final order and the fee payable to the Registrar of Deeds on the registration in the Registry of Deeds shall be paid to the court at the time of entering the final order by the party requesting the entry of that final order.

### **Right to order sale**

**53.** The court may, on the request of a party to a partition proceeding and notwithstanding the dissent or disability of a party, direct a sale and distribution of the proceeds where,

- (a) because of the nature of the property;
- (b) because of the number of persons interested in the property;
- (c) because of the absence or disability of some of the parties; or
- (d) because of other circumstances,

a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property.

### **Duty to order sale**

**54.** The court shall direct a sale of the property and a distribution of the proceeds instead of a division of the property, unless there are good reasons to the contrary, where the parties interested individually or collectively to the extent of 1/2 or more of the property request a sale.

### **Purchase of share**

**55.** (1) The court may direct a sale of the property and a distribution of the proceeds instead of a division of the property where a party requests such a sale unless all or some of the other parties agree to purchase the share of the party requesting the sale.

(2) Where the parties agree to purchase the share of the party requesting the sale, the court may order a valuation of that party's share in the manner that it thinks appropriate and may give all directions necessary in this regard.

### **Ancillary direction**

**56.** The court may give all directions necessary for the sale of the property where a sale is directed under sections 53 to 55.

### **Party may bid**

**57.** The court may allow a party to bid at a sale under sections 53 to 55 on those terms as to

- (a) non-payment of deposit;
- (b) setting off or accounting for the purchase money or part of the purchase money, instead of paying it; or
- (c) other matters,

that the court considers reasonable.

### **Value of rent charge**

**58.** Where the interest of a party is a rent charge or annuity, the court may make an order

- (a) necessary to ascertain its value, either as a share of or charge upon the property or a part of the property; and
- (b) necessary for distributing, settling and providing for the application of the order,

as if the interest of that party were a share of the property itself.

## 7. DRAFT SASKATCHEWAN PARTITION AND SALE ACT

### Definitions

1. In this Act

- (a) "co-ownership" means ownership of an interest in land by two or more persons as joint tenants or tenants in common, but does not include any future interest in land or any other interest in land that does not give the owner a right of possession in the land, and does not include any interest in land held beneficially for others;
- (b) "co-owner" means an owner of land in co-ownership;
- (b) "encumbrance" means any interest in land other than a fee simple estate;
- (c) "encumbrancee" means an owner of an encumbrance;
- (d) "land" means any interest in land, and includes a leasehold interest and a profit a prendre;
- (e) "registered" means registered under the Land Titles Act.

### Application for termination of co-ownership

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

(2) On bearing an application under subsection (1), the Court shall make one or more of the following orders:

- (a) a physical division of all or part of the land between the co-owners,
- (b) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
- (c) the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest.

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

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



### **Refusal to approve sale of interest in land**

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

### **Compensation**

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

### **Ensurance that obligations performed**

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

### **Severance of joint tenancy**

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

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

### **Refusal to allow application**

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

### **Encumbrances against the entire interest**

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

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

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

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

### **Service of application**

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

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

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

### **Application of municipal planning legislation**

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

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**APPENDIX C: RULES OF COURT RESPECTING PARTITION AND SALE  
ACROSS CANADA**

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Province	Rules of Court	Section/Rule	Content
British Columbia	<i>Supreme Court Civil Rules</i>	R 13-5	<p><b>Court may order sale</b>  (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.</p> <p><b>Sale in debenture holder's proceeding</b>  (2) In a debenture holder's proceeding in which the debenture holder is entitled to a charge on any property, the court, if it is of the opinion that eventually there must be a sale of the property, may order the sale before or after judgment, whether or not all interested persons are ascertained or served.</p> <p><b>Conduct of sale</b>  (3) If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.</p> <p><b>Directions for sale</b>  (4) The court may give directions for the purpose of effecting a sale, including directions</p> <ul style="list-style-type: none"> <li>(a) appointing the person who is to have conduct of the sale,</li> <li>(b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,</li> <li>(c) fixing a reserve or minimum price,</li> <li>(d) defining the rights of a person to bid, make offers or meet bids,</li> <li>(e) requiring payment of the purchase price into court or to trustees or to other persons,</li> <li>(f) settling the particulars or conditions of sale,</li> <li>(g) obtaining evidence of the value of the property,</li> <li>(h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or expenses resulting from the sale,</li> <li>(i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and</li> <li>(j) authorizing a person to enter on any land or building.</li> </ul>

Province	Rules of Court	Section/ Rule	Content
	<p>-----</p> <p><i>Supreme Court Family Rules</i></p>	<p>-----</p> <p>R 15-8</p>	<p><b>Application for directions</b>  (5) A person having conduct of a sale may apply to the court for further directions.</p> <p><b>Certificate of sale</b>  (6) The result of a sale by order of the court must be certified in Form 60 by the person having conduct of the sale and that certificate must be filed promptly after completion of the sale.</p> <p><b>Vesting order</b>  (7) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.</p> <p>-----</p> <p><b>Court may order sale</b>  (1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.</p> <p><b>Conduct of sale</b>  (2) If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.</p> <p><b>Directions for sale</b>  (3) The court may give directions for the purpose of effecting a sale, including directions</p> <ul style="list-style-type: none"> <li>(a) appointing the person who is to have conduct of the sale,</li> <li>(b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff’s sale, tender or some other manner,</li> <li>(c) fixing a reserve or minimum price,</li> <li>(d) defining the rights of a person to bid, make offers or meet bids,</li> <li>(e) requiring payment of the purchase price into court or to trustees or to other persons,</li> <li>(f) settling the particulars or conditions of sale,</li> <li>(g) obtaining evidence of the value of the property,</li> <li>(h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or expenses resulting from the sale,</li> </ul>

Province	Rules of Court	Section/ Rule	Content
			<p>(i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and</p> <p>(j) authorizing a person to enter on any land or building.</p> <p><b>Application for directions</b> (4) A person having conduct of a sale may apply to the court for further directions.</p> <p><b>Certificate of sale</b> (5) The result of a sale by order of the court must be certified in Form F70 by the person having conduct of the sale and that certificate must be filed promptly after completion of the sale.</p> <p><b>Vesting order</b> (6) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.</p>
Alberta	<i>Alberta Rules of Court</i>	S 9.37-9.39	<p><b>Application of this Division</b> <b>9.37</b> This Division</p> <p>(a) is subject to the Civil Enforcement Act, and</p> <p>(b) does not apply to foreclosure actions.</p> <p><b>Sale and disposition of land</b> <b>9.38(1)</b> If land is to be sold, mortgaged, partitioned or exchanged as a result of an action, the Court may make that order and specify the time and place of, the manner of, and the price or sum associated with the transaction that the Court considers appropriate.</p> <p><b>(2)</b> If the Court is satisfied that all interested parties are before the Court or bound by the order, the Court may order</p> <p>(a) the sale, mortgage, partition or exchange of land, and</p> <p>(b) the procedure to be carried out to give effect to the order.</p> <p><b>(3)</b> Any money produced as a result of carrying out an order under this rule must</p> <p>(a) be paid into Court,</p> <p>(b) be paid to persons specified in the order, or</p> <p>(c) otherwise be dealt with in accordance with the order.</p>

Province	Rules of Court	Section/Rule	Content
			<p>(4) If a judgment or order states that land is to be sold,</p> <ul style="list-style-type: none"> <li>(a) the sale must be approved by the Court before the sale is completed, and</li> <li>(b) the persons necessary to complete the sale must join the sale and conveyance in accordance with the Court's order.</li> </ul> <p><b>Terms, conditions and limitations on orders</b></p> <p><b>9.39</b> In an order under this Division the Court may include one or more of the following terms, conditions or directions:</p> <ul style="list-style-type: none"> <li>(a) that a person pay or account for rent or profit, or both, to another person;</li> <li>(b) the manner in which the transaction is to be carried out;</li> <li>(c) the person or persons who are to carry out or facilitate compliance with the order;</li> <li>(d) that any proceeds of the transaction be paid into Court or otherwise paid to or disposed of by the Court.</li> </ul>
Saskatchewan	<i>The Queen's Bench Rules</i>	S 10-46-10-50	<p><b>Court may order sale of real property</b></p> <p><b>10-46(1)</b> If in any cause or matter relating to real property the Court considers it necessary or expedient that all or any part of the real property should be sold, the Court may order the real property to be sold.</p> <p>(2) Any party who is bound by an order pursuant to this rule and who possesses the real property, or is in receipt of the rents and profits of the real property, must deliver up the possession or receipt to:</p> <ul style="list-style-type: none"> <li>(a) the purchaser; or</li> <li>(b) any other person named in the order.</li> </ul> <p><b>Manner of carrying out sale, mortgage, etc., when ordered by Court</b></p> <p><b>10-47(1)</b> If a sale, mortgage, partition or exchange of real property is ordered, the Court may, in addition to any other power it has, authorize the sale, mortgage, partition or exchange to be carried out:</p> <ul style="list-style-type: none"> <li>(a) by laying proposals before the judge in chambers for his or her sanction; or</li> <li>(b) subject to subrule (3), by proceedings out of Court.</li> </ul> <p>(2) Any moneys resulting from the sale, mortgage, partition or exchange must be paid into Court or to trustees, or otherwise dealt with as the judge in chambers may order.</p>

Province	Rules of Court	Section/Rule	Content
			<p>(3) The judge in chambers shall not authorize proceeding out of Court, unless the judge is satisfied by evidence that the judge considers sufficient that all persons interested in the real property to be sold, mortgaged, partitioned, or exchanged:</p> <ul style="list-style-type: none"> <li>(a) are before the Court; or</li> <li>(b) are bound by the order for sale, mortgage, partition or exchange.</li> </ul> <p>(4) Every order authorizing proceedings out of Court must contain:</p> <ul style="list-style-type: none"> <li>(a) a declaration that the chambers judge is satisfied as required by subrule (3); and</li> <li>(b) a statement of the evidence on which the declaration is made.</li> </ul> <p>(5) For the purposes of this rule:</p> <ul style="list-style-type: none"> <li>(a) an order nisi for sale of land subject to a non-matured mortgage is to be in Form 10-47A;</li> <li>(b) an order nisi for sale of land subject to a matured or demand mortgage is to be in Form 10-47B;</li> <li>(c) an order nisi for sale of land subject to a non-matured mortgage by real estate listing is to be in Form 10-47C;</li> <li>(d) an order nisi for sale of land subject to a matured or demand mortgage by real estate listing is to be in Form 10-47D; and</li> <li>(e) an order confirming sale is to be in Form 10-47E.</li> </ul> <p>(6) The applicant for an order under this rule shall file a draft order in the applicable form, with all additions, insertions and changes underlined.</p> <p><b>Order for sale in debenture holders' action</b>  <b>10-48(1)</b> This rule applies to debenture holders' actions if:</p> <ul style="list-style-type: none"> <li>(a) the debenture holders are entitled to a charge by virtue of the debentures, a trust deed or otherwise;</li> <li>(b) the plaintiff is suing on behalf of himself or herself and other debenture holders; and</li> <li>(c) the judge is of the opinion that there must eventually be a sale.</li> </ul>



Province	Rules of Court	Section/ Rule	Content
			<p>(2) In the circumstances mentioned in subrule (1), the judge may direct a sale before judgment and also after judgment, before all the persons interested are ascertained or served.</p> <p><b>Sale requires approval of Court</b>  <b>10-49</b>(1) Unless the Court orders otherwise, if a judgment is given or an order made, whether in Court or in chambers, directing any property be sold, the property must be sold to the best purchaser.</p> <p>(2) For the purposes of this rule, the best purchaser is the person so approved by the Court.</p> <p>(3) All proper parties shall join in the sale and conveyance in accordance with any direction of the Court.</p> <p><b>Special directions</b>  <b>10-50</b> The Court may give any special directions that the Court considers just respecting:</p> <ul style="list-style-type: none"> <li>(a) the carrying out or execution of a judgment or order pursuant to this Division; or</li> <li>(b) the service of a judgment or order on any persons who are not parties.</li> </ul>
<b>Ontario</b>	<i>Rules of Civil Procedure</i>	R 66	<p><b>WHERE AVAILABLE</b>  <b>66.01</b> (1) A person who is entitled to compel partition of land may commence an action or application under the <i>Partition Act</i>. O. Reg. 770/92, s. 16.</p> <p>(2) A proceeding for partition or sale by or on behalf of a minor shall be on notice to the Children's Lawyer. R.R.O. 1990, Reg. 194, r. 66.01 (2); O. Reg. 69/95, s. 19.</p> <p><b>FORM OF JUDGMENT</b>  <b>66.02</b> A judgment for partition or sale shall be in Form 66A. R.R.O. 1990, Reg. 194, r. 66.02.</p> <p><b>PROCEEDS OF SALE</b>  <b>66.03</b> All money realized in a partition proceeding from sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee. O. Reg. 396/91, s. 13.</p>
<b>Quebec</b>	<i>Code of Civil Procedure</i>	476-477	<b>476.</b> In granting an application for the partition of undivided property, the court may order either a partition in kind or the sale of the property.

Province	Rules of Court	Section/ Rule	Content
			<p>The court may appoint an expert, or more than one expert if necessary, to assess the value of the property, divide the property into lots and distribute the lots, if the property can conveniently be divided and distributed, or to sell the property in the manner determined by the court. On completion of the operations, the expert prepares a report, files it with the court office and delivers a copy to the co-owners.</p> <p>The expert must have the report homologated; the homologation application may be contested by any interested person. When homologating the report, the court may, if necessary, direct the court clerk or any other person it designates to hold a drawing of the lots; minutes of this operation must be filed in the court record.</p> <p><b>477.</b> An application relating to divided co-ownership of an immovable is notified to the syndicate of coowners, which must inform all the co-owners of the subject matter of the application within five days after the notification.</p>
<p><b>New Brunswick</b></p>	<p><i>Rules of Court of New Brunswick</i></p>	<p>R 67</p>	<p><b>67.01 How Commenced</b> A proceeding to compel the partition or sale of land or an estate or interest therein may be commenced by Notice of Application.</p> <p><b>67.02 Powers of Court</b> In a proceeding for partition or sale, the court may</p> <ul style="list-style-type: none"> <li>(a) decide all questions concerning the title to the lands sought to be partitioned,</li> <li>(b) order that the lands or any portion thereof be partitioned,</li> <li>(c) order that the lands or any portion thereof be sold and direct the distribution of the proceeds of the sale in accordance with the interests and priorities of persons having an interest in the lands,</li> <li>(d) subject to Rule 67.06, direct payment of costs from the proceeds of the sale of lands, or as may be appropriate,</li> <li>(e) direct a reference upon such terms, including directions to sell, as may be necessary.</li> </ul> <p><b>67.03 Conduct of Reference</b> Where the court directs a reference under Rule 67.02, the referee shall conduct the reference in accordance with Rule 56.</p>

Province	Rules of Court	Section/ Rule	Content
			<p><b>67.04 Proceeds of Sale</b> All money realized from a sale of the land or any estate or interest therein shall forthwith be paid into court, unless ordered otherwise.</p> <p><b>67.05 Effect of Order for Partition or Sale</b> (1) When an Order for Partition or Sale is made and  <ul style="list-style-type: none"> <li>(a) no appeal is taken within the time prescribed for appeal, or</li> <li>(b) all appeals and applications for leave to appeal have been <ul style="list-style-type: none"> <li>i. dismissed,</li> <li>ii. abandoned, or</li> <li>iii. refused,</li> </ul> </li> </ul> the clerk shall certify on a copy of the Order for Partition or Sale,  <ul style="list-style-type: none"> <li>(c) that it was made and filed,</li> <li>(d) that it is final, and</li> <li>(e) that a conveyance or sale made in accordance with its terms will convey all the right, title and interest of all parties to the proceedings as directed in the Order for Partition or Sale.</li> </ul> (2) When the clerk has placed his certificate on a copy of the Order for Partition or Sale under paragraph (1), he shall  <ul style="list-style-type: none"> <li>(a) retain and file it, and</li> <li>(b) provide a copy to the applicant and, on request, to any other person.</li> </ul> (3) When an Order for Partition or Sale is made and endorsed with the certificate of the clerk under paragraph (1), the land or estate or interest in land described in the Order for Partition or Sale shall be partitioned or sold according to its terms.</p> <p>(4) A copy of the Order for Partition or Sale endorsed with the certificate of the clerk under paragraph (1) may be registered in the Registry Office for the county in which the lands are situate.</p> <p><b>67.06 Costs</b> (1) Unless ordered otherwise, the costs of all parties to a proceeding under this rule shall be assessed by the court and shall be shared by the parties in proportion to the value of their respective interests in the lands and premises partitioned or sold.</p>

Province	Rules of Court	Section/Rule	Content
			<p>(2) Costs assessed under paragraph (1) shall be a lien upon the respective shares of the parties in the lands partitioned or in the proceeds of any sale thereof.</p> <p>(3) If a party has needlessly commenced a proceeding for partition, or has, without sufficient reason, refused to agree to a partition, a sale or other disposition of the property, the court may</p> <ul style="list-style-type: none"> <li>(a) order the party to pay <ul style="list-style-type: none"> <li>i. all of the costs of the proceeding, or</li> <li>ii. a larger proportion of the costs than he would have paid under paragraph (1), and</li> </ul> </li> <li>(b) deprive the party of all or part of the costs to which he would be entitled under paragraph (1).</li> </ul>
Nova Scotia	<i>Civil Procedure Rules of Nova Scotia</i>	R 74	<p><b>74.01 Scope of Rule 74</b></p> <p>(1) This Rule provides for sale of property as a final remedy and for setting terms for the conduct of a sale by interlocutory order under Rule 42.09, of Rule 42 - Preservation Order.</p> <p>(2) A party may seek an order for sale or other disposition of property, in accordance with this Rule.</p> <p><b>74.02 Order for sale or possession</b></p> <p>(1) In a proceeding relating to property, a judge may order that the property, or part of it, be sold, mortgaged, exchanged, or partitioned.</p> <p>(2) A judge who makes an order for the sale, mortgage, exchange, or partition of property may order a party to deliver possession of the property or rents and profits of the property to a purchaser, mortgagee, or other person.</p> <p><b>74.03 Conveying interest of party</b></p> <p>(1) A judge may order a party who has an interest in property ordered to be sold to execute and deliver an instrument transferring the interest.</p> <p>(2) A judge may order that an interest of a party in property ordered to be sold is transferred as if the party had executed and delivered an instrument, and the interest transfers as the order provides.</p> <p><b>74.04 Method of sale</b></p> <p>(1) A judge who orders a sale may order that the sale be conducted by whatever method the judge is satisfied is likely to produce the greatest proceeds.</p> <p>(2) The following are examples of methods of sale that may be considered:</p>

Province	Rules of Court	Section/Rule	Content
			<p>(a) marketing by a qualified person with power to conclude an agreement subject to approval by a judge;</p> <p>(b) marketing by a qualified person with power to conclude an agreement without further approval;</p> <p>(c) public auction conducted by the sheriff or another qualified person;</p> <p>(d) tender conducted by the sheriff or another qualified person.</p> <p><b>74.05 Other terms for conduct of sale</b>  A judge who orders a sale must appoint the person to conduct the sale and give necessary directions to that person, which may include directions on any of the following subjects:</p> <p>(a) marketing the property, such as advertising or a real estate listing;</p> <p>(b) entering into, and closing, a proposed agreement without marketing;</p> <p>(c) paying the person conducting the sale;</p> <p>(d) authorizing, or requiring, the person to retain a lawyer;</p> <p>(e) fixing a reserve or minimum bid, or a list price;</p> <p>(f) establishing terms required in an agreement, terms for tender, or terms binding on a party who bids at an auction.</p> <p><b>74.06 Expenses of sale</b>  <b>(1)</b> A judge who orders a sale must provide terms for payment of the expenses of the sale, including remuneration of the person conducting the sale.  <b>(2)</b> A judge may order that some or all of the costs of the proceeding are included in the expenses of the sale, including, if necessary, a valuation and a title opinion.  <b>(3)</b> The judge may order that the expenses form a charge on the property and the proceeds of sale in priority to the interest of a party.</p> <p><b>74.07 Variation</b>  <b>(1)</b> A judge may vary a term under which property is offered for sale, change instructions for the conduct of a sale, or substitute a method of sale before an agreement for sale of the property is made.  <b>(2)</b> After an agreement for sale is made, a judge may vary a term or condition of the agreement with the consent of the purchaser.</p>

Province	Rules of Court	Section/ Rule	Content
			<p><b>74.08 Report</b> The person having conduct of a sale must file a report on the sale as soon as possible after the sale is concluded.</p> <p><b>74.09 Approval and discharge</b> The person who conducts a sale must make a motion for an order approving the conduct of the sale and discharging the person from duties under the order for sale, unless the order for the sale provides or a judge permits otherwise.</p> <p><b>74.10 Duty to disclose defects</b> A person who seeks an order for sale of property and who knows of a defect in title to the property, or any other defect that may not be apparent to a purchaser, must do both of the following:</p> <ul style="list-style-type: none"> <li>(a) disclose the defect to the judge who hears the motion for the order;</li> <li>(b) take reasonable steps to ensure that a potential purchaser is made aware of the defect.</li> </ul> <p><b>74.11 No assurances of title</b></p> <p>(1) A sale by the court is without assurances to the purchaser, except for an express assurance in the conveyancing instrument given by the person who sells on behalf of the court.</p> <p>(2) A person who determines whether to purchase property being sold by the court must rely on the person's own inquiries about the property, and the following are examples of measures the person may need to take:</p> <ul style="list-style-type: none"> <li>(a) a lawyer's investigation and opinion on title, or restrictions on land use;</li> <li>(b) a surveyor's investigation and opinion on boundary locations;</li> <li>(c) a thorough physical inspection by the potential purchaser or an expert;</li> <li>(d) an engineer's, builder's or mechanic's inspection and opinion on compliance with environmental requirements or standards;</li> <li>(e) a builder's or mechanic's inspection and opinion on structural or mechanical defects.</li> </ul>
<b>Prince Edward Island</b>	<i>Rules of Civil Procedure</i>	R 66	<p><b><u>GENERAL</u></b> <b>66.01</b> (1) The originating process for the commencement of a proceeding for the partition of lands under Part III of the Real Property Act is a petition for partition.</p>

Province	Rules of Court	Section/Rule	Content
			<p>(2) A proceeding for partition or sale may be commenced by any person who is entitled to compel partition.</p> <p>(3) The petition and proceeding for partition on sale shall be in accordance with the provisions of Part III of the <i>Real Property Act</i>.</p> <p>(4) These rules apply to such proceedings with necessary modifications except where the rules are inconsistent with the provisions of Part V of the <i>Real Property Act</i> in which case the rules do not apply to the extent of any such inconsistency.</p> <p>(5) A proceeding for partition or sale by or on behalf of a minor shall be on notice to the Official Guardian.</p> <p><b>Form of Judgment</b>  <b>66.02</b> A judgment for partition or sale shall be in Form 66A.</p> <p><b>Proceeds of Sale</b>  <b>66.03</b> All money realized in a partition proceeding from a sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee.</p>
Newfoundland and Labrador	<i>Rules of the Supreme Court</i>	26	<p><b>Power to order sale, etc. of property</b>  26.07. Where it appears necessary or expedient in a proceeding that any property be sold, the Court may order the property to be sold and any party bound by the order and having any interest therein, or who is in possession of the property or in receipt of the rents, profits or income thereof, shall, if the Court so orders, join in the sale, conveyance or transfer, or deliver up the possession or receipts thereof to the purchaser or person designated by the Court.</p> <p><b>Power to order sale in debenture holders' proceeding</b>  26.08. Where the holders of debentures or bonds in a proceeding brought by or on their behalf are entitled to a charge on any property, the Court may, if it is of the opinion that there must eventually be a sale of the property, order the sale before or after judgment has been entered and whether or not all interested persons are ascertained or served.</p> <p><b>Manner of carrying out sale</b>  26.09. (1) Where an order is made directing a property to be sold, the Court may permit any party or person having the conduct of the sale to sell the property in such</p>

Province	Rules of Court	Section/Rule	Content
			<p>manner as the party or person thinks fit, or as the Court directs, for the best price that can be obtained.</p> <p>(2) The Court may give such direction as it thinks fit for the purpose of effecting a sale, including, without restricting the generality of the foregoing, directions,</p> <ul style="list-style-type: none"> <li>(a) appointing the party or person who is to have the conduct of the sale;</li> <li>(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, sheriff's sale, tender or some other manner;</li> <li>(c) fixing a reserve or minimum price;</li> <li>(d) requiring payment of the purchase price into Court or to trustees or other persons;</li> <li>(e) for settling the particulars or conditions of sale;</li> <li>(f) for obtaining evidence of the value of the property;</li> <li>(g) fixing the remuneration to be paid to the party or person having the conduct of the sale; or</li> <li>(h) requiring an abstract of title to be prepared for the use of the Court.</li> </ul> <p><b>Report of result of sale</b></p> <p>26.10. (1) A report, verified by affidavit, of the result of a sale made under an order of the Court shall be prepared by the sheriff or person conducting the sale and shall be filed immediately after the sale with the Court.</p> <p>(2) The report as filed shall be verified as to its correctness by the solicitor of the party or person having the conduct of the sale.</p> <p><b>Mortgage, exchange, partition, etc., under order of Court</b></p> <p>26.11. The provisions of Rule 26 shall, as far as applicable and with any necessary modification, apply in relation to a mortgage, exchange, partition, lease, or other disposal of any property under an order of the Court as they apply in relation to the sale of any property under such an order.</p>
<b>Northwest Territories</b>	<i>Rules of the Supreme Court of the Northwest Territories</i>	558-561	<p><b>Order for sale</b></p> <p><b>558.</b> Where, in a proceeding relating to real estate, the Court determines that it is necessary or expedient that the real estate or any part of the real estate be sold, the Court may order it to be sold and may</p> <ul style="list-style-type: none"> <li>(a) compel any party bound by the order and in possession of the real estate to deliver up</li> </ul>



Province	Rules of Court	Section/ Rule	Content
			<p>possession to the purchaser or such other person as the Court may direct; or</p> <p>(b) compel any party bound by the order and in receipt of the rents and profits of the real estate to deliver up the receipts to the purchaser or such other person as the Court may direct.</p> <p><b>Directions</b>  <b>559.</b> In addition to any other power the Court has on ordering a sale, mortgage, partition or exchange of real estate, the Court may give directions as to how the sale, mortgage, partition or exchange shall be carried out.</p> <p><b>Proceedings out of court</b>  <b>560.</b> Where it appears that all persons interested are before the Court or bound by an order for sale, mortgage, partition or exchange of real estate, the Court may order the sale, mortgage, partition or exchange to be carried out by proceedings out of court, but any moneys produced by the proceedings shall be</p> <p>(a) paid into court or, where the Court so directs, to trustees; or</p> <p>(b) otherwise dealt with as the Court may direct.</p> <p><b>Sale must be approved by Court</b>  <b>561.</b> Where a judgment is given or an order made directing that property be sold, the sale shall not be made until it is approved by the Court.</p>
Nunavut	<i>Consolidation of the Rules of the Supreme Court of the Northwest Territories</i>	558-561	<p><b>Order for sale</b>  <b>558.</b> Where, in a proceeding relating to real estate, the Court determines that it is necessary or expedient that the real estate or any part of the real estate be sold, the Court may order it to be sold and may</p> <p>(a) compel any party bound by the order and in possession of the real estate to deliver up possession to the purchaser or such other person as the Court may direct; or</p> <p>(b) compel any party bound by the order and in receipt of the rents and profits of the real estate to deliver up the receipts to the purchaser or such other person as the Court may direct.</p> <p><b>Directions</b>  <b>559.</b> In addition to any other power the Court has on ordering a sale, mortgage, partition or exchange of real estate, the Court may give directions as to how the sale, mortgage, partition or exchange shall be carried out.</p>

Province	Rules of Court	Section/ Rule	Content
			<p><b>Proceedings out of court</b>  <b>560.</b> Where it appears that all persons interested are before the Court or bound by an order for sale, mortgage, partition or exchange of real estate, the Court may order the sale, mortgage, partition or exchange to be carried out by proceedings out of court, but any moneys produced by the proceedings shall be</p> <ul style="list-style-type: none"> <li>(a) paid into court or, where the Court so directs, to trustees; or</li> <li>(b) otherwise dealt with as the Court may direct.</li> </ul> <p><b>Sale must be approved by Court</b>  <b>561.</b> Where a judgment is given or an order made directing that property be sold, the sale shall not be made until it is approved by the Court.</p>
Yukon	<i>Rules of Court</i>	R 46	<p><b>Court may order sale</b>  (1) Where in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.</p> <p><b>Sale in debenture holder's proceeding</b>  (2) In a debenture holder's proceeding where the debenture holder is entitled to a charge on any property, the court, if it is of the opinion that eventually there must be a sale of the property, may order the sale before or after judgment, whether or not all interested persons are ascertained or served.</p> <p><b>Conduct of sale</b>  (3) Where an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner as the person thinks just or as the court directs.</p> <p><b>Directions for sale</b>  (4) The court may give directions it thinks just for the purpose of effecting a sale, including directions</p> <ul style="list-style-type: none"> <li>(a) appointing the person who is to have conduct of the sale,</li> <li>(b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,</li> <li>(c) fixing a reserve or minimum price,</li> </ul>

Province	Rules of Court	Section/ Rule	Content
			<p>(d) defining the rights of a person to bid, make offers or meet bids,</p> <p>(e) requiring payment of the purchase price into court or to trustees or to other persons,</p> <p>(f) settling the particulars or conditions of sale,</p> <p>(g) obtaining evidence of the value of the property,</p> <p>(h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or the expenses resulting from the sale,</p> <p>(i) that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and</p> <p>(j) authorizing a person to enter upon any land or building.</p> <p><b>Application for directions</b>  (5) A person having conduct of a sale may apply to the court for further directions.</p> <p><b>Certificate of sale</b>  (6) The result of a sale by order of the court shall be certified by the person having the conduct of the sale in Form 51, verified by affidavit, and promptly filed after completion of the sale.</p> <p><b>Vesting order</b>  (7) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.</p>

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## APPENDIX D: SUMMARY OF MANITOBA CASE LAW ON PARTITION AND SALE

### General Overview of Case Law

Case citations are included in the Detailed Case Summaries which follow the General Overview.

In 1939, *The Law of Property Act*, SM 1931, c. 38, was amended to add ss. 13A-13I and repeal *The Partition Act*, 1913.<sup>107</sup> Section 13B amended the wording of s. 4 of *The Partition Act*, 1913<sup>108</sup> by deleting the words “shall and” preceding the word “may”, so that the section read:

13 B. All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, **may** be compelled to make or suffer partition or sale of the land or any part thereof [emphasis added].

In 1940, s. 13B became s. 19 of *The Law of Property Act* and ultimately s. 19(1) in 1949. Prior to this amendment, with the words “shall and” in the wording of the section, the courts interpreted the section to mean that an order of partition or sale was a matter of right and the courts had no discretionary jurisdiction to dismiss an application. Despite the amendment, and immediately following its implementation, a Court of King’s Bench judge maintained this earlier interpretation of s. 19, providing for an order of partition or sale to be a matter of right, the court having no discretionary jurisdiction to dismiss an application (see *Szmando*, 1940).

The courts accepted that there were at least two exceptions to the right of partition or sale:

1. Where the property was encumbered and the encumbrancer objected to partition (see *Kluss*, 1947); and
2. Where a husband and wife were owners of the homestead as joint tenants or as tenants in common. In those cases, neither the husband nor wife was entitled as against the other to the partition or sale of the homestead. Partition or sale could be granted against a homestead only where there was consent by the spouse under *The Dower Act* (see *Wimmer*, 1947).

In 1949, section 19 was amended by separating it into ss. 19(1) and (2). S. 19(2) stated:

(2) Where a person to whom subsection (1) applies is a married man or a married woman, an action for partition or sale of the land may be brought by or against him or her; and

(a) partition, or

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<sup>107</sup> This amendment was made pursuant to *An Act to amend “The Law of Property Act”*, SM 1939, c 50.

<sup>108</sup> Section 4 of *The Partition Act*, 1913 was the successor to s. III of *The Partition Act*, 1878.

- (b) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition,

may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse having been obtained as provided in *The Dower Act*.

Section 19(2) supersedes *Wimmer*, referenced above and also in the Detailed Case Summaries, to follow (*Fritz*, 1952, *Mitchelson*, 1953, and *Confab*, 2009).

Eventually, the courts construed s. 19(1) to confer on the court a discretionary jurisdiction to make or refuse an order of partition or sale (*Beraskin*, 1950, *Fritz*, 1952, *Mitchelson*, 1953, *Klemkowich*, 1954, *Steele*, 1960, *Shwabiuk*, 1965). However, there evolved the principle that a co-owner has a “prima facie right” to partition or sale (*Klemkowich*, 1954, *Fetterley*, 1965, *Bundy*, 1974, *Leippi*, 1977, *Boittiaux*, 1977, *Chaboyer*, 1979, *Stefaniuk*, 1987, *Sabourin*, 1988, *Katz*, 1988, *Balzar*, 1990, *Magne*, 1990, *Carnahan*, 1994, *Woloshyn*, 1996, *Ellis*, 1997, *Parniak*, 1999, *K.L.V.*, 2000, *Payne*, 2002, *Stuart*, 2006, *Simcoff*, 2009, *Dickson*, 2009, *Hildebrandt*, 2009, *Lane*, 2010, *Chevalier*, 2012, *Lotz*, 2013, *Shumilak*, 2013, *Mucz*, 2017, *Siwak*, 2018, *Mireault*, 2019 and *Temple*, 2019), and that the discretion is a “limited” (*Magne*, 1990), or “judicial” jurisdiction (*Fritz*, 1952, *Fetterly*, 1965, *Shwabiuk*, 1965, *Woloshyn*, 1996, *Simcoff*, 2009, *Dickson*, 2009, *Chevalier*, 2012, *Lotz*, 2013, *Mucz*, 2017, and *Mireault*, 2019), to be exercised according to or governed by “certain rules”:

1. The right to an order for partition or sale may be denied if the application is vexatious or oppressive (see *Klemkowich*, 1954, *Steele*, 1960, *Bundy*, 1974, *Roy*, 1977, *Leippi*, 1977, *Boiteaux*, 1977, *Winspear*, 1978, *Chaboyer*, 1979, *Stefaniuk*, 1987, *Sabourin*, 1988, *Katz*, 1988, *Balzar*, 1990, *Magne*, 1990, *Carnahan*, 1994, *Woloshyn*, 1996, *Fergus*, 1997, *Parniak*, 1999, *K.L.V.*, 2000, *Payne*, 2002, *McKenzie*, 2005, *Stuart*, 2006, *Simcoff*, 2009, *Dickson*, 2009, *Hildebrandt*, 2009, *Lane*, 2010, *Chevalier*, 2012, *Lotz*, 2013, *Siwak*, 2018, and *Mireault*, 2019).
  - a. Mere hardship or inconvenience is insufficient to prove oppression (see *Stefaniuk*, 1987, *Sabourin*, 1988, *Woloshyn*, 1996, *Payne*, 2002, *Stuart*, 2006, *Simcoff*, 2009, *Dickson*, 2009, *Hildebrandt*, 2009, *Lane*, 2010, *Chevalier*, 2012, *Lotz*, 2013, *Mucz*, 2017, and *Mireault*, 2019).
  - b. Neither the prospect nor threat of future default by a respondent under a family maintenance order should operate against the exercise of a court’s discretion in favour of an applicant on an application for partition or sale (see *Klemkowich*, 1954).
  - c. When considering oppression, a court may consider the fact that one party would be required to find a new home; however, this factor is not necessarily decisive, and may be of more weight given a respondent’s older age and poor health conditions (see *Chupryk*, 1980).

- d. The number of cases in which an order of partition and/or sale has been dismissed in Manitoba for reasons of oppression is quite small in comparison to those in which the order was granted. Each case is fact specific, but most tend to favour the prima facie right of the applicant to partition or sale unless “unusual circumstances” exist (see *Siwak*, 2018). Unusual circumstances generally involve hardship to a spouse with dependent children who will be displaced or financially affected by a move to a new residence (see *Siwak*, 2018).
2. The application may be denied by the court if the applicant does not come to court with “clean hands” (see *Fritz*, 1952, *Klemkowich*, 1954, *Shwabiuk*, 1965, *Leippi*, 1977, *Chaboyer*, 1979, *Stefaniuk*, 1987, *Sabourin*, 1988, *Katz*, 1988, *Balzar*, 1990, *Magne*, 1990, *Carnahan*, 1994, *Woloshyn*, 1996, *Parniak*, 1999, *K.L.V.*, 2000, *Payne*, 2002, *Simcoff*, 2009, *Dickson*, 2009, *Hildebrandt*, 2009, *Chevalier*, 2012, *Lotz*, 2013, *Mucz*, 2017, *Mireault*, 2019, *Temple*, 2019).
    - a. The phrase clean hands must be given a relative interpretation, for, if literally applied to connote spotlessness, it would demand virtual perfection of behaviour, a standard which no co-owner would be able to attain (see *Klemkowich*, 1954).
    - b. The doctrine of clean hands does not apply to all conduct of the applicant. What bars the claim is not "general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense” (see *Woloshyn*, 1996).
    - c. The conduct complained of must be “fairly egregious” for an application for partition or sale to be rejected, and must relate to the application for partition or sale (see *Simcoff*, 2009, *Lane*, 2010, and *Lotz*, 2013).
    - d. Just because an applicant has begun a new relationship with another partner does not mean that the applicant comes to court with unclean hands (see *Shwabiuk*, 1965).
    - e. That there are, or may be, matrimonial differences between the parties is not sufficient to refuse an order for partition or sale (see *Fetterly*, 1965).
    - f. The fact that two co-owners, in the legal sense at least, have a subsisting and intact marriage and still reside in the same house, does not prevent the order for partition or sale being made (see *Bundy*, 1974).
    - g. A husband's occasional tardiness in making child and spousal support payments is insufficient to say that he does not come to court with clean hands (see *Lotz*, 2013).
    - h. An example of unclean hands can be found in *Dickson*, 2009, where the judge held that the respondent had unclean hands, as he had accumulated arrears of child and spousal support in an amount well in excess of \$100,000, which was almost equal to the totality of his portion of the equity in the home, despite being able to pay said support.

- i. Another example can be found in *Chaboyer*, 1979, in which the court found that the husband had unclean hands because he withheld information in his affidavit, gave a false picture of his financial circumstances, and because he purported to list the property for sale without his wife's signature on the listing agreement, after the wife had made an application for sole occupancy of the family residence.
3. The onus is on the respondent to satisfy the Court that it would be improper to make the order of partition or sale by virtue of vexation, oppression, or unclean hands (see *Fetterly*, 1965, *Shwabiuk*, 1965, *Lotz*, 2013, and *Siwak*, 2018).
4. Where the prima facie right of the applicant does not stumble on any of the potential discretionary "barriers" of vexation, oppression or unclean hands, the question still remains as to whether the court should order partition of the land or that the land be sold. The decision at this stage is an exercise in discretion, to be exercised judicially in the context of the particular facts and circumstances of each case, and considering the additional guidance provided by *The Law of Property Act* as to the manner in which the discretion is to be exercised; namely:
  - a. The discretion should favour sale if the sale is considered by the court to be more advantageous to the parties interested (see s. 20(1)). In determining whether sale would be more advantageous to the parties than partition, the Court may take into account the age and state of health of the parties, their litigious history, and the goal of minimizing the litigation between the parties (see *Chupryk*, 1980).
  - b. Where the co-owners are husband and wife and the land cannot reasonably be partitioned, sale in lieu of partition should be ordered (see s. 19(2)(b), and *Chevalier*, 2012).
  - c. If the evidence reliably points to a way in which the court could equally and fairly partition and divide the property between joint owners, the court would, in the absence of important countervailing evidence, be remiss if it did not grant an order for partition (see *Desrochers*, 2020).
5. An applicant's entitlement to partition or sale assumes that the applicant is both the legal and the beneficial owner of the co-owned interest. Where the entitlement to a beneficial interest in the property is called into question, a court is required to look at the intention of the parties at the time of the purchase of the property to determine their interest in the property and thus their entitlement to partition or sale (see *Anderson*, 1994).
6. A mortgagee cannot be compelled to give up his right of sale under a mortgage at the instance of a co-owner who seeks partition or sale, without being given notice and an opportunity to be heard in the matter (see *Kluss*, 1947, *Winspear*, 1978, and *Jesmer*, 1986).
7. Neither a judgment creditor nor sheriff, by virtue of a registered judgment or a writ of execution, has an interest in land sufficient to support an application for partition or sale, at least where the judgment or writ does not apply to all of the co-owners (see *Confab Laboratories*, 2006).

- a. Both a judgment creditor and sheriff under a writ of execution have the right to sell the *interest* of the debtor as a co-owner of the property. The purchaser of that interest acquires an interest in the land and is entitled to apply for partition or sale.
  - b. Neither the exemptions under *The Judgments Act* nor the discretion given a judge under *The Law of Property Act* to postpone or refuse the sale are relevant at the stage of the sale of the judgment debtor's *interest* in the property as it is not the property, but the judgment debtor's *interest* in the property, that is being sold. Those provisions become relevant only if and when an owner applies for partition or sale of the property.
8. Regarding an agreement not to apply for partition or sale, the court's jurisdiction is designed to avert a stalemate. To oust this jurisdiction by agreement, if it is possible at all, would require explicit language which is unmistakable in intent (see *Fergus*, 1997).
9. The court may defer a partition or sale application, pending the disposition of other matrimonial proceedings (see *Boittiaux*, 1977, *Winspear*, 1978, *Downey*, 1982, *Harrison*, 1983, *Peters*, 1995, and *Ellis*, 1997), and where a partition requires municipal planning approval (see *Crawford*, 1988).
10. When the court orders partition or sale, it may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties (see *Morrisette*, 1987, and *Berard*, 1980).
  - a. In determining the appropriate apportionment of sale proceeds of co-owned marital property, the judge must try to make an order that, in the current circumstances, fairly gives effect in law to what the parties, in the judge's findings, must have intended at the time that the parties first obtained the property (see *Berard*, 1980, *McCrae*, 1984, and *Stefaniuk*, 1987).
    - i. The proceeds of the sale of the marital home should not be divided on a basis of the contribution made by each party to the acquisition or improvement of the home. Marriage is not merely a business partnership (see *Sidorski*, 1984; but see *Balzar*, 1990).
    - ii. To expect co-owners to keep track of every penny expended over numerous years towards the improvement, maintenance or repairs, without an agreement between the parties as to their respective rights between themselves, is unreasonable and contrary to the overt actions of the parties. This is particularly so when the co-owners are a married couple (see *McCrae*, 1984).
11. In *Siwak*, 2018, the court said that where an action for partition, administration or sale involves a life estate, s. 23(1) and (2) of *The Law of Property Act* are engaged and not s. 19; but, echoing *Chupryk*, 2008, the court said that it would be “a rare case where a life tenant would be compelled to suffer partition or sale against his wishes,” and that the discretion to order a sale in such circumstances should be exercised cautiously. The court enunciated the following principles with respect to section 23:



- a) The phrase "regard shall be had to the interests of all the parties" in section 23(1) refers to the actual legal ownership interests in the property in question.
  - b) The value of the said legal ownership interest would necessarily be determined by the court at the time of the actual sale of the property.
  - c) Any loss of a spouse's interest in the property would be dealt with and compensated at the time of the actual sale of the property as opposed to when the decision to order the sale was being made.
  - d) It is useful to consider the law which has developed in Manitoba around ss. 19(1) and (2) of *The Law of Property Act* concerning partition or sale applications when making a determination involving s. 23(1) of *The Law of Property Act*. There is no reason to think that the Legislature would have intended different principles to apply in the court's determination of whether or not to order sale of a property (with or without homestead rights or life estate interests engaged).
12. Other considerations that courts have taken into account in partition and sale applications can be found in *Michaleski*, 1975, *Chupryk*, 1980, *Iwanysyn*, 1981, *Mayer*, 1983, *Wagener*, 1988, K.L.V., 2000.

**Detailed Case Summaries:**

<i>Year</i>	<i>Case Name</i>	<i>Relevant Issues and Holding</i>	<i>Key Conclusions</i>
1940	<i>Szmando v. Szmando</i> , [1940] C.C.S. NO. 577 (KB)	Whether application for partition or sale of land between husband and wife, who are tenants in common, ought to be granted.  <i>Order granted for sale of property, with permission to either of the parties to bid at such sale.</i>	There is no discretionary powers for the Court to grant or refuse partition. Partition is a matter of right.  The disposition by a husband or wife of property owned by them as joint tenants or tenants-in-common is not a disposition of their homestead.
1947	<i>Kluss v. Kluss</i> , 55 Man. R. 460, [1947] 2 W.W.R. 379 (KB)	Whether application for partition or sale of property shared by husband and wife as joint tenants ought to be granted, even though the property was encumbered (husband took out a mortgage on the property and he was also subject to a judgment made under <i>The Wives' and Children's Maintenance Act (WCMA)</i> , binding his estate and any interest he had in land).	Partition is not of right where the property is encumbered and the encumbrancer objects to partition.

		<i>Order granted on the basis that the husband file the consent of the mortgagee to an order being made, and that the proceeds of sale be paid to the wife and into court as security for the WCMA judgment.</i>	
1947	<i>Wimmer v. Wimmer</i> [1947] 2 WWR 249, 55 Man R 232 (CA)	<p>Whether a husband, as a matter of right, is entitled to have his homestead disposed of by an order for partition.</p> <p><i>Appeal of husband against order not to grant partition of land dismissed.</i></p>	<p>Where husband and wife are owners of the homestead as joint tenants or as tenants in common, neither one is entitled as against the other to the partition or sale of the homestead.</p> <p>Partition or sale cannot be granted as against the homestead, even when the title is held jointly, unless there is a consent by the wife under <i>The Dower Act</i>.</p>
1950	<i>Beraskin v. Beraskin</i> [1950] 2 WWR 276, 58 Man R 405 (KB)	<p>Whether motion for partition or sale ought to be granted.</p> <p><i>Order for sale of property granted.</i></p>	<p>It is left to the discretion of the Court to decide whether or not partition or sale of the homestead should be granted, notwithstanding the objection of the opposing spouse.</p>
1952	<i>Fritz v. Fritz (No. 2)</i> (1952), M.J. No. 8. (CA)	<p>Whether the trial judge had any discretion to grant or refuse sale or partition of the land in question, and if he had discretion, whether he exercised it properly.</p> <p><i>Appeal dismissed.</i></p>	<p>The amendment of s. 19 of <i>The Law of Property Act</i>, RSM, 1940, ch. 114, made by 1949, ch. 32, makes it possible to proceed for partition where the property is held jointly by man and wife and is their homestead, however, whether the order should be made is discretionary.</p> <p>This discretion must be exercised in a judicial manner.</p> <p>An applicant for partition and sale should come into court "with clean hands."</p>

			In accordance with this amendment, <i>Wimmer</i> is no longer applicable.
1953	<i>Mitchelson v. Mitchelson</i> (1953), 9 W.W.R. (N.S.) 316 (QB)	<p>Whether the plaintiff ought to be declared the owner of a one-half interest in the house in question.</p> <p><i>Judge declared that the house in question was a joint venture and that each is entitled to one-half.</i></p> <p>Whether an order ought to be granted directing that the property be sold.</p> <p><i>Order granted for sale. Sale proceeds to be shared equally.</i></p>	<p>In determining whether the wife owned a one-half interest in the house, the judge asked: “What is the position between the parties in the circumstances which have arisen and which it is clear they could never have envisaged when this house was purchased?”</p> <p>Where there is a joint purse between husband and wife and a common pool into which they put all their resources, it is not consistent that their joint assets should thereafter be divided with reference to their respective contributions, crediting the husband with the whole of his earnings and the wife with the whole of her earnings.</p> <p>Since subsection 19(2) was enacted in <i>The Law of Property Act</i> by 1949, c. 32, s. 1, sale may be ordered of homestead property without the consent of any party to the action and without the consent of his or her spouse. The applicant has no absolute right to partition and the order is a discretionary one.</p>
1954	<i>Klemkovich v. Klemkovich</i> , [1954] M.J. No. 44 (QB)	<p>Whether partition or sale should be granted.</p> <p><i>Order for sale granted.</i></p>	<p>The Court has discretion to grant or refuse partition or sale.</p> <p>The Court should grant the order when there is a prima facie right to partition or sale which the applicant seeks to enforce without vexation or oppression,</p>

			<p>and the applicant comes to court with clean hands.</p> <p>The phrase “clean hands” must be given a relative interpretation, for if literally applied to connote spotlessness it would demand virtual perfection of behaviour, a standard which no spouse would be able to attain.</p> <p>Neither the prospect nor threat of future default by a respondent under a family maintenance order should operate against the exercise of a court’s discretion in favour of an applicant on an application for partition or sale.</p>
1955	<i>Atamanchuk v. Atamanchuk</i> , [1955] M.J. No. 18 (QB)	<p>Whether the plaintiff ought to be declared the owner of a one-half interest in the property in question.</p> <p><i>Judgment granted for the plaintiff declaring that she is entitled to an undivided one-half interest in the land in question.</i></p> <p>Whether an order for partition or sale of the land should be made.</p> <p><i>Order for sale granted. Sale proceeds to be shared equally.</i></p>	<p>Where there is a joint purse between husband and wife and a common pool into which they put all their resources, it is not consistent that the assets should thereafter be divided with reference to their respective contributions, crediting the husband with the whole of his earnings and the wife with the whole of her earnings. It would be impossible to make any such calculation.</p> <p>When a husband and wife, by agreement, work together in operating a farm and the properties are in the husband's name, he will be held to hold title thereto as a trustee for her to the extent of one-half.</p>
1960	<i>Steele v. Steele</i> (1960), 67 Man.R. 270 (QB)	<p>Whether partition or sale should be granted for property held between husband and wife as joint tenants.</p>	<p>A judge has a discretion in the matter of granting or refusing partition or sale.</p>

		<p><i>Order not granted because: (1) conditions of housing have worsened and wife shouldn't be turned out of the house; (2) granting the application would be oppressive; (3) the applicant has acted maliciously; (4) the parties might reconcile; and (5) granting the order would involve a variation of the separation agreement.</i></p>	
1962	<p><i>Zuke v. Zuke and Bownass, [1962] M.J. No. 20 (QB)</i></p>	<p>Whether an order ought to be granted for sale of property shared between husband and wife as joint owners, where the person seeking said order filed a statement of claim containing said relief, where interlocutory judgment was signed in her favour and against the defendant in the absence of a defence being filed, and where the plaintiff then failed to take the proper procedures to enforce the judgment (filing a notice of motion saying that an application would be made to the court for an order that the plaintiff be awarded judgment in this action for the relief claimed).</p> <p><i>Application is refused, because the plaintiff's lawyer merely filed an affidavit which stated that the statement of claim was issued as aforesaid and that interlocutory judgment was signed as aforesaid.</i></p>	<p>By <i>The Law of Property Act</i> any person who is a joint tenant of land may apply to compel his other joint tenant or tenants to suffer partition or sale of the land; and in an appropriate case will be successful in such an application.</p> <p>The expression used in the Act is that such a person "may commence action." "Action," for the purposes of partition or sale, is deemed as "a civil proceeding commenced by a statement of claim or in such other manner as is prescribed by the rules of the court."</p> <p><i>The Married Women's Property Act</i> stated, "In any question between husband and wife as to the title to or possession of property, either party may apply in a summary way to a judge of the Court of Queen's Bench..."</p> <p>The Queen's Bench Rules stated, "Where by a statute a summary application without the institution of an action may be made to the court or a judge, the application shall be made by way of originating notice, unless</p>

			<p>the statute prescribes another procedure.</p> <p>It is but a trite observation that when different modes of procedure lie before a litigant, such person should choose that which is shortest, simplest, and least costly.</p> <p>Certain considerations may be taken into account when improper procedure is followed to allow the matter to be heard on the merits (e.g. that the parties had already been put to considerable expense and the action had been at issue between them for some time.)</p>
1965	<p><i>Shwabiuk v. Shwabiuk</i>, [1965] M.J. No. 40; 51 D.L.R. (2d) 361 (QB)</p>	<p>Whether partition or sale should be granted for property held between husband and wife as joint tenants.</p> <p><i>Order for sale granted.</i></p>	<p>The right to partition is a matter in the discretion of the Court, but the Court's discretion is a judicial one and is governed by certain rules.</p> <p>An applicant is entitled to an order for partition and sale, or sale when they have joint ownership of the property. For the application to be rejected, the respondent must show that the order would be oppressive or vexatious.</p> <p>The applicant must also come to court with “clean hands”</p> <p>Just because an applicant has begun a new relationship with another partner does not mean that they come to court without “clean hands.”</p>

1965	<i>Fetterly v. Fetterly</i> (1965), (NS) 218 (QB)	<p>Whether partition or sale should be granted for property held between husband and wife as joint tenants.</p> <p><i>Order for sale granted.</i></p>	<p>Prima facie, one of two joint tenants is entitled, as of right, to an order directing the partition or sale of the property so owned.</p> <p>The fate of the application, in every case, lies in the discretion of the Court, which discretion must be exercised in a judicial manner.</p> <p>The onus is cast upon the respondent to satisfy the Court that it would be improper to make the order directing partition or sale. The respondent may do this by evidence to demonstrate that the applicant has failed to enter Court with clean hands, or that the claim cannot be enforced without vexation or oppression, which latter does not extend to mere inconvenience which may be suffered by the respondent as a result of the order.</p> <p>That there are, or may be, matrimonial differences between the parties is not sufficient to refuse an order for partition or sale.</p>
1974	<i>Bundy v. Bundy</i> , [1974] M.J. No. 155 (QB)	<p>Whether an order ought to be granted for partition or sale of property held in joint tenancy between the husband and wife.</p> <p><i>Order for "partition and sale" (sic) granted.</i></p>	<p>There is, of course, a prima facie right in any joint tenant to obtain an order for partition or sale. This prima facie right may be defeated if it is proven that the application is vexatious, or that it is malicious, or that it is oppressive to the respondent.</p> <p>The fact that a couple, in the legal sense at least, have a subsisting and intact marriage and still reside in the same</p>

			house, does not prevent the order for partition or sale being made.
1975	<i>Michaleski v. Michaleski</i> , [1975] M.J. No. 335 (QB)	Whether an order ought to be granted for partition and sale of property held in joint tenancy between husband and wife.  <i>Order for “partition and sale” (sic) granted.</i>	In granting the order, the court considered the interests of the children and their schooling and noted that they should not be interfered with by a court order which would interfere with their schooling until the end of the school year.
1977	<i>Leippi v. Leippi</i> , [1977] 2 W.W.R. 497 (CA)	Whether an appeal should be allowed on the basis that the lower court judge failed to make an Order directing the sale of the property which was held between husband and wife as joint tenants.  <i>Appeal not allowed, as court held that lower court judge exercised discretion properly.</i>	On such an application the court has a discretion to grant or refuse partition or sale.  The order should be granted when there is a prima facie right to partition or sale which the applicant seeks to enforce without vexation or oppression, and the applicant comes to court with clean hands.  Under ordinary circumstances, in an application for partition or sale, in the absence of agreement, a trial judge will not order one party to convey his interest to the other. Usually there will be an order for sale, a reference to the master for an accounting and often the parties will be allowed to bid at the sale.
1977	<i>Roy v. Roy</i> , [1977] M.J. No. 156 (QB)	Whether an order for partition or sale ought to be made for the matrimonial home.  <i>Order for partition not granted because it would be impractical. Order for sale not granted, because it would be oppressive. Specifically, to order a sale would be an unjust interference with the parental responsibility</i>	Partition and sale ought not to be granted where it would be oppressive to the party opposing the application.



		<i>to provide a home for the children in the community to which they are accustomed.</i>	
1977	<i>Boittiaux v. Boittiaux</i> , [1977] M.J. No. 64 (CA)	<p>Whether an appeal ought to be granted from the court's dismissal of the appellant's application for partition or sale of the matrimonial home, on the basis that the judge erred in finding that such an order would be oppressive.</p> <p><i>Appeal allowed, given court of appeal's finding that the circumstances of this case did not warrant the conclusion that it would be oppressive to the respondent husband to give effect to the appellant wife's prima facie right to an order of partition and sale.</i></p>	<p>It is not a rule of practice nor of law to deny partition or sale applications until divorce proceedings and related issues are resolved. Such a state of affairs could only create an advantage to one spouse over another in the settlement or adjudication of corollary relief in pending divorce proceedings.</p> <p>The prima facie right to partition or sale should not be denied except where clear oppression would result. For example, when the result would be to deprive a spouse of limited resources of the means to provide reasonable accommodation for himself or herself and dependent children.</p>
1978	<i>Winspear Higgins Stevenson Inc. v. Friesen</i> , [1978] 5 W.W.R. 337 (CA)	<p>Whether an appeal should be granted on the basis that the lower court judge exercised his discretion improperly in ordering a sale of the property held between the husband and wife as tenants in common, by failing to take into account the wife's dower right in the estate of her husband.</p> <p><i>Appeal allowed in part, but not with respect to this question. Court found that lower court judge exercised discretion properly.</i></p>	<p>The question of vexation or oppression on the part of an applicant is not the sole determinant which a judge should take into account in deciding whether or not to exercise his discretion on an application for partition or sale of a homestead. He may also take into account the fact that under s. 19(2) of <i>The Law of Property Act</i> he is exercising a discretion not only to direct partition or sale but also to deprive the co-tenant of her dower right in the interest of her spouse in the homestead.</p> <p>The court's discretion over the partition of a homestead enables the court to defer partition or</p>

			<p>sale in a proper case pending the disposition of other matrimonial proceedings.</p> <p>A mortgagee cannot be compelled to give up his right of sale under a mortgage at the instance of one of two joint owners who seek partition, without being given an opportunity to be heard in the matter.</p>
1979	<p><i>Chaboyer v. Chaboyer</i>, [1979] M.J. No. 288 (QB)</p>	<p>Whether an order ought to be granted for the sale of the matrimonial home held by the parties in joint tenancy.</p> <p><i>Application for sale dismissed.</i></p>	<p>There is a prima facie right of one joint tenant to an order for partition or sale of joint property. However, if a respondent demonstrates that it would be improper for the court to make such an order in the circumstances of the case (because the applicant has come to court with unclean hands or because the order would be oppressive), this right may be defeated.</p> <p>In determining that the order would be oppressive, the court considered that if the matrimonial home were to be sold, either the wife and the children would suffer a drastic lowering of their standard of accommodation, or else the husband or the Provincial Government would be required to increase the level of financial assistance provided to the wife and children. Court held that this was not a case where mere hardship or inconvenience would be suffered.</p>

			<p>In determining that the husband did not come to court with clean hands, the court considered the fact that he withheld information in his affidavit and gave a false picture of his financial circumstances. The court also indicated that it got the impression that the husband had little regard for the real welfare and interests of his children. Finally, the court considered the fact that the husband purported to list the property for sale - without his wife's signature on the listing agreement - after the wife had made an application for sole occupancy of the family residence.</p>
1980	<p><i>Chupryk v. Haykowski</i> (1980), 3 Man.R. (2d) 216 (CA)</p>	<p>Should an appeal be granted allowing the sale of the property at issue?</p> <p><i>Appeal allowed and order of sale should be granted.</i></p>	<p>In exercising the discretion to grant or refuse an order for partition and sale, a court may consider the fact that one party would be required to find a new home. However, this factor is not necessarily decisive. It may be of more weight given a respondent's age and health conditions.</p> <p>Other factors that a court may consider in exercising this discretion include the litigious history of the parties and the goal of minimizing the litigation between the parties.</p> <p>It would be a rare case where a life tenant would be compelled to suffer partition or sale against his wishes.</p>
1980	<p><i>Berard v. Berard</i> (1980), 14 R.F.L. (2d) 201 (QB)</p>	<p>The percentage of the sale proceeds to be granted to the wife by virtue of the order for</p>	<p>When joint tenancy is terminated by a court order for partition or sale, the court may in such</p>

		<p>sale of the matrimonial home, which both parties agreed to.</p> <p><i>Wife's interest to be fixed at 75% and husband at 25%.</i></p>	<p>proceedings make all just allowances and should give such directions as will do complete equity between the parties.</p> <p>The judge must try to make an order that now, in the current circumstances, fairly gives effect in law to what the parties, in the judge's findings, must have intended at the time of the house transaction itself.</p>
1981	<i>Tycholiz v. Tycholiz</i> , [1981] M.J. No. 65 (CA)	<p>Whether appeal ought to be allowed from part of trial judgment giving sole possession of the jointly-owned family residence to the wife until further order and postponing the husband's right to apply for partition and sale subject to the wife's right of occupancy.</p> <p><i>Appeal dismissed.</i></p>	<p>The principles established by case law in applications for partition or sale under <i>the Law of Property Act</i> provide only limited guidance in considering whether an order for exclusive possession and for postponement of sale ought to be made under s. 10 of the <i>Family Maintenance Act</i>.</p>
1981	<i>Iwanyshyn v. Iwanyshyn</i> , [1981] M.J. No. 322 (QB)	<p>Whether an order ought to be granted for the partition or sale of the family home held by the parties in joint tenancy.</p> <p><i>Order not granted.</i></p>	<p>The law is clear and normally the sale should be ordered.</p> <p>In refusing to grant the order, the judge considered the severe mental health problems suffered by the husband, who was at the time of this hearing, living in the home. Specifically, the court worried that if the house was sold, and the proceeds were split equally after all expenses were paid, the husband might, because of his mental condition, "become a problem himself." The judge stated, "[after] the sale he would have to leave and find lodging somewhere. He may then become a prey for undesirable elements or under some stress become violent and</p>

			do something that all would regret. It is this uncertainty with the possibility of dire consequences that has made me tell counsel that I am not prepared to grant the motion for sale at this time.”
1982	<i>Downey v. Downey</i> , [1982] M.J. No. 41 (CA)	Whether appeal ought to be allowed from the dismissal of a husband’s application for an order for partition or sale of the marital home, pending the wife’s application for division of assets under the <i>Marital Property Act</i> .  <i>Appeal dismissed.</i>	The court's discretion over the partition of a homestead enables the court to defer partition or sale in a proper case pending the disposition of other matrimonial proceedings.
1983	<i>Harrison v. Harrison</i> 1983 M.J. No. 513, (1984), 27 Man.R. (2d) 198 (QB)	Whether the partition or sale proceedings should be brought separate and apart from the other issues to be decided between the parties.  <i>Application to direct partition and sale separate and apart from the other issues denied.</i>	In general, the situation with regard to the matrimonial home should not be interfered with until the trial of the divorce proceedings. The court's discretion over the partition of a homestead enables the court to defer partition or sale in a proper case pending the disposition of other matrimonial proceedings.
1983	<i>Mayer v. Mayer</i> , [1983] M.J. No. 444 (Co. Ct.)	Whether an order ought to be granted postponing the sale of the family home until the applicant’s grandchild reaches adulthood or a period of over 15 years, and granting the applicant possession of the home.  <i>Order for “partition and sale” (sic) granted.</i>	In determining whether to grant sale or to postpone it, the court considered that neither party was in a healthy financial position, and that it would be a difficult problem for either to pay the taxes, make extensive repairs, meet the utility bills and the house maintenance costs. Further, it considered that there is no attachment to the home by the child.  A postponement of sale in terms of years has been relatively restricted in the case law, and has generally been limited to

			<p>situations where the children have had a special attachment to the home or special needs, such as completion of high school, or university or musical studies.</p>
1984	<p><i>McCrea v. Berman</i> (1984), 30 Man. R. (2d) 41 (QB)</p>	<p>Whether partition or sale should be granted.</p> <p><i>Order for “partition and sale” (sic) granted.</i></p> <p>Whether there should be an unequal division of the proceeds of the sale of the marital home.</p> <p><i>Unequal division not ordered.</i></p>	<p>In determining the appropriate apportionment of sale proceeds of jointly held marital property, it is the responsibility of the judge in each particular case to determine what was in the minds of the parties, given any change in circumstances, at the time of the transaction itself.</p> <p>To expect parties who are joint tenants or tenants in common of an undivided half interest in property to keep track of every penny expended over numerous years towards the improvement, maintenance or repairs to that property, without an agreement between the parties as to their respective rights between themselves, would be unreasonable and contrary to the overt actions of the parties. This is particularly so when the joint tenants or tenants in common are a married couple.</p> <p>Where a wife purchases property and places it in the names of herself and her husband as joint tenants there is no presumption of a gift to the husband and such gift must be specifically proved. If the evidence indicates that a gift was intended, then each party is deemed to own an equal share up to the date of divorce or separation and accounts are to be taken from that date forward.</p>

1984	<i>Sidorski v. Sidorski</i> (1984), 30 Man. R. (2d) 4 (QB)	<p>Whether there should be an unequal division of the proceeds of the sale of the marital home.</p> <p><i>Unequal division not ordered.</i></p>	<p>The proceeds of the sale of the marital home should not be divided on a basis of the contribution made by each party to the acquisition or improvement of the home. This was a marriage and not merely a business partnership.</p> <p>When parties register a home in their joint names, there is a presumption in law that the value of that home will be equally shared between them on its disposition, unless there can be demonstrated to the court some compelling reason why that should not be and particularly some agreement between the parties that would have different effect.</p>
1986	<i>Jesmer v. Jesmer</i> , [1986] M.J. No. 473 (QB)	<p>Whether a consent order ought to be varied to delete the postponement of sale clause and to allow for the sale of the marital home.</p> <p><i>Postponement of sale clause deleted. Variance to allow for sale of the home not allowed, given that mortgagee had not been served with notice of the application.</i></p>	<p>An application for partition or sale cannot proceed until the mortgagee has been served with notice of the application.</p>
1987	<i>Morrisette v. Morrisette</i> , [1987] M.J. No. 377 (QB)	<p>Whether there ought to be an order granted for the sale of the marital home.</p> <p><i>Order for sale granted.</i></p> <p>Whether the sale proceeds of the marital home ought to be divided unequally.</p>	<p>When a joint tenancy is terminated by a Court order for partition or sale, the Court may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties.</p>

		<p><i>Wife is to receive the full sum of \$11,707.81 (what she paid to pay off the balance of the outstanding mortgage on the marital home) from the proceeds of any sale of the marital home before any monies are shared with the husband.</i></p>	
1987	<p><i>Stefaniuk v. Stefaniuk</i>, [1987] M.J. No. 393 (QB)</p>	<p>Whether partition or sale should be granted.</p> <p><i>Order for sale granted.</i></p> <p>Whether there should be an unequal division of sale proceeds of the property.</p> <p><i>Order for unequal division not granted.</i></p>	<p>Either joint tenant has a prima facie right to an order for partition or sale of jointly held property provided that the one seeking the order comes to court with clean hands and provided that such an order would not be oppressive or vexatious.</p> <p>The court may exercise its discretion and not grant an order so requested if either or both of these conditions are present.</p> <p>Personal inconvenience or hardship is not enough to refuse to grant the order.</p> <p>In determining the appropriate apportionment of the sale proceeds of jointly held property, it is up to the judge to determine what was in the mind of the parties at the time of the transaction itself.</p>
1988	<p><i>Wagener v. Wagener</i> (1988), 55 Man. R. (2d) 91 (QB)</p>	<p>Whether partition or sale should be granted.</p> <p><i>Order not granted for the 7 acre site, including the residence, but granted for the 33.23 acre farm land parcel.</i></p>	<p>In opposing partition or sale of said site, the Judge considered the fact that if the wife and her daughter were uprooted from their residence, their housing expenses would increase substantially; that it's the only home the daughter has ever lived in; that the wife had resided there for a long period of time,</p>



			and that both mom and daughter were very comfortable there.
1988	<i>Sabourin v. Sabourin</i> , [1988] M.J. No. 203 (QB)	<p>Whether there should be an order granted for partition and sale of the jointly owned marital home.</p> <p><i>Order for sale granted.</i></p>	<p>In a joint tenancy each tenant has a prima facie right to partition and sale of the jointly owned property provided the applicant comes to court with clean hands and provided the application is not vexatious or oppressive. If either or any of those conditions are present the judge has a certain limited discretion to deny a joint tenant their right to realize on the equity in a joint property.</p> <p>In determining that sale would not be oppressive, court rejected husband's argument that sale of the farmland would end his ability to earn a living as a farmer. Rather, court found that a substantial part of husband's farming operations had always been carried out on leased lands, and that he could continue to do so. At worst, the court held, this would result in inconvenience.</p>
1988	<i>Katz v. Katz</i> , [1988] M.J. No. 202 (QB)	<p>Whether an order ought to be granted for partition and sale of the jointly owned marital home.</p> <p><i>Order of sale granted.</i></p>	<p>In a joint tenancy each tenant has a prima facie right to partition and sale of the jointly owned property provided the applicant comes to court with clean hands and provided the application is not vexatious or oppressive. If either or any of those conditions are present the judge has a certain limited discretion to deny a joint tenant their right to realize on the equity in a joint property.</p>

			In determining that the same would not be oppressive, the court considered the effect that the sale would have on the kids (whether they are particularly attached to the home, whether they are very involved in the neighbourhood, whether their friends are limited to that neighbourhood, and whether there is alternate accommodation available in the general area).
1990	<i>Balzar v. Balzar</i> , [1990] M.J. No. 395 (QB)	<p>Whether, after the divorce proceedings of the parties in which no relief was sought other than for divorce, partition or sale should be granted for property jointly held by the parties.</p> <p><i>Order for sale granted.</i></p> <p>Whether proceeds of sale should be equally divided even though the husband paid all of the expenses of the home (mortgage, taxes, insurance, repairs), or whether the husband should be compensated for one-half of the reduction in principal of the mortgage, and further for one-half of mortgage interest, taxes, insurance and repairs, paid since separation.</p> <p><i>Proceeds to be equally divided between the parties, after payment of any necessary real estate commission; husband entitled to receive from the wife's share of the proceeds, one-half of the amount by which the principal of the mortgage was reduced, since separation, and one-half of current expenses, namely mortgage</i></p>	<p>There is a prima facie right to partition or sale, unless it is vexatious or oppressive, or the party seeking it does not come to Court with clean hands.</p> <p>Although an accounting between parties for contributions made during cohabitation will not readily be granted, an accounting between them after separation is commonplace.</p> <p>An occupying party will be entitled to reimbursement for one-half of the principal reduction of the mortgage, but will only be entitled to claim current expenses, such as mortgage interest, taxes, insurance and repairs, if that person submits to a claim for occupation rent.</p> <p>It is the occupying party's election whether to pursue a claim for current expenses and submit to a claim for occupation rent. The occupying party may make that election once occupation rent is fixed. If the occupation rent will total more than the current expenses</p>

		<i>interest, taxes, insurance and repairs, from the date of separation; and wife entitled to occupation rent from after the parties' son turned 18.</i>	<p>claimed, the occupying party can abandon his application for current expenses, and no occupation rent will be payable.</p> <p>On an application for partition and sale, the Court must do complete equity between the parties. It would not be equitable for a party to obtain rent for the home, during a period when it was occupied by his/her infant child, and he/she was not otherwise contributing to the child's maintenance.</p>
1990	<i>Magne v. Magne</i> (1990), 26 R.F.L. (3d) 364 (QB)	<p>Whether partition or sale should be granted for property held jointly in both parties' names.</p> <p><i>Order for sale granted.</i></p>	<p>It is acknowledged that each joint tenant has a right to partition and sale of a jointly held property unless it can be shown that the one seeking the relief does not come to court with clean hands or that the partition and sale would be oppressive or vexatious.</p> <p>Judges have limited discretion to deny partition and sale upon the application of one of the parties.</p>
1994	<i>Carnahan v. Carnahan</i> , [1994] M.J. No. 306 (QB)  *Decision appealed in 1995 in <i>Carnahan v. Carnahan</i> , [1995] M.J. No. 300. In that case, court held that the judge should have first decided whether the farmland was or was not marital property. Only if it	<p>Whether partition or sale should be granted.</p> <p><i>Order for sale granted. All sale related costs and all real property related debts (loan, mortgage, and taxes to date of sale) shall be deducted from the sale proceeds, and the net proceeds shall be divided equally between the parties. The wife shall then pay to the husband an amount equal to one-half the reduction in principle sum of the real</i></p>	<p>Each joint tenant has a right to partition or sale of a jointly held property unless it can be shown that the one seeking the relief does not come to court with clean hands or that the partition or sale would be oppressive or vexatious.</p>

	<p>was found not to be, should the judge have considered whether this was a proper case to order a sale. As such, wife's application for an order of sale was referred back to the Court of Queen's Bench for an issue to be directed for trial.</p>	<p><i>property related debts since the date of separation.</i></p>	
1994	<p><i>Anderson v. Von Stein</i>, [1994] M.J. No. 411 (QB)</p>	<p>Whether an order ought to be granted for partition or sale of a jointly held home where the respondent has subsequently filed a statement of claim in which he claims a declaration that the applicant holds title to the property in trust for him.</p> <p><i>Application adjourned sine die and the matter was to proceed to trial on the basis of the husband's statement of claim. Court held that it would be inappropriate to make a decision without allowing the applicant an opportunity to respond to the issues surrounding a possible constructive trust.</i></p>	<p>An applicant's entitlement to sale of jointly held property assumes that he or she is both the legal and the beneficial owner of his/her joint interest.</p> <p>Where one's entitlement to beneficial interest in property is called into question so as to raise the possibility that one holds title in trust for someone else, as it was here, consideration of the presumption of a resulting trust raises the question of whether there is evidence to rebut that presumption, which, in turn, requires the court to look at the intention of the parties at the time of the purchase of the property.</p>
1995	<p><i>Peters v. Peters</i>, [1995] M.J. No. 175 (QB)</p>	<p>Whether partition or sale should be granted of property held by parties in joint tenancy, or whether sale ought to be postponed until other matters can be dealt with.</p> <p><i>Motion to postpone sale is allowed.</i></p>	<p>In postponing sale, court considered the complications with respect to the mortgage being held by the wife's mother. It held that the wife wants to purchase the home and cannot make a sensible decision in that regard without having all financial matters dealt with concurrently.</p>

1996	<i>Woloshyn v. Woloshyn</i> , [1996] M.J. No. 153 (QB)	Whether partition or sale should be granted of property held by parties in joint tenancy.  <i>Order for sale granted.</i>	The right to partition is a matter in the discretion of the court, but the court's discretion is a judicial one and is governed by certain rules. Prima facie the applicant is entitled to an order for partition and sale. For the application to be rejected, the party must show that the order applied for would be oppressive or vexatious. Personal inconvenience and hardship is not enough.  The doctrine of "clean hands" does not apply to all conduct of the applicant. Equity does not demand that the applicant should have led a blameless life. What bars the claim is not "general depravity, it must have an immediate and necessary relation to the equity sued for, it must be a depravity in a legal as well as in a moral sense."
1996	<i>Thome v. Thome</i> (1996), 112 Man. R. (2d) 256 (QB)	Whether partition or sale should be granted.  <i>Order not granted.</i>	In denying father's application for partition or sale, judge considered the fact that it would not be in the best interests of the parties' three sons for them to move, given that they had lived in the home all their lives. Specifically, judge found that it would cause a real hardship on the youngest son who has autism. Judge found that to change his environment and supports in place at home and school would not be in his best interests.
1997	<i>Ellis v Ellis</i> , [1997] MJ No 643 (QB)	Whether the jointly held property is an asset which falls within the ambit of the <i>Marital</i>	1. Prima facie a parcel of property held in joint tenancy entitles a party to obtain an order for partition or sale. This right

		<p><i>Property Act or The Law of Property Act.</i></p> <p><i>The jointly held land is not marital property within the meaning of the relevant legislation. Therefore, the court declined to place a value on the jointly held property unless directed to do so by a justice of the court at a future date.</i></p>	<p>precludes a party from the application of the <i>Marital Property Act</i> by virtue of section 10 ("This Act does not apply to any asset that has already been shared equally between spouses, or that is acquired by one spouse from the other by virtue of a sharing of assets under this Act.")</p> <p>2. An exception to this rule will entitle a party to bring jointly held land under an accounting within the <i>Marital Property Act</i> where there are reviewable circumstances surrounding the issuance of title in joint names. In addition where the continuation of a viable farming unit is at risk the court may also review the circumstances of the case.</p> <p>3. After a determination as to whether the jointly held property should be considered as an asset under the <i>Marital Property Act</i>, additional consideration may arise resulting from the use of the land.</p>
1997	<i>Fergus v. Fergus</i> , [1997] M.J. No. 348 (CA)	<p>Whether the parties, by agreement, have precluded the court from making an order for the sale of property owned by them as joint tenants in lieu of partition.</p> <p><i>Appeal ought to be granted, as trial judge erred in considering parol testimony to explain how the wife understood the agreement at issue, when the agreement was clear. Further, court erred in interpreting the</i></p>	<p>Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract.</p> <p>The court's jurisdiction to order a sale under s. 19 of <i>The Law of Property Act</i> is designed to avert a stalemate. To oust this jurisdiction by agreement, if it is possible at all, would require</p>

		<p><i>agreement as ousting the court of its jurisdiction to order a sale.</i></p> <p><i>Order for sale granted.</i></p>	<p>explicit language which is unmistakable in intent.</p> <p>A sale will not be ordered by the court where the application is vexatious or an order of sale oppressive.</p>
1998	<p><i>Crawford v. Durrant</i>, [1998] M.J. No. 27 (CA)</p>	<p>Whether the order for partition of the land in question under <i>The Law of Property Act</i> contravened the provisions of <i>The Planning Act</i>.</p> <p><i>Appeal granted and order of the motions judge for partition set aside.</i></p>	<p>Prior to 1986, s. 60(1) of <i>The Planning Act</i> did not refer to orders and judgment of a court. It stated that “a District Registrar shall not accept for registration an instrument that has the effect or that may have the effect of subdividing a parcel unless the subdivision has been approved by the approving authority.”</p> <p>Section 15 of the above-noted 1986-87 amendment was changed to amend s. 60(1) to include the words "including an order or judgment of a court." This demonstrates clearly that a partition order which results in a subdivision must be approved by the approving authority prior to title being issued for separate titles.</p> <p>Accordingly, an order of partition cannot go unless it meets the requirements of <i>The Planning Act</i>.</p>
1999	<p><i>Parniak v. Parniak</i>, [1999] M.J. No. 37 (QB)</p>	<p>Whether partition or sale should be granted for property jointly held by the parties.</p> <p><i>Order for sale granted, subject to certain conditions of sale.</i></p>	<p>In a joint tenancy, each joint tenant has a prima facie right to partition and sale provided the applicant comes to court with clean hands and that the application is not vexatious or oppressive.</p>

			<p>In considering whether order would be oppressive, judge's main concern was the effect on the children. Specifically, he considered whether sale would deprive the children of the ability to go to school with peers from their neighbourhood who have been schoolmates over the years, and whether it would deprive them of being able to continue on with their extracurricular activities.</p>
2000	<p><i>K.L.V. v. A.L.V.</i> (2000), 149 Man. R. (2d) 29, 2000 MBQB 56 (QB)</p>	<p>Whether partition or sale should be granted or whether the sale of the home should be postponed.</p> <p><i>Order granted.</i></p>	<p>A joint tenant of property has a prima facie right to an order for sale of the property, barring oppression, vexatiousness, or unclean hands.</p> <p>A court has a wide discretion to refuse or grant a sale order.</p> <p>In considering whether an order would be oppressive, the judge considered the fact that the wife intended to use her equity in the marital home to purchase a home in the same neighbourhood, allowing her to live in a house with a yard, as opposed to an apartment which she was currently living in. Judge found that any disadvantage or oppression to the husband and/or the children caused by an increased mortgage debt on the marital home would be offset by the collateral advantage to the wife and the children while in her care, given her plans to purchase a home in the area.</p>



2001	<i>Koshowski v. Bell</i> , [2001] M.J. No. 398 (QB)	<p>How the proceeds of the sale of the home should be distributed between a life tenant and residual beneficiaries.</p> <p><i>Order made indicating that property be sold for the purchase price agreed upon by the parties, and that the proceeds of sale, after payment of all the necessary costs incidental to the sale, be divided in accordance with the percentage of value set out by the actuary.</i></p>	The court has the discretion to determine the most equitable means of dividing the proceeds of a sale.
2002	<i>Payne v. Payne</i> , [2002] M.J. No. 120 (QB)	<p>Whether partition or sale should be granted for property held by parties as joint tenants.</p> <p><i>Order for sale granted.</i></p>	Prima facie a joint tenant is entitled to an order for sale. However, the Court has discretion to refuse an application where an order would be oppressive or vexatious or where the applicant has not come to court with clean hands. Personal inconvenience or hardship is not enough.
2002	<i>Gray v. Gray</i> , [2002] M.J. No. 274 (QB)	<p>Whether there should be an order for the partition or sale of the jointly owned marital home.</p> <p><i>Order for sale granted.</i></p>	In deciding to order the sale of the home, the court considered the fact that neither of the two children would be negatively affected by the sale.
2003	<i>Newton v. Newton</i> , [2003] M.J. No. 64 (QB)	<p>Whether partition or sale should be granted.</p> <p><i>Order for “partition and sale” (sic) granted.</i></p> <p><i>No real discussion in this case as the parties essentially agreed that partition and sale was needed. They agreed that wife would deal with partition and sale before Master.</i></p>	

<p>2003</p>	<p><i>D.D.M. (Trustee of) v. S.A.J.M.,</i> [2003] M.J. No. 96 (QB)</p>	<p>Whether an order ought to be granted in favour of the trustee, compelling the sale of the marital home formerly jointly owned and occupied by the respondent and her ex-husband ("the bankrupt").</p> <p><i>Weighing the relative hardships to the respondent and the children, with particular emphasis on the situation and needs of these two children, against the hardship to the various other unsecured creditors of the bankrupt, Court was satisfied, on balance, that sale should be refused at that point in time.</i></p> <p><i>The sale of the home was postponed until the youngest child reached age 18, unless the parties otherwise agreed, and the respondent was required to maintain the home in a reasonable state of repairs, keep it insured, and pay the taxes, utility charges, and mortgage payments on a timely basis. She would be responsible in any accounting at the time of sale, for any diminution in the fair market value of the property since the date of the bankruptcy which is proven to be as a result of her failure or inability to reasonably maintain and repair the home during her occupancy.</i></p> <p><i>At the time of any sale the respondent would be entitled to payment from the Trustee of 50% of the amount by which had reduced the principal balance owed on the mortgage and any</i></p>	<p>Prima facie, the Trustee is entitled to an order for sale.</p> <p>This application should only be refused if the court is satisfied, on the evidence and on reasonable inferences to be drawn from the evidence that serious hardship would accrue to the respondent and the young children if the order were granted at this time.</p> <p>In an application for partition and sale where one joint tenant has made an assignment in bankruptcy, the trustee has no better right than the bankrupt to have the order made.</p> <p>There is no good reason in law (or in equity) for the Trustee (the creditors of the bankrupt) to be put in any better position than the bankrupt as of and immediately prior to the date of bankruptcy in an application such as this for sale.</p> <p>The bona fide creditors of the bankrupt, represented by the Trustee, are entitled to some protection against reductions in market value caused by the respondent's inability to make and perform reasonable repairs and maintenance.</p>
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2005	<i>McKenzie (Trustee of) v. McKenzie</i> , [2005] M.J. No. 70 (CA)	<p>Whether appeal ought to be allowed from the dismissal of a trustee in bankruptcy's application for an order for partition and sale of the marital home.</p> <p><i>Appeal not allowed.</i></p>	<p>A judge can postpone the granting of partition and sale if it can be demonstrated on the evidence and on reasonable inferences to be drawn from the evidence that serious hardship would accrue to the party seeking the postponement of sale. Such hardship is to be viewed relative to the rights of a trustee on behalf of creditors of the bankrupt (based on Ontario case law).</p> <p>Asking whether the sale would be a serious hardship to the wife and her children, as per Ontario law, is in effect, asking whether the sale would be oppressive, as per Manitoba case law.</p> <p>In an application for partition and sale where one joint tenant has made an assignment in bankruptcy, the trustee has no better right than the bankrupt party to have the order made.</p>
2006	<i>Stuart v. Multan</i> , [2006] M.J. No. 418 (QB)	<p>Whether partition or sale should be granted or whether the sale of the home should be postponed.</p> <p><i>Order for "partition and sale" (sic) granted.</i></p>	<p>A joint tenant has the prima facie right to an order of partition and sale, unless the other joint tenant can show that it would be oppressive or vexatious to order a sale.</p> <p>Personal hardship or inconvenience is not enough to found a claim of oppression or vexation.</p>

2006	<p><i>Confab Laboratories Inc. v. Wilding</i>, [2006] M.J. No. 514 (QB)</p>	<p>Whether a judgment creditor who has obtained a judgment and registered said judgment against the respondent's residence (which is jointly owned by him and his wife), ought to be granted an order to sell the respondent's interest in the property.</p> <p><i>Respondent's one-half interest in the land ordered to be sold under the direction of the master to realize the amount owing to the applicant under its judgment against the respondent.</i></p>	<ol style="list-style-type: none"> <li>1. The interest of a joint tenant in jointly owned property is exigible - that is, not exempt from seizure or execution by or on behalf of a judgment creditor.</li> <li>2. The acts of registering of a judgment or depositing a writ of execution with a sheriff do not sever a joint tenancy. Severance occurs when proceedings are commenced to realize on the judgment or steps are taken by the sheriff to execute the writ - that is, to bring about an alienation of the judgment debtor's title.</li> <li>3. Neither a judgment creditor nor the sheriff, by virtue of a registered judgment or a writ of execution, has an interest in land sufficient to support an application for partition or sale of the property pursuant to <i>The Law of Property Act</i>, at least where the judgment or writ does not apply to all of the owners.</li> <li>4. Both a judgment creditor and a sheriff under a writ of execution have the right to sell the interest of the debtor as an owner of the property - i.e., a tenant in common. The purchaser of that interest would acquire an interest in the land and would be entitled to apply to partition or sell the property under <i>The Law of Property Act</i>.</li> <li>5. Neither the exemptions under <i>The Judgments Act</i> nor the discretion given a judge under <i>The Law of Property Act</i> to postpone or refuse the sale are</li> </ol>
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			<p>relevant at the stage of the sale of the judgment debtor's interest in the property as it is not the property, but the judgment debtor's interest in the property, that is being sold. Those provisions become relevant only if and when an owner applies to partition or sell the property. Pursuant to s. 19(2) of <i>The Law of Property Act</i>, the interest of one spouse in a property can be sold to pay that spouse's debts without obtaining the consent of the other spouse under <i>The Homestead Act</i>.</p> <p>S. 23 of <i>The Law of Property Act</i> deals with the loss of various interests in the property upon sale and provides the court with the discretion to compensate for the loss of other interests such as a life interest. Thus, the loss of one's life interest in the property would be dealt with and could be compensated at the time of the actual sale of the property.</p>
2009	<i>Simcoff v. Simcoff</i> , [2009] M.J. No. 265 (CA)	<p>Whether appeal ought to be allowed from the dismissal of a mother's application for an order for partition or sale of property she shared with her son (among other issues).</p> <p><i>Appeal allowed in part, given that application judge erred in applying a test of fairness to the application for partition or sale.</i></p> <p>Whether an order for partition or sale of the property should be granted.</p>	<p>The right to the partition of real property under the authority of s. 20 of <i>The Law of Property Act</i> is a matter in the discretion of the court. However, the court's discretion is to be exercised in a judicial manner and is governed by certain well-defined principles. Prima facie, an applicant is entitled to an order for partition and sale. To defeat such an application, a respondent must show that the order would be oppressive or vexatious or that the applicant did not come to court with clean</p>

		<p><i>Order for “partition and sale” (sic) granted.</i></p>	<p>hands. Personal inconvenience and hardship is not enough.</p> <p>The case law suggests that the conduct complained of must be fairly egregious for an application for partition and/or sale to be rejected. Nor need the conduct of the applicant be above criticism in every respect. Moreover, the conduct complained of must relate to the application for partition and sale.</p> <p>Common sense tells us that partition often presents enormous practical difficulty and therefore, although the application is still referred to as one for partition and/or sale, more often than not, the result is one of sale and not partition.</p>
2009	<p><i>Dickson v. Dickson</i>, [2009] M.J. No. 374 (QB)</p>	<p>Whether partition or sale should be granted.</p> <p><i>Order not granted.</i></p>	<ol style="list-style-type: none"> <li>1. The applicant has a prima facie right to an order for partition or sale;</li> <li>2. This right may be denied by the exercise of the court's discretion although this discretion is a judicial one, to be exercised according to certain rules;</li> <li>3. The application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting: mere hardship or inconvenience to the resisting party is insufficient; and</li> <li>4. As the relief sought is equitable in nature the application may also be denied</li> </ol>

			<p>by the court in its discretion if the applicant does not come to court with clean hands.</p> <p>Vexatious proceedings are generally those which are pursued without reasonable or probable cause or excuse.</p> <p>The event of sale of the home, the process of finding alternate accommodation and the process of moving from one residence to another would not ordinarily be an oppressive outcome.</p> <p>"Unclean hands" must have an "immediate and necessary relation to the equity sued for." In this case, the judge held that the respondent had unclean hands, as he had accumulated arrears of child and spousal support in an amount well in excess of \$100,000, which was almost equal to the totality of his portion of the equity in the home, despite being able to pay said support.</p>
2009	<i>Hildebrandt v. Hildebrandt</i> , [2009] M.J. No. 73 (QB)	<p>Whether to sever the partition and sale issue from the other issues that exist between the parties, and, if so...</p> <p><i>Partition or sale issue severed.</i></p> <p>Whether summary judgment ought to be granted for an order of sale of the land at issue.</p> <p><i>Summary judgment granted.</i></p>	<p>An order for sale is discretionary relief. That said, joint tenants have a prima facie legal right to partition and sale. To defend such a proceeding, a party needs to show that the order applied for would be oppressive, vexatious, or that the applicant comes to court with unclean hands. Personal inconvenience and hardship is not enough.</p> <p>Judge found that oppression was not made out, as the respondent couldn't prove that he couldn't reside anywhere else, or that the parcel was essential to the main</p>

			<p>farm operation conducted on other land.</p> <p>Unless the applicant's claim can be shown to have no likely prospect of success, it is not prima facie vexatious to put oneself in a position to fund litigation from one's capital assets if there is just no other way to do it.</p>
2010	<i>Lane v. Lane</i> , [2010] M.J. No. 232 (QB)	<p>Whether an order for partition or sale should be granted for a recreational dwelling cottage (not family home) jointly owned by a husband and wife.</p> <p><i>Order for sale granted.</i></p>	<p>When considering an application for partition or sale, the court's discretion is to be exercised in a judicial manner and governed by well-defined overriding principles. The starting place in the analysis is that, generally speaking, an applicant is entitled to an order for partition or sale. To defeat that prima facie entitlement, a respondent must show that, in the particular circumstances of his/her case, the order sought would be oppressive or vexatious or that the applicant did not come to court with clean hands. Neither personal inconvenience nor hardship is enough. The case law establishes as well that a judge who hears an application for partition or sale has a wide discretion to refuse or grant such equitable remedies.</p> <p>To find that the applicant's conduct is sufficiently oppressive or vexatious to deprive him of his prima facie right to an order for sale, or that he does not come to court with clean hands, his conduct must be fairly egregious.</p>



2011	<i>Moss Estate v. Moss</i> , [2011] M.J. No. 198 (QB)	<p>Whether the applicant trustee in bankruptcy was a person interested in the subject property under s. 20 of <i>The Law of Property Act</i>.</p> <p><i>Court exercised discretion pursuant to Queen's Bench Rule 38.09(b) and ordered that the matter proceed to trial in order to determine (1) whether the applicant was a person interested in the subject property by virtue of the Certificate of Decision, or otherwise, and if so, what the nature and value of that interest is; (2) Whether Rochelle (one of the respondents) had any interest in the subject property, and if so, what the nature and value of that interest is; and (3) whether a sale of the subject property should be ordered pursuant to s. 20 of The Law of Property Act.</i></p>	If the applicant is a person interested in the subject property as contemplated by subsection 20(1), the court must consider whether the sale would be "more advantageous to the parties interested". This can only occur if the parties and their interests are known.
2012	<i>Chevalier v. Chevalier</i> , [2012] M.J. No. 260 (QB)	<p>Whether partition or sale should be granted.</p> <p><i>Order for sale granted. In these circumstances the land cannot be reasonably partitioned. Moreover, the sale of the land will be more advantageous to the parties.</i></p>	<ol style="list-style-type: none"> <li>1. The applicant has a prima facie right to an order for partition or sale;</li> <li>2. This right may be denied by the exercise of the court's discretion although this discretion is a judicial one, to be exercised according to certain rules;</li> <li>3. The application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting; mere hardship or inconvenience to the resisting party is insufficient; and</li> </ol>

			<p>4. As the relief sought is equitable in nature the application may also be denied by the court in its discretion if the applicant does not come to court with clean hands.</p> <p>Where the prima facie right of the applicant does not stumble on any of the potential discretionary "barriers" of vexation, oppression or unclean hands, the question still remains as to whether the court should order partition of the land in some fashion as between joint tenants or alternatively that the land be sold. The decision at this stage is an exercise in discretion, to be exercised judicially in the context of the particular facts and circumstances of each case. The legislature has provided additional guidance to the courts as to the manner in which the discretion is to be exercised, namely:</p> <ol style="list-style-type: none"> <li>1. The discretion should favour sale if the sale is considered by the court to be more advantageous to the parties interested: s. 20(1) L.P.A.; and</li> <li>2. Where the owners of the land are husband and wife and the land cannot reasonably be partitioned, sale in lieu of partition should be ordered: s. 19(2)(b) L.P.A.</li> </ol> <p>If the evidence reliably points to a way in which the court could equally and fairly partition and divide the property between these joint owners, the court</p>
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			would, in the absence of important countervailing evidence, be remiss if it did not grant an order for partition.
2013	<i>Lotz v. Lotz</i> , [2013] M.J. No. 27 (QB)	<p>Whether to sever the partition or sale issue from the other issues that exist between the parties, and, if so...</p> <p><i>Partition or sale issue is severed.</i></p> <p>Whether partition or sale should be granted.</p> <p><i>Order for sale granted.</i></p>	<p>Whether to grant severance is a matter of discretion, which is to be exercised judicially having regard to the unique facts of each individual case.</p> <p>When considering an application for partition or sale, the court's discretion is to be exercised in a judicial manner and governed by well-defined overriding principles. The starting place in the analysis is that, generally speaking, an applicant is entitled to an order for partition or sale. To defeat that prima facie entitlement, a respondent must show that, in the particular circumstances of his/her case, the order sought would be oppressive or vexatious or that the applicant did not come to court with clean hands. Neither personal inconvenience nor hardship is enough. The case law establishes as well that a judge who hears an application for partition or sale has a wide discretion to refuse or grant such equitable remedies.</p> <p>To find that a party's conduct is sufficiently oppressive or vexatious to deprive him of his prima facie right to an order for sale, or that he does not come to court with clean hands, his conduct must be fairly egregious.</p>

			A husband's occasional tardiness in making child and spousal support payments is not sufficient to say that he comes to court with unclean hands.
2013	<i>Shumilak v. Shumilak</i> , 2013 MBQB 54 (QB)	<p>Whether an order should be made for partition or sale of the jointly owned property.</p> <p><i>Order granted for sale and for an accounting of all rental and farm income and expenses associated with the property from the date of the testatrix's death.</i></p>	Court relies on court's explanation of the law of partition or sale as set out in <i>Chevalier</i> .
2017	<i>Mucz v. Popp</i> , [2017] M.J. No. 156 (QB), appeal dismissed, [2018] M.J. No. 17	<p>Whether the applicants should be granted an order for a sale of the property which was transferred to them from the estate of their mother and in respect of which all four parties have an equal and undivided interest.</p> <p><i>Order for sale granted.</i></p>	<ol style="list-style-type: none"> <li>1. The applicant has a prima facie right to an order for partition or sale;</li> <li>2. This right may be denied by the exercise of the court's discretion although this discretion is a judicial one, to be exercised according to certain rules;</li> <li>3. The application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting: mere hardship or inconvenience to the resisting party is insufficient; and</li> <li>4. As the relief sought is equitable in nature the application may also be denied by the court in its discretion if the applicant does not come to court with clean hands.</li> </ol>

2018	<p><i>Siwak v. Siwak</i>, [2018] M.J. No. 20 (QB)</p>	<p>Is an application for partition or sale that is made after a life estate has vested determined upon the same criteria as when the parties were both alive?</p> <p><i>Yes.</i></p> <p>If the Court determines to order partition or sale, how is compensation for the life estate quantified?</p> <p><i>Sale of the property granted, subject to the husband's life interest in the property.</i></p> <p><i>Valuation may be established by using the principles applicable to life annuities.</i></p>	<p>Where an action for partition or sale involves a life estate, ss. 23(1) and (2) of <i>The Law of Property Act</i> are engaged and not s. 19.</p> <p>Section 23(1) indicates that "regard shall be had to the interests of all the parties" when determining if a sale of the property in question should be ordered. It seems that that phrase refers to the actual legal ownership interests in the property in question. The value of the said interest would necessarily be determined by the court at the time of the actual sale of the property.</p> <p>Any loss of a spouse's interest in the property would be dealt with at the time of the actual sale of the property as opposed to when the decision to order the sale was being made.</p> <p>It is useful to consider the law which has developed in Manitoba around ss. 19(1) and (2) of <i>The Law of Property Act</i> concerning partition or sale applications when making a determination involving s. 23(1) of <i>The Law of Property Act</i>. There is no reason to think that the legislature would have intended different principles to apply in the court's determination of whether or not to order sale of a property (with or without homestead rights or life estate interests engaged).</p>
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			<p>advantageous to the parties interested; and</p> <p>2. Where the owners of the land are husband and wife and the land cannot reasonably be partitioned, sale in lieu of partition should be ordered.</p> <p>It would be a rare case where a life tenant would be compelled to suffer partition or sale against his wishes, and that discretion to order a sale should be exercised cautiously.</p> <p>Manitoba case law has consistently demonstrated that the party resisting an order for partition and sale faces a high threshold in demonstrating to the court why the applicant's prima facie right should be denied.</p>
2019	<i>Siwak v. Siwak</i> , [2019] M.J. No. 145 (CA)	<p>Whether the trial judge erred in dispensing with the husband's consent to the sale of the co-owned property pursuant to s. 19 of <i>The Law of Property Act</i>, CCSM c L90.</p> <p><i>The trial judge did not err.</i></p> <p>Whether the trial judge erred in presuming that the estate had a prima facie right to the partition or sale of the co-owned property without the husband's consent.</p> <p><i>The trial judge did not err.</i></p>	<p>According to the Schedule of Definitions to the <i>Interpretation Act</i>, CCSM c 180, the definition of "person" in section 20(1) of <i>The Law of Property Act</i> "includes ... the heirs, executors, administrators or other legal representatives of a person".</p> <p>As part of an order for partition or sale of a homestead under section 19(1) of <i>The Law of Property Act</i>, a court can grant the partition or sale without the consent of any party to the action and without the consent of any party's spouse or common-law partner under the <i>Homestead Act</i>. This authority is provided in section 19(2) of <i>The Law of Property Act</i>.</p>

			<p>Thus, while the estate could have applied to dispense with the husband's consent to the disposition of the homestead under section 10 of the <i>Homestead Act</i>, that separate application was not necessary as the court also had authority to dispense with his consent under section 19(2) of <i>The Law of Property Act</i> and to determine and order compensation regarding those rights pursuant to section 24 of <i>The Law of Property Act</i>.</p>
2019	<p><i>Mireault v. Podolsky</i>, [2019] M.J. No. 55 (QB)</p>	<p>Whether an appeal ought to be granted from the order of the Master which required the sale of one parcel of land as opposed to all three parcels which were the subject of the application.</p> <p><i>Appeal allowed. All three parcels ordered to be sold.</i></p>	<ol style="list-style-type: none"> <li>1. The applicant has a prima facie right to an order for partition or sale;</li> <li>2. This right may be denied by the exercise of the court's discretion although this discretion is a judicial one, to be exercised according to certain rules;</li> <li>3. The application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting: mere hardship or inconvenience to the resisting party is insufficient; and</li> <li>4. As the relief sought is equitable in nature the application may also be denied by the court in its discretion if the applicant does not come to court with clean hands.</li> </ol>



2019	<i>Temple v. Nelson</i> , [2019] M.J. No. 198 (QB)	<p>Whether an order ought to be granted for the sale of the jointly owned family home.</p> <p><i>Finding that the best interests of the children would be served by granting the exclusive right to occupy the home to the petitioner for the foreseeable future, court did not grant an order for sale. However, it indicated that a new application may be brought to the court any time after two years from the date of this decision.</i></p>	<p>Normally, where the parties approach the court with clean hands, the court will not interfere with one party's right to realize on their equity. However, where there is a request for a postponement of sale and exclusive occupancy of the home by a party, a more detailed inquiry is required.</p>
2020	<i>Desrochers v. Desrochers</i> , [2020] M.J. No. 241 (QB)	<p>Whether an order for sale or an order for partition ought to be granted for three parcels of land shared by husband and wife as tenants in common.</p> <p><i>This is not an appropriate case for partition, but it is an appropriate case for sale.</i></p>	<p>Cites <i>Chevalier</i>, which cites <i>Dickson</i>, to outline the major principles relating to partition and sale in MB case law.</p> <p>If the evidence reliably points to a way in which the court could equally and fairly partition and divide the property between joint owners, the court would, in the absence of important countervailing evidence, be remiss if it did not grant an order for partition. However, partition often represents enormous practical difficulty and therefore, although the application is still preferred, more often than not, the result is one of sale and not partition.</p> <p>The function of the court under an order for partition and/or sale is not to make a redistribution of property, no matter how fair and equitable it may appear. Both of the parties has a one-half common interest in all of the land. The Act does not grant the court the jurisdiction to impose</p>

			an ownership structure which differs from the ownership interest reflected in the title.
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