Partition or sale of co-owned property?
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Polanski v. Roth, 2008 ABCA 378
http://www2.albertacourts.ab.ca/jdb%5C2003-%5Cca%5Ccivil%5C2008%5C2008abca0378.pdf

This brief Memorandum of Judgment delivered from the bench by the Alberta Court of Appeal is notable for a number of reasons. First, the Court of Queen's Bench judge did not give any reasons for his order but, aside from noting this fact, the Court of Appeal does not appear to be concerned by the lack of reasons and even applies "reasonableness" as the standard of review. How can a judgment given without reasons be assessed as reasonable? Second, the content of a proposal made by the appellant during settlement negotiations is used against him. Ordinarily, communications made for the purpose and in the course of negotiating a settlement are made on a "without prejudice" basis and cannot be used in court as evidence, whether "without prejudice" is expressly claimed for the communication or not. There might have been a reason why the appellant's settlement proposal was used against him in this case, but none is offered. Third, the appellant would probably have succeeded had his application been brought between 460 and 30 years ago, when the relevant law was three old Imperial statutes dating from 1539, 1540 and 1868. The law was, however, changed to a made-in-Alberta law in 1979, and the 110 year old provision which would have assured the appellant's win was dropped, seemingly without discussion.

In *Polanski v. Roth*, the Alberta Court of Appeal dismissed an appeal from a Court of Queen's Bench order for the physical partition of co-owned land. Mr. Justice Peter Costigan delivered the very brief (11 paragraph) judgment on behalf of himself and Justices Jean Côté and Frans Slatter. The land was a quarter-section with an old house on it. It was owned two-thirds by the appellant, John Polanski, who had asked that the co-ownership be terminated and the land be sold. His request was supported by his sister, Hertha Polanski, one of the respondents and the owner of a one-sixth interest. His sister, Mary Roth, the other respondent and the owner of the remaining one-sixth interest, had asked that the co-owned land be physically partitioned. The case — and the relationship between the three siblings — appeared to have been complicated by the fact that the old farm house on the quarter section had been occupied by Mary Roth's son for thirty years.

The parties had attempted to negotiate a settlement based on partition of the land, and Mary Roth had even obtained pre-approval from the subdivision approval authority for a tentative plan of a subdivision of the land into three parcels. The continued occupation of the house on the land by Mary Roth's son appeared to be insisted upon by Roth and rejected by John Polanski.

The Court of Appeal does not mention it in its Memorandum of Judgment from the bench, but the governing law is Part 3 of the *Law of Property Act*, R.S.A. 2000, c. L-7. That Part was originally enacted as the *Partition and Sale Act*, S.A. 1979, c. 59. That 1979 Act was in turn based on the recommendations of the then Institute of Law Research and Reform (now the Alberta Law Reform Institute) Report No. 23: Partition and Sale, of March 1977. Under section 15(1) of the *Law of Property Act*, a co-owner — a joint tenant or a tenant in common of an interest in land — may apply to the Court for an order terminating the co-ownership. Section 15(2) enumerates the three remedies a court can choose between:

> 15(2) On hearing an application under subsection (1), the Court shall make an order directing
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> (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)

As the Court of Appeal noted in an earlier case, *Ross v. McRoberts*, 1999 ABCA 227 at para. 16, "[t]he use of the words 'shall' and 'or' in s. 15(2) suggests the mandatory as well as disjunctive nature of the three possible directions. . ." (emphasis added).

In recommending that a court have no discretion to refuse an application to terminate co-ownership, the Institute noted in its *Report No. 23* at page 2 that, because co-owners often buy or inherit property without making an agreement as to what will happen if they disagree over its use or disposition, it is in their interest that the law provides a means by which one or more of them can bring their relationship to an end. The Institute further notes that it is also in the public interest that the law provides a means by which the disuse of land, due to disagreement by the owners, can be brought to an end.

As for the three possible remedies, the first — partition, or the physical division of the land — is the oldest remedy: see the *Partition Act, 1539*, 31 Hen. VIII c1 (U.K.) and the *Partition Act, 1540*, 32 Hen. VIII c32 (U.K.), reproduced as Appendices I and II in the Institute's *Report No. 23*. It was not until over 300 years later, in 1868 with the enactment of the *Partition Act, 1868*, 31 & 32 Vict. c.40 (U.K.), that a court was permitted to order sale instead of partition. Even then, section 4 of the 1868 Act provided that, if an owner of a half interest or more applied for sale of the land, the court was required to order the sale "unless it sees good reason to the contrary": *Report No. 23* at pages 4 and 41. These three Imperial statutes were the governing law in Alberta until 1979. Had John Polanski, the owner of a two-thirds interest, applied for sale anytime prior to 1979, the starting position would have been that he was entitled to the order he requested. Under the current *Law of Property Act*, however, the request of an owner of a half interest or more does not garner any special consideration. There is no indication in the Institute's *Report No. 23* as to why this provision of the 1868 statute was dropped.

When a co-owner of land requests termination of the co-ownership, the court must make one of the three orders permitted under section 15(2) of the *Law of Property Act*. There is nothing in that Act to suggest how a court should decide which remedy to order and so the choice is in the court's discretion.

How does a court decide whether to order partition, sale or sale to a co-owner? There are few Court of Appeal cases on partition and sale outside of the matrimonial context. One that does provide some guidance is the previously mentioned *Ross v. McRoberts*, 1999 ABCA 227. That case involved an appeal from an order compelling the appellant to sell his interest to the respondents, i.e., an order under section 15(2)(c). In dismissing the appeal, the Court of Appeal

stated (at para. 16) that the lower court had chosen "the most logical and reasonable option" and (at para. 22) that he chose "the only realistic option open to him." Other Alberta courts have chosen on the basis of which remedy would be "the most equitable for all of the parties": *Sheffield Welding and Fabricating Ltd. v. 958760 Alberta Ltd.*, 2003 ABQB 181 at para. 15.

Under the old 1868 Imperial statute, section 3 provided courts with only a little more guidance. That section provided, in effect, that if sale would be more "beneficial" than a physical division of the land, the court could order sale. According to the Institute's *Report No. 23* (at page 4) "beneficial" related to the nature of the property; the number, absence or disability of the parties; or "any other circumstance."

In the *Polanski v. Roth* case, the Court of Queen's Bench judge had granted Mary Roth's application for partition on the condition that, if the proposed subdivision was not approved within 90 days, the land would be listed for sale. No reasons were given for that choice.

With no reasons given for the order for partition, how does the Court of Appeal determine whether to allow or dismiss the appeal? The first issue on this point is, what is the standard of review? On the appeal, the Court of Appeal noted (at para. 6) that the parties agreed that the standard of review was one of "reasonableness." (On standards of review in general, albeit in the context of judicial review of the decisions of administrative tribunals, see *Dunsmuir v. New Brunswick*, 2008 SCC 9, where the Supreme Court reconsidered both the number and definitions of the various standards of review, and the three posts on ABlawg: Shaun Fluker's Dunsmuir: Much Ado about Nothing; Alice Woolley's The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review; and David Corry's *Dunsmuir v. New Brunswick*: Standards of Review and Employment Contracts.)

How does a court decide if a decision of a lower court is unreasonable? Does it look at how the decision was reached, its "justification, transparency and intelligibility" to borrow the descriptive elaboration from para. 27 of *Dunsmuir*? Or does it look at the nature of the decision itself and whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47. Or does the appeal court look at both the process of decision-making and the outcome?

What did the Court of Appeal do in this case in the face of a conditional order for partition made without reasons? It could not look at how that decision was reached. Did it look at the outcome and that outcome's defensibility on the basis of the facts and the law? The Court of Appeal, in its reasons, focused exclusively on the appellant's argument that three factors prevented partition from being the most equitable remedy and discussed whether or not the factual evidence and the record supported those three arguments: see paras. 7 to 9. Based on their analysis of whether those arguments had merit or not, the Court concluded (at para. 10) that "we are not satisfied that the chambers judge erred in refusing to order sale on this record." The Court of Appeal's approach could be characterized as one that looked at the outcome's defensibility on the basis of the facts in evidence before the lower court – facts only, as no law is mentioned. That would be an application of a reasonableness standard of review. However, when contrasted with the Court of Appeal's review of a lower court's decision which did give reasons, the Court in *Polanski v. Roth* appears close applying a correctness standard of review. When using a correctness

standard, a court undertakes its own analysis of the question and, based on that analysis, determines if it agrees with the decision under review. The Court of Appeal did not analyze which remedy to choose based on all the evidence before the lower court, but it did consider all of the appellant's arguments based on that evidence. Then they concluded that they were not satisfied the lower court's order was incorrect.

A contrast can be drawn with *Ross v. McRoberts*, where the Court of Appeal stated (at para. 22) that they could not find the lower court's "choice of disposition was based on an error in principle or that he ignored relevant evidence or took into account irrelevant matters." The review in that case looked at how the decision was reached, at the reasons for the order. It was on that basis that the Court of Appeal in *Ross v. McRoberts* concluded (at para. 22) that the lower court's decision "was not unreasonable." The contrast reveals how much easier it is to apply a reasonableness standard of review when reasons are given for the decision reviewed.

The three arguments made by the appellant in *Polanski v. Roth* were all directed toward establishing that the conditional order for partition that the Court of Queen's Bench had made was unfair. He first argued that there is only one approach to the quarter section which partition gave to Mary Roth, thereby forcing him to incur the cost of constructing a new approach. However, the Court of Appeal noted that Roth's tentative plan of subdivision divided the approach equally between John Polanski's parcel and Mary Roth's parcel. His second argument was that the majority of the parcel allotted him was bush and the majority of the portion allotted to Mary Roth was pasture and, because pasture land is worth more than bush land and he was a two-thirds owner, he should get most of the pasture land. The Court of Appeal noted there was no admissible evidence on the composition or value of parts of the quarter section. The reference to "no admissible evidence" appears to be a reference to an appraisal which was attached to the appellant's affidavit and therefore characterized as hearsay evidence. Then they noted (at para. 8) that "in settlement negotiations, the appellant proposed that he should receive a portion similar to that allotted to him in the tentative plan." His third argument was that, because Roth's parcel included the house, he would receive none of its value. In response, the Court of Appeal refers to the appellant's affidavit in which the appellant swore that the hearsay appraisal attributed "very little value" to the house and the lack of any other evidence to show the house had any significant value.

The Court of Appeal's use of a proposal made by the appellant in settlement negotiations is unusual. The Court of Appeal offers no explanation for their use of the appellant's settlement proposal against him, but the law has traditionally excluded evidence of settlement negotiations in subsequent legal proceedings. Underlying this exclusionary rule of evidence is the public policy objective of encouraging the negotiated settlements of disputes. As Sopinka, Lederman & Bryant put it in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 719:

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement

The authors continue (at 722) by noting that there are three conditions that must normally be met before communications attract the "without prejudice" rule:

> (a) a litigious dispute must be in existence or within contemplation; (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and (c) the purpose of the communication must be to attempt to effect a settlement.

Perhaps the appellant's settlement proposal was not made with the intention that it would not be disclosed to the court if negotiations failed. The other two conditions seem to be fulfilled, but without some explanation, no more than idle speculation is possible.

Unfortunately, because this Court of Appeal decision is merely a Memorandum of Judgment delivered form the bench, it does not provide any answers to questions such as: What principles determine whether the court will order a sale instead of partition? What remedy will ordinarily be granted? The answers to these questions used to be clearer under the Imperial statutes that applied in Alberta until 1979. For example, in *Gilbert v. Smith* (1879), 11 Ch. D. 78 at 81, Jessel M.R. stated: "The meaning of the Legislature was then when you see that the property is of such a nature that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties." Partition was the remedy that was ordinarily granted. A court would order a sale only if the land could not be reasonably partitioned.