

1978 BILL 74

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Fourth Session, 18th Legislature, 27 Elizabeth II

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THE LEGISLATIVE ASSEMBLY OF ALBERTA

# BILL 74

THE PARTITION AND SALE ACT

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THE ATTORNEY GENERAL

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First Reading .....

Second Reading .....

Committee of the Whole .....

Third Reading .....

Royal Assent .....

## BILL 74

1978

### THE PARTITION AND SALE ACT

(Assented to \_\_\_\_\_, 1978)

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

**1** In this Act,

- (a) “Court” means the Supreme Court of Alberta or the District Court of Alberta;
- (b) “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;
- (c) “encumbrance” means an encumbrance as defined in *The Land Titles Act*;
- (d) “encumbrancee” means an encumbrancee as defined in *The Land Titles Act*;
- (e) “homestead” means a homestead as defined in *The Dower Act*;
- (f) “land” means land as defined in *The Land Titles Act* and includes a profit a prendre;
- (g) “local authority” means
  - (i) a city, town, new town, village, municipal district or county, or
  - (ii) the Minister of Municipal Affairs, in the case of an improvement district or a special area;
- (h) “order” means an order made under this Act;
- (i) “parcel” means a parcel as defined in *The Planning Act, 1977*;

### **Explanatory Notes**

**GENERAL** This Bill is based on the recommendations contained in report 23 issued by the Institute of Law Research and Reform and entitled “Partition and Sale”.

**1** Definitions.

(j) “registered” means registered under *The Land Titles Act*;

(k) “Registrar” means a Registrar as defined in *The Land Titles Act*.

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

(2) Upon 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 land and the distribution of the proceeds of the sale between the co-owners, or

(c) the sale of all or part of the interest of one or more of the co-owners’ interests in land to one or more of the other co-owners who are willing to purchase the interest.

(3) A sale of land 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.

**3** Notwithstanding section 2(2), if an order is made under section 2(2)(c) 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 that it considers proper.

**4**(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 consider whether

**2** Application for the termination of co-ownership.

**3** Refusal to approve the sale of an interest.

**4** Accounting, contribution and adjustment with respect to an unequal division of land.

- (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 his 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 Act dower 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.

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

**6** An order severs the joint tenancy of the land in respect of which the order is made.

**7** The Registrar shall not register an order until

- (a) he is given a certificate issued by the clerk of the Court in which the order was entered stating that
  - (i) the time for commencing an appeal from the order has expired without an appeal being commenced, or
  - (ii) if an appeal has been commenced,
    - (A) the appeal has been concluded or discontinued,
    - (B) no other appeal with respect to the order can be commenced, and

**5** Court to ensure obligations of a co-tenant are performed.

**6** Severance of a joint tenancy.

**7** Registration of an order.

(C) the order presented for registration is the order as finally determined by the Court,

or

(b) he has received from those persons having a right to appeal from the order a written undertaking that

(i) no appeal from the order will be commenced, or

(ii) if an appeal from the order has been commenced, it has been discontinued and no other appeal with respect to the order will be commenced.

**8(1)** A termination of co-ownership under this Act is not a disposition under *The Dower Act*.

(2) Upon a termination of co-ownership under this Act, the land that was co-owned ceases to be a homestead.

**9** Notwithstanding section 2(2), the Court may, with respect to land that comprises a matrimonial home as defined in *The Matrimonial Property Act*, stay proceedings under this Act

(a) pending the disposition of an application made under *The Matrimonial Property Act*, or

(b) while an order made under *The Matrimonial Property Act* remains in force.

**10** Notwithstanding section 2(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.

**11** Except as ordered by the Court under section 12, an order does not affect an encumbrance against the entire interest in land in respect of which the order is made.

**12** If an order is made in respect of land against which an encumbrance is registered and

(a) the land is to be physically divided between the co-owners, the Court may direct that the encumbrance upon 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) 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



**8** Homestead.

**9** Effect of an application or order made under The Matrimonial Property Act.

**10** Refusal to allow an application.

**11** Encumbrance against an entire interest.

**12** Effect of an order on an encumbrance.

may direct that the encumbrance upon the land being sold be discharged 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) the interest of a co-owner is to be sold to another co-owner, the Court may direct that the encumbrance upon the interest being sold

(i) be discharged 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, or

(ii) not be discharged and 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 accruing to the vendor of the interest, if the interest in respect of which the encumbrance was registered was the interests of both the vendor and the purchaser.

**13(1)** If a co-owner is to make an application for an order in respect of land that is subject to an encumbrance, he shall, not less than 10 days before the application is to be heard, serve a copy of the originating notice on the encumbrancee.

(2) Every encumbrancee present or represented at a hearing of an application for an order shall be given an opportunity to make representations to the Court.

**14** Notwithstanding section 2(2), if an order has or may have the effect of subdividing a parcel to which *The Planning Act, 1977* applies, the Court may

(a) stay the proceedings under this Act until the requirements of *The Planning Act, 1977* have been complied with, or

(b) make the order subject to the requirements of *The Planning Act, 1977* being complied with.

**15** Notwithstanding any agreement between co-owners of land, a 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.

**13** Service of an application of an encumbrancee.

**14** The Planning Act, 1977.

**15** Termination of co-ownership notwithstanding any agreement between co-owners.

**16**(1) 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*.

(2) Any proceeding commenced challenging the validity of a partition order referred to in subsection (1) by reason that the partition order was not approved under *The Planning Act* is discontinued without costs to any party to the proceeding.

(3) Any caveat, instrument or lis pendens registered on behalf of a local authority in respect of a partition order referred to in subsection (1) shall be discharged by the Registrar.

**17** *The Transfer and Descent of Land Act* is amended by repealing section 6 and substituting the following:

**6**(1) Subject to section 9, if land is transferred to a man and wife, the transferees take according to the tenor of the transfer.

(2) Every tenancy by entireties existing immediately before the commencement of this section becomes upon the commencement of this section a joint tenancy.

(3) Any letters patent, transfer, conveyance, assurance, will or other assignment that would have the effect of creating a tenancy by entireties creates instead a joint tenancy.

**18** The following statutes of England no longer apply in Alberta:

31 Hen. VIII, c.1;

32 Hen. VIII, c.32;

31 and 32 Vict., c.40.

**19**(1) This Act, except section 9, comes into force on the day upon which it is assented.

(2) Section 9 comes into force on a date or dates to be fixed by Proclamation.

**16** Validity of partition orders registered in a Land Titles Office before May 20, 1976.

**17** Abolition of tenancy by entireties. Section 6 of The Transfer and Descent of Land Act presently reads:

*6 When land is transferred to a man and his wife, the transferees take according to the tenor of the transfer, and do not take by entireties unless it is so expressed in the transfer.*

**18** Certain statutes of England are to no longer apply in Alberta.