Manitoba Law Reform Commission

THE LAW OF PARTITION AND SALE

Consultation Paper
February 2022

Manitoba Law Reform Commission

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

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CONSULTATION PAPER

Comments on this Consultation Paper should reach the Manitoba Law Reform Commission ("the Commission") by **April 15, 2022**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba's law. Please refer to the issues for discussion identified in this Paper, and any other matters you think should be addressed. As well, the Commission strongly urges anyone with a better understanding of the law of partition and sale than the Commission, as reflected in this Paper, to bring to our attention any miscues.

Please submit your comments in writing by email, fax or regular mail to:

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The Commission welcomes comments on all of its publications.

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CHAPTER 1: INTRODUCTION

When co-owners[1] 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*[2] provide them with two potential remedies: partition, a judicial order physically dividing the co-owned property between the co-owners, and sale, a judicial order of sale of the co-owned property and division of the proceeds of sale between the co-owners.

The origins of these sections date back to three statutes passed by the Parliament of England; the first in 1539,[3] followed by a second in 1540,[4] and a third in 1868.[5] All three English statutes became law in Manitoba in 1870[6], until 1878, when the Legislative Assembly of Manitoba enacted its own legislative scheme known as *The Partition Act.*[7] This statute underwent a number of legislative changes over the next several decades, including a repeal and amendment of the legislation in 1939,[8] which introduced the provisions that are now represented in *The Law of Property Act*.

A comparison of the 1878 *Partition Act*, 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[9], costs[10], practice[11], and the effect of the court order of partition or sale.[12] However two of the key sections of the 1878 Act,

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[1] Historically, there were four types of co-ownership of land: co-parcenary, tenancy by the entireties, 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. Co-parceners are included in s 2(1) of the *Partition of Property Act* of British Columbia, s 2 of the *Partition Act* of Ontario, s 4 of the *Partition Act* of Nova Scotia, and s 19 of the *Real Property Act* of Prince Edward Island (see Appendix B).
A tenancy by the entireties "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.pdf1> [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 entireties 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. Tenancy in common and joint tenancy co-ownership, on the other hand, remain commonplace.
[2] RSM 1987, c L90 [MB *LPA*].
[3] *An Act for Joint Tenants and Tenants in Common* (UK), 1539, 31 Henry VIII, c 1.
[4] *Joint Tenants for Life or Years* (UK), 1540, 32 Henry VIII, c 32.
[5] *An Act to amend the Law relating to Partition* (UK), 1868, 31, 32 Vict, c 40.
[6] 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.
[7] SM 1878, c 6 [*Partition Act*].
[8] *An Act to amend "The Law of Property Act"*, SM 1939, c 50.
[9] *Partition Act*, *supra* note 7, ss. IV-VII, XI-XVIII.
[10] *Ibid*, s XXVI.
[11] *Ibid*, s XXV.
[12] *Ibid*, ss XX-XXIV.

which established the Court's authority to compel partition or sale[13], and which established the right of persons interested in land to seek an order of partition or sale from the Court[14], 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* outline some of the key components of partition and sale proceedings; namely, the major actors and their rights under the Act, the powers of the Court in conducting partition or sale proceedings, and the duties owed by the Court to the various actors in the process. The major actors in partition and sale proceedings include individuals bringing the action for partition or sale of land[15], individuals who may be compelled to make partition or sale of land[16], and other individuals who are not necessarily parties to the action, but who have some type of interest in the land that is the subject of the action ("subject land").[17] In addition to delineating the rights of these individuals, ss. 18-26 of the Act set out the powers of the Court and the duties it owes to these actors in various unique circumstances. For instance, these sections address partition and sale proceedings involving interested persons with homestead rights in the subject land, interested persons who are missing or deceased, minor or mentally incompetent parties or interested persons, and parties or interested persons with a life estate in the subject land.[18] Complementing ss. 18-26 is Rule 66 of the Court of Queen's Bench Rules ("QB Rules"), which establishes certain procedural guidelines for partition and sale matters.

In this Paper, the Commission contemplates whether the current version of ss. 18-26 of *The Law of Property Act* and the complementary QB Rules adequately address the partition and sale of land in Manitoba, or whether these sections and rules are in need of reform. Specifically, the Commission contemplates whether the Act or Rules require further specification, elaboration, modernization or simplification to better reflect the current realities of Manitoba and to better guide and support Manitobans through an inherently complicated legal process. In particular, the Commission contemplates whether the Act and Rules should be amended to more clearly address who can bring action for and who may be compelled to make partition or sale of land in Manitoba, and to touch upon additional unique circumstances in which partition or sale proceedings may be brought, such as where encumbrance holders are involved, where parties have contracted out of the right to apply for partition and sale, where dispositions are pending in parallel proceedings under other Acts, etc. The Commission also explores whether the Act or Rules should be amended to provide additional practical and procedural guidance to applicants with respect to filing and service requirements, to better inform parties and interested persons as to the effects that orders of partition or sale may have on them, to reflect current societal attitudes and recent statutory amendments, and to otherwise simplify the process.

[13] *Ibid*, s III.
[14] *Ibid*, s V.
[15] MB *LPA*, *supra* note 2 at ss 19(2), 20(1).
[16] *Ibid*, ss 19(1), 19(2).
[17] See, e.g. *ibid*, ss 21(1), 22(2), 23(1).
[18] *Ibid*, ss 21(1)-26.

The Commission will address these questions with reference to the statutory legislation providing for partition and sale in the other provinces of Canada,[19] the provincial and territorial partition and sale court rules[20], as well as the relevant Canadian case law.[21] It will also rely on 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,[22] (the "AB Report"), *Proposals for a New Partition and Sale Act,* published by the Law Reform Commission of Saskatchewan,[23] (the "SK Report"), and *Report on Partition of Property Act*, Report No. 68, published by the British Columbia Law Institute[24] (the "BC Report"). Each of these reports make recommendations which were intended to shape new partition and sale legislation in these provinces, with the Saskatchewan and British Columbia reports including actual drafts of the legislation envisioned in the reports. With reference to these reports and the legislation in other provinces, the Commission asks the question: can *The Law of Property Act* of Manitoba and the QB Rules be improved?

[19] See Appendix B.
[20] See Appendix C.
[21] See Appendix D.
[22] AB Report, *supra* note 1.
[23] The Law Reform Commission of Saskatchewan, *Proposals for a New Partition and Sale Act* (June 2001), online: <https://lawreformcommission.sk.ca/Partition_and_Sale_Proposals.pdf> [SK Report].
[24] British Columbia Law Institute, *Report on the Partition of Property Act*, Report #68 (March 2012) [BC Report].

CHAPTER 2: THE CURRENT STATE OF THE LAW

In determining whether Manitoba's current Act and QB Rules are effectively and appropriately guiding Manitobans through the legal process of partition and sale, it is important to first gain an understanding of the relevant sections of the Act and how they compare to the legislation and court rules of the other Canadian provinces and territories.

1. *The Law of Property Act,* ss. 18-26

As indicated in the previous Chapter, ss. 18-26 of *The Law of Property Act* outline the major actors in partition and sale proceedings and their rights under the Act, the powers of the Court in conducting said proceedings, and the duties owed by the Court to the various actors under different circumstances. More specifically, these sections outline who may be compelled to make partition or sale of land[25], who may bring an action for the partition or sale of land[26], the treatment of individuals who may have an interest in the subject land, and the powers and duties of the Court in respect of affected parties.[27] Under s. 18 of the Act, "action" is defined as "a civil proceeding commenced by a statement of claim or in such other manner as is prescribed by the rules of the court"; "court" is defined as "the Court of Queen's Bench"; and "land" is defined as "lands, tenements and hereditaments and all estates and interest therein."[28]

a. Who May be Compelled to Make Partition and Sale of Land?

Section 19(1) of *The Law of Property Act* provides a broad list of individuals who may be compelled to make partition or sale of co-owned land in Manitoba. This list includes:

> **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** […] [emphasis added].

Joint tenants and tenants in common are individuals who hold freehold or leasehold estates concurrently with other people. There are two main differences between a joint tenancy and tenancy in common: first, the interests of joint tenants must be identical[29] whereas the interests of tenants in common can differ from each other; and second, joint tenants have the right of survivorship whereas tenants in common do not.[30] Pursuant to s. 19(1) of the Act, both joint tenants and tenants in common may be compelled to make partition or sale of their co-owned land. This is also the case for mortgagees, who hold a conditional conveyance of a legal estate or interest in

[25] MB *LPA*, *supra* note 2 at ss 19(1), 19(2).
[26] *Ibid*, ss 19(2), 20(1).
[27] *Ibid*, ss 21(1)-26.
[28] *Ibid*, s 18.
[29] Joint tenancies must be identical in four different respects, referred to as the "four unities." The four unities are (1) unity of possession: all joint tenants must share possession at the same time; (2) unity of interest: all joint tenants must have the same interest in the right they hold together; (3) unity of title: all joint tenants must derive their title from the same instrument; and (4) unity of time: all joint tenants must have acquired their interest at the same time. See Chambers, *supra* note 1 at 83-84.
[30] When a joint tenant dies, her joint tenancy estate ceases to exist, and accrues to the surviving joint tenant(s), whereas when a tenant in common dies, her tenancy in common estate becomes an asset of her own estate. See *ibid* at 83.

co-owned land as security for the payment of a debt[31], and any other creditor having an interest in co-owned land which acts as a security for the satisfaction of a debt or performance of an obligation.[32]

Additionally, pursuant to the catch-all phrase "all persons interested in, to, or out of any land in Manitoba", s. 19(1) can be interpreted to mean that every person in Manitoba with some concurrent legal right to or claim upon subject land, may be compelled to partition or sell that land. According to s. 19(2) of the Act, the list in s. 19(1) includes married persons and common-law partners with homestead rights in subject land, which could not otherwise be disposed of by that person's spouse without their consent, as per *The Homesteads Act*. In other words, s. 19(2) of the Act empowers the Court to compel a person to partition or sell subject land in which they have a homestead right, regardless of whether they consent or not. Having said that, recognizing the negative impacts that this can have on homestead rights holders, s. 24 of the Act requires the Court, in cases of sale, to determine the value of any rights held by the spouse or common-law partner of a party to the action under *The Homesteads Act*, and to order the payment of that value to the spouse or common-law partner. This payment, according to s. 24, will bar any further right or claim under *The Homesteads Act*.

b. Who May Bring Action for the Partition or Sale of Land?

Like s. 19(1) of the Act, s. 20(1) indicates, quite broadly, the individuals who are entitled to bring an action for the partition or sale of land in Manitoba. These individuals include "any person interested in land in Manitoba", a catch-all group similar to that listed in s. 19(1), as well as guardians who represent the estates of infants with interests in land. When the subject land is held in joint tenancy or tenancy in common by any of these individuals by virtue of a devise or intestacy, s. 20(2) of the Act indicates that these individuals may not commence an action until one year after the death of the testator or person dying intestate in whom the land was vested.

Section 20(1) states:

> **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].

Of particular note in this section is the use of the bolded phrase "entitled to the immediate possession of any estate therein", following the words "or the guardian of the estate of an infant." Upon first glance, one might interpret this section to mean that in order to have standing to bring an action for partition or sale under the Act, any person interested in land in Manitoba, including the guardian of the estate of an infant, must have both a concurrent interest in land as well as a right to the immediate possession of any estate in that land. This would mean that one would not have standing if they held a future interest or one which does not give them a right of immediate

[31] John A. Yogis, Catherine Cotter & Catherine Cotter, *Barron's Canadian Law Dictionary* (Hauppauge, NY: Barron's Educational Series, Inc., 2009) sub verbo "mortgage" [Barron's].
[32] *Ibid* at sub verbo "charge".

possession in said land (i.e. a remainder or reversionary interest, a landlord leasehold interest, or an interest such as a mortgage, judgement debt, charge or lien).

However, as will be demonstrated in Chapter 3 of this Paper, the punctuation and wording of this section raises questions as to who may actually bring an action for partition or sale under the Act. Read in the manner described above, standing is essentially restricted to fee simple co-owners of land, which protects these co-owners from attempts by conditional or future interest holders to unseat them. However, when read more narrowly, with more attention being paid to punctuation, one may conclude that without a comma following the word "infant," the words "entitled to the immediate possession of any estate therein" 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 interpretation, one could argue that only the guardian of the estate of an infant is required to have both a co-ownership of concurrent estates and an entitlement to immediate possession of the subject land in order to bring action for partition or sale in Manitoba. All other persons interested in land in Manitoba would need only to have a concurrent interest in the subject land. This interpretation results in a much less restrictive threshold for standing to bring partition or sale actions, opening the door for these remedies to co-owners such as remainderers, reversioners, landlord leaseholders, mortgagees, etc.

As will be discussed in Chapter 3, this interpretation has been accepted by Manitoba courts and rejected by other Canadian courts interpreting analogous provisions, causing confusion as to who may actually bring action for partition or sale in Manitoba.

c. Treatment of Missing or Deceased Interested Parties

Section 21 of the Act addresses partition and sale actions involving persons with an interest in the subject land who have not been heard of for three years or more, and who may be deceased. In such cases, s. 21(1) empowers other interested parties to bring an application to the Court to appoint a guardian to take charge of that person's interest, and the interests of those who, in the event of that person being dead, are entitled to that person's share or interest in the subject land. Once appointed by the Court under s. 21(1), s. 21(2) vests power in this guardian to act on behalf of these interested parties. Any acts by the guardian will be binding on the absent person and all others claiming or entitled to claim under or through that person, and are treated as if they are acts done by those persons themselves.

If, upon application to the Court, the guardian or anyone interested in the estate which they represent proves that there are reasonable grounds to believe that the absent person is deceased, s. 21(3) empowers the Court to deal with the absent (or deceased) person's estate or interest, and to order payment of the proceeds, income or produce of said estate or interest to the person who would be entitled to it upon the person's death.

In general, s. 22(1) of the Act empowers the Court, upon ordering partition or sale of land in a given case, to order the execution of a conveyance, transfer or other document by all the proper parties to give effect to the sale or partition of the land. Section 22(3) refers specifically to cases involving guardians and interested persons named in s. 21 of the Act, empowering the Court to

order that a conveyance, transfer, or other document needed to give effect to the sale or partition of land in such cases be executed by a guardian appointed under s. 21.

d. Treatment of Parties under Disability

Similarly, s. 22(2) of the Act deals specifically with actions for partition or sale of land involving "parties under disability." This section states:

> 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*.

Like s. 22(3), s. 22(2) empowers the Court, upon ordering partition or sale of land in an action involving a party under disability, to order that the conveyance, transfer or other document needed to give effect to the partition or sale be executed by the disabled party's representative. According to s. 22(2), the interests of an infant, person of unsound mind, or mentally incompetent person may be represented by a guardian, committee, administrator, or substitute decision maker for property appointed under *The Vulnerable Persons Living with a Mental Disability Act.*[33] Section 25 of the Act makes clear that any court-ordered partition or sale of land in which a party under disability has an interest is as effectual against that party as it would be for any other person competent to act for him or herself.

e. Treatment of Parties with Life Estates

A life estate is an "estate whose duration is limited to or measured by the life of the person holding it or that of some other person."[34] A life tenant, one who holds a life estate, "[has] the right to possession and to enjoy the profit of the estate, but lack[s] the power to make significant alterations to property […] and to completely alienate full title, as the grantor [of the life estate] retains the fee simple in reversion."[35] This means that the grantor of the life estate will regain title to the property upon the death of the life tenant. Pursuant to s. 23(1) of *The Law of Property Act*, where an action for partition or sale involves a party who has established such a life estate, the Court has the discretion to determine whether the life estate at issue ought to be sold or exempted from an order of sale. Section 23(1) stipulates that the Court is to exercise this discretion having regard to the interests of all of the parties.

Where the Court exercises this discretion so as to grant an order of sale of a life estate, the purchaser of the estate will hold the premises "freed and discharged from all claims by virtue of the estate or interest of the [life] tenant, whether it is to an undivided share or to the whole or any part of the premises sold." This point is crystalized in s. 23(2) of the Act, which indicates that all of the life estate and interest of the life tenant passes to a purchaser upon the sale of such an estate

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[33] SM 1993, c 29.

[34] Barron's , supra note 31 at sub verbo "life estate".

[35] *Ibid.* In other words, "[upon] the grantee's death, the interest in the land will revert back to the original grantor, or, if she or he has specified, to a third party known as the remainderperson. In this way, both the grantee and grantor, or the grantee and the remainderperson have a present interest in the same piece of land." See Halsbury's Laws of Canada (online), *Real Property*, "Estates in Land: Types of Estates: Life Estates: Nature of Estate" (I.2.(4)(a)) at HRP-19.

by the Court under s. 23(1). The life tenant need not provide a conveyance or release to the purchaser in order for this to occur.

In such cases, however, the Court also has the discretion, under s. 23(3) of the Act, to compensate the life tenant for the reasonable satisfaction of the life estate. Section 23(3) provides two options for such compensation:

> **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 [emphasis added].

In any event of sale under the Act, whether the sale involves a life estate or not, s. 26 of the Act provides the Court with the discretion to allow any of the parties interested in the subject land to bid on the land, on whatever terms the Court deems to be reasonable.

2. The Queen's Bench Rules, Rule 66

Rule 66 of the QB Rules outlines a select few procedural matters underlying partition and sale proceedings:

> **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.

3. Partition and Sale Legislation across Canada

While all of the provinces and the three territories of Canada have partition and sale court rules,[36] not all have partition and sale-related statutory legislation like Manitoba. 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-related statutory legislation in the SK Report in 2001, the general law governing partition and sale in Saskatchewan continues to be contained in the English statutes received as part of the law of that province. According to the SK Report, these statutes, which are the same English statutes from which Manitoba's partition and sale legislation emerged (the statutes of 1539, 1540, and 1868), "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."[37] 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.[38] Presumably, the same is true for Yukon. Although, based on recent case law addressing an application for the sale of land[39], it appears that this territory may also rely on s. 34 of the *Judicature Act*[40] and Court Rule 46[41] for sale proceedings. Section 34 of the *Judicature Act* states:

> **34** When in any cause or matter relating to real estate or any interest therein it appears necessary or expedient that the real estate or interest or any part thereof should be sold, the Court may order it to be sold and any party bound by the order and in possession of the estate or interest, or in receipt of the rents or profits thereof, shall deliver up the possession or receipt to the purchaser or any other person thereby directed.

Like Yukon, 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"). In *Pavlakidis v. Pavlakidis*, [2020] Q.J. No. 12567, the Quebec Superior Court explained that the rules of partition of undivided property are contained in these particular articles of the CCQ, "because the provisions relating to the partition of the property of successions apply to the partition of undivided property." These articles state:

> **838.** If all the heirs agree, partition is made in accordance with the proposal appended to the final account of the liquidator or is made as they see best.

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[36] See Appendix C.
[37] SK Report, *supra* note 23 at 3.
[38] 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.
[39] *Jones v Duval*, 2018 YKSC 33 at para 1.
[40] RSY 2002, c 128.
[41] Y, *Rules of Court.*

> If the heirs disagree, partition may not take place except under the conditions set out in Chapter II and in the forms required by the Code of Civil Procedure
> […]
> **1037.** Indivision [(co-ownership)] ends by the partition or alienation of the property.
> In the case of partition, the provisions relating to the partition of successions apply, adapted as required.
>
> However, the act of partition which terminates indivision, other than indivision by succession, is an act of attribution of the right of ownership.

As alluded to in Article 838, partition or sale of "undivided property" in Quebec must also conform to article 476 of the Code of Civil Procedure, which is reproduced in Appendix C of this Paper.

Like Saskatchewan and the territories, the 1539 and 1540 Acts of the English legislature may have been 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.[42] Despite this, New Brunswick does not have any local statutory enactments like Manitoba's Act, governing the law of partition and sale in the province. Recent New Brunswick cases, *McQuaid v Underbill*[43] and *McKellar v Buxton*[44] indicate that New Brunswick courts rely on their Court Rule 67 for their partition and sale jurisdiction. This Rule outlines how partition or sale proceedings are commenced[45], the powers of the Court in such proceedings[46], the treatment of sale proceeds[47], the effect of an order of partition or sale[48], and costs[49].

The remaining provinces, British Columbia, Alberta, Ontario, Nova Scotia, Prince Edward Island and Newfoundland and Labrador, each have legislation similar to *The Law of Property Act* of Manitoba, governing partition and sale.[50] Like Manitoba's Act, the legislation in these other provinces outline matters such as who may be compelled to make partition or sale, who may bring an action for partition or sale, when proceedings may be commenced, the treatment of parties under disability, missing or deceased interested persons, and parties or interested persons entitled to a life estate, the Court's powers regarding sales, etc. However, as will be demonstrated in the following Chapter, these Acts and their supporting rules of court contain certain nuances and additional provisions which help to guide parties and interested persons through the complicated partition and sale processes of the respective provinces. Many of these provisions are not found in

[42] 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.
[43] 2014 NBQB 87 at paras 58-59.
[44] 2020 NBQB 9 at para 1.
[45] NB, *Rules of Court*, r 67.01
[46] *Ibid*, r 67.02.
[47] *Ibid*, r 67.04.
[48] *Ibid*, r 67.05.
[49] *Ibid*, r 67.06.
[50] See Appendix B.

Manitoba's Act or Rules, 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.

4. Law Reform Efforts in Saskatchewan, British Columbia and Alberta

The continued reliance of Canadian provinces on 16th-19th century English partition and sale law has sparked law reform efforts in Saskatchewan, British Columbia and Alberta. As briefly mentioned above, the Saskatchewan Law Reform Commission, in the SK Report in 2001, recommended the enactment of partition and sale-related legislation in that province so that the general law governing partition and sale would no longer be contained in the English statutes received as part of the law in 1870. Despite this Report, no such legislation has been enacted in Saskatchewan.

For similar reasons, the Institute of Law Research and Reform of Alberta and the British Columbia Law Institute, in their respective reports, made comparable recommendations. The AB Report, written in March 1977, explains that at that time, the law governing partition and sale in Alberta was contained in the same three English statutes governing the law in Saskatchewan, which, it notes, were no longer even in force in England. It explains that the law was unsatisfactory because it was inconvenient to have to continue to refer to English statutes, and because its form and content could be improved in different respects. Accordingly, it recommended that the Legislature enact a statute providing for the termination of the co-ownership of Land in Alberta, and that it conform to a number of recommendations it provided with respect to form and content, which are referenced in Chapter 3 of this Paper. As a result of this Report, Alberta enacted the *Law of Property Act*[51] in 1980, which contains an entire Part dedicated to partition and sale. By virtue of s. 33 of this Act, the English Statutes of 1539, 1540, and 1868 no longer apply in Alberta.

Similarly, at the time that the BC Report was written, in March 2012, the remedies of partition and sale were still governed in part by pre-1868 English legislation. While other parts were then governed by revised local legislation known as the *Partition of Property Act*[52], many aspects of this revised legislation were still "not understandable without reference to much earlier legislation and common law."[53] Accordingly, like the SK Report and AB Report, the BC Report recommended replacement of the *Partition of Property Act* and the older statutes with "modern legislation that would remove the need to examine the pre-1868 state of the law."[54] It also made other recommendations to improve the overall effectiveness of the Act, which are referenced in Chapter 3 of this Paper. Like Saskatchewan, British Columbia has not implemented any of the recommendations contained in this partition or sale-related Report.

In the following Chapter, the Commission will analyze sections 18-26 of *The Law of Property Act* and Rule 66 of the QB Rules and compare and contrast them with both analogous and supplementary legislative provisions and rules from other Canadian jurisdictions, as well as with

[51] RSA 1980, c L-8.
[52] RSBC 1996, c 347 [BC *PPA*].
[53] BC Report, *supra* note 24 at 27.
[54] *Ibid* at Introductory Note.

legislative provisions proposed by the abovementioned law reform bodies. Looking at the statutory, judicial, and scholarly treatment of these and other comparable statutory provisions and rules around Canada, the Commission seeks to determine whether Manitoba's legislation could benefit from reform.

CHAPTER 3: REFORM AND IMPROVEMENT?

Manitoba has relatively modern partition and sale legislation which no longer relies on the English laws of the 16th and 19th centuries. However, certain aspects of *The Law of Property Act* and the QB Rules might be out of touch with the current realities of the province, and with statutory developments and trends in other Canadian provinces, which make for more detailed, simplified and modern partition and sale schemes. In this Chapter, the Commission explores these aspects of *The Law of Property Act* and the developments and trends in partition and sale regimes of other Canadian provinces to determine whether and how Manitoba's Act and QB Rules could be reformed. In particular, the Commission contemplates whether further specification, elaboration, modernization or simplification of the Act or Rules might result in a legal regime that can more effectively and appropriately guide Manitobans through the partition and sale process in the 21st century.

1. Specification

Currently, there are a number of provisions within ss. 18-26 of *The Law of Property Act* which, by virtue of their broad language or even punctuation, leave room for multiple interpretations and ensuing confusion in the realm of partition and sale. There are also several areas of the law surrounding 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 partition or sale proceedings, who may be compelled to partition or sell their land, how partition or sale orders may affect parties' interests in subject land, and how partition and sale proceedings operate under certain specific circumstances. In this section, the Commission examines the relevant provisions (or lack thereof) and comparable provisions in other Canadian jurisdictions, with an eye to determining whether Manitoba land owners might benefit from the addition of more specific language and details in our Act.

a. Should The Law of Property Act be amended to more clearly specify who has standing to bring an action for partition or sale under the Act?

Historically, only co-parceners, persons who, by virtue of descent, had become co-owners of land[55], had standing to sue for partition, until the 1539 and 1540 English statutes extended the opportunity 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 also able to seek the remedy of sale. Subsequent judicial decisions which interpreted the legislation extended the availability of the remedies to anyone with concurrent interests in land,[56] entitling them to

[55] Barron's, *supra* note 31 at sub verbo "coparceners".

[56] For example, a profit à prendre, examples of which being mineral, sand, and gravel extraction agreements and timber harvesting licences, which the AB Report, *supra* note 1 at 22-23 and 24-25, the BC Report, *supra* note 24 at 19, and the SK Report, *supra* note 23 at 7 and 11, endorse. Co-owned fee simple, life, and leasehold estates are also concurrent estates, as are co-owned remainder and reversionary fee simple estates. A life estate coupled with a

possession or an immediate right to possession of the subject land.[57] Apparently, these combined stipulations of concurrent interests/estates and possession or an immediate right to possession, denied the remedies of partition and sale to co-owners 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.[58] This is the case given that co-owning landlords of 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 interest.

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

Currently, s. 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 is contrary to the stipulations above, which, in essence, made possession or a right to possession an essential condition for standing for any co-owners to apply for an order of partition or sale. As mentioned in the previous Chapter, 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 estates and an entitlement to immediate possession of the subject land in order to bring action for partition or sale in Manitoba, whereas all other persons interested in land in Manitoba need only to have a concurrent interest in the subject land. Accordingly, the remedies of partition and sale would be made available to co-owners who had traditionally been denied standing, like, for instance, co-

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remainder or reversionary fee simple estate are not concurrent estates; they are consecutive (successive) estates. The estates comprising a fee simple estate subject to a leasehold estate might be described as concurrent estates.

[57] See e.g. *Evans v Bagshaw,* (1870), 5 LR 5 Ch App 340.

[58] 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 23 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 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.

owners of a remainder fee simple estate. This interpretation was adopted by the Court in *Chupryk v. Haykowski.*[59]

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 partition (and hence possibly sale) before the remainder has fallen into possession and without the consent of a prior life tenant."[60] In other words, it held that possession or a right to immediate possession was not an essential condition for standing to apply for an order of partition or sale. This decision is contrary to all the current English and Ontario jurisprudence[61] 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".[62]

Chupryk has been referenced in two Ontario cases, *Morris v. Howe*[63] and *Dwyer v. Dwyer*[64]. While the *Dwyer* reference is of no consequence, *Morris* is noteworthy in that it rejects the notions 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."[65] *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.[66] 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."[67]

In British Columbia, on the other hand, in the decision of *Aho v. Kelly*,[68] *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

[59] (1980) 3 Man R (2d) 216, [1980] MJ No 133 [*Chupryk*].
[60] *Morris v. Howe*, (1983) 38 OR (2d) 480 at 4 [*Morris*].
[61] Irvine, *supra* note 1 at 228-41 (Appendix E). Section 20(1) of *The Law of Property Act* of Manitoba and s 3(1) of the *Partition Act* of Ontario are identical.
[62] *Ibid* at 246.
[63] *Morris, supra* note 60.
[64] [1988] OJ No 1851.
[65] *Morris, supra* note 60 at 4.
[66] Irvine, *supra* note 1 at 244-45 (Appendix E).
[67] *Morris, supra* note 60 at 4.
[68] (1998) 57 BCLR (3d) 369 at para 35, [1998] BCJ No 1400.

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 on the 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 in *Siwak v. Siwak*[69], 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 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, 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[70] 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.[71]

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 section 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

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[69] *Siwak v Siwak*, 2016 MBQB 61.

[70] *Siwak v Siwak*, 2018 MBQB 9, aff'd *Siwak v Siwak*, 2019 MBCA 60.

[71] 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 60, 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" and in the instant case the "life interest runs concurrently" (see *S.B.* at paras 39-40).

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 partition and sale actions is not restricted to owners of concurrent interests/estates, 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[72] and Prince Edward Island,[73] and the proposed Act in the SK Report[74], 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 actions. Specifically, both the *Partition Act* of Nova Scotia and the *Real Property Act* of Prince Edward Island state that a partition or sale 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."[75] Similarly, the proposed Act in the SK Report restricts standing to co-owners, which are defined as:

> [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.[76]

In a similar vein, *The Law of Property Act* does not specify the impact of a legal versus equitable interest in land on an individual's ability to bring an action 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 the legal, but not the beneficial, owner of a co-owned estate; (2) a vendor or purchaser of a long-term agreement for sale, whose title of the subject land is subject to the completion of scheduled payments of the purchase price; and (3) a trustee or beneficiary of a trust. This issue was touched upon briefly by the Manitoba Court of Queen's Bench in *Anderson v. Von Stein*[77], a case involving an application by Ms. Anderson against Mr. Von Stein for the partition and 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 action 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 on 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."[78] 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

[72] *Partition Act*, RSNS 1989, c 333, s 6 [NS *PA*](Appendix B).
[73] *Real Property Act*, RSPEI 1998, c R-3, s. 20(2) [PEI *RPA*](Appendix B).
[74] SK Report, *supra* note 23 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a)).
[75] NS *PA*, *supra* note 72 at s 6, and PEI *RPA*, *supra* note 73 at s 20(2).
[76] SK Report, *supra* note 23 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a)) [emphasis added].
[77] [1994] MJ No 411, 49 ACWS (3d) 1273.
[78] *Ibid* at para 10.

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 action in respect of that property. Recommendations in both the SK Report and AB Report reflect these sentiments.

The Draft Saskatchewan *Partition and Sale Act*, articulated in the SK Report, specifies in ss. 2(1) and 2(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 legislation 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."[79]

Similarly, the AB Report deals specifically with the availability of the remedies of partition and sale to trustees and beneficiaries of a 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 that 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 "equitable estates not be made subject to the proposed Act and that co-owners holding in trust for common beneficiaries have no right to apply for termination of co-ownership as amongst themselves."[80]

<u>ISSUE FOR DISCUSSION 1</u>:

(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;**

[79] SK Report, *supra* note 23 at 20 (Draft Saskatchewan Partition and Sale Act, s 1(a)).
[80] 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).

- **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?

b. Should The Law of Property Act be amended to more clearly specify who may be compelled to partition or sell land under the Act?

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 Nova Scotia, Prince Edward Island and Newfoundland and Labrador. However, it does not specify, as the legislation does in Ontario and British Columbia, whether one can be compelled to partition or sell their land where the estate at issue is merely an equitable estate.

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*[81] 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].

<u>ISSUE FOR DISCUSSION 2</u>: Should s. 19(1) of *The Law of Property Act* be amended to include wording similar to the wording found in s. 2 of Ontario's and British Columbia's legislation, which specifically indicates that individuals may be compelled to partition or sell their land whether the estate at issue is legal or equitable or both?

[81] BC *PPA*, *supra* note 52.

c. Should The Law of Property Act be amended to more clearly specify what the effect of a partition or sale order is on a party's interest in the land?

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 order for partition or sale has on the parties' co-ownership status, which entitles them to seek the order in the first place. Specifically, it does not specify what happens to parties' joint-tenancy co-ownership upon an application or granting of an order for the partition or sale of the land shared in joint tenancy. This is a particularly important factor to be aware of, given the right of survivorship associated with and 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, on the other hand, their tenancy in common estate does not accrue by survivorship to the surviving tenant(s) in common; it becomes an asset of the estate. By common law, a joint tenant can deal with their estate 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). This question was 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 proceeding,] 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.[82]

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.

ISSUE FOR DISCUSSION 3: Should *The Law of Property Act* be amended to include a section like s. 19 of the *Law of Property Act* of Alberta, which specifically indicates the impact of an application for an order of partition or sale on a joint tenancy co-ownership?

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?

In its current form, *The Law of Property Act* touches upon a few unique circumstances under which partition or sale proceedings may be brought, including where a potential interested party is missing or possibly deceased, where a party or interested person is a minor, or a mentally

[82] AB Report, *supra* note 1 at 36.

incompetent person represented by a guardian, committee, or other legal representative, and where a party to the action has a life estate in the subject land. As is reflected in the legislative schemes of the other provinces, however, there are a number of other circumstances which can raise unique concerns and challenges in partition and sale proceedings that are not currently addressed in our Act. These include, for instance, where co-leaseholders, co-owners of a profit à prendre, or encumbrance holders are involved; where the parties have contracted out of the right to apply for partition and sale; where a disposition is pending in parallel proceedings under other legislation; or where an order will result in a subdivision of a parcel of land for which approval is required under different legislation. Many of these specific instances are dealt with in the legislation or proposed legislation of other Canadian jurisdictions. This leads the Commission to consider whether Manitoba's Act or court rules could be improved by meeting this greater level of specificity.

i. Where encumbrances are involved

An encumbrance was 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."[83] The Alberta *Law of Property Act* defines encumbrance in simpler terms, as "any interest in land other than a fee simple estate."[84] Unlike the legislative scheme in 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 actions for partition and sale involving co-owners with an interest in land other than a fee simple estate, such as co-leaseholders, co-owners of a profit à prendre, co-mortgagees, co-mortgagors, etc. 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.
>
> […]
>
> **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.

[83] *Ibid* at 23-24.
[84] AB *LPA*, *supra* note 80, s 14(b) (Appendix B).

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 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).[85] 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.

ISSUE FOR DISCUSSION 4: Should *The Law of Property Act* be amended to include sections like the sections in the legislation of Alberta, Nova Scotia and Prince Edward Island, described above, specifically governing partition and sale proceedings involving co-leaseholders, co-owners of a profit à prendre, and other co-owners with an interest in land other than a fee simple estate?

[85] AB Report, *supra* note 1 at 23.

Moreover, the AB Report and the resulting provisions of the Alberta *Law of Property Act* consider the positions 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 in such proceedings. 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.[86]

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

[86] *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.

Both the SK Report and the BC Report differ in terms of their treatment of encumbered land. In fact, the SK Report is devoid of any 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.[87] The SK Report does, however, endorse British Columbia's suggested approach for the treatment of encumbrances in partition and sale actions 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.[88] 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.[89]

<u>ISSUE FOR DISCUSSION 5</u>: Should *The Law of Property Act* be amended to include sections like ss. 23-24 of the *Law of Property Act* of Alberta, which specify how encumbered land is to be treated upon an order of partition or sale?

[87] SK Report, *supra* note 23 at 16.
[88] *Ibid*.
[89] *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*[90] 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,[91] 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.

ISSUE FOR DISCUSSION 6: Should *The Law of Property Act* 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 Paper, 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,[92] 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[93] and s. 10(1)(b. 2) and (5) of *The Family Maintenance Act* of Manitoba.[94] Specifically, s. 21 of the Alberta Act states:

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[90] 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).

[91] AB Report, *supra* note 1 at 17-78. The Saskatchewan Law Reform Commission agrees; see SK Report, *supra* note 23 at 21 (Draft Saskatchewan Partition and Sale Act, s. 2(4)).

[92] AB *LPA*, *supra* note 80, s 21 (Appendix B).

[93] RSM 1987, c M45.

[94] 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, not-withstanding 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 […]

(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

> 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.

Section 19(1) of Manitoba's *The Law of Property Act*, which will also be discussed in further detail later on in this Paper, vests the Court with a discretionary jurisdiction to grant orders of partition or sale. Accordingly, while it is not necessary to include in Manitoba's legislation a section comparable to s. 21 of the Alberta *Law of Property Act*, given that the Court already has the discretion to refuse an application, the Commission contemplates whether it might be helpful to include such a section as a reminder to the parties and the Court of those other Acts when the family residence is involved.

ISSUE FOR DISCUSSION 7: Should *The Law of Property Act* be amended to include a section referring to *The Family Property Act* and *The Family Maintenance Act,* expressly empowering the Court to stay an application pending the disposition of an application made pursuant to the relevant sections of those Acts?

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,* empowering the Court with a discretion to stay proceedings, is when a partition order will result in a subdivision of a parcel of land for which approval is necessary under Alberta's *Municipal Government Act*.[95] The comparable Manitoba legislation is *The Planning Act*[96], 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,[97] it is not absolutely necessary to include a section comparable to s. 26

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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.

[95] See AB *LPA*, *supra* note 80, s 26 (Appendix B), which refers to Part 17 of the Alberta *Municipal Government Act*.

[96] SM 2005, c 30, s 121(1)(c).

[97] See *Crawford v Durant,* (1998) 123 Man R (2d) 262, [1998] M.J. 27.

of the Alberta *Law of Property Act*. However, the Commission considers whether a comparable section might still be a useful addition to *The Law of Property Act*.

ISSUE FOR DISCUSSION 8: Should *The Law of Property Act* be amended to include a section referring to *The Planning Act*, s. 121(1), expressly empowering 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 QB Rules 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 wishing to bring partition or sale proceedings would benefit from further elaboration on these points in our Act.

a. Should The Law of Property Act or QB Rules be amended to elaborate further on court procedure in partition and sale matters?

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.*[98] These sections state:

Partition Act, Nova Scotia:

> **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

[98] See Appendix B.

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.

With these provisions in mind, the Commission considers whether *The Law of Property Act* of Manitoba or the QB Rules ought to elaborate further on procedure to provide more certainty to parties and to the Court and to facilitate a more efficient process.

ISSUE FOR DISCUSSION 9: Should *The Law of Property Act* or the QB Rules be amended to include sections like s. 9 of the *Partition Act* of Nova Scotia, or 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?

Another procedural aspect which receives little attention in both the QB Rules and *The Law of Property Act* compared to other provincial Acts and rules is the concept of serving notice of partition or sale proceedings on parties with an interest in the subject land. Other than Rule 66.01(2), which requires that proceedings for partition or sale by or on behalf of a minor be made on notice to the Public Guardian and Trustee, and Rule 66.01(3), which requires an applicant for partition or sale to serve a copy of the document by which the proceedings are commenced on every person with a registered interest in the land, the Act and QB Rules are silent with respect to notice requirements. Accordingly, neither the Act nor QB Rules outline matters surrounding service such as the powers of courts to dispense with or alter notice requirements in circumstances where service would be difficult or impossible.

This issue of notice to interested parties is addressed fulsomely in the legislation of British Columbia, Nova Scotia, and Prince Edward Island, which each outline the duties owed by applicants and the Court to interested parties in the commencement of applications for partition or sale, and the rights that those interested parties have with respect to participation in the proceedings. Specifically, these Acts state:

Partition of Property Act of British Columbia:

4 […]

(3) Persons served with notice […]

(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.

5 (1) If in a proceeding for partition it appears to the court that a [notice]… 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…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…

Partition Act of Nova Scotia:

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.

Real Property Act of Prince Edward Island:

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.

Again, considering these provisions, the Commission contemplates whether Manitobans undertaking partition or sale proceedings might benefit from elaboration in *The Law of Property Act* or QB Rules on service requirements, so that they are more fully aware of their obligations in commencing partition or sale proceedings.

ISSUE FOR DISCUSSION 10: Should *The Law of Property Act* or the QB Rules be amended to include additional notice provisions like ss. 4-5 of the *Partition Act* of British Columbia, ss. 10-13 of the *Partition Act* of Nova Scotia , and/or ss. 23-25 of the *Partition of Property Act* of Prince Edward Island?

b. Should *The Law of Property Act* or QB Rules be amended to elaborate further on sale proceedings, generally?

The legislation and court rules of other provinces elaborate quite extensively on the powers, duties, and overall role of courts in actions for the sale, as opposed to partition, of property.[99] 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."[100] 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.[101] The courts in both British Columbia and Prince Edward Island may not, however, grant an order for sale, where other parties interested in the

[99] See Appendix B and Appendix C.
[100] BC *PPA*, *supra* note 52, s 6, and PEI *RPA*, *supra* note 73, s 39(1)(b)(Appendix B).
[101] *Ibid* at BC *PPA*, s 7 and PEI *RPA*, s 39(1)(a).

property undertake to purchase the share of a party who is requesting a sale.[102] 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.[103]

Moreover, 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.[104] 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.[105] 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[106]; requirements for the distribution of sale proceeds in cases involving unequal divisions of the property[107], and requirements for persons having conduct of a sale to file reports on the sale with the court.[108]

Comparatively, *The Law of Property Act* and QB Rules 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.

The QB Rules provide:

> **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.

Outside of this one provision and one rule, *The Law of Property Act* contains a small handful of sections which govern orders for sale in specific circumstances, including where a homestead right or a life estate are at issue.

ISSUE FOR DISCUSSION 11: Should *The Law of Property Act* or the QB Rules be amended to elaborate further on orders for sale, as the other Canadian provinces do in their respective legislative schemes and court rules?

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[102] *Ibid* at BC *PPA*, s 8(2) and PEI *RPA*, s 39(1)(c).
[103] *Ibid* at BC *PPA*, s 8(3) and PEI *RPA*, s 39(1)(c).
[104] See Appendix B and Appendix C.
[105] See BC, *Supreme Court Civil Rules*, BC Reg 168/2009 and BC, *Supreme Court Family Rules*, BC Reg 169/2009 (Appendix C).
[106] See BC *PPA*, *supra* note 52, s 14 (Appendix B).
[107] See AB *LPA*, *supra* note 80, s 17 (Appendix B).
[108] See *Nova Scotia Civil Procedure Rules*, r 74.08 (Appendix C).

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 modern-day laws, 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 of societal shifts on their legislation. In this section, the Commission highlights these aspects of Manitoba's legislation as well statutory provisions of other Canadian provinces not present in our Act, to discern whether the Act ought to be updated to better reflect modern Manitoba.

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[109], "registered interests in land" include caveats among other things, it might be in order to delete "registered" from QBR 66.01(3).

<u>ISSUE FOR DISCUSSION 12</u>: Should the word "registered" 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.

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. With the passage of time and changing societal conditions, sale has now become the remedy typically sought by applicants over partition. This shift also occurred elsewhere in Canada, including in British Columbia, as reflected in s. 3 of British Columbia's *Partition of Property Act*, which states:

> **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.

<u>ISSUE FOR DISCUSSION 13</u>: Should *The Law of Property Act* or the QB Rules 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 proceedings?

[109] *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.

a. "Parties under Disability"

Another aspect of *The Law of Property Act* that may benefit from modernization are the provisions addressing "persons under disability," including ss. 20(1), 22(2) and 25. The term "disability" is defined in the QB Rules as a person or party who is a minor or who is mentally incompetent or incapable of managing his or her affairs, whether or not so declared by a court.[110] This definition is no doubt informed by Manitoba 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*")[111], *The Advocate for Children and Youth Act* ("*The ACYA"*)[112], *The Mental Health Act* ("*The MHA*")[113], *The Vulnerable Persons Living with a Mental Disability Act* ("*The VPA*")[114], and *The Powers of Attorney Act* ("*The POA*"),[115] among others. *The Law of Property Act* currently defines persons under disability to include "infants", "persons of unsound mind" and "mentally incompetent persons"[116] who may be assisted by a guardian, committee, administrator, or substitute decision maker for property appointed under *The VPA.* In this section, the Commission contemplates whether *The Law of Property Act* reflects current understandings of those individuals typically known to be "under disability" in Manitoba, and whether it accurately represents the relevant laws which governs the rights of these individuals. Specifically, the Commission focuses on the following:

i. "Infants"

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,"[117] and *The ACYA* defines child as "a person under the age of 18 years […] includ[ing] a youth."[118] Neither Act uses the word "infant" at any point to describe this group of individuals.

<u>ISSUE FOR DISCUSSION 14</u>: Should *The Law of Property Act* be amended to substitute the words "minor" or "child" for "infant"?

ii. "Persons of Unsound Mind or Mentally Incompetent Persons"

The MHA, The VPA, and *The POA* each use the terms "incapability", "incapacity" and "incompetence" interchangeably, to refer to an individual's inability, due to mental disability, disorder, or infirmity, to manage their affairs and to meet the ordinary demands of life.[119] Specifically, an "incapable person" is defined in *The MHA* as a person for whom a committee has

[110] MB, *Court of Queen's Bench Rules*, Man Reg 553/88, r 1.03.
[111] SM 1985-86, c 8 [*CFSA*].
[112] SM 2017, c 8 [*ACYA*].
[113] SM 1998, c 36 [*MHA*].
[114] SM 1993, c 29 [*VPA*].
[115] SM 1996, c. 62 [*POA*].
[116] MB *LPA, supra* note 2, s. 22(2).
[117] *CFSA, supra* note 111, s 1(1).
[118] *ACYA, supra* note 112, s 1.
[119] *MHA, supra*, note 113, s 1; *VPA, supra* note 114, s 1(1); and *POA, supra* note 115, s. 1(1).

been appointed under section 41, 61 or 75 of that Act, essentially being when a physician or the Court has deemed them to be incapable of managing their own property or personal care and in need of decisions being made on their behalf in those respects.[120] When a committee is appointed under *The MHA* as a committee of property, the committee takes into their custody or control all of the incapable person's property that is subject to the committeeship order and may "manage, handle, administer and otherwise deal with the property in the same manner as the incapable person could if he or she were capable."[121]

Mental "incapability" is given similar meaning in *The VPA*, which states that the term can be used interchangeably with the term "incapacity."[122] As under *The MHA*, mentally incapable people under *The VPA* are those who are either incapable of personal care or incapable of managing their property, meaning they are unable to understand information concerning their health care or other needs, or information that is relevant to making decisions in the management of their property, respectively.[123] Mentally incapable people under *The VPA* are also unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision regarding their personal care or property.[124] Upon a finding of mental incapability under *The VPA*, a substitute decision maker for personal care or for property will be appointed to make decisions on the incapable person's behalf in respect of their personal care or property. Decisions regarding property may include the decision to purchase, sell, dispose of, mortgage, encumber or transfer real property, among others.[125]

Under *The POA*, an individual ("donor") may create a power of attorney, authorizing another individual (the attorney) to act on their behalf in several regards. This grant of authority may and often does provide the attorney with rights and powers in respect of property owned by the donor. Under *The POA*, mental incompetence is defined as the inability of a person to manage his or her affairs by reason of mental infirmity arising from age or a disease, addiction or other cause.[126] Section 10 of *The POA* enables individuals to create enduring powers of attorney under which the authority given by the donor to an attorney will not terminate if the donor should become mentally incompetent.[127]

Neither *The MHA*, *The VPA*, nor *The POA* use the term "person of unsound mind" to describe mentally incapable or incompetent persons, unlike *The Law of Property Act.*

ISSUE FOR DISCUSSION 15: Should *The Law of Property Act* be amended to eliminate the term "person of unsound mind" from its treatment of persons under disability? If so, what should this term be replaced with?

[120] *MHA*, *supra* note 113, s 1.
[121] *Ibid*, s 78.
[122] *VPA*, *supra* note 114, s 1(1).
[123] *Ibid*, ss. 46, 81.
[124] *Ibid.*
[125] *Ibid*, s 92(2)(b).
[126] *POA*, *supra* note 115, s 1(1).
[127] *Ibid*, s 10.

iii. Bankrupt Co-Owners

Given that all of a bankrupt debtor's assets, including real property, vest in a trustee in bankruptcy upon the commencement of bankruptcy proceedings, bankrupt co-owners, like minors, and certain mentally incompetent persons under *The VPA* or *The MHA,* are technically incapable of managing their own property. As is the case for minors, and mentally incompetent persons deemed under *The VPA* or *The MHA* to be incapable of managing their own property, the property of bankrupt co-owners must be managed by a third party who acquires certain responsibilities in respect of that property. For trustees in bankruptcy, these responsibilities include the responsibility to liquidate assets in the bankrupt estate and distribute proceeds of the estate to creditors, which might involve proceedings under *The Law of Property Act* for partition and sale.

ISSUE FOR DISCUSSION 16: Should *The Law of Property Act* be amended to include bankrupt co-owners as a party under disability?

iv. Representatives of Parties under Disability

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

> **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].

The wording of this section is peculiar in that it suggests that an infant or the guardian of an infant's estate is a special class of person interested in land in Manitoba, calling into question a minor co-owner's standing to commence an application for partition of sale. 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?

ISSUE FOR DISCUSSION 17:

(a) Should *The Law of Property Act* continue to provide in a discrete section for the guardian of a minor or child who is a co-owner to have standing to apply for an order of partition or sale?

(b) If yes, should such a section also provide standing to a substitute decision maker pursuant to *The Vulnerable Persons Living with a Mental Disability Act,* a committee appointed pursuant to *The Mental Health Act,* or an attorney appointed in an enduring power of attorney on behalf of a mentally incompetent co-owner, and to a trustee in bankruptcy[128] on behalf of a bankrupt co-owner?

[128] For partition and sale cases involving trustees in bankruptcy, see *D.D.M. (Trustee of) S.A.J.M.*, 2003 MBQB 48, *McKenzie (Trustee of) v. McKenzie*, 2005 MBCA 35, and *Moss Estate v. Moss*, 2011 MBQB 123.

Section 22(2) of *The Law of Property Act* currently provides:

> 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*** [emphasis added].

The Commission contemplates whether the wording in this section accurately represents the various representatives available to parties under disability in Manitoba today.

ISSUE FOR DISCUSSION 18: If your answer to Issue No. 17(b) was yes, should s. 22(2) of *The Law of Property Act* be amended to reflect the various types of legal representatives available to mentally incompetent persons in Manitoba today, and the representative for a bankrupt co-owner?

For example, should s. 22(2) state:

22(2) Where a party is an infant, a person of unsound mind or a mentally incompetent person, or a bankrupt co-owner, the court may order that the conveyance, transfer or other document be executed by the minor party's guardian, by a committee appointed pursuant to *The Mental Health Act*, a substitute decision maker appointed pursuant to *The Vulnerable Persons Living with a Mental Disability Act*, or an attorney appointed in an enduring power of attorney for a mentally incompetent party, and by a bankrupt party's trustee in bankruptcy?

b. 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 parties in partition and sale proceedings 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, that Act was repealed and replaced with *The Presumption of Death and Declaration of Absence Act* ("the *PDDAA"*).[129] This amended Act provides in s. 5(1) that the Court is to 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* still sets a prerequisite minimum period of absence for an absent interested party, and it provides 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

[129] SM 2019, c. 20 [*PDDAA*].

> 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.

<u>ISSUE FOR DISCUSSION 19</u>: Given s. 5(1) of *The Presumption of Death and Declaration of Absence Act,*

(a) Should s. 21(1) of *The Law of Property Act* be amended to delete the prescribed waiting period of three years?

(b) Should s. 21(1) of *The Law of Property Act* be re-worded to incorporate the appointment of a committee, as opposed to a guardian, pursuant to *The Presumption of Death and Declaration of Absence Act*?

c. 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.[130] In fact, whether they are or ever were still 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. However, co-parceners were not included in the transfer of *The Partition Act* into *The Law of Property Act* in 1939, which remains largely intact today. 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," [131] 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 and application 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.[132]

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[130] See footnote 1.

[131] 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.

[132] *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.

ISSUE FOR DISCUSSION 20: Should *The Law of Property Act* 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.

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.[133] 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].

Like Manitoba's Act, 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 orders of partition or sale.

[133] See Irvine, *supra* note 1 at 225-227.

The Alberta Institute of Law Research and Reform, in the AB Report[134], concluded that a co-owner should be entitled as of right to have their co-ownership terminated and to have their co-owned land partitioned or sold. 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…

In accordance with the recommendation of the AB Report, Alberta has retained the word "shall" in s. 15 of its *Law of Property Act*, establishing an applicant's statutory entitlement to partition or sale, which is 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

[134] AB Report, *supra* note 1 at 7. The SK Report agrees; see SK Report, *supra* note 23 at 4-5, 10.

(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.[135]

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. However, there 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."[136] 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."[137] These and other common-law principles in Manitoba pertaining to the judicial discretion to grant or refuse partition or sale[138] 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 much more complicated, roundabout way.

The treatment of s. 19(1) of Manitoba's legislation (i.e. the statutory grant of judicial discretion and rebuttable common law presumption of entitlement) leaves room for multiple competing interpretations of a party's entitlement to partition or sale that does not exist in Alberta in light of its simplified statutory grant of entitlement.

ISSUE FOR DISCUSSION 21: Should the Court continue to have discretionary jurisdiction to grant or dismiss an application for partition or sale under s. 19(1) of *The Law of Property Act*, or should that section be amended to provide statutory entitlement to applicants for an order of partition or sale, subject to specified exceptions as under the *Law of Property Act* of Alberta?

[135] AB *LPA*, *supra* note 80 (Appendix B).
[136] See Appendix D.
[137] *Ibid.*
[138] *Ibid.*

b. Discrete Partition and Sale Legislation

Until 1931, the statutory law governing partition and sale in Manitoba was contained in discrete legislation pertaining strictly to partition and sale. From that point on, partition and sale would be addressed in broader legislation dealing with the law of property, generally. Currently, British Columbia, Ontario and Nova Scotia's partition and sale laws are governed by the type of discreet legislation which once existed in Manitoba, while the partition and sale laws of Alberta, Prince Edward Island and Newfoundland and Labrador are contained in broader property-related legislation like *The Law of Property Act* of Manitoba. The Commission contemplates whether standalone legislation that focuses only on matters pertaining to partition and sale could create a clearer and simpler partition and sale regime in Manitoba that is more easily accessed and understood by Manitobans.

ISSUE FOR DISCUSSION 22: Should the legislation governing partition and sale continue in *The Law of Property Act* or should it be re-enacted in a discrete *Partition and Sale Act*?

CHAPTER 4: SUMMARY OF ISSUES FOR DISCUSSION

The following list provides a summary of all issues for discussion contained in this Consultation Paper.

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? (p. 18&19)

ISSUE FOR DISCUSSION 2: Should s. 19(1) of *The Law of Property Act* be amended to include wording similar to the wording found in s. 2 of Ontario's and British Columbia's legislation, which specifically indicates that individuals may be compelled to partition or sell their land whether the estate at issue is legal or equitable or both? (p. 19)

ISSUE FOR DISCUSSION 3: Should *The Law of Property Act* be amended to include a section like s. 19 of the *Law of Property Act* of Alberta, which specifically indicates the impact of an application for an order of partition or sale on a joint tenancy co-ownership? (p. 20)

ISSUE FOR DISCUSSION 4: Should *The Law of Property Act* be amended to include sections like the sections in the legislation of Alberta, Nova Scotia and Prince Edward Island, described above, specifically governing partition and sale proceedings involving co-leaseholders, co-owners of a profit à prendre, and other co-owners with an interest in land other than a fee simple estate? (p. 22)

ISSUE FOR DISCUSSION 5: Should *The Law of Property Act* be amended to include sections like ss. 23-24 of the *Law of Property Act* of Alberta, which specify how encumbered land is to be treated upon an order of partition or sale? (p. 24)

ISSUE FOR DISCUSSION 6: Should *The Law of Property Act* 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. 25)

ISSUE FOR DISCUSSION 7: Should *The Law of Property Act* be amended to include a section referring to *The Family Property Act* and *The Family Maintenance Act,* expressly empowering the Court to stay an application pending the disposition of an application made pursuant to the relevant sections of those Acts? (p. 26)

ISSUE FOR DISCUSSION 8: Should *The Law of Property Act* be amended to include a section referring to *The Planning Act*, s. 121(1), expressly empowering 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. 26)

ISSUE FOR DISCUSSION 9: Should *The Law of Property Act* or the QB Rules be amended to include sections like s. 9 of the *Partition Act* of Nova Scotia, or 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. 28)

ISSUE FOR DISCUSSION 10: Should *The Law of Property Act* or the QB Rules be amended to include additional notice provisions like ss. 4-5 of the *Partition Act* of British Columbia, ss. 10-13 of the *Partition Act* of Nova Scotia , and/or ss. 23-25 of the *Partition of Property Act* of Prince Edward Island? (p. 30)

ISSUE FOR DISCUSSION 11: Should *The Law of Property Act* or the QB Rules be amended to elaborate further on orders for sale, as the other Canadian provinces do in their respective legislative schemes and court rules? (p. 31)

ISSUE FOR DISCUSSION 12: Should the word "registered" 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. 32)

ISSUE FOR DISCUSSION 13: Should *The Law of Property Act* or the QB Rules 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 proceedings? (p. 32)

ISSUE FOR DISCUSSION 14: Should *The Law of Property Act* be amended to substitute the words "minor" or "child" for "infant"? (p. 33)

ISSUE FOR DISCUSSION 15: Should *The Law of Property Act* be amended to eliminate the term "person of unsound mind" from its treatment of persons under disability? If so, what should this term be replaced with? (p. 34)

ISSUE FOR DISCUSSION 16: Should *The Law of Property Act* be amended to include bankrupt co-owners as a party under disability? (p. 35)

ISSUE FOR DISCUSSION 17:

(a) Should *The Law of Property Act* continue to provide in a discrete section for the guardian of a minor or child who is a co-owner to have standing to apply for an order of partition or sale?

(b) If yes, should such a section also provide standing to a substitute decision maker pursuant to *The Vulnerable Persons Living with a Mental Disability Act,* a committee appointed pursuant to *The Mental Health Act,* or an attorney appointed in an enduring power of attorney on behalf of a mentally incompetent co-owner, and to a trustee in bankruptcy on behalf of a bankrupt co-owner? (p. 36)

ISSUE FOR DISCUSSION 18: If your answer to Issue No. 17(b) was yes, should s. 22(2) of *The Law of Property Act* be amended to reflect the various types of legal representatives available to mentally incompetent persons in Manitoba today, and the representative for a bankrupt co-owner? For example, should s. 22(2) state:

> 22(2) Where a party is an infant, a person of unsound mind or a mentally incompetent person, or a bankrupt co-owner, the court may order that the conveyance, transfer or other document be executed by <u>the minor party's guardian</u>, by <u>a committee appointed pursuant to *The Mental Health Act*, a substitute decision maker appointed pursuant to *The Vulnerable Persons Living with a Mental Disability Act*</u>, or <u>an attorney appointed in an enduring power of attorney</u> for a mentally incompetent party, and by a bankrupt party's trustee in bankruptcy? (p. 36)

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

(a) Should s. 21(1) of *The Law of Property Act* be amended to delete the prescribed waiting period of three years?

(b) Should s. 21(1) of *The Law of Property Act* be re-worded to incorporate the appointment of a committee, as opposed to a guardian, pursuant to *The Presumption of Death and Declaration of Absence Act*? (p. 37)

ISSUE FOR DISCUSSION 20: Should *The Law of Property Act* be amended to abolish co-parcenary and tenancy by the entireties co-ownerships? (p. 38)

ISSUE FOR DISCUSSON 21: Should the Court continue to have discretionary jurisdiction to grant or dismiss an application for partition or sale under s. 19(1) of *The Law of Property Act*, or should that section be amended to provide statutory entitlement to applicants for an order of partition or sale, subject to specified exceptions as under the *Law of Property Act* of Alberta? (p. 40)

ISSUE FOR DISCUSSION 22: Should the legislation governing partition and sale continue in *The Law of Property Act* or should it be re-enacted in a discrete *Partition and Sale Act*? (p. 41)

CAP. VI.

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

[*Assented to 2nd February*, 1878.]

Preamble.

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

Interpretation.

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.

Partition of lands how to be made.

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.

Parties entitled to estate may be compelled to make partition.

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.

Proceedings to be instituted in Court of Q. B.

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.

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

Persons interested may file a bill of complaint.

son, or the guardian of any infant or minor interested or entitled as aforesaid to or in the said lands or any part or parts thereof, can and may file a bill of complaint in the said court, setting forth the particulars as mentioned in the seventh section of this Act, and praying that a partition or sale of such lands or part or parts thereof may be made under the direction of the court; and the court may upon the hearing of the bill of complaint and answer thereto, if any, as in ordinary cases in the said court, make such decree or order for the partition or sale, if a sale shall appear more advantageous, of the said lands subject to such conditions, and on such terms, as shall appear proper and expedient, in the interest of all parties interested, with such direction as to inquiries, if any shall appear necessary, as the court shall see proper to make; Provided always that no steps shall be taken under this Act in respect of any lands or any estate or interest therein, vested in, descended, or belonging to, any person from any person dying intestate, until six months of his decease.

Proviso.

How to be entitled.

VI. All proceedings under this Act may be entitled as follows:

MANITOBA. } IN THE QUEEN'S BENCH.
In Equity. }

The day of in the year of Our Lord 18

In the matter of Partition.

Between A. B. Plaintiff.

and

C. D. Defendant.

In all other respects, except as provided in this Act, the bill is to be framed as an ordinary bill of complaint according to the general orders of the court.

Parties filing a bill of complaint to fully describe the lands.

VII. Every person, having at the time of filing a bill of complaint, any interest or estate as aforesaid in the said lands shall or may be made a party to such bill, either as plaintiff or defendant; and the bill of complaint shall particularly and accurately describe the said lands to be partitioned or sold; and shall also set forth: 1.

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

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.

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

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.

Every guardian so appointed to execute a bond,

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

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 excepted 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.

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.

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

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 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. Costs to be paid out of estate.

APPENDIX B: LEGISLATION, OTHER CANADIAN PROVINCES

TABLE OF CONTENTS

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.

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.

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.

APPENDIX C: RULES OF COURT RESPECTING PARTITION AND SALE ACROSS CANADA

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Province	Rules of Court	Section/ Rule	Content
British Columbia	*Supreme Court Civil Rules*	R 13-5	**Court may order sale** (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. **Sale in debenture holder's proceeding** (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. **Conduct of sale** (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. **Directions for sale** (4) The court may give directions for the purpose of effecting a sale, including directions (a) appointing the person who is to have conduct of the sale, (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, (c) fixing a reserve or minimum price, (d) defining the rights of a person to bid, make offers or meet bids, (e) requiring payment of the purchase price into court or to trustees or to other persons, (f) settling the particulars or conditions of sale, (g) obtaining evidence of the value of the property, (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, (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 (j) authorizing a person to enter on any land or building.

Province	Rules of Court	Section/ Rule	Content
			Application for directions (5) A person having conduct of a sale may apply to the court for further directions. **Certificate of sale** (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. **Vesting order** (7) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.
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	Supreme Court Family Rules	R 15-8	**Court may order sale** (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. **Conduct of sale** (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. **Directions for sale** (3) The court may give directions for the purpose of effecting a sale, including directions (a) appointing the person who is to have conduct of the sale, (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, (c) fixing a reserve or minimum price, (d) defining the rights of a person to bid, make offers or meet bids, (e) requiring payment of the purchase price into court or to trustees or to other persons, (f) settling the particulars or conditions of sale, (g) obtaining evidence of the value of the property, (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,

Province	Rules of Court	Section/ Rule	Content
			(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 (j) authorizing a person to enter on any land or building. **Application for directions** (4) A person having conduct of a sale may apply to the court for further directions. **Certificate of sale** (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. **Vesting order** (6) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.
Alberta	*Alberta Rules of Court*	S 9.37-9.39	**Application of this Division** **9.37** This Division (a) is subject to the Civil Enforcement Act, and (b) does not apply to foreclosure actions. **Sale and disposition of land** **9.38(1)** 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. **(2)** If the Court is satisfied that all interested parties are before the Court or bound by the order, the Court may order (a) the sale, mortgage, partition or exchange of land, and (b) the procedure to be carried out to give effect to the order. **(3)** Any money produced as a result of carrying out an order under this rule must (a) be paid into Court, (b) be paid to persons specified in the order, or (c) otherwise be dealt with in accordance with the order.

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			(4) If a judgment or order states that land is to be sold, (a) the sale must be approved by the Court before the sale is completed, and (b) the persons necessary to complete the sale must join the sale and conveyance in accordance with the Court's order. **Terms, conditions and limitations on orders** **9.39** In an order under this Division the Court may include one or more of the following terms, conditions or directions: (a) that a person pay or account for rent or profit, or both, to another person; (b) the manner in which the transaction is to be carried out; (c) the person or persons who are to carry out or facilitate compliance with the order; (d) that any proceeds of the transaction be paid into Court or otherwise paid to or disposed of by the Court.
Saskatchewan	*The Queen's Bench Rules*	S 10-46-10-50	**Court may order sale of real property** **10-46(1)** 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. (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: (a) the purchaser; or (b) any other person named in the order. **Manner of carrying out sale, mortgage, etc., when ordered by Court** **10-47**(1) 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: (a) by laying proposals before the judge in chambers for his or her sanction; or (b) subject to subrule (3), by proceedings out of Court. (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.

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			(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: (a) are before the Court; or (b) are bound by the order for sale, mortgage, partition or exchange. (4) Every order authorizing proceedings out of Court must contain: (a) a declaration that the chambers judge is satisfied as required by subrule (3); and (b) a statement of the evidence on which the declaration is made. (5) For the purposes of this rule: (a) an order nisi for sale of land subject to a non-matured mortgage is to be in Form 10-47A; (b) an order nisi for sale of land subject to a matured or demand mortgage is to be in Form 10-47B; (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; (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 (e) an order confirming sale is to be in Form 10-47E. (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. **Order for sale in debenture holders' action** **10-48**(1) This rule applies to debenture holders' actions if: (a) the debenture holders are entitled to a charge by virtue of the debentures, a trust deed or otherwise; (b) the plaintiff is suing on behalf of himself or herself and other debenture holders; and (c) the judge is of the opinion that there must eventually be a sale.

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			(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. **Sale requires approval of Court** **10-49**(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. (2) For the purposes of this rule, the best purchaser is the person so approved by the Court. (3) All proper parties shall join in the sale and conveyance in accordance with any direction of the Court. **Special directions** **10-50** The Court may give any special directions that the Court considers just respecting: (a) the carrying out or execution of a judgment or order pursuant to this Division; or (b) the service of a judgment or order on any persons who are not parties.
Ontario	*Rules of Civil Procedure*	R 66	**WHERE AVAILABLE** **66.01** (1) A person who is entitled to compel partition of land may commence an action or application under the *Partition Act*. O. Reg. 770/92, s. 16. (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. **FORM OF JUDGMENT** **66.02** A judgment for partition or sale shall be in Form 66A. R.R.O. 1990, Reg. 194, r. 66.02. **PROCEEDS OF SALE** **66.03** 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.
Quebec	*Code of Civil Procedure*	476-477	**476.** 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.

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			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. 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. **477.** 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.
New Brunswick	*Rules of Court of New Brunswick*	R 67	**67.01 How Commenced** A proceeding to compel the partition or sale of land or an estate or interest therein may be commenced by Notice of Application. **67.02 Powers of Court** In a proceeding for partition or sale, the court may (a) decide all questions concerning the title to the lands sought to be partitioned, (b) order that the lands or any portion thereof be partitioned, (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, (d) subject to Rule 67.06, direct payment of costs from the proceeds of the sale of lands, or as may be appropriate, (e) direct a reference upon such terms, including directions to sell, as may be necessary. **67.03 Conduct of Reference** Where the court directs a reference under Rule 67.02, the referee shall conduct the reference in accordance with Rule 56.

Province	Rules of Court	Section/ Rule	Content
			67.04 Proceeds of Sale All money realized from a sale of the land or any estate or interest therein shall forthwith be paid into court, unless ordered otherwise. **67.05 Effect of Order for Partition or Sale** (1) When an Order for Partition or Sale is made and (a) no appeal is taken within the time prescribed for appeal, or (b) all appeals and applications for leave to appeal have been i. dismissed, ii. abandoned, or iii. refused, the clerk shall certify on a copy of the Order for Partition or Sale, (c) that it was made and filed, (d) that it is final, and (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. (2) When the clerk has placed his certificate on a copy of the Order for Partition or Sale under paragraph (1), he shall (a) retain and file it, and (b) provide a copy to the applicant and, on request, to any other person. (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. (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. **67.06 Costs** (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.

Province	Rules of Court	Section/ Rule	Content
			(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. (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 (a) order the party to pay i. all of the costs of the proceeding, or ii. a larger proportion of the costs than he would have paid under paragraph (1), and (b) deprive the party of all or part of the costs to which he would be entitled under paragraph (1).
Nova Scotia	*Civil Procedure Rules of Nova Scotia*	R 74	**74.01 Scope of Rule 74** **(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. **(2)** A party may seek an order for sale or other disposition of property, in accordance with this Rule. **74.02 Order for sale or possession** **(1)** In a proceeding relating to property, a judge may order that the property, or part of it, be sold, mortgaged, exchanged, or partitioned. **(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. **74.03 Conveying interest of party** **(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. **(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. **74.04 Method of sale** **(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. **(2)** The following are examples of methods of sale that may be considered:

Province	Rules of Court	Section/ Rule	Content
			(a) marketing by a qualified person with power to conclude an agreement subject to approval by a judge; (b) marketing by a qualified person with power to conclude an agreement without further approval; (c) public auction conducted by the sheriff or another qualified person; (d) tender conducted by the sheriff or another qualified person. **74.05 Other terms for conduct of sale** 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: (a) marketing the property, such as advertising or a real estate listing; (b) entering into, and closing, a proposed agreement without marketing; (c) paying the person conducting the sale; (d) authorizing, or requiring, the person to retain a lawyer; (e) fixing a reserve or minimum bid, or a list price; (f) establishing terms required in an agreement, terms for tender, or terms binding on a party who bids at an auction. **74.06 Expenses of sale** **(1)** 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. **(2)** 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. **(3)** 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. **74.07 Variation** **(1)** 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. **(2)** After an agreement for sale is made, a judge may vary a term or condition of the agreement with the consent of the purchaser.

Province	Rules of Court	Section/ Rule	Content
			74.08 Report The person having conduct of a sale must file a report on the sale as soon as possible after the sale is concluded. **74.09 Approval and discharge** 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. **74.10 Duty to disclose defects** 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: (a) disclose the defect to the judge who hears the motion for the order; (b) take reasonable steps to ensure that a potential purchaser is made aware of the defect. **74.11 No assurances of title** **(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. **(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: (a) a lawyer's investigation and opinion on title, or restrictions on land use; (b) a surveyor's investigation and opinion on boundary locations; (c) a thorough physical inspection by the potential purchaser or an expert; (d) an engineer's, builder's or mechanic's inspection and opinion on compliance with environmental requirements or standards; (e) a builder's or mechanic's inspection and opinion on structural or mechanical defects.
Prince Edward Island	*Rules of Civil Procedure*	R 66	**GENERAL** **66.01** (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.

Province	Rules of Court	Section/ Rule	Content
			(2) A proceeding for partition or sale may be commenced by any person who is entitled to compel partition. (3) The petition and proceeding for partition on sale shall be in accordance with the provisions of Part III of the *Real Property Act*. (4) These rules apply to such proceedings with necessary modifications except where the rules are inconsistent with the provisions of Part V of the *Real Property* Act in which case the rules do not apply to the extent of any such inconsistency. (5) A proceeding for partition or sale by or on behalf of a minor shall be on notice to the Official Guardian. **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, 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.
Newfoundland and Labrador	*Rules of the Supreme Court*	26	**Power to order sale, etc. of property** 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. **Power to order sale in debenture holders' proceeding** 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. **Manner of carrying out sale** 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

Province	Rules of Court	Section/ Rule	Content
			manner as the party or person thinks fit, or as the Court directs, for the best price that can be obtained. (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, (a) appointing the party or person who is to have the conduct of the sale; (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; (c) fixing a reserve or minimum price; (d) requiring payment of the purchase price into Court or to trustees or other persons; (e) for settling the particulars or conditions of sale; (f) for obtaining evidence of the value of the property; (g) fixing the remuneration to be paid to the party or person having the conduct of the sale; or (h) requiring an abstract of title to be prepared for the use of the Court. **Report of result of sale** 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. (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. **Mortgage, exchange, partition, etc., under order of Court** 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.
Northwest Territories	*Rules of the Supreme Court of the Northwest Territories*	558-561	**Order for sale** **558.** 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 (a) compel any party bound by the order and in possession of the real estate to deliver up

Province	Rules of Court	Section/ Rule	Content
			possession to the purchaser or such other person as the Court may direct; or (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. **Directions** **559.** 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. **Proceedings out of court** **560.** 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 (a) paid into court or, where the Court so directs, to trustees; or (b) otherwise dealt with as the Court may direct. **Sale must be approved by Court** **561.** 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.
Nunavut	*Consolidation of the Rules of the Supreme Court of the Northwest Territories*	558-561	**Order for sale** **558.** 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 (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 (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. **Directions** **559.** 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.

Province	Rules of Court	Section/ Rule	Content
			Proceedings out of court **560.** 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 (a) paid into court or, where the Court so directs, to trustees; or (b) otherwise dealt with as the Court may direct. **Sale must be approved by Court** **561.** 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.
Yukon	*Rules of Court*	R 46	**Court may order sale** (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. **Sale in debenture holder's proceeding** (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. **Conduct of sale** (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. **Directions for sale** (4) The court may give directions it thinks just for the purpose of effecting a sale, including directions (a) appointing the person who is to have conduct of the sale, (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, (c) fixing a reserve or minimum price,

Province	Rules of Court	Section/ Rule	Content
			(d) defining the rights of a person to bid, make offers or meet bids, (e) requiring payment of the purchase price into court or to trustees or to other persons, (f) settling the particulars or conditions of sale, (g) obtaining evidence of the value of the property, (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, (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 (j) authorizing a person to enter upon any land or building. **Application for directions** (5) A person having conduct of a sale may apply to the court for further directions. **Certificate of sale** (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. **Vesting order** (7) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.

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.[139] Section 13B amended the wording of s. 4 of *The Partition Act*, 1913[140] 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

[139] This amendment was made pursuant to *An Act to amend "The Law of Property Act",* SM 1939, c 50.
[140] 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, *Boitteaux*, 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 *Morrissette,* 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, *Iwanyshyn*, 1981, *Mayer*, 1983, *Wagener*, 1988, K.L.V., 2000.

Detailed Case Summaries:

Year	***Case Name***	***Relevant Issues and Holding***	***Key Conclusions***
1940	*Szmando v. Szmando*, [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. *Order granted for sale of property, with permission to either of the parties to bid at such sale.*	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	*Kluss v. Kluss*, 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 *The Wives' and Children's Maintenance Act (WCMA)*, 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.

		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.	
1947	*Wimmer v. Wimmer* [1947] 2 WWR 249, 55 Man R 232 (CA)	Whether a husband, as a matter of right, is entitled to have his homestead disposed of by an order for partition. *Appeal of husband against order not to grant partition of land dismissed.*	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. 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 *The Dower Act*.
1950	*Beraskin v. Beraskin* [1950] 2 WWR 276, 58 Man R 405 (KB)	Whether motion for partition or sale ought to be granted. *Order for sale of property granted.*	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.
1952	*Fritz v. Fritz (No. 2)* (1952), M.J. No. 8. (CA)	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. *Appeal dismissed.*	The amendment of s. 19 of *The Law of Property Act*, 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. This discretion must be exercised in a judicial manner. An applicant for partition and sale should come into court “with clean hands."

			In accordance with this amendment, *Wimmer* is no longer applicable.
1953	*Mitchelson v. Mitchelson* (1953), 9 W.W.R. (N.S.) 316 (QB)	Whether the plaintiff ought to be declared the owner of a one-half interest in the house in question. *Judge declared that the house in question was a joint venture and that each is entitled to one-half.* Whether an order ought to be granted directing that the property be sold. *Order granted for sale. Sale proceeds to be shared equally.*	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?" 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. Since subsection 19(2) was enacted in *The Law of Property Act* 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.
1954	*Klemkowich v. Klemkowich*, [1954] M.J. No. 44 (QB)	Whether partition or sale should be granted. *Order for sale granted.*	The Court has discretion to grant or refuse partition or sale. 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,

			and the applicant comes to court with clean hands. 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. 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.
1955	*Atamanchuk v. Atamanchuk*, [1955] M.J. No. 18 (QB)	Whether the plaintiff ought to be declared the owner of a one-half interest in the property in question. *Judgment granted for the plaintiff declaring that she is entitled to an undivided one-half interest in the land in question.* Whether an order for partition or sale of the land should be made. *Order for sale granted. Sale proceeds to be shared equally.*	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. 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.
1960	*Steele v. Steele* (1960), 67 Man.R. 270 (QB)	Whether partition or sale should be granted for property held between husband and wife as joint tenants.	A judge has a discretion in the matter of granting or refusing partition or sale.

		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.	
1962	*Zuke v. Zuke and Bownass,* [1962] M.J. No. 20 (QB)	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). *Application is refused, because the plaintiff's lawyer merely filed an affidavit which stated that the statement of claim was issued as aforestated and that interlocutory judgment was signed as aforestated.*	By *The Law of Property Act* 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. 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." *The Married Women's Property Act* 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…" 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

			the statute prescribes another procedure. 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. 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.)
1965	*Shwabiuk v. Shwabiuk*, [1965] M.J. No. 40; 51 D.L.R. (2d) 361 (QB)	Whether partition or sale should be granted for property held between husband and wife as joint tenants. *Order for sale granted.*	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. 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. The applicant must also come to court with “clean hands” Just because an applicant has begun a new relationship with another partner does not mean that they come to court without “clean hands.”

1965	*Fetterly v. Fetterly* (1965), (NS) 218 (QB)	Whether partition or sale should be granted for property held between husband and wife as joint tenants. *Order for sale granted.*	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. The fate of the application, in every case, lies in the discretion of the Court, which discretion must be exercised in a judicial manner. 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. That there are, or may be, matrimonial differences between the parties is not sufficient to refuse an order for partition or sale.
1974	*Bundy v. Bundy*, [1974] M.J. No. 155 (QB)	Whether an order ought to be granted for partition or sale of property held in joint tenancy between the husband and wife. *Order for "partition and sale"* (sic) *granted.*	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. The fact that a couple, 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.
1975	*Michaleski v. Michaleski,* [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. *Order for "partition and sale"* (sic) *granted.*	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	*Leippi v. Leippi,* [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. *Appeal not allowed, as court held that lower court judge exercised discretion properly.*	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	*Roy v. Roy,* [1977] M.J. No. 156 (QB)	Whether an order for partition or sale ought to be made for the matrimonial home. *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*	Partition and sale ought not to be granted where it would be oppressive to the party opposing the application.

		to provide a home for the children in the community to which they are accustomed.	
1977	*Boittiaux v. Boittiaux*, [1977] M.J. No. 64 (CA)	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. *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.*	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. 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.
1978	*Winspear Higgins Stevenson Inc. v. Friesen*, [1978] 5 W.W.R. 337 (CA)	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. *Appeal allowed in part, but not with respect to this question. Court found that lower court judge exercised discretion properly.*	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 *The Law of Property Act* 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. 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. 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.
1979	*Chaboyer v. Chaboyer*, [1979] M.J. No. 288 (QB)	Whether an order ought to be granted for the sale of the matrimonial home held by the parties in joint tenancy. *Application for sale dismissed.*	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. 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.

			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.
1980	*Chupryk v. Haykowski* (1980), 3 Man.R. (2d) 216 (CA)	Should an appeal be granted allowing the sale of the property at issue? *Appeal allowed and order of sale should be granted.*	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. 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. It would be a rare case where a life tenant would be compelled to suffer partition or sale against his wishes.
1980	*Berard v. Berard* (1980), 14 R.F.L. (2d) 201 (QB)	The percentage of the sale proceeds to be granted to the wife by virtue of the order for	When joint tenancy is terminated by a court order for partition or sale, the court may in such

		sale of the matrimonial home, which both parties agreed to. *Wife's interest to be fixed at 75% and husband at 25%.*	proceedings make all just allowances and should give such directions as will do complete equity between the parties. 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.
1981	*Tycholiz v. Tycholiz*, [1981] M.J. No. 65 (CA)	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. *Appeal dismissed.*	The principles established by case law in applications for partition or sale under *the Law of Property Act* 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 *Family Maintenance Act*.
1981	*Iwanyshyn v. Iwanyshyn*, [1981] M.J. No. 322 (QB)	Whether an order ought to be granted for the partition or sale of the family home held by the parties in joint tenancy. *Order not granted.*	The law is clear and normally the sale should be ordered. 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

			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	*Downey v. Downey*, [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 *Marital Property Act*. *Appeal dismissed.*	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	*Harrison v. Harrison* 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. *Application to direct partition and sale separate and apart from the other issues denied.*	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	*Mayer v. Mayer*, [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. *Order for "partition and sale"* (sic) *granted.*	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

			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.
1984	*McCrea v. Berman* (1984), 30 Man. R. (2d) 41 (QB)	Whether partition or sale should be granted. *Order for "partition and sale"* (sic) *granted.* Whether there should be an unequal division of the proceeds of the sale of the marital home. *Unequal division not ordered.*	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. 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. 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.

1984	*Sidorski v. Sidorski* (1984), 30 Man. R. (2d) 4 (QB)	Whether there should be an unequal division of the proceeds of the sale of the marital home. *Unequal division not ordered.*	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. 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.
1986	*Jesmer v. Jesmer*, [1986] M.J. No. 473 (QB)	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. *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.*	An application for partition or sale cannot proceed until the mortgagee has been served with notice of the application.
1987	*Morrissette v. Morrissette*, [1987] M.J. No. 377 (QB)	Whether there ought to be an order granted for the sale of the marital home. *Order for sale granted.* Whether the sale proceeds of the marital home ought to be divided unequally.	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.

		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.	
1987	*Stefaniuk v. Stefaniuk*, [1987] M.J. No. 393 (QB)	Whether partition or sale should be granted. *Order for sale granted.* Whether there should be an unequal division of sale proceeds of the property. *Order for unequal division not granted.*	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. The court may exercise its discretion and not grant an order so requested if either or both of these conditions are present. Personal inconvenience or hardship is not enough to refuse to grant the order. 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.
1988	*Wagener v. Wagener* (1988), 55 Man. R. (2d) 91 (QB)	Whether partition or sale should be granted. *Order not granted for the 7 acre site, including the residence, but granted for the 33.23 acre farm land parcel.*	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,

			and that both mom and daughter were very comfortable there.
1988	*Sabourin v. Sabourin*, [1988] M.J. No. 203 (QB)	Whether there should be an order granted for partition and sale of the jointly owned marital home. *Order for sale granted.*	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. 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.
1988	*Katz v. Katz*, [1988] M.J. No. 202 (QB)	Whether an order ought to be granted for partition and sale of the jointly owned marital home. *Order of sale granted.*	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.

			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	*Balzar v. Balzar*, [1990] M.J. No. 395 (QB)	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. *Order for sale granted.* 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. *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*	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. Although an accounting between parties for contributions made during cohabitation will not readily be granted, an accounting between them after separation is commonplace. 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. 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

		interest, taxes, insurance and repairs, from the date of separation; and wife entitled to occupation rent from after the parties' son turned 18.	claimed, the occupying party can abandon his application for current expenses, and no occupation rent will be payable. 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.
1990	*Magne v. Magne* (1990), 26 R.F.L. (3d) 364 (QB)	Whether partition or sale should be granted for property held jointly in both parties' names. *Order for sale granted.*	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. Judges have limited discretion to deny partition and sale upon the application of one of the parties.
1994	*Carnahan v. Carnahan*, [1994] M.J. No. 306 (QB) *Decision appealed in 1995 in *Carnahan v. Carnahan*, [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	Whether partition or sale should be granted. *Order for sale granted. All sale related costs and all real property related debts (loan, mortgage, and taxes to date of sale) shall be deduced 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*	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.

	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.	*property related debts since the date of separation.*	
1994	*Anderson v. Von Stein,* [1994] M.J. No. 411 (QB)	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. *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.*	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. 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.
1995	*Peters v. Peters,* [1995] M.J. No. 175 (QB)	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. *Motion to postpone sale is allowed.*	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.

1996	*Woloshyn v. Woloshyn*, [1996] M.J. No. 153 (QB)	Whether partition or sale should be granted of property held by parties in joint tenancy. *Order for sale granted.*	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	*Thome v. Thome* (1996), 112 Man. R. (2d) 256 (QB)	Whether partition or sale should be granted. *Order not granted.*	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	*Ellis v Ellis*, [1997] MJ No 643 (QB)	Whether the jointly held property is an asset which falls within the ambit of the *Marital*	1. Prima facie a parcel of property held in joint tenancy entitles a party to obtain an order for partition or sale. This right

		Property Act or *The Law of Property Act.* *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.*	precludes a party from the application of the *Marital Property Act* 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.") 2. An exception to this rule will entitle a party to bring jointly held land under an accounting within the *Marital Property Act* 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. 3. After a determination as to whether the jointly held property should be considered as an asset under the *Marital Property Act*, additional consideration may arise resulting from the use of the land.
1997	*Fergus v. Fergus*, [1997] M.J. No. 348 (CA)	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. *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*	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. The court's jurisdiction to order a sale under s. 19 of *The Law of Property Act* is designed to avert a stalemate. To oust this jurisdiction by agreement, if it is possible at all, would require

		agreement as ousting the court of its jurisdiction to order a sale. *Order for sale granted.*	explicit language which is unmistakable in intent. A sale will not be ordered by the court where the application is vexatious or an order of sale oppressive.
1998	*Crawford v. Durrant*, [1998] M.J. No. 27 (CA)	Whether the order for partition of the land in question under *The Law of Property Act* contravened the provisions of *The Planning Act.* *Appeal granted and order of the motions judge for partition set aside.*	Prior to 1986, s. 60(1) of *The Planning Act* 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." 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. Accordingly, an order of partition cannot go unless it meets the requirements of *The Planning Act*.
1999	*Parniak v. Parniak*, [1999] M.J. No. 37 (QB)	Whether partition or sale should be granted for property jointly held by the parties. *Order for sale granted, subject to certain conditions of sale.*	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.

			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.
2000	*K.L.V. v. A.L.V.* (2000), 149 Man. R. (2d) 29, 2000 MBQB 56 (QB)	Whether partition or sale should be granted or whether the sale of the home should be postponed. *Order granted.*	A joint tenant of property has a prima facie right to an order for sale of the property, barring oppression, vexatiousness, or unclean hands. A court has a wide discretion to refuse or grant a sale order. 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.

2001	*Koshowski v. Bell*, [2001] M.J. No. 398 (QB)	How the proceeds of the sale of the home should be distributed between a life tenant and residual beneficiaries. *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.*	The court has the discretion to determine the most equitable means of dividing the proceeds of a sale.
2002	*Payne v. Payne*, [2002] M.J. No. 120 (QB)	Whether partition or sale should be granted for property held by parties as joint tenants. *Order for sale granted.*	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	*Gray v. Gray*, [2002] M.J. No. 274 (QB)	Whether there should be an order for the partition or sale of the jointly owned marital home. *Order for sale granted.*	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	*Newton v. Newton*, [2003] M.J. No. 64 (QB)	Whether partition or sale should be granted. *Order for "partition and sale"* (sic) *granted.* *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.*	

2003	*D.D.M. (Trustee of) v. S.A.J.M.*, [2003] M.J. No. 96 (QB)	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"). *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.* *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.* *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*	Prima facie, the Trustee is entitled to an order for sale. 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. 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. 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. 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.

		renewal thereof between the date of her separation from the bankrupt and the date of sale.	
2005	*McKenzie (Trustee of) v. McKenzie*, [2005] M.J. No. 70 (CA)	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. *Appeal not allowed.*	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). 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. 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.
2006	*Stuart v. Multan*, [2006] M.J. No. 418 (QB)	Whether partition or sale should be granted or whether the sale of the home should be postponed. *Order for "partition and sale"* (sic) *granted.*	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. Personal hardship or inconvenience is not enough to found a claim of oppression or vexation.

2006	*Confab Laboratories Inc. v. Wilding,* [2006] M.J. No. 514 (QB)	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. *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.*	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. 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. 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 *The Law of Property Act*, at least where the judgment or writ does not apply to all of the owners. 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 *The Law of Property Act*. 5. 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 to partition or sell the property. Pursuant to s. 19(2) of *The Law of Property Act*, 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 *The Homestead Act*. S. 23 of *The Law of Property Act* 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.
2009	*Simcoff v. Simcoff*, [2009] M.J. No. 265 (CA)	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). *Appeal allowed in part, given that application judge erred in applying a test of fairness to the application for partition or sale.* Whether an order for partition or sale of the property should be granted.	The right to the partition of real property under the authority of s. 20 of *The Law of Property Act* 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

		Order for "partition and sale" (sic) *granted.*	hands. Personal inconvenience and hardship is not enough. 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. 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.
2009	*Dickson v. Dickson,* [2009] M.J. No. 374 (QB)	Whether partition or sale should be granted. *Order not granted.*	1. The applicant has a prima facie right to an order for partition or sale; 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; 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 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. Vexatious proceedings are generally those which are pursued without reasonable or probable cause or excuse. 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. "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.
2009	*Hildebrandt v. Hildebrandt*, [2009] M.J. No. 73 (QB)	Whether to sever the partition and sale issue from the other issues that exist between the parties, and, if so… *Partition or sale issue severed.* Whether summary judgment ought to be granted for an order of sale of the land at issue. *Summary judgment granted.*	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. 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

			farm operation conducted on other land. 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.
2010	*Lane v. Lane*, [2010] M.J. No. 232 (QB)	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. *Order for sale granted.*	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. 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.

2011	*Moss Estate v. Moss*, [2011] M.J. No. 198 (QB)	Whether the applicant trustee in bankruptcy was a person interested in the subject property under s. 20 of *The Law of Property Act*. *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 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.*	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	*Chevalier v. Chevalier*, [2012] M.J. No. 260 (QB)	Whether partition or sale should be granted. *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.*	1. The applicant has a prima facie right to an order for partition or sale; 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; 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

			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. 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: 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 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. 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

			would, in the absence of important countervailing evidence, be remiss if it did not grant an order for partition.
2013	*Lotz v. Lotz*, [2013] M.J. No. 27 (QB)	Whether to sever the partition or sale issue from the other issues that exist between the parties, and, if so… *Partition or sale issue is severed.* Whether partition or sale should be granted. *Order for sale granted.*	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. 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. 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.

			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	*Shumilak v. Shumilak*, 2013 MBQB 54 (QB)	Whether an order should be made for partition or sale of the jointly owned property. *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.*	Court relies on court's explanation of the law of partition or sale as set out in *Chevalier*.
2017	*Mucz v. Popp*, [2017] M.J. No. 156 (QB), appeal dismissed, [2018] M.J. No. 17	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. *Order for sale granted.*	1. The applicant has a prima facie right to an order for partition or sale; 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; 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 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.

2018	*Siwak v. Siwak*, [2018] M.J. No. 20 (QB)	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? *Yes.* If the Court determines to order partition or sale, how is compensation for the life estate quantified? *Sale of the property granted, subject to the husband's life interest in the property.* *Valuation may be established by using the principles applicable to life annuities.*	Where an action for partition or sale involves a life estate, ss. 23(1) and (2) of *The Law of Property Act* are engaged and not s. 19. 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. 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. 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).

			The Court relies on the explanation of the law of partition or sale in Manitoba outlined in *Dickson, Simcoff, Chupryk v. Haykowski, Woloshyn, Collins (Keith G.), Steele, Wagener,* and *Thome.* The number of cases in which an order of partition 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 and sale unless unusual circumstances exist. 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. Citing *Chevalier*, the court also holds that the decision of whether the Court should order partition of the land in some fashion, or alternatively, that the land be sold, is another 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: 1. The discretion should favour sale if the sale is considered by the court to be more

			advantageous to the parties interested; and 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. 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. 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.
2019	*Siwak v. Siwak,* [2019] M.J. No. 145 (CA)	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 *The Law of Property Act,* CCSM c L90. *The trial judge did not err.* 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. *The trial judge did not err.*	According to the Schedule of Definitions to the *Interpretation Act*, CCSM c 180, the definition of "person" in section 20(1) of *The Law of Property Act* "includes ... the heirs, executors, administrators or other legal representatives of a person". As part of an order for partition or sale of a homestead under section 19(1) of *The Law of Property Act*, 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 *Homestead Act.* This authority is provided in section 19(2) of *The Law of Property Act.*

			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 *Homestead Act*, that separate application was not necessary as the court also had authority to dispense with his consent under section 19(2) of *The Law of Property Act* and to determine and order compensation regarding those rights pursuant to section 24 of *The Law of Property Act.*
2019	*Mireault v. Podolsky*, [2019] M.J. No. 55 (QB)	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. *Appeal allowed. All three parcels ordered to be sold.*	1. The applicant has a prima facie right to an order for partition or sale; 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; 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 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.

2019	*Temple v. Nelson*, [2019] M.J. No. 198 (QB)	Whether an order ought to be granted for the sale of the jointly owned family home. *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.*	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.
2020	*Desrochers v. Desrochers*, [2020] M.J. No. 241 (QB)	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. *This is not an appropriate case for partition, but it is an appropriate case for sale.*	Cites *Chevalier,* which cites *Dickson*, to outline the major principles relating to partition and sale in MB case law. 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. 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

			an ownership structure which differs from the ownership interest reflected in the title.

APPENDIX E: JOHN IRVINE, A HOUSE DIVIDED: ACCESS TO PARTITION AND SALE UNDER THE LAWS OF ONTARIO AND MANITOBA (2011) 35 MAN. L.J. 217, PP. 228-248.

IV. TAKING STOCK: THE LEGAL LANDSCAPE CIRCA 1880

If we now return to the point at which our historical account was interrupted by the foregoing digression, we find ourselves in the year 1880, or thereabouts. Both Ontario and Manitoba have their own, recently overhauled or recently enacted partition statutes, apparently "Canadian made" and very similar in their wording; small wonder, for the Manitoba *Partition Act* is largely and avowedly copied from its Ontario counterpart. Both statutes confer jurisdiction to order either partition, or sale in lieu thereof, with subsequent division of the proceeds.

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52 (1965), 51 DLR (2d) 361, 51 WWR 549 (Man CA).

53 *Supra* note 48.

54 (1965), 54 DLR (2d) 435, 54 WWR 218, (Man QB) Wilson J.

55 [1977] 2 WWR 497, 30 RFL 342, (Man CA).

56 *Supra* note 49.

57 Such a list, indeed, is provided for us by Wilson J in *Fetterly v Fetterly*, *supra* note 54 at 221.

58 *Supra* note 4 at 20(1).

Both adopt the strategy of defining the incidence of these remedies by setting out, in separate, crucial sections, who may petition for partition or sale; and who may be compelled to undergo or "suffer" those processes, whether they like it or not. While it is true that the Ontario law has (very recently) made these avenues of redress discretionary, while Manitoba has yet to make that change, the critical provisions are almost as like as two peas in a pod; both ascribing *locus standi* for seeking partition to "any party interested" in the affected land, and decreeing that "all parties interested in, to or out of" that land may be compelled to undergo partition. A number of inquiries and observations suggest themselves.

First, where does this format, and its curious language, both in the Ontario and Manitoba statutes and their successors, come from? In Manitoba, at the time of which we are now speaking, the answer is easy enough. The "any person interested" phraseology is right there in the *Partition Act*, 1878[59] the province's very first "locally-produced" legislation on the subject. This phrasing (in s 5) is drawn directly from the then-current provision in Ontario,[60] re-enacting with minor semantic corrections the *Partition Act* of 1869.[61] But that is not the end of the matter. If we go back into the Ontario legislation *prior to* 1869, the track becomes fainter and muddier. The *Partition Act* of 1859[62] says that partition may be sought by "Any joint tenant, tenant in common, or co-parcener", and later observes that upon an intestacy "Any one or more persons entitled to a share or interest in ... land and the immediate possession thereof" may seek such partition or sale." Whatever problems of interpretation this rambling provision may suggest, there is nothing in it to dictate that the sole owner of an undivided estate in land may seek partition; and certainly nothing to encourage belief that a remainderperson or anyone else lacking immediate possessory rights might do so. The 1859 provision is modelled in turn on s 2 of the 1857 *Rights of Primogeniture Amendment Act*[63] which is equally "difficult".

Alas, the difficulty does not end there. In the Ontario case of *Murcar v Bolton*[64] discussed later in this paper, Armour J (as he then was), in his dissenting judgment, declares *à propos* of nothing in particular that the 1857 Act of Upper Canada,[65] which as noted above was shortly to be incorporated in the *Partition Act* in the Consolidated Statutes of 1859,[66] was "largely transcribed" from the

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59 *Supra* note 30.

60 *Supra* note 36 at s 8.

61 SO 1869, c 33, s 6.

62 SC 1859 (22 Vict), c 86, s 6.

63 SC 1857 20 Vict c 65.

64 (1884), 5 OR 164 [*Murcar*].

65 SC 1857 (20 Vict) c 65.

66 CSC 1859 (22 Vict), c 86.

Partition Act of the State of New York;[67] and that the decision of the Court of Appeals of New York in *Blakeley v Calder*[68] may cast further light on its meaning. If this American statute indeed represents the true *Urschrift* or inspiration of the later Ontario partition statutes (and by extension, those of Manitoba too), it deserves, surely, the closest attention. But I regret to report that examination of the New York revised statute discloses no evidence of anything that could be called "transcription", nor any congruencies of language which suggest anything more than coincidental (and not particularly intimate) similarities of expression. Nor does *Blakeley* (casually mentioned again in the much later Manitoban case of *Chupryk v Haykowski*)[69] help our understanding much. Rather than protract this digression further, and endanger the cogency of the main argument, I have adopted instead the strategy favoured in American law journals, and consigned the whole issue to an enormous footnote.[70]

Another general observation which might well have been made in or around 1880, would be along these lines: with respect to partition or sale, Ontario and Manitoba now have almost identical statutes, and each province offers a judicial power of ordering sale of the real estate, if a sufficiently interested party asks for such a measure to be directed. That, contemporaries might have said, makes two co-existing statutes on the books in our respective provinces, enabling such forced

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67 2 RS, title 3, pp 315 ff.

68 15 NY 623, 1 EP Smith 617, (1857) [*Blakeley*]

69 (1980), 110 DLR (3d) 108, 3 Man R (2d) 216, [1980] 4 WWR 534 [*Chupryk*].

70 Volume II of the Revised Statutes of New York represents part of a more general programme of codification, ambitious in scope, enacted by that state during the years 1827-8. Title 3, addressing "The Partition of Lands owned by Several Persons", is lengthy, elaborate and meticulous. It may very well have been used as a source of ideas for Ontario's statute of 1857, but it was nothing more – certainly it was not "transcribed", and the key provision (s 1), governing "Who may apply" [for partition] and to what courts, is explicit in confining that entitlement (a) to joint tenants or tenants in common; and (b) to persons who as such are "in possession of any lands, tenements or hereditaments". There is no use of the Ontario (or Manitoba) phraseology which speaks of applications by "any person interested" in the land, and nothing to encourage so expansive an interpretation. Recorded cases upon the statute, such as *Brownell v Brownell*, 19 Wend 367, (1838 SCNY), show partition being refused, in deference to the statute, to persons who cannot show a right to immediate possession. As for the case of *Blakeley v Calder*, *supra* note 68, on which Armour J seems to rely in *Murcar* to support his position, it may be noted that [i] he relies solely upon the opinion on this issue of Denio CJ, who found himself in a minority on this particular point; [ii] Denio CJ's thesis was founded upon a heterodox theory of possession, which would accord possessory rights to any vested remainderperson; and [iii] the entire discussion was *obiter*, the whole Court of Appeals concurring in a *ratio decidendi* which declared that if an order of sale had been made, at the suit of a remainderperson, then whether that order was supportable in law or not, its very existence would give a good title to the purchaser at such a sale, who could not, therefore, properly refuse to complete his purchase. All in all, *Blakeley* represents a frail support for the dissenting opinion of Armour J in *Murcar*, and none for the Manitoba Court of Appeal's judgment in *Chupryk v Haykowski*, extensively discussed hereafter. In short the "New York connection" is a classic red herring.

sales on the application of people sharing the real estate. Two? Yes, for long before any Canadian partition statute was ever enacted, there had been *Settled Estates* legislation to be taken into account. A strange little procession of these statutes under a variety of titles and gradually expanding in scope, may be traced in the English statute book from the early 1800s onwards, and all had the same basic function. They were designed to enable the holders for the time being of limited interests in land (almost invariably life tenants) to deal with the fee simple title to the land (which *ex hypothesi* they lacked) in such a way as to "bind the remainderman", and "saddle" him with the results of such transaction - which might, for example, be a lease of the land for a term of years, or an outright sale of the fee simple title. In cases where these *Settled Estates Acts* applied, the remainderman might find himself "stuck", after the life tenant's death, with whatever was left of a lease granted to a third party by the lamented life tenant; or, in a more extreme case, made to content himself with money in lieu of the landholding he had hoped for, in consequence of the life tenant having sold the land with the permission of the Court under the *Settled Estates Act*.

The powers of sale and other powers of disposition conferred by *Settled Estates Acts* - some of which still exist in Canada - were always made available to the current life tenant, and no-one else: and it would (usually subject to judicial approval) avail him against his remainderperson or reversioner. In other words, they were designed to operate between and affect the rights of persons "sharing" the land by way of temporally consecutive estates - not, like *Partition Act* powers of sale as traditionally understood, between persons simultaneously sharing, spatially, a single estate.

A lawyer of the 1880's would have well understood this divergence of functions between Partition Statutes and Settled Estates enactments: and might lightly dismiss any suggestion that any confusion of their functions, or any usurpation, by the *Partition Act* powers of sale, of the functions of *Settled Estates Act*, was seriously in prospect.

Yet it is my contention in this paper that this confusion or "slippage" of functions is precisely what threatened to happen in Ontario in the late Victorian period, and ultimately has happened, more recently, here in Manitoba;[71] and the consequences are with us still.

The reason for this confusion is not just that lawyers have at various times "taken their eyes off the ball", or exploited judicial inattention for their clients' ends. Rather it lies in the extraordinarily broad language used in the key provisions of both the Ontario statutes and Manitoba's (right from the original

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[71] The "take-off" point for this faux pas, as I see it, is the judgment of the Manitoba Court of Appeal in *Chupryk v Haykowski*, and the story is more fully recounted in my earlier note in this journal, "Unsettled Estates: Manitoba's Forgotten Statute" etc.

1878 version). Just look again, if you will, at the key words of the current (2011) Ontario and Manitoba statutes, as set out above in section II.

Taking, for the sake of argument, ss 19(1) and 20(1) of Manitoba's current partition-and-sale provisions, as there set out; and taking their language at face value – especially those "all" or "any persons interested" phrases, is it unduly fanciful, or at all cynical, to suggest that informally expressed they should be construed as "Anyone with any interest whatever in land, great or small, undivided or partial, in possession or in remainder, and whether or not amounting to a freehold estate in the land, may seek partition or sale and, subject to the discretion of the Court, succeed in that application against anyone else who may claim any "interest" in that land as defined just as compendiously"?

If that is the law, then those who advocate it should realize that no-one (except a sole holder of a fully vested fee simple absolute in possession) can ever claim to enjoy any interest in land in Manitoba that is not subject to partition or conversion into money at any time, at the suit of any other person who can point to his or her entitlement to some other interest, however trivial, in that same property. In the last analysis, under such a regime, only the discretion of the judiciary keeps the sword of Damocles suspended in the air. Can it really be that this was the intention of the Ontario and Manitoba legislatures? Yet this is the inescapable result of adopting what I shall call the "plain meaning" perspective upon the extremely expansive wording of the "entitlement to sue" provisions of the partition and sale statutes of both provinces.

Against that (to some, alarming) approach, one might argue for what I shall call the "essentialist or historical" perspective. Instead of taking the stark language of the statute at face value, this approach construes it in light of the historical background against which the statutes were composed, and accords to certain of its words – the word "partition" in particular – a specific and technical meaning which, it is inferred, has so long been associated with that expression as to become part of its essential or "core" meaning. On this view, the remedy of partition means not, as the uninitiated might suppose, just a spatial division or parcelling out of land between two or more people. It means a remedy sought by one person, presently sharing possession of an interest in that land with another, who is the defendant. On this view, in its most uncompromising formulation, partition (or sale in lieu thereof) can only be sought by one who is presently in occupation of the realty, or is at least entitled to such immediate possession of it, as a joint tenant or tenant in common with the person who now opposes him.

A less dogmatic version of this approach would not insist that the claimant be a joint tenant or tenant in common, but would insist at least that the claimant show an immediate possessory right, in some capacity.

V. So What is the Law?

Before expressing any concluded opinion as to which of these two (or three?) divergent perspectives is correct, it might be wise to ask ourselves a few hard questions.

Can the wording of the Manitoba and Ontario statutes now under scrutiny possibly be taken to "mean just about what it says"? If it does, it represents a dramatic departure, first, from the position generally prevailing, to this day, in the rest of Canada; and secondly, from the law as anciently developed in England, and universally applied in the common law world in the days before these statutes were enacted. Both these assertions on my part may seem to call for explanation and justification, which I shall now attempt.

As to the former proposition, I shall simply cite the summary given by Professor Bora Laskin (as he then was) in the 1964 edition of his text "Cases and Notes in Land Law":

> It has been held that an applicant for partition under the general run of legislation in the common law provinces must have an estate in possession or have the immediate right to its possession; hence a registered judgment creditor of a joint tenant has no standing to seek partition (see *Morrow v Eakin* [1953] 2 DLR 593, 8 WWR (NS) 548 (BC)), nor has a claimant of a legacy charged on land (see *Re Fidler and Seaman*, [1948] 2 DLR 771, [1948] OWN 454), nor has a widow who is entitled to dower out of the land held in co-tenancy (see *Morrison v Morrison* (1917), 39 OLR 163, 34 DLR 677 (App Div)), nor has a mortgagee of a co-tenant who is still in possession (see *Mulligan v Hendershott* (1896), 17 PR 227 (Ont)) In so far as partition legislation in Canada may be invoked only by persons in possession or entitled to immediate possession, neither reversioners nor remaindermen who are co-owners of such interests may seek partition either against an existing tenant for life, in any event because there is no co-tenancy with a life tenant (see *Murcar v Bolton* (1884), 5 OR 164) or as against each other (see *Morrison v Morrison, supra*), even though there is no intention to disturb an existing life tenant (see *Bunting v Servos* [1931] OR 409, [1931] 4 DLR 167 (CA))[72]

As to my second assertion, that the traditional stance of the whole law, prior to these statutes, is seemingly challenged by the language of the modern Ontario and Manitoba statutes, I must say a little more.

Whatever may have been its other shortcomings, the old writ *de partitione facienda* was admirably clear as to its function and range of application. As Sir Edward Coke put it "It is to be observed that the words of the writ *de partitione facienda* be "*quod cum eadem A et B insimul et pro indiviso teneant tres acras &*";[73] this meant, he explained, that to claim partition, one must be (a) a tenant in

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[72] Bora Laskin (as he then was), *Cases and Notes in Land Law*, rev ed (Toronto: University of Toronto Press, 1964) at 402 [emphasis added]. We shall look at some of the cases cited *inter alia* later. The phrases emphasized by me show the acuteness with which the learned author deliberately accommodates and reserves comment on the Manitoba and Ontario positions.

[73] *Coke on Littleton*, *supra* note 7, Co Litt Lib 2 167.

possession of a freehold estate, and (b) be sharing that estate simultaneously ("*insimul*") with the other co-owner or co-owners. It is clear that this understanding, familiar to Littleton in 1481, had by Coke's day been challenged, unsuccessfully but with sufficient frequency to generate and define a recognized plea of "*non tenet insimul*", when, for example, a sole estate holder, or the holder(s) of an estate not yet in possession, sought an order of partition. As we shall see later, this plea - and the very conception of partition which it embodies - seem in some way to have faded from the collective memory of the profession in subsequent centuries and in some jurisdictions, and this had given rise - and still gives rise - to doctrinal confusion when disputants who are not currently in possession, and/or are not sharing such possession simultaneously, seek to invoke the statutory remedies of partition or sale. The reasons for this error - if it be such - probably relate (a) to the universal decline or de-formalization of the strict arts of pleading; (b) the often imprecise, even nebulous language of "modern" partition statutes; and (c) a felt need to challenge the ancient limits of the partition concept, in light of the protracted absence of what we would nowadays call "Settled Estates" or "Settled Land" legislation, adequate to deal with the dissatisfaction of consecutive (as distinct from concurrent) estate holders.

So we see that in England, as late as 1869, tenants in common of a reversionary interest, not yet in possession, were told by Lord Romilly MR that they lacked status to seek partition or sale.[74] As Mr. Jessel (as he then was) put it in argument, "At law only a tenant in possession of the freehold could sue out a writ of partition; and equity follows the law in this respect." And this was emphatically endorsed on appeal,[75] where Lord Hatherley LC reminded the profession of "the ordinary rule that the Court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things."[76]

Other cases, illustrative of the "old" law's insistence that a petitioner for partition or sale be able to show an interest "in possession", might easily be cited. In the English case of *Dodd v Cattell*,[77] the reversioner upon a lease with nearly 1000 years left to run should not have been surprised that Warrington J declined

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74 *Evans v Bagshaw*, (1869) LR 8 Eq 469.

75 *Evans v Bagshaw*, (1870) LR Ch App 340.

76 *Ibid* at 341. As Mr W R Pepler points out in his valuable article "Partition - A Survey of the Law in Alberta" (1977) 15 Alta LR 1 at 4. Meredith CJCP was to make the same point some years later in *Morrison v Morrison* (1917), 39 OLR 163 at 173, 34 DLR 677 at 684, (Ont CA), explaining "Partition is a remedy only available to those who need it." "In other words", Pepler explains at 4, "those in possession." Yet in Canada, there are cases, as we shall see presently, where in supposed reliance on provincial statutes, this rule has been challenged (see *Murcar v Bolton*, *supra* note 64): or flatly disregarded (see *Chupryk v Haykowski*, *supra* note 69, and *Aho v Kelley* (1998), 57 BCLR (3d) 369, 24 ETR (2d) 156, (BCSC).

77 [1914] 2 Ch 1.

her invitation to order partition or sale.[78] Mortgagees of shares however, have on occasion been acknowledged to have a right to seek partition or sale, provided that they first acquire, by foreclosure or otherwise, the right to immediate possession of the land.[79] Similarly, in some jurisdictions it has been held that judgment creditors may seek partition if, and only if, their efforts to realize upon the judgment debt have reached the point where possession of the debtor's share has been gained.[80] Other potentially contentious fact-situations might easily be imagined. But all discussion in this area is potentially confounded by a number of variables – as to the question of whether the plaintiffs' right to immediate possession is an indispensable prerequisite, the Canadian Law is almost[81] uniform. But as to whether the claimant must also be a co-owner, in the sense of sharing "insimul" the estate to be divided or sold, the picture is confused by differences between the statutes of various jurisdictions. And often too, as in cases advanced by persons seeking orders of sale to realize upon their as yet inchoate dower rights, the answer may of course be determined not by the partition legislation of the province, but rather by the particular directions of its dower or homestead legislation.[82]

Returning once more to the wording of the Ontario and Manitoba statutes, it must be acknowledged once again that their expansive and imprecise wording; and in particular their failure to define who is a "person interested in land"[83] have created that dichotomy of views, or antithesis of perspective, as to how the statutes of these two provinces should properly be construed and applied. Those conflicting perspectives, the "plain meaning" approach, and the "essentialist" approach, must now be examined in the context of the reported case-law over the years.

VI. CONFRONTING THE CASE-LAW

It may perhaps be thought remarkable that so stark a difference of perspectives, on so fundamental an issue, would for decades remain unresolved and indeed unaddressed by the courts of Canada's most populous province. Yet really we should not be surprised, for, then as now, the great majority of partition

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78 Though he also refused her application because she was neither joint-tenant, tenant-in-common, nor coparcener.

79 *Fall v Elkins* (1861), 9 WR 861.

80 *Re Craig* (1929), 1 DLR 142 (Ont SC).

81 The most blatant contradiction of it lies, unfortunately, in the leading Manitoba case of *Chupryk v Haykowski*, extensively discussed later in this paper.

82 A particularly valuable analysis of who may demand partition generally, which illustrates all these variables in play (and just about every imaginable fact-situation) is to be found in Pepler, *supra* note 76, at pp 4-8 inclusive.

83 *Supra* note 34 at s 20(1), and note 35 at s 3(1).

suits are, one suspects, straightforward conflicts between concurrent owners of a fee simple in possession; and one may readily believe that in most other cases, a peaceable solution by agreement may be arrived at, and costly litigation avoided, which might have put in issue and perhaps resolved the more challenging legal difficulties.

In the event, it must be admitted that the debate in Ontario, once litigants and judges had attuned themselves to the outwardly astonishing breadth of the "new generation" of partition legislation from 1869 onwards, got off to rather a bad start. Widows whose dower rights were as yet unassigned, but who were impatient to realize upon their rights, sought to circumvent the delays of the dower legislation[84] by application for partition, (or more frankly, for sale in lieu of partition) under the then current Ontario *Partition Act*.[85] Even now, reading the case-law of that era, the discomfiture of the Ontario judiciary, seeking to reconcile these statutes, can be clearly sensed. The issue clearly provoked real differences of opinion. The quality of the reports and, one fears, of the judgments they purport to reflect, is variable. In *Rody v Rody*,[86] we are treated to a meticulous and learned analysis[87] of the problem, and a doweress whose dower had not yet been assigned was denied partition on the twin grounds, apparently, that she was (a) not in any sense a concurrent owner; and (b) that her "interest" was not in possession. In 1883, we encounter *Lalor v Lalor*,[88] a case so inadequately reported that the divination of its facts is itself a challenge, and the legitimacy of its ratio (and its headnote too) accordingly a matter of speculation. Again, it was an action by a doweress who was also a life tenant in the share of a child who had predeceased her. Proudfoot J declared that whatever rights she had as a doweress, she was certainly entitled as a life tenant to seek partition. So the headnote baldly states "A tenant for life is entitled to a partition." But all the internal indicators, such as they are, suggest that she was only a tenant in-common of the life estate, not a sole owner thereof. *Gaskell v Gaskell*,[89] the only case cited in support of the judgment, was a case of that kind, and as such frankly uncontroversial, since co-holders of a life tenancy, as we have seen, had been entitled to seek partition for the duration of that estate ever since King Henry VIII's statute of 1540.[90] I labour the point

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84 Notably the *Dower Procedure Act*, SO 32 Vict c 7, incorporated into RSO 1877 c 55.

85 *Supra* note 36.

86 (1881), 1 CLT 546.

87 By Judge Kingsmill of Bruce County, who sets an example in scholarship which later judges at more elevated levels would have done well to follow.

88 (1883), 9 PR 455, (Ont HC).

89 (1836), 58 ER 735, 6 Sim 643 (Ch).

90 *Supra* note 13. The view here taken, I am pleased to see, is shared by Dupont J in the later Ontario case of *Morris v Howe* (1982) 38 OR (2d) 480, 138 DLR (3d) 113 (Ont HC), discussed *post*.

because of the unqualified and to my mind inflated effect accorded to this case by the Manitoba Court of Appeal in *Chupryk v Haykowski*, which will be discussed shortly.

Devereux v Kearns,[91] a decision of Ferguson J, is said by its headnote-writer to have "overruled" *Rody*, and to have held that a doweress, though her dower still be unassigned, was entitled, under the statute, to seek partition, since she was a "party interested in the land" within the meaning of section 8, giving the statute its "fair and obvious meaning". The language of Ferguson J in relation to the *Rody* decision is language of politely deferential disagreement, to be sure. But the real mystery of the case is how Ferguson J escapes the clear implications of the then-recent judgment of his own Divisional Court in *Murcar v Bolton*,[92] to the effect that remaindermen cannot seek partition against a sitting life tenant. As it was, the case of *Fisken v Ife* in 1897,[93] as discussed below, must surely be regarded, in retrospect, as having implicitly overruled *Devereux v Kearns*.[94]

While the differences of judicial opinion as to the scope of the statutory partition remedy were obvious just "below the surface" in these dower cases, they really come into the open most starkly in the still-important case of *Murcar v Bolton*,[95] which divided a Divisional Court of the Ontario Court of Queen's Bench in 1884.

Murcar, which was the first appellate ruling of the Ontario courts germane to the ambit or scope of the statutory jurisdiction in partition, only made its appearance in 1884, and disclosed sharp differences of opinion in a strong Divisional Court of the Queen's Bench Division. The facts were simple enough. A Crown grant had conferred upon Flora Bolton, the defendant, a simple and undivided life estate, with remainder to the defendants, her five children, in fee simple. Eight years later, with Mrs. Bolton quietly in possession of her life estate, the children (tenants-in-common of the remainder) were seeking an order of partition or sale, to dispossess her. A County Court judge, relying on the version of the Ontario *Partition Act* then in force,[96] ordered the sale; and the widowed mother of the petitioners appealed.

The majority judgment (by Hagarty CJ, Cameron J concurring) was short and lucid. They allowed the appeal, assuring Mrs. Bolton that she could remain in her house, and that her children would not be allowed to unseat her. With thinly disguised outrage, the judges observed that "no such proceedings would have been

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91 (1886), 11 PR 452, (Ont HC).

92 (1884), 5 OR 164, [1884] OJ No 211 (available on QL) (Ont HC) [*Murcar*].

93 (1897), 28 OR 595, (Ont Div Ct).

94 Which, incidentally, had already provoked an embarrassing and ill-concealed difference of opinion in the Divisional Court ten years earlier in *Fram v Fram* (1887), 12 PR 185 (Ont CA).

95 *Supra* note 93.

96 *Supra* note 35.

entertained for a moment in England, since there it had long been axiomatic that "only persons entitled to an estate in possession could maintain a suit therefor."[97] Nothing in the Ontario statutes, they said, should be considered as altering that position, for "of what is there to make partition? There is no common interest or possession between [the mother] and those in remainder."[98] Acceding to the arguments of the children in this case would have left each and every holder of a life estate or other limited interest exposed to the threat of being ousted at any time by remaindermen. The court held that despite the unguarded language of the statute, it should be read as extending the remedy of partition or sale only to those enjoying (or entitled to enjoy) immediate possession of the land.

> We are brought directly to meet the proposition that the Legislature have in a manner (to say the least of it) most indirect and inferential only, declared that an estate for life specially granted to an individual may be lawfully sold on the application of parties with whom she has no common estate or interest whatever, her possession and personal interest of it destroyed, and money presented to her in lieu thereof.[99]

The children's claim, thus understood, was entirely unsupportable. Yet Armour J, in dissent, would have supported it and affirmed the order below. In a long and intermittently interesting judgment, his Lordship relates the statutory history of partition and sale in Ontario and concludes (not without some ingenuity) that since 1857, the "persons interested" sufficiently to advance a partition suit need not show an immediate right to possession, but would include anyone with a vested remainer or reversion. He would thus have affirmed the order for sale made below, in deference to what he considered the plain meaning and intendment of the currently prevailing Act.

In fairness to Armour J's view, it must be conceded that the breadth of s 8 of the (then) statute does, on its plain meaning, seem adequate to embrace the claim of a remainderperson. To say that "Any party interested in land" does not include a remainderperson is startling to those who spend their professional lives explaining to students that a non-contingent remainder, "vested in interest", is indeed a present right to the future possession of the land.

That said, the majority ruling in *Murcar* has never, to the best of my knowledge, been challenged by any later Ontario court. In 1897, the case of *Fisken v Ife*[100] gave the Queen's Bench (represented, interestingly, by Armour CJ) an opportunity to deal with the converse of *Murcar*. This time, instead of the remaindermen seeking partition or sale against the life tenant, this case involved a life tenant (with a fractional share in the remainder) seeking partition or sale

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97 *Murcar*, *supra* note 92, at para 50.

98 *Ibid* at para 84.

99 *Ibid* at para 107.

100 *Supra* note 93.

against the remainderpersons. Armour CJ, as he now was, refused, and a strong Divisional Court (Boyd C, Ferguson and Meredith JJ) affirmed his ruling.

Chancellor Boyd, for the Court, gave the plaintiff tenant-for life (technically, a tenant *pur autre vie*), very short shrift. The governing statute, he explained,[101] was not intended to give *locus standi* to life tenants in possession to seek physical partition or sale of the land as a whole over the objection of reversioners. The case was just a converse of that in *Murcar v Bolton*, and as such, hopeless of success.

This answer, consistent with the *Murcar* ruling, amounts to this - that only co-owners presently sharing possession a such can seek partition; not successive estate holders, whether it be a life tenant seeking partition against a reversioner or remainderperson (*Fisken*) or *vice versa* (*Murcar*).

It is no doubt because of its tantalizing brevity - or at least, that of its only available report - that the little case of *Re Asseltine*[102] seems to have escaped comment, judicial or otherwise, in later years. Like *Murcar*, this case involved a group of persons (nephews and nieces of their adversary) who were collectively entitled to a half-interest in remainder, and now sought an order of sale against their aunt as life tenant.[103] The case was advanced upon alternative bases: (a) under the recently enacted *Settled Estates Act* of Ontario, 1895[104] and (b) under the then-current version of the *Partition Act* of that Province.[105] Ferguson J rejected both arguments: the former because the powers of disposition conferred by the *Settled Estates Act* were explicitly given only to life tenants, not remaindermen; the latter because only persons in possession could advance their claims (per *Murcar*) under the *Partition Act*. The case is worthy of remark, and I think admirable, in that both statutes were put forward, with no attempt to conflate them, and the requirements of each duly considered. Such precautions, and the very awareness of the settled estates legislation, had been conspicuous by their absence in the *Murcar* and *Fisken* cases.

The next case in the sequence was really that of the Appellate Division of the Ontario Supreme Court in *Morrison v Morrison*, in 1917.[106] In this case, Mrs. Morrison, a widow, entitled as such to claim a life estate in her late husband's lands by way of dower, was seeking partition of those lands as against his other heirs-at-law (the dead man's brother, sisters and other close relatives). But at the time of her application, she had not yet made her election as between her rights

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101 Now the *Partition Act*, RSO 1887, c 104.

102 (1902), 1 OWR 178.

103 An even more speculative claim of the same type was advanced two years later, and dismissed with equal brevity by Falconbridge CJ, in *Rajotte v Wilson* (1904), 3 OWR 737.

104 SO 1895, c 20. It was re-enacted as RSO 1897, c 71.

105 RSO 1897, c 123.

106 (1917) 34 DLR 677, 39 OLR 163 (Ont SC, App Div) [*Morrison*].

under the *Dower Act* and the general intestacy statute.[107] As such, she had no immediate right to possession and for that very reason alone, said the Court, had no right to compel partition under the *Partition Act*. The observations of Meredith CJ later in his careful judgment that Armour J had been wrong in his dissenting suggestion in *Murcar* that a remainderman still out of possession might compel partition are entirely consistent with that answer.

The quite separate question, of whether only concurrent owners sharing a single estate, might seek partition (and not sole owners in consecutive-estate situations), did not arise in *Morrison*: for until such time as she made her election to be a life tenant under the *Dower Act*, or alternatively to be a tenant in common in fee simple with her present antagonists, no partition suit could be advanced by her in either of those capacities. Until then, the personal representative alone was entitled to possession, and no one had standing to seek partition.

For a few years after *Morrison*, all seemed settled in Ontario; but dissension reared its head again in *Bunting v Servos* in 1931,[108] when a rare 5-judge Appellate Court was called upon to decide whether the parties, a brother and sister who were remaindermen of a farm property, might have partition as to that remainder, even though their mother, the life tenant in possession, objected. The brother sought such a remedy; the sister objected that, lacking any immediate right to possession, the Court lacked statutory jurisdiction to entertain the suit, quite apart from the life tenant's opposition to it. The Court split 3:2 in affirming the order of the court below, and refusing an order for partition. Latchford CJ, Masten and Fish JJA all asserted that *Morrison* had correctly settled the issue, and that only persons entitled to possession of their shares in land could be entitled to partition. That disposed of the plaintiff's case. In dissent, however, Riddell and Orde JJA, clearly unpersuaded by the authority of *Murcar*, *Fisken* and their congeners, sought to distinguish them on the grounds that in the case at bar, the life tenant was at no risk of being turned out of possession or interfered with in any way. They added that the plain wording of the *Partition Act* was sufficient to grant standing to a "person interested in land" without any insistence that he be in possession. This is the clearest example in the books of Ontario judges taking the "plain meaning" approach to the statutory test. But it did not prevail, and partition was denied.[109]

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107 *The Dower Act*, RSO 1914, c 70, and the *Devolution of Estates Act*, RSO 1914, c 119, respectively.

108 [1931] OR 409, [1931] 4 DLR 167, (Ont CA).

109 Some have felt, and feel still, that the majority ruling in Bunting is needlessly dogmatic, given that the life tenant did not face the prospect of disturbance in the enjoyment of her interest. That is the view of Dr. Heather Conway in her valuable work Co-Ownership of Land: Partition *Actions and Remedies* [London: Butterworths, 2000] esp. at 4: 25 (p. 51): she points out that *Aho v Kelley*, *supra* note 76, is of the same mind. Both Doctor Conway and the *Aho* case, however, are moved to their views not only by dissatisfaction with the rigidity of the orthodox position, but by

After *Bunting*, the dust was for some years allowed to settle on the law of Ontario, so far as this aspect of the law of partition was concerned. What is perhaps surprising is that quietude prevailed still in Manitoba, which, though equipped with virtually indistinguishable legislation (the present *Law of Property* Act, s 20(1) and its legislative precursors back to the original *Partition* Act of 1878) had produced not one single judicial reference to the issue through the entire *sturm und drang* of the Ontario debate. Then, in 1980, the moment finally came. In the celebrated case of *Chupryk v Haykowski*,[110] the Manitoba Court of Appeal had its opportunity to weigh in upon the issues we have discussed.

The facts in *Chupryk*, and indeed its outcome, have a certain poignancy to them. Old Michael Chupryk was 87 and in poor health by the time the Court of Appeal delivered its judgment: and he had been embroiled in litigation for the previous six years. He was a widower, the courts having decided, not without some difficulty, that he was entitled under the *Dower Act* and his late wife's will to a life estate in the urban double lot which the couple had occupied, plus a one-third share in the remainder, the other two-thirds of that remainder being vested in Mrs. Haykowski (Mr. Chupryk's god-daughter and Mrs. Chupryk's first husband's niece). Mrs. Haykowski's son John was executor and trustee, but during the course of earlier litigation it was decided that he should be removed, and replaced by the Public Trustee. As a Parthian shot, on the eve of his removal, John Haykowski, properly or not,[111] divested himself of the common law title, and both Michael Chupryk and Mrs. Haykowski thus became common law holders of their respective interests.

The property itself was not an opulent one. It consisted of a double lot on Stella Avenue, half of which was largely occupied by a decrepit duplex building, formerly let to tenants, but now officially uninhabitable (though Mrs. Haykowski and her son had occupied it without paying rent for a while), and subject to outstanding work orders. At the rear of the other half of the property was a small stucco house where old Michael still lived. The value of the entire holding had been estimated in 1973 at about $13 000, and was self-evidently a wasting asset.

Mr. Chupryk, however, had decided to show some initiative, and to raise the money needed – about $4,500, he thought – to repair and refurbish the duplex and its rental units, and restore its income-producing capacity. To achieve this end, he proposed to mortgage the property as a whole: that is, the fee simple. But how? Mrs. Haykowski, the only other person with an interest in the property, was not in agreement with Mr. Chupryk's plan, and wanted the whole property,

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the ruling of the Manitoba Court of Appeal in *Chupryk*, which I shall presently show to be heretical.

110 *Supra* note 69.

111 The Court of Appeal took a dim view of his behaviour as trustee, but were perplexed as to what they might do to correct its consequences; which in the end proved ruinous for Mr. Chupryk.

duplex, little house and all, sold, with subsequent division of the proceeds. That was the substance of the present phase of litigation. By what mechanism, if any, could the life tenant Mr. Chupryk secure a mortgage for the fee simple over the objections of his remainderperson?

If the trust had been still in existence, an easy avenue would have been available to resolve the issue; for by what was then[112] s 60(1) of the *Trustee Act*,[113] the Court of Queen's Bench had general powers to confer on any trustee the authority to make any mortgage or other disposition expedient for the good of the property. Indeed, by s 60(3) the appropriate application might be made by "any person beneficially interested" - but only if the property was "vested in trustees".

Where did that leave Mr. Chupryk, now that the trust had been erased? Could he still, somehow, gain access to the section 60 powers? In a judgment of great resourcefulness, Kroft J, at first instance thought he could. The termination of the trust had, in his view, been improper. So, though his Lordship didn't quite express it this way, he took the position that "equity looketh on that as undone which ought not to have been done", and deemed the shattered trust to be re-constituted, with the Public Trustee in charge of it. He proceeded to deem the Public Trustee to have made the appropriate application to authorize the desired mortgage; and declared that it was just and equitable to do so. Mrs. Haykowski appealed.

Her appeal was doubly successful. Mr. Chupryk was denied the approval he needed to secure the mortgage, and a sale of the entire property was ordered, under the "partition" sections of the *Law of Property Act*, at the behest of Mrs. Haykowski, with the result, one must surmise, that old Michael Chupryk was deprived of his modest home and almost certainly his independence. O'Sullivan, JA, one must suppose in some ghastly spirit of consolation, noted that "In the circumstances, Mr. Chupryk may have a claim against the executor for accounting on the footing of wilful default."[114] But the outcome was tragic for this elderly man, whose only error had lain in making known and putting in issue his intent to improve the property.

His failure to secure approval for the mortgage is a matter collateral to the purpose of this article, and can be quickly explained. Kroft J's ingenuity in resurrecting the trust did not find favour in the Court of Appeal.[115] So the *Trustee Act* powers must be considered to have passed irretrievably out of Mr. Chupryk's reach. Further, Kroft J's belief that as a judge in equity he might possess inherent

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112 Now CCSM, c T160, s 58(1) as of December 2nd, 2011.

113 RSM 1970, c T160.

114 *Supra* note 69 at para 53.

115 Like the splendid but alas, apocryphal Lord Mildew, in *Travers v Travers* (unrep) cited by A.P. Herbert, *Codd's Last Case* (London: Methuen & Co Ltd, 1952) at 80: "There is too much of this damned deeming."

or residual powers to authorize such transactions as were here proposed received short shrift in the Court of Appeal. The Court did look at the possibilities of the old English *Settled Estates* legislation, but found (quite correctly) that no such legislation as would assist Mr. Chupryk in getting his mortgage had ever passed into Manitoba law. In the course of their reasons on this issue, they made, I would submit, albeit by way of *obiter dictum*, an egregious mis-statement of the general law of settled estates in Manitoba, an episode which I have already discussed at length in this volume.

So the long and the short of it is that Mr. Chupryk was denied his mortgage. But look at what happens next; Mrs. Haykowski is granted an order for the sale of the property, and this is done, as noted above, on the purported authority of the *Law of Property Act*, ss 19-23 - the "partition and sale" provisions of the statute. So we have here an instance of sale (in lieu of partition) being granted at the suit of a remainderperson over the resistance of a life tenant. The issue is complicated by the Court's assertion that, by this stage in the litigation,[116] old Mr. Chupryk had apparently abandoned his opposition to selling the property. Whether this represented a true acquiescence, or merely a symptom of litigation fatigue or a fatalistic surrender to the inevitable, it is hard to say. If indeed the parties agreed that sale was the best solution, might it not have been achieved consensually?

It may be worthy of note, too, that Mr. Chupryk's share in the remainder was neither here nor there: nor did the Court treat it as in any way significant. This was a case of a remainderman seeking sale (in lieu of partition) against a life tenant, and would have been decided in just the same way if it had been a sole remainderperson (and by definition not a person in possession) seeking such liquidation of the life tenant's interest.

Manifestly, such a claim to an order of sale flew directly in the face of the Ontario cases we have considered: cases which dealt with an essentially identical statutory provision, and had consistently denied such relief or remedy to remaindermen[117] (as had the English law, for that matter).

It remained to be seen, of course, how the Ontario courts would respond or react to this offering from Manitoba. In *Garnet v McGoran*,[118] Maloney J gives no suggestion that anything in the partition law of Ontario has changed since *Bunting*, or indeed since *Morrison* in 1917. Mr. and Mrs. McGoran, joint tenants of what appears to have been the family home, had run into trouble. Mr.

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116 Mr. Chupryk and Mrs. Haykowski, and their indefatigable counsel, had over the previous six years been twice before the Court of Appeal and even after the present proceedings two determined efforts were made to take matters further. The Court of Appeal denied leave to go to the Supreme Court of Canada: (1980) 110 DLR (3d) 108n [Freedman CJM]; but the Supreme Court thereafter granted such leave: (1980) 33 NR 622.

117 Such a claim obviously defies the authority of *Murcar*, among others. And in allowing it, the Manitoba Court of Appeal was quite explicit in rejecting that line of authority.

118 (1980), 32 OR (2d) 514, 18 RPR 208 (Ont SC).

McGoran, unbeknown to his wife, had mortgaged his half share to Garnet, and gone into default. Garnet was now seeking to enforce judgment against the affected half-share, and now sought partition and sale. Mrs. McGoran understandably objected and sought various relief, including rejection of the mortgagee's application for partition. Maloney J agreed with her and emphatically rejected Mr. Garnet's claim, founding himself explicitly on his Court of Appeal's ruling in *Morrison v Morrison*,[119] and its insistence that only a person "entitled to immediate possession of an estate" in land could be allowed to seek its partition. Mr. Garnet would have to overcome various hurdles, several of them vigorously erected by Mrs. McGoran in still-pending proceedings, before he could assert the kind of possession that could give him *locus standi* to seek partition. *Chupryk*, which might be thought to militate against this position, was neither discussed nor even mentioned.

Two years later, though, the case of *Morris v Howe*[120] came before Dupont J in the Ontario High Court. Mrs. Morris, the applicant, was tenant for life of the family farm under her late husband's will, the remainder being devised to his sister. Now the life tenant sought partition and sale because she found the upkeep of the property expensive and tiresome. The remainderperson objected that the dead man had wanted the property to remain in the family, just as she looked forward to leaving the property to her own children. There was no "co-ownership" element in the case at all; just a life tenant in possession seeking to sell the property and partition the proceeds over the objections of the remainderperson. That, of course, flew directly in the face of *Fisken v Ife*,[121] eighty-five years before; and Dupont J was quite firm in rejecting the application, even though *Chupryk v Haykowski* had been pressed upon him. His reasoning was lucid but nuanced:

> I do not think that where, as here, land is subject to consecutive interests of a sole life tenant and a remainderman, this Court can or ought to 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. I find that the respondent's opposition to sale of the lands is reasonable, having regard to all the circumstances. I leave open for

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119 Also, the older case of *Mulligan v Hendershott*, (1896), 17 PR 227, 1896 CarswellOnt 60 (WL Can) citing the still more venerable judgment in *Train v Smith* (14th April 1875), unreported, (Spragge C). Maloney J's judgment in *Garnet* was tersely affirmed on appeal: (1981), 32 OR (2d) 514, 122 DLR (3d) 192, (Ont SC), though Krever J's judgment expressly declined to express an opinion on the applicability of *Mulligan v Hendershott* to the case at bar (para 12). *Garnet v McGoran* is applied in the later cases of *Toronto Dominion Bank v Morison*, (1984) 47 OR (2d) 524 (Ont Co Ct) and *Royal Bank v Mayhew*, (1995) Carswell Ont 3664 (WL Can), (Ont Gen Div) McDermid J.

120 (1982), 38 OR (2d) 480, 138 DLR (3d) 113 [*Morris*].

121 *Supra* note 93.

> future consideration factual situations where it can be concluded that such opposition is not reasonable.[122]

If that means that Dupont J believed that he had jurisdiction under the *Partition Act* to grant partition or sale at the behest of a sole life tenant against a sole remainderperson, and that only the "reasonable opposition" of the latter would preclude the exercise of his discretion to that end, I would respectfully disagree. The binding authority of *Fisken v Ife* would seem to run contrary to the use of the *Partition Act* to compel sales as between consecutive owners *simpliciter*, though the *Settled Estates* legislation in Ontario[123] might legitimately be used for that purpose. Dupont J's tentative language may have been used to soften the impact of his clear rejection of the Manitoba Court of Appeal's analysis in *Chupryk*. In truth, the whole tenor of the rest of his Lordship's judgment is to the effect that the *Partition Act* simply has no application between consecutive estate-holders. Thus we find him saying: "I do not think I can give the applicant the order she seeks. In my view a sole tenant for life cannot apply under the *Partition Act* for sale of the estate ... *Fisken v Ife*."[124] And again: "To the extent that [*Chupryk*] may be seen as authority for the propositions that a life tenant may obtain sale of land over the opposition of a remainderman, or that one of several remaindermen may obtain partition (and hence possibly sale) of the lands before the remainder has fallen into possession and without the consent of a prior life tenant, *Lalor* and *Bunting v Servos* establish that the law of this province is to the contrary."[125] The succinct pronouncement of the headnote writer seems just: "There was no authority under the *Partition Act*, RSO 1980 c 369 to order partition at the suit of a sole life tenant against the reasonable opposition of the remainderman. The Act applied only to concurrent, not to consecutive interests."[126]

In *Morris v Howe*, then, we see *Chupryk* confronted and finally rejected by the Ontario High Court. True, Dupont J offered his comforting opinion that the conflict between the law of Manitoba and Ontario "may be more apparent than real,"[127] given that "The essential fact in *Chupryk* was that all the parties interested in the land desired sale."[128] That premise, which may as I have indicated be taken *cum grano salis*, does not really disguise the jurisprudential rift which has opened up between the two provinces.

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122 *Supra* note 120 at para 21.

123 As to which, see my "Unsettled Estates" paper earlier in this volume.

124 *Supra* note 120 at para 11.

125 *Ibid* at para 20.

126 *Ibid* at 480.

127 *Ibid* at para 20.

128 *Ibid*.

VII. CONCLUSIONS

Morris puts beyond debate several propositions which were already apparent from the foregoing discussion, namely: "That the provisions of ss 19-26 of Manitoba's *Law of Property Act* are "essentially identical" to those of [Ontario's] *Partition Act*".[129] Despite this, the Ontario *Partition Act* applies only as between the holders of concurrent interests, as distinct from consecutive ones, whereas in Manitoba, *Chupryk* flatly denies this.[130] In Ontario, abundant authority shows that only a claimant in physical possession of the land, or the immediate right to such possession, may seek partition or sale in lieu thereof. *Chupryk v Haykowski* flatly rejects that view in Manitoba.

It is idle of course, to enquire which of these approaches is "right". It depends upon whether one prefers a "plain meaning" interpretation of the shared language of the respective statutes (which might well support the Manitoba view) or a more historically-sensitive, contextual or "essentialist" construction (which would favour the Ontario position). I would merely note that

a) The Manitoba doctrine in *Chupryk* seems to have been adopted in ignorance or disregard of the existence in Manitoba of "Settled Estates" legislation (admittedly of a rather recondite kind) which might, had it been acknowledged, have deterred the Court from "stretching" the function accorded to the partition legislation.
b) To allow, as *Chupryk* does, that partition or sale may be effected between consecutive owners, creates difficult conundrums of valuation.
c) The result of *Chupryk* will be that in Manitoba only a sole fee simple owner in possession of land 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. Only the Court's discretion stands between them and the liquidation of their tenure.[131]

There will be some whose response to the situation outlined in this paper will be "so what? If an unrestricted right to seek partition or sale is made available under the *Law of Property Act*, and simply renders redundant the powers of sale previously available under other statutes, what harm can there be in that;

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129 *Morris*, *supra* note 120, at 484.

130 Per O'Sullivan JA: "I agree with my brother Matas that the *Law of Property Act*... covers successive interests, as well as concurrent interests, in land." *Supra* note 69 at 554.

131 There are limits to the utility of *reductiones ad absurdum*, but the English case of *Dodd v Cattell*, *supra* note 77, gives food for thought. O'Sullivan JA's reflection in *Chupryk*, *ibid*, that "In the vast majority of cases, application of the provisions of our *Law of Property Act* can do justice as between owners of successive interests, since they will have money in lieu of money's worth" seems question-begging and provocative. The questions it raises will be revived and discussed in my third note in this series to appear in a forthcoming number of this journal.

especially if the courts in Manitoba are always alert to use their discretion to prevent potential hardship?" To that I would respond firstly, that so radical a change in the scope of the partition/sale remedy, brought about almost in a somnambulist fashion by judges seemingly unaware of the broader statutory picture, does not necessarily conduce to clarity of analysis in the law of real property. It may be worth reflecting that the relationships between consecutive estate-holders (e.g. life tenant and remainderman) and that between contemporaneous co-owners (joint tenants and tenants-in common) have always been governed by a quite different dynamic. As between life tenant and remainderman, there exists a fiduciary duty owed by the former to the latter: the classic Manitoba instance being *Mayo v Leitovski*.[132] It is not obvious that the life tenant's fiduciary duty can easily be reconciled with a supposedly co-existing right to seek partition of the land, or its sale, over the protestations of the remainderman. It is true that such sale may be authorized by the court under the aegis of other statutes,[133] but only under certain conditions and not merely for the satisfaction of the personal caprice or cupidity of the life tenant.

As for the converse situation (that actually involved in *Chupryk*), it is inconsistent with our law's usual reluctance to disturb an occupant in possession, or to tolerate the liquidation of the possessory interest of a sitting life tenant, by recognition of a remainderman's power to compel sale. If the remainderman actually sought partition, upon what principles, one wonders, could a court authorize the demarcation of appropriate lines of division? Even assuming a piece of land that is featureless and of even quality, how would one fairly express in spatial terms the temporal division between a life tenant's temporary possession of the land, here and now; and the remainderman's prospect of securing at some uncertain future date, the remainder of the fee simple? Crudely put, how could one express this temporal division in acres or hectares, even with the assistance of skilled actuaries? Is this really an exercise the courts would wish to undertake?[134]

If, as in Ontario, partition and sale remedies may be invoked only by joint tenants or tenants in common in possession, most of those conceptual brain-teasers disappear. As between such co-owners, there is no fiduciary relationship.[135] The sizes of the parties' respective shares are known or readily ascertainable; and the aim and end of the law is simply to give each party his strict dues, with due

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132 [1928] 1 WWR 700, 1928 CarswellMan 21 (WL Can).

133 e.g. the *Settled Estates Act, 1856*, (UK) 19 & 20 Vict c 120, s 11.

134 In *Winspear Higgins Stevenson Inc v Friesen*, [1978] 5 WWR 337, 5 RPR 81, (Man CA), we see O'Sullivan JA recoiling at the prospect of even making a fair monetary evaluation of a wife's inchoate dower rights in the context of a sale in lieu of partition between co-owners: a task several degrees simpler than the puzzle here presented.

135 See *Kennedy v De Trafford*, [1897] AC 180, (UK HL) and *Re Nunes and District Registrar (Winnipeg)* (1971), 21 DLR (3d) 97, [1971] 5 WWR 427.

regard to the statutory, common law and equitable rules governing the settlement of accounts between them.[136]

It is difficult to avoid the conclusion that in *Chupryk* the Manitoba Court of Appeal unwittingly wandered off course and thereby introduced into our law a needless element of complexity, absent from the law of Ontario. Perhaps in doing so, they were seduced by misapprehension of the state of Manitoba's law of settled estates. But that tale has already been told. It now remains to be examined how, just two short years after *Chupryk*, the law of real property, as it relates to consecutive estates was a properly revolutionized by the advent of the *Perpetuities and Accumulations Act* in 1983: a statute which may be seen as making almost redundant the earlier legislation on settled estates, while creating, at the same time, perplexities for those who administer Manitoba's land titles system. To these and other issues I hope to return presently in another short article.

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136 As helpfully explained in *Osachuk v Osachuk*, (1971), 18 DLR (3d) 413, [1971] 2 WWR 481, (Man CA).