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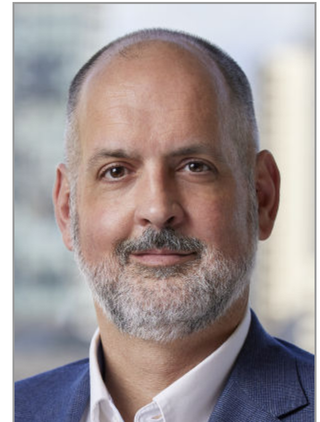
Interpretation and application of British Columbia's Partition of Property Act

By **E. Craig Watson**



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Law360 Canada (April 26, 2024, 8:27 AM EDT) -- In British Columbia, disputes with respect to co-owned property are often resolved under the *Partition of Property Act* (PPA), which governs how and when a co-owner of a property may be granted permission for partition or sale of the property against the wishes of the other co-owner(s). Such disputes may arise in various circumstances, such as family law, wherein spouses who co-own property have different ideas about how such property should be utilized post-separation or divorce. These issues are also seen in cases involving multi-generational property ownership and estate law, wherein various parties may be assigned co-ownership under the terms of a will and disagree on the use of such property.

Regardless of the context in which such a dispute under the PPA arises, British Columbia courts are often called upon to resolve such issues. Two key sections of the PPA, under which claims are consistently brought before the courts, include s. 6, which deals with a request for sale of a property by a party or parties who own more than 50 per cent of a property and s. 7, which governs orders of sale in place of partition. Another common issue concerning the PPA is the payment of occupation rent by a property co-owner who resides on the property to a co-owner who does not reside on the premises. The courts have routinely been called upon to analyze and apply the related provisions of the PPA, which has provided clarity as to how the legislation should be interpreted and used in a variety of situations.

Interpretation of 'Good Reason' in ss. 6 and 7 of the Partition of Property Act

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Applications often come before the courts when a co-owner of a property seeks an order of partition and/or sale of that property without the permission of the co-owner(s). Such applications are brought under ss. 6 or 7 of the PPA, which respectively dictate that the court will order sale or partition unless there is "good reason" not to do so. Thus, in considering such applications, the courts contemplate what constitutes "good reason" not to apply the law and order the sale or partition sought.

Importantly, as noted by the B.C. Court of Appeal in the decision *Sahlin v. Nature Trust of British Columbia, Inc*., [2011] B.C.J. No. 548., the language of subsection 6 of the PPA is mandatory, which means that the court must order partition or sale without good reason not to do so. In other words, there is no onus on the party who opposes an application for partition or sale to demonstrate such "good reason to the contrary." The Court of Appeal further noted in that decision that the discretion of the court with respect to s. 6 of the PPA is "broad and unfettered" and "bestows on the court the ability to refuse to order a sale when … such an order would not do justice between the parties." In that case, the court found the following factors constituted "good reason" not to issue the order:

- the opposing party's long-standing connection to the property in question;
- their desire "to use the land in a manner that respected its ecological and environmental sensitivities";
- an order of sale would risk exposure of the property in question to ownership by a third party who did not share their values with respect to ecological and environmental concerns; and
- an order of sale was unnecessary to enable both parties to achieve their goals concerning the property.

What constitutes "good reason" under s. 6 of the *Partition of Property Act* was also discussed in *CGT Management Corp. v. Mackenzie-Moore*, [2022] B.C.J. No. 2436, in which the B.C. Supreme Court declined to order partition of the property based on "good reason" not to do so. Those reasons included:

- the co-owners of the subject property had collectively agreed and covenanted with one another not to apply to sell one another's interests in the property under the PPA;
- the physical condition of the property did not warrant its sale;
- the residents of the property would face significant hardship if forced to sell their interests in the property; and
- the sale sought was neither provident nor had it been pursued in a transparent manner.

The "good reasons" proffered by the respondent in *H & W Investments Ltd. v. George*, [2017] B.C.J. No. 2385, who was the 25 per cent owner of a property co-owned by multiple parties, were primarily financial in that they asserted that the petitioner would be financially disadvantaged if the property were sold immediately rather than at some point some down the road. The B.C. Supreme Court concluded it was "not reasonable or fair for the petitioners to have to wait an indefinite time so that the respondent, with a quarter-interest, can effectively bar the majority owners from their receiving equitable share." The court found the petitioner's position to be both unreasonable and unfair, and her "good reasons" were found wanting. As such, the s. 6 application was granted.

Does it matter who bears the burden?

As for whether there is a difference in what constitutes "good reason" under section 6 versus section 7 of the Partition of Property Act, Justice Sharma of the B.C. Supreme Court noted, in the recent decision of *Harper KL Development Corp. v. 1131182 B.C. Ltd*., [2022] B.C.J. No. 2296, that "it does not matter whether the analysis proceed[s] under s. 6 or s. 7. My analysis and conclusions would be no different regardless of who bears the burden." In that case, the court stated financial considerations are relevant to whether a sale is beneficial and where such considerations favour the sale of a property, then an order for sale will be granted.

Zackariuk Estate v. Chepsiuk, [2005] B.C.J. No. 1376. also involved an application under s. 7 of the PPA, this one brought by the executrix of her father's estate, who had been bequeathed an interest in the father's home after his death. The deceased's wife, stepmother to the petitioner, had also been bequeathed interest in the property and remained in the property at issue for six years after the

testator's death. Her continued residence impeded the executrix's ability to distribute the estate. Thus, she sought the sale of the home under s. 7 of the PPA. The stepmother resisted the sale because she said that as she could not afford to live anywhere else, it would be fundamentally financially unfair to force the sale.

The court disagreed. It was noted the respondent stepmother could not afford to live in the home by her own means regardless, as her children regularly subsidized her lifestyle. Without their assistance, she would have been forced to sell the house much earlier. Moreover, she was not able to contribute to repairs and upkeep necessary for the property, which would diminish the value of the other beneficiaries' interests under the will. Further, failure to order the sale of the property would frustrate the efforts of the executrix to carry out the testator's wishes. In these circumstances, the respondent's financial hardship was insufficient to constitute "good reason" not to order the sale.

A pre-existing contract between the parties outlining how they would dispose of the property was fatal to a claim of "good reason to the contrary" in *Arden v. Arden*, [2021] B.C.J. No. 2410. In this case, the parties had previously signed a contract containing a "Subdivision of the Property and Termination of the Agreement" clause that governed the actions to be taken if the property owners decided to subdivide the property together. As this agreement was legal and enforceable, the Court found it constituted "good reason to refuse the relief sought."

Availability, assessment of occupation rent under the Partition of Property Act

"Occupation rent" refers to a situation where only one co-owner of a property resides on the premises, which forces the other co-owner(s) to seek and pay for accommodation elsewhere. In these circumstances, the non-resident co-owner often seeks occupation rent from the resident property co-owner. Such situations are typical of divorcing spouses, wherein one party leaves the residence and the other remains behind for some time, while expenses are shared amongst the two.

The factors to be assessed by a court in determining whether occupation rent is due were summarized in *McManus v. McManus* [2019] B.C.J. No. 135 to include the following:

- aside from ouster (forced removal), the circumstances in which the non-occupant spouse left the house and whether/when that spouse moved for a sale of the home;
- whether any children live with the occupant spouse;
- whether the occupant spouse has claimed expenses related to the house from the non-occupant spouse;
- whether support had been paid from one party to another;
- whether the occupant spouse took measures to increase/decrease the property's value; and
- any competing litigation that may offset an award of occupation rent.

According to Justice Robert Jenkins of the B.C. Superior Court in *McFarlen v. McFarlen*, 2017 BCSC 1737, an order for occupational rent is discretionary, and such orders are intended to achieve fairness. Moreover, such a remedy should be considered exceptional and implemented cautiously. The McFarlen case involved a husband and wife who had separated. The husband had remained in the family home from the time of separation until the house was sold, and the wife left to seek accommodation elsewhere.

As such, the wife brought a petition post-sale of the marital home for an order of occupational rent. The wife sought occupation rent "measured by the cost of alternative accommodation on a 'fairness' basis," under which she requested "an adjustment of $1,000 per month as one-half of the rental value of the former family residence." She provided listings for rental accommodations in the same general vicinity as that occupied by the family home to substantiate her claim. The court noted that such evidence, found through internet searches, constituted hearsay and did not assign any weight to such evidence. However, "for the sake of 'fairness,'" the court determined that the wife should be credited for monies spent due to not being able to reside in the family residence, and it assigned a value of $625 per month as a reasonable amount. That sum was to be credited to the wife from the proceeds of the sale of the former family residence.

The case of *Donnell-Vella v. Vella*, 2021 BCSC 1953 involved spouses who sought a divorce after 35 years of marriage. Post-separation, the husband vacated the family home and rented an apartment

for about three years until he purchased a condo. The wife remained in the marital home, which was fully paid for. As such, the husband sought payment by the wife of occupation rent of $66,187.46, which comprised the total rent the husband paid throughout the period, the interest the husband paid on the mortgage for his condo and the strata fees associated with the husband's condo. The court noted that compensating the husband in full for the monies spent on his residence would "shift this cost of separation to [the wife]." As such, the court determined the parties should share the burden of such costs equally and granted the order for occupation rent subject to an order that it be paid out of the proceeds of the sale of the family home.

In the recent decision of *Hill v. Kelly*, 2023 BCSC 630, the court considered a request for occupation rent in circumstances where the married couple who had owned the property in question had refinanced the property to include all of their personal debt one month before their legal separation. The parties separated in June 2018, after which the wife remained on the premises and the husband left. While the husband paid the mortgage and associated utilities for the property until the end of September 2018, he never made any payments toward the property thereafter. The wife, who had remained on the property after the separation, paid for home insurance, maintenance and repairs until the property sold but did not make any mortgage payments. Since nobody made any mortgage payments, the home went into foreclosure and was sold in December 2019, following which the proceeds were placed in a trust account. The husband claimed that he was entitled to occupation rent from the wife for the time she had remained on the property pre-sale of the home. The court, however, disagreed and declined to award occupation in these circumstances, as it concluded that an order for occupational rent was unnecessary to achieve fairness in the circumstances.

The case of *Moulton v. Warren*, 2023 BCSC 335 also involved divorcing spouses, one of whom remained in the marital property post-separation and the other vacated the premises and secured alternative accommodation. In this case, the husband had left the house on Nov. 30, 2022. He continued to pay his portion of expenses associated with the property while simultaneously paying to rent another place for himself to live. The husband claimed he had paid rent totalling $29,000 for the entire period since he had left the marital home and claimed that amount as occupation rent. The court granted the application and ordered that the division of assets between the divorcing spouses be adjusted by a payment by the wife to the husband of $14,500, which represented one-half of the expenses incurred by the husband in relation to the accommodation.

E. Craig Watson, principal at Meridian Law Group in Vancouver, is a skilled litigator, having represented clients before all levels of courts in British Columbia since 1995. He works with plaintiffs and defendants in insurance defence, commercial litigation, construction litigation and complex personal injury matters.

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