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Real Estate

Partition orders are rare, for good reason

By **Ray Mikkola**

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(January 19, 2021, 1:41 PM EST) -- A co-owner in Ontario may apply for partition or sale of real property under the *Partition Act*. Case law under the Act favours a presumption for partition (that is, dividing the property between or among the owners) rather than an order for the sale of the entire property with a division of sale proceeds. But a recent Superior Court decision in *1312733 Ontario Inc. v. Simone* 2020 ONSC 6546 makes the prospect of obtaining a partition order more unlikely.

The imposition of subdivision control after the Second World War was followed perhaps predictably by a variety of schemes by property owners to circumvent such controls. The schemes often relied on technical arguments as to what constitutes a conveyance for the purpose of subdividing land. One such scheme involved obtaining a partition order under the Act.

As it turns out, there is good reason at common law to treat court orders differently from voluntary conveyances, even where the effect of the order is to convey title. But the concern generally of the provincial government and those tasked with implementing and formulating local land use controls was the prospect of co-owners circumventing the planning process by, for example, creating a "dispute" which would result in a partition order thereby creating a new parcel of land without any involvement of planning authorities or the application of good planning principles.

The issue was ultimately resolved by the enactment of what is today s. 50 (20) of the *Planning Act* which provides as follows:

(20) No order made under the *Partition Act* for the partition of land shall have any effect in law unless,

(a) irrespective of the order, each part of the land described in the order could be conveyed without contravening this section; or

(b) a consent is given to the order.

In *Simone*, a corporation and Quinto and Giovanna Simone were each 50 per cent co-owners of vacant land slated for development. The corporation applied for a sale order and the Simones asked for a partition order under the Act. During argument, the Simones asked for an adjournment to allow them to apply for a consent to sever as contemplated by s. 50 (20). The judge refused, noting that the consent should have been obtained prior to the parties' attendance at court. The court ordered a sale of the property under the Act.

Ted Evangelidis, the litigator who acted for the corporation, says that the importance of the decision is that it clarifies that the presumption in favour of partition is just that — a presumption — which can be effectively rebutted by planning evidence that demonstrates that the proposed partition violates s. 50 of the Act.

The decision provides more than merely the authority for confirming the paramountcy of s. 50 (20) over the Act in respect of partition orders. It requires that compliance with s. 50 must have been achieved prior to and as a condition of obtaining a partition order under the *Planning Act*. Where an

adjournment is requested to allow a party to make a consent application, the court is justified in refusing the adjournment.

The sale order issued by the court in this case also confirms the details of the sales process: it provided for the retention of appraisers, real estate brokers and real estate lawyers and for their compensation, the requirement to achieve a sale at demonstrably fair market value, the process to consider offers and the payment of net sale proceeds into court, together with the right to attend for directions where any dispute arises between the parties. Importantly, the court authorized either owner to participate as purchasers.

Importantly, there are other practical complications arising from attempting to satisfy the consent requirements of s. 50 (20) (b). Consents to sever are almost never given without conditions. Presumably, the Act requires evidence of a consent which is final, not subject to appeal, and in respect of which all conditions have been satisfied, and which could therefore result in the issuance of the required certificate authorizing the registration of a transfer on title to the property or properties. The *Planning Act* distinguishes between consent approvals which are still subject to conditions (called "provisional consents") and consents which are final, all conditions having been satisfied. Satisfying conditions of consent are not always within the control of the applicant. Some consent conditions, for example, require the applicant to obtain a rezoning or minor variance, which obviously must be processed and approved by municipal council or other decision makers not in the control of the applicant or the land division committee itself.

Other conditions frequently imposed include the installation of local services related to the proposed new lot(s), the conveyance of easements, road widenings, pedestrian and bicycle paths and the conveyance of land for park use or payment of money in lieu thereof. Mortgagees on title to the subject property may not agree to provide the required postponements and partial discharges which may result in the inability to satisfy conditions. It appears that the consent in s. 50 (20) is to be final as it does not refer to a "provisional consent."

At a practical level, it is difficult to imagine that owners who are already engaged in litigation would co-operate to satisfy sometimes complex and potentially expensive conditions to obtain a final consent to sever. One wonders if the land division committee would even accept an application for consent to sever which is signed by less than all of the owners, and whether a co-owner could, for example, attend at the consent hearing and object to the severance, or refuse to co-operate with and bear the expense of satisfying the conditions.

It may be important to note that s. 50 (20) does not expressly preclude the issuance of a partition order. It merely provides that any such order will not have any legal effect until the consent is obtained. However, it is not surprising that a court would not wish to issue an order that is patently of no legal effect, although it might be possible, of course, to issue a partition order conditional upon the obtaining of a consent thereafter (after all, the section refers to obtaining the consent "to the order").

For legal and practical reasons, therefore, it seems that the prospect of obtaining a partition order under the Act is unlikely, in view of the requirements to satisfy section 50 (20) (b) of the *Planning Act.*

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