NOVA SCOTIA COURT OF APPEAL
Citation: *Fownes v. Ernst*, 2021 NSCA 8

Date: 20210114
Docket: CA 498568
Registry: Halifax

Between:

Goldie S. Fownes (by her litigation guardian Allen C. Fownes)

Appellant

v.

Kevin W. Ernst

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	November 26, 2020, in Halifax, Nova Scotia
Legislation:	*Partition Act*, R.S.N.S. 1989, c. 33; *Real Property Act*, R.S.N.S. 1989, c. 385, s. 5; *The Partition of Lands*, R.S.N.S. 1851, c. 139, s. 3; *An Act for Partition of Lands in Coparcenary, Jointenancy, and Tenancy in Common, and thereby for the more effectual collecting His Majesty's Quit Rents in the Colony of Nova Scotia*, 7 Geo. III, c. 2; *An Act for Joint Tenants and Tenants in Common*, 31 Hen. 8, c. 1; *An Act Concerning Joint Tenants for Life or Years*, 32 Hen. 8., c. 32; *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, s. 36; *The Partition Act*, 31 & 32 Vict., c. 40; *Partition Act*, R.S.N.S. 1900, c. 168; *Partition of Property Act*, R.S.B.C. 1996, c. 347, ss. 2 and 4;
Cases Cited:	*Sellon v. Huston Estate* (1991), 107 N.S.R. (2d) 6; *Re Legh's Resettlement Trust*, [1937] 3 All E.R. 823 (C.A.); *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, paras. 94-95; *Doane v. McKenny* (1854), 2 N.S.R. 328, (S.C. in banco); *McNeil v. McDougall* (1896), 28 N.S.R. 296 (S.C. in banco); *Archibald v. Handley* (1904), 40 N.S.R. 427 (S.C. in banco); *Gaskell v. Gaskell* (1836), 6 Sim. 643 (Ch.); *Hobson v. Sherwood* (1841), 4 Beav. 184 (Ch.); *Lalor v. Lalor*, [1883]

O.J. No. 228 (Ont. H.C.); *Baring v. Nash*, 1 Ves. & B. 551 (Ch.); *Evans v. Bagshaw* (1870), L.R. 5 Ch. App. 340; *Dodd v. Cattell*, [1914] 2 Ch. 1; *Murcar v. Bolton* (1884), 5 O.R. 164; *Fisken v. Ife* (1897), 28 O.R. 595 (Ont. Div. Ct); *Morrison v. Morrison*, [1917] O.J. No. 222; *Bunting v. Servos*, [1931] O.R. 409; *Chupryk v. Haykowski*, [1980] M.J. No. 133 (C.A.); *Aho v. Kelly*, [1998] B.C.J. No. 1400 (S.C.); *Pallot v. Douglas*, 2017 BCCA 254; *Morris v. Howe* (1983), 38 O.R. (2d) 480;

Subject: Real Property; Partition; Interests in Land; Contingent Interests;

Summary: The parties held life interests as tenants in common of rural land. The remainder was gifted to the survivor of them. The parties applied to determine, as a question of law, whether the appellant, Ms. Fownes, could partition the land. The application judge ruled she could not. Ms. Fownes appealed.

Issues:
(1) What interests in land did the parties hold?
(2) Did the *Partition Act* permit partition of a remainder?
(3) Did the common law permit partition of the remainder?

Result: Appeal dismissed. The gift of the remainder is a contingent interest, which is not an interest in land and therefore not subject to partition. The *Partition Act* specifically excludes an action by anyone entitled only to a remainder or reversion. Although the *Act* preserves partition at common law, common law did not permit partition of a remainder interest but rather confined partition actions to holders of concurrent interests in possession.

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Appellant

v.

Kevin W. Ernst

Respondent

Judges:	Wood C.J.N.S.; Bryson and Bourgeois JJ.A.
Appeal Heard:	November 26, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bryson J.A.; Wood C.J.N.S. and Bourgeois J.A. concurring
Counsel:	Colin D. Bryson, Q.C., for the appellant Timothy C. Matthews, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] The parties share a life interest in a large tract of largely undeveloped land. The survivor will inherit everything. But we do not know who that will be. Ms. Fownes brought a partition action to divide the land. Mr. Ernst says that is impossible because neither owns the fee simple interest. The point of partition is to divide what one has. But the parties do not have the fee simple interest, so they cannot divide it. The judge below agreed and dismissed Ms. Fownes' proceeding. She now appeals. For reasons that follow, the appeal should be dismissed.

[2] After a factual overview, the following issues will be addressed:

(a) What interest in land do the parties have?

(b) Does the *Partition Act*, R.S.N.S. 1989, c. 33, permit partition of a remainder?

(c) Does the common law permit partition of a remainder?

Factual Overview

[3] Goldie Fownes and Kevin Ernst are heirs of the late Harris Langille whose 1967 will gave each a life interest in approximately 190 acres on Big Mush-a-Mush Lake, Lunenburg County. The survivor will get the fee simple in it all.

[4] Ms. Fownes was Mr. Langille's daughter and Mr. Ernst was his grandson. Ms. Fownes wanted to partition the land. She brought a partition action to divide it up or alternatively force its sale. Mr. Ernst defended the action, arguing that partition was unavailable primarily because it could not operate on the contingency of survivorship described in the will.

[5] The parties applied to determine, as a question of law, whether Ms. Fownes could partition the property. In an unreported decision, the Honourable Justice Mona Lynch found that the contingent remainder was not amenable to partition.

[6] Ms. Fownes argues that a proper interpretation of the *Partition Act* contemplates division of the ownership present in this case. She adds that partition of these interests would also have been available under the English law incorporated and preserved by s. 3 of the *Act*.

[7] Ms. Fownes explains that the trial judge erred in law when she said, "… the person with a life interest can only sell the life interest; they cannot vest in a buyer more than they, themselves, have … The remainder belongs to only one of them. It cannot be partitioned as it is not an estate in possession under the *Partition Act*". The judge also allegedly erred by finding, in the alternative, that the life interests might be partitioned, but not the remainder.

[8] Ms. Fownes claims that as a co-tenant of a life interest, she has the standing to seek partition of both the life and remainder interests. She says this interpretation is supported both by the *Act* and the most compelling jurisprudence.

[9] To test Ms. Fownes' assertions, we must begin with asking what interests the parties have.

Nature of the parties' interests

[10] Mr. Langille gave to his daughter and grandson a joint life interest in the property. In a demise, the intention of the testator expressed by the language of the will would govern. When intention is not obvious, the common law presumes joint tenancy (*Sellon v. Huston Estate* (1991), 107 N.S.R. (2d) 6; *Anger & Honsberger, Law of Real Property*, 3d ed (Toronto: Thomson Reuters Canada Ltd., 2019), §14:20:10). That presumption has been reversed by statute (*Real Property Act*, R.S.N.S. 1989, c. 385, s. 5). The parties agree they have a tenancy in common of the life interest.

[11] Ownership of the fee simple remains unresolved because recognized interests in land must be "vested" in interest or possession. A gift to "A" for life with the remainder to "B" is a vested life interest in possession for "A" and a vested fee simple interest—though not vested in possession—for "B". In this case, we do not know who will inherit the fee simple interest. Neither party has a vested estate in the remainder whether in interest or possession. At best they have an expectancy—something which is hoped for but does not presently exist. A contingency as to both right and possession—as here—is not a vested right in property (*Re Legh's Resettlement Trust*, [1937] 3 All E.R. 823 (C.A.)). An expectancy is not a property right (*Black's Law Dictionary*, 4th ed, at p. 686, citing caselaw).

[12] The same point is more explicitly made in *Cheshire's Modern Law of Real Property*, 12th ed, at pp. 295-96, where the words "contingent" or "future" interest may be equated with Black's "expectancy":

> The result of the distinction between vested and contingent interests is that reversions and vested remainders, despite the element of futurity of possessory enjoyment that characterizes them, have always been regarded as *estates* in the true sense of the word, though, with the reduction in 1925 of legal estates to the fee simple absolute in possession and the term of years absolute, the more appropriate word is now "interests." Moreover, they are present, not future, interests. ***A future interest properly so called is one which cannot be the subject-matter of ownership until something happens that may never happen.*** This is not the position with regard to reversions and vested remainders, for although they may be described as future *interests* inasmuch as they do not at the moment carry immediate possession of the land, they are nevertheless present existing interests in the sense that they confer upon their holders a portion of the actual ownership of the land.
>
> > "The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested him in, an estate in the land." [Hawkins on Wills (3rd Edn.), p. 263.]
>
> They are classified as future interests merely because the right of possessory enjoyment is postponed, but they are present in the sense that they may be disposed of as freely as an estate carrying a right to immediate possession. On the other hand, ***a contingent remainder does not become an estate, but continues as a mere possibility of acquiring an estate, until the contingency upon which it depends has occurred.*** [Hargreaves, *Introduction to Land Law* (4th Edn.), pp. 47-50; 103-4.]
>
> [Bold italicized emphasis added]

[13] The right of survivorship in Mr. Langille's will does not create an interest in land until one of the life tenants dies.

Does the Act permit partition of a remainder?

[14] Three sections of the *Act* are directly relevant to this issue. They provide:

> **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.***
>
> [Emphasis added]

[15] Ms. Fownes submits that the following propositions can be drawn from interpreting ss. 4, 5 and 6:

(a) The "joint tenants" and "tenants in common" described in s. 4 include lesser interests such as a life interest, a remainder or reversionary interest.

(b) But for s. 6, s. 5 would give a right of partition to those with a remainder or reversionary interest because otherwise s. 6 would be redundant.

(c) Since the remainder/reversion limitation in s. 6 does not apply to s. 4, a person holding a remainder or reversionary interest may be compelled to have that interest partitioned by someone holding a possessory interest, such as Ms. Fownes' life tenancy.

[16] Ms. Fownes urges that s. 9 of the *Act*, general principles, and the law's policy against restraints on alienation support her submissions on interpretation of the *Act*.

Section 4 – Interests Subject to Partition

[17] The statute does not define "land", but the common law does settle what interests in land are. Legislation is presumed to assume the common law, absent a contrary intention (*Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, paras. 94-95). The word "land" in s. 4 would ordinarily be confined to interests in land. As we have seen, while the parties do have a life interest, they have no vested future interest—only an expectancy. So there is no future interest to partition.

Sections 5 and 6 – Who can initiate partition?

[18] The same logic applies to s. 5 which describes who may seek partition. As holders of a life interest, the parties could seek partition of that interest—but not an expectancy, which is not an interest in land.

[19] Section 6 does not assist Ms. Fownes because it actually diminishes the right to partition, by excluding holders of remainder or reversionary interests from asking for it. (A remainder interest is created by instrument—as in a vested gift over after a life estate. A reversion occurs irrespective of intention and operates as a matter of law by reverting title to the grantor or testator when a gap occurs in ownership. Some of the cases mistakenly use the terms indiscriminately.)

[20] The statutory limitation of a right of action to estates in possession, not remainders or reversions, is relatively old, first appearing in 1851 (*The Partition of Lands*, R.S.N.S. 1851, c. 139, s. 3). Here, the parties' expectancy is an unvested contingent remainder—not an estate in interest or possession—so they have nothing to partition and, owing to s. 6, no right—even if they held a vested remainder—to apply for it.

Section 9 – Statement of Claim

[21] Ms. Fownes counters that s. 9 supports her interpretation because it describes the persons that must be listed in a Statement of Claim:

> **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.
>
> [Emphasis added]

[22] Ms. Fownes says that because s. 9(1) expressly contemplates a contingent remainder being "bound by" a partition, such an interest can be partitioned. Section 9 of the *Act* is procedural. This portion of the statute is prefaced by the title "Parties and Service". The language used here captures contingent remainders—i.e. expectancies—which are not interests in law capable of partition. Describing what interests may be bound by a partition proceeding does not create a right to partition those interests which has not already been granted in s. 5.

Policy and Principle

[23] Ms. Fownes draws an analogy to a joint tenancy and says that the parties are "co-owners" of the contingent remainder. The *Act* permits partition between joint tenants of a fee simple, even though only one of the two will have the entire interest in the lands following the death of the other. If one can partition a joint tenancy when this future interest in the whole is not known, why not partition the contingent interest in this case?

[24] The answer is that joint tenants own the entirety of the estate. There is one title vested in possession, now shared by both. The death of one of two joint tenants, which leaves the survivor the sole owner of the whole, does not change the estate that each possesses at the time it is originally granted or devised to them both. There is only one estate. No new estate is created when one of the joint tenants dies; the survivor simply holds the one title which had previously been shared. It is otherwise with a contingent interest which does not yet exist. The parties in this case are not joint tenants of the entire title to the lands, but joint owners of a life interest. The fee simple interest is not currently enjoyed by either but belongs to the survivor. The contingency of that event has not yet occurred and so the interest that arises upon that occurrence has not yet been created.

[25] Next Ms. Fownes says that previous conveyances by the parties "demonstrated" that contingent remainder interests can be sold. Respectfully, this is beside the point. Anyone can contract to surrender a personal right. If both parties entitled to an expectancy grant title to a third party, they clearly are surrendering that right and would be estopped from later asserting it. But that is quite different from forcing a partition of a non-proprietary right on an unwilling party who may yet inherit the whole.

[26] Finally, Ms. Fownes contends that the policy of the *Act* also supports her interpretation, because the law disliked restraints on alienation of land which may occur if co-owners disagree. Ms. Fownes does not offer any authorities, articles or texts that associate the policy of freedom of alienation with partition. We can start with Nova Scotia's first *Partition Act*.

[27] The preamble of the first Nova Scotia Act of 1767 laments the loss of Crown revenue and seeks its improvement through facilitation of partition which would allow development of granted lands by occupiers against absentee co-owners: *An Act for Partition of Lands in Coparcenary, Jointenancy, and Tenancy in Common, and thereby for the more effectual collecting His Majesty's Quit Rents in the Colony of Nova Scotia*, 7 Geo. III, c. 2. We can infer easier alienation of land from

its fuller use that would increase public revenue. But the alienation of land is not the stated or principal goal of the legislation.

[28] Partition may indirectly facilitate alienation of land by overcoming a conflict between co-owners. But partition is not an attack on excessive restraint of alienation such as is proscribed by the rule against perpetuities—rather, partition is a means by which current owners can resolve a present impasse. To repeat, the *Act* permits actions by those holding estates in possession, not in remainder or reversion. Policy arguments cannot transcend imperative statutory language.

Does the common law permit partition of a remainder?

[29] Ms. Fownes also submits there is jurisprudential authority supporting her right to partition of a remainder. She says the common law right to partition is preserved by s. 3 of the *Act*, which says:

> **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.

[30] At common law, partition was available to coparceners—heirs at law who shared one title but without a right of survivorship as in a joint tenancy. Each coparcener had an interest. (Owing to legislative enactments dealing with intestate succession, coparceny no longer exists in Canadian provinces.) The common law right was extended in the 16th century to joint tenants and tenants in common and then to holders of life estates and lessees. (*An Act for Joint Tenants and Tenants in Common*, 31 Hen. 8, c. 1; *An Act Concerning Joint Tenants for Life or Years*, 32 Hen. 8., c. 32).

[31] The common law remedy of partition, augmented by the two statutes of Henry, became part of the law of Nova Scotia and was not repealed by the early Nova Scotia legislation on partition: *Doane v. McKenny* (1854), 2 N.S.R. 328, (S.C. in banco). The equitable partition jurisdiction of the English Court of Chancery survived legislative implementation in Nova Scotia (*McNeil v. McDougall* (1896), 28 N.S.R. 296 (S.C. in banco); *Archibald v. Handley* (1904), 40 N.S.R. 427 (S.C. in banco)).

[32] By the early 19th century, for both procedural and remedial reasons, partition proceedings had migrated to the Courts of Chancery. In 1833, the common law writ was abolished in England (*Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, s. 36). Chancery's remedial power was legislatively extended to include a power of sale in 1868, (*The Partition Act*, 31 & 32 Vict., c. 40). In Nova Scotia, sale in lieu of partition received statutory sanction in 1900: R.S.N.S. 1900, c. 168.

[33] With respect to the jurisprudential principles preserved by s. 3 of the *Act*, Ms. Fownes advances three broad grounds sustaining the relief she seeks:

(a) The parties hold "the exact same interest"; a concurrent life interest and a concurrent contingent remainder, consistent with the English 16th century legislation giving co-owners a partition remedy;

(b) Ms. Fownes' position is consistent with the Law Reform Commission of Saskatchewan's statement that "subsequent judicial decisions held that the legislation is broad enough to apply to any co-tenancy";

(c) Ms. Fownes' position is consistent with the 19th century cases (*Gaskell*, *Hobson*, and *Lalor*), discussed further below.

a) Do the parties hold the exact same interest?

[34] It is true that the parties are co-tenants of the exact same life estate. But not of the contingent remainder. To describe the parties as "co-tenants" is a misnomer because tenancy assumes an interest in land, which a contingent remainder is not (¶11 and 12 above).

b) Law Reform Commission of Saskatchewan's comments on co-tenancy

[35] In her factum, Ms. Fownes emphasizes the following passages from the Saskatchewan report:

> […] *The Statute of Partition, 1540* (32 Hen. 8, c. 32) extended the right to co-owners holding land for life or a term of years. Subsequent judicial decisions held that the legislation is broad enough to apply to any co-tenancy (see *Murray v. Murray* [*sic*] (1879), L.R. 10, Eq. 346). […]
>
> […] The 1540 legislation extended the right to co-owners with life or leasehold interests. As interpreted by the courts, the rights extend to co-owners of any recognized interest in land, including a minor interest such as a *profit a prendre*,

> so long as it gives the owner a right of possession. Even co-owners of a lease may apply for partition of the lease.
>
> [Appellant's factum, paras. 17-18: "*Murray*" should be *Hurry v. Hurry* (1879), L.R. 10, Eq. 346. *Hurry* does not say anything about the co-tenancies to which the *Act* applies.]
>
> [Appellant's emphasis]

[36] These quotations show that an applicant for partition must be: (a) a co-owner of an interest in land which (b) gives that owner a right of possession.

[37] Respectfully, these passages do not expand a right of partition beyond common owners of an interest in possession. Even a vested remainder—which the parties do not have—is not an interest in possession while a life interest intervenes. Ms. Fownes is only a co-owner of a possessory life interest.

c) *Do the 19th century cases support Ms. Fownes?*

[38] This proposition requires a closer examination of these cases and their jurisprudential treatment by English and Canadian courts.

[39] Ms. Fownes relies on three 19th century cases to support her claim for partition by a life interest: *Gaskell v. Gaskell* (1836), 6 Sim. 643 (Ch.); *Hobson v. Sherwood* (1841), 4 Beav. 184 (Ch.); and, *Lalor v. Lalor*, [1883] O.J. No. 228 (Ont. H.C.). *Gaskell* was a case in which tenants for life and a remainder holder agreed to partition; *Lalor* and *Hobson* involved life interests seeking partition against remainders. They followed *Gaskell* without noting the agreement to partition. None of these cases cite any other as authority that a life tenant can partition a remainder. Ms. Fownes is right that the parties cannot confer partition jurisdiction on the court. But the court can implement that to which the parties have agreed.

[40] The applicants in *Hobson* cited *Gaskell* and the 1813 decision of *Baring v. Nash*, 1 Ves. & B. 551 (Ch.), in support of partition by a life tenant. In *Baring*, the court expressly declined to make the applicant's reversioner a party because his interest could not be partitioned. The applicant had a one-tenth interest as tenant in a long-term lease. He was granted partition against the nine-tenth fee simple holders *for the term of the lease*. He did not acquire a fee simple interest. The fee simple interest of the defendant was not partitioned. *Baring* does not support partition of a fee simple or reversionary interest by a life tenant.

[41] In *Hobson*, the plaintiff had a life interest in a one-fifth share of an undivided estate. The defendants owned the fee simple in the estate as tenants in common subject to the plaintiff's one-fifth life estate. Partition was granted, but it is not clear whether Mr. Hobson obtained a fee simple interest or only a life interest in a divided one-fifth of the estate. This latter interpretation would be consistent with *Baring*, as both parties in each case had a right to possession.

[42] *Gaskell* and *Lalor* appear to go beyond *Hobson* and *Baring*, by granting more than a partition to accommodate a life interest. They also grant partition of the fee simple—an interest neither applicant had in either case. These cases provide dubious support for Ms. Fownes' claim for partition. They are against the weight of later authority to which we will now turn.

[43] *Gaskell* and *Lalor* do not accord with later English law or with Ontario cases purporting to apply it: *Evans v. Bagshaw* (1870), L.R. 5 Ch. App. 340 (reversioner has no status to seek partition); *Dodd v. Cattell*, [1914] 2 Ch. 1 (only possessory interests can claim partition, referred to in *Morrison*, below); *Murcar v. Bolton* (1884), 5 O.R. 164 (remainder cannot obtain partition against life tenant); *Fisken v. Ife* (1897), 28 O.R. 595 (Ont. Div. Ct) (life tenant cannot partition against the remainder).

[44] Mr. Ernst resists Ms. Fownes' claim of jurisprudential support for her requested partition, arguing that only those in possession could apply for partition:

> [28] ***It was well settled, and well-understood, law that only those who were entitled to possession of their shares in land could have partition***; that is the law in England now, and always has been, though its statutes in regard to partition and sale are wide and liberal: see Dodd v. Cattell, [1914] 2 Ch. 1, in which counsel for the party seeking partition on being asked by the Court, "***Can a person entitled in remainder expectant on a life estate obtain a partition?" answered, "No, there must be possession***," shewing how well-settled and well-understood the rule there is. And in the United States of America, it seems to have been equally so well-settled and well-understood. The rule there is thus stated in the Cyclopaedia of Law and Practice, vol. 30, p. 182: "It was the rule both at common law and in Chancery that none but estates in possession were subject to compulsory partition. This rule prevails in the United States except where it has been abrogated by statute." And, until money instead of land was brought in sight by legislation, it is difficult to understand why partition would be made, or sought, except to give possession in severalty.
>
> [*Morrison v. Morrison*, [1917] O.J. No. 222; Emphasis added]

[45] The Ontario legislation is broader than Nova Scotia's because it authorizes "any person interested in land …" to bring a partition proceeding. Land is defined as including "… lands, tenements, hereditaments, and all estates and interests therein". Despite this broader language, a remainder holder could not ask for partition.

[46] In a later case, a majority of the Ontario Court of Appeal observed that "any person interested in land" did not include remainder interests because they were not possessory:

> [32] Now, in the second place, while it may be that, on a proper reading of the statute, "lands" include estates in remainder, and possibly that the appellant is given a status to make such an application as the present, yet the difficulty in his way is that he is not entitled to "partition" because, in my opinion, ***"partition," as used in the statute, means actual present physical division, among those entitled, of the very property itself***, and does not mean a declaration regarding future rights in specific property of which the parties may at some future date become entitled to possession.
>
> [*Bunting v. Servos*, [1931] O.R. 409; Emphasis added]

[47] In reply, Ms. Fownes cites the Manitoba Court of Appeal in *Chupryk v. Haykowski*, [1980] M.J. No. 133 (C.A.) which quotes the minority in *Bunting*, interpreting "any person interested in land" to include interests not yet in possession. The Ontario and Manitoba *Acts* have similar language.

[48] The real issue in *Chupryk* was whether Mr. Chupryk could mortgage property in which he had a life interest and one-third remainder against the wishes of the two-thirds remainder holder, Mrs. Haykowski. The Court of Appeal found no authority for Mr. Chupryk's request, but alternatively granted Mrs. Haykowski's counter-motion for sale under Manitoba's *Law of Property Act*, which authorized partition and sale in the very broad language of the Ontario legislation. Despite this similarity of language, *Chupryk* grants a partition remedy by a remainder against a remainder and life tenant—something Ontario courts, citing English law, have refused to do. *Chupryk* treats partition as a straight-forward interpretation of the statute, free of the jurisprudential nuances of the Ontario and later English cases.

[49] Next Ms. Fownes turns to the British Columbia decision of *Aho v. Kelly*, [1998] B.C.J. No. 1400 (S.C.) in which a life tenant sought partition and sale. Ms. Aho also owned a one-third interest in the fee simple and the respondents owned

the other two-thirds. British Columbia permits partition of a wide array of proprietary interests—but only at the instance of those who could have applied under English law (*Partition of Property Act*, R.S.B.C. 1996, c. 347, ss. 2 and 4; *Pallot v. Douglas*, 2017 BCCA 254, para. 17).

[50] In *Aho*, the court granted an order for sale with payment to Ms. Aho for the value of her life interest. *Aho* may be explained as a division by co-owners of a remainder interest to which the prior life tenant in possession agreed. But the judge fails to confront the absence of a co-life tenant against whom partition could be claimed. Not being possessory, a remainder interest could not ask for partition (*Pallot*, para. 20), and a sole life tenant does not need it because there is no competing concurrent interest.

[51] In response to *Chupryk* and *Aho*, Mr. Ernst cites *Morris v. Howe* (1983), 38 O.R. (2d) 480, which declines to follow *Chupryk* and points out that *Gaskell* and *Lalor* could be distinguished because they dealt with concurrent rather than consecutive interests. Ms. Morris held a life interest and sought partition against the remainder interest holder. The Court would not give to Ms. Morris by partition that which she did not inherit, nor thereby disinherit the remainder holder.

[52] In oral reply, Ms. Fownes protests "we are not dealing with consecutive interests—the interests are concurrent", presumably referring to the contingent remainder. At least four responses can be made:

1. A remainder cannot initiate a partition (s. 6 of the *Act*);
2. A life tenant may initiate a partition, but is not an interest concurrent with a remainder;
3. The jurisprudence that incorporates the contextual history of partition does not contemplate partition of a remainder by a life tenant;
4. In any event, the unvested remainder in this case is not an interest in land susceptible to partition.

[53] The potential problems which arise from Ms. Fownes' submissions are well-described in an article[1] to which she refers us in which the interpretation of the Manitoba Court of Appeal in *Chupryk* is criticized:

[1] John Irvine, "A House Divided: Access to Partition and Sale under the Laws of Ontario and Manitoba" (2011) 35 Man LJ 217, pp. 246-248.

> […] ***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. ***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, 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?
>
> ***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 brainteasers disappear.*** As between such co-owners, there is no fiduciary relationship. 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 regard to the statutory, common law and equitable rules governing the settlement of accounts between them.
>
> ***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. […]
>
> [Emphasis added]

[54] It is clear from the preamble to the first of the 16th century statutes of Henry that it contemplated partition between tenants of a common interest in possession. The preamble refers to a wasting of commonly held land by one tenant at the expense of another—without partition, co-ownership precluded a remedy. Henry's

second statute extended partition to life interests and lessees. These are interests in possession. That would also be the case of coparceners who had a common law right to partition. Conversely, consecutive estates lacked the commonality of a frustrated shared interest to attract legislative intervention. For the same reason, interests not in possession did not require a present solution. Modern cases put this in practical terms:

> […] the Court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical but founded on good sense in not allowing the reversioner to disturb the existing state of things [*Bagshaw*];
>
> […] that none but those entitled to possession, that is, none but those who really need it, are entitled to partition [*Morrison*];
>
> […] of what is there to make partition? There is no common interest or possession between her [life tenant] and those in remainder [*Murcar*, para. 84];

[55] In *Murcar*, the Ontario Divisional Court insisted on commonality of estates in possession, protesting that the legislature could not have intended to destroy the interest of a life tenant; in other words, 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.
>
> [p. 184]

[56] Respectfully, the Ontario courts' interpretation that partition is available to and against concurrent owners in possession, better accords with the historical development of the right to partition and the amelioration of a dispute between owners enjoying a present interest in possession. It minimally intrudes on property rights to address an existing impasse, thereby avoiding a conflict with successors who do not yet—and may never—enjoy the land.

[57] *Aho* and *Chupryk* can be defended on the strength of the statutory language, distinguishing those jurisdictions from Nova Scotia. But unlike the Ontario cases, they fail to engage the contextual history of partition which suggests a remedy confined to the holders of concurrent possessory interests. Nor do they anticipate the practical problems of dividing or valuing differing temporal interests which Professor Irvine identifies. Accordingly, an interpretation that limits partition to concurrent possessory interests better addresses the contextual and practical issues he describes.

Conclusion

[58] The appeal should be dismissed because:

1. Partition is unavailable in Nova Scotia against an expectancy, which is not an interest in "land" (s. 4 of the *Act*);
2. Only holders of a possessory interest may seek partition (ss. 5 and 6 of the *Act*; *Morrison*; *Morris*; *Bunting*);
3. Partition assumes a division of concurrent possessory interests and is not available between consecutive interests which do not share a present interest in need of division (*Morris*; *Morrison*; *Bunting*; *Murcar*).

[59] I would order costs of $1,500, inclusive of disbursements to Mr. Ernst.

Bryson, J.A.

Concurred in:

Wood, C.J.N.S.

Bourgeois, J.A.