Report on Leases of Unsubdivided Land and the Top Line Case

BCLI Report No. 38 July 2005

British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org
WWW: http://www.bcli.org

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

This project is being carried out as part of the Institute's Community Law Reform Project, which is made possible with the financial support of the Law Foundation of British Columbia and of the Notary Foundation. The Institute gratefully acknowledges the support of these bodies for its work.

Library and Archives Canada Cataloguing in Publication

Report on leases of unsubdivided land and the Top Line case.

(BCLI report; no. 38)
ISBN 1-894278-30-5

1. Leases—British Columbia. 2. Land subdivision—Law and legislation—British Columbia. I. British Columbia Law Institute II. Series

KEB224.R46 2005 346.71104'346 C2005-904231-1
KF590.R46 2005

INTRODUCTORY NOTE

The British Columbia Law Institute has the honour to present:

Report on
Leases of Unsubdivided Land and the Top Line Case

This report focusses on the legal issues that have arisen in the wake of the Court of Appeal's decision in *International Paper Industries Ltd.* v. *Top Line Industries Inc.* The *Top Line* case involved a lease of a portion of a parcel of land. The parties in *Top Line* neglected to obtain approval to subdivide the land in this manner. The court ruled that, in consequence of this breach of the subdivision requirements of the *Land Title Act*, the lease must be considered void *ab initio*.

This ruling surprised real estate lawyers. It has also proved to be a continuing source of frustration to persons involved in commercial leasing and agriculture. The *Top Line* case has imposed additional costs on these persons. In addition, by giving persons a means to escape from their contractual obligations, it has added uncertainty to the law and raised the volume of litigation.

The recommendations in this report provide a means for holding parties to such purported leases to the contractual obligations that they have entered into. This result may be achieved without undue harm to local control of land development and to the land title system because the law has evolved a variety of other procedures, in addition to subdivision control, to protect those interests.

Ann McLean
Chair,
British Columbia Law Institute

July 2005

TABLE OF CONTENTS

I. INTRODUCTION

The British Columbia Court of Appeal's decision in *International Paper Industries Ltd.* v. *Top Line Industries Inc.*[1] has caused a considerable stir. When the decision was rendered in 1996 it was greeted with surprise, criticism, and concern. One commentator called for legislation, ". . . so that the problem raised by this decision can be eliminated."[2] This report will examine the decision in *Top Line*, commentary on and criticism of *Top Line*, and some recent developments in the courts after *Top Line*. It will conclude by setting out the Law Institute's recommendations for reform of the law.

II. SUMMARY OF THE *TOP LINE* CASE

The court's interpretation of section 73 of the *Land Title Act*[3] was at the heart of *Top Line*. The relevant parts of section 73 for the case were:[4]

> **Restrictions on subdivision**
>
> **73** (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> (a) transferring it, or
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> . . .
>
> (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
>
> . . .
>
> (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

Top Line was concerned with the consequences of entering into a document that purports to be a lease but that does not comply with the restrictions on subdivision established by section 73.

---

1. (1996) 135 D.L.R. (4th) 423, [1996] 7 W.W.R. 179, 20 B.C.L.R. (3d) 41 (C.A.), Newbury J.A. (for the court) [*Top Line* cited to B.C.L.R.].

2. Bruce D. Woolley, "Case Comment: *International Paper* v. *Top Line Industries*" (1996) 54 Advocate 915 at 917.

3. R.S.B.C. 1996, c. 250.

4. This quotation is taken from the 1996 revised statutes. It differs slightly in expression and subsection numbering from the version of section 73 that the court considered in *Top Line*, but in substance it is the same. *See* Appendix A, below, at 17 for the full text of section 73.

In *Top Line*, International Paper Industries Ltd. (the "Tenant") owned a building from which it carried on a waste recycling business. The Tenant entered into an agreement with Top Line Industries Inc. (the "Landlord"). The Landlord agreed to purchase the Tenant's building and to move it onto the Landlord's property. The Landlord and the Tenant signed a document that purported to be a lease of an unsubdivided part of the Landlord's land (the "Lease"). The term of the Lease was 51 months. Despite having a term in excess of three years, nothing in the Lease, which was prepared by the parties without legal advice, addressed registration in the land title office. Further, nothing in the Lease dealt with obtaining subdivision approval. Apparently neither the Landlord nor the Tenant was aware of the requirements of section 73.

The relationship between the Landlord and the Tenant deteriorated after the Lease was signed. Two disputes between the parties ended up in court. These disputes were resolved in the Tenant's favour. With the expiry of the term of the Lease approaching, the Tenant decided to renew it. In accordance with the provisions of the Lease, the Tenant sent the Landlord a written request for renewal. The Landlord refused to renew the term. The Tenant petitioned the Supreme Court for a declaration of the Lease's validity and of the Tenant's entitlement to renew it, setting in motion the proceedings that would end up in the Court of Appeal.

At the hearing of the petition[5] the Landlord argued for the first time that the Lease was unenforceable or void, due to its noncompliance with section 73. The chambers judge reviewed three earlier cases that had considered section 73.[6] He regarded himself to be bound by what he took to be their conclusion: a document purporting to be a lease that is not in compliance with section 73 confers no rights in land, but may create personal rights and obligations between the parties to it. As a result, the chambers judge declared the Lease to be enforceable as a personal contract, which created binding obligations for the Landlord and the Tenant.

The Court of Appeal rejected the chambers judge's conclusion on the earlier cases that considered section 73. It decided that the three cases cited by the chambers judge either did not address the question of whether a document that contravenes section 73 confers personal rights and obligations on the parties to it, or, to the extent that these cases came to that

5. *International Paper Industries Ltd.* v. *Top Line Industries Inc.*, (1994) 93 B.C.L.R. (2d) 135, 38 R.P.R. (2d) 194 (S.C.), Tysoe J.

6. *Nesrallah* v. *Pagonis*, (1982) 136 D.L.R. (3d) 762, [1982] 5 W.W.R. 175, 38 B.C.L.R. 112 (S.C.), Taylor J.; *Yorkshire Trust Co.* v. *Gunter Farms Ltd.*, (1987) 47 R.P.R. 216 (B.C.S.C.), Hutchinson L.J.S.C., *aff'd*, (1989) 40 B.C.L.R. (2d) 161 (C.A.); *Anglican Synod of the Diocese of British Columbia* v. *Tapanainen*, [1990] B.C.J. No. 1164 (S.C.) (QL), MacKinnon J.

conclusion, they were wrongly decided.[7] In the court's view, then, there was no definitive case authority on the effect of a contravention of section 73.

Since section 73 does not spell out the consequences of breach—beyond providing that a document in breach of the section cannot be registered in the land title office—and since there was no binding past authority, the court said it was necessary to examine the policies underlying the provision. The court identified two policies: first, ". . . to ensure that municipal authorities retain control over subdivision as a means of regulating zoning, drainage, utility supply, building encroachment, siting, local aesthetics, and land development and use generally in the public interest";[8] and, second, ". . . to ensure the operation of the Torrens land registration system in this Province."[9] The court held that section 73 deserved an expansive interpretation in order to sustain its underlying policies.

After the court identified the policies advanced by the legislation, it was ready to address the key question raised by this lawsuit: "[d]oes a lease executed by the parties in ignorance of this provision [*i.e.*, section 73] create any equitable interest in respect of the land, or any contractual interest, or is such a document void *ab initio*?"[10] The Tenant put forward three arguments, each phrased as alternatives to the others, to convince the court to reject the third choice in favour of the first or the second. It asked the court to imply a condition precedent to the Lease, which would require the Landlord to comply with section 73. It requested that the court fashion a licence of occupation from the Lease, which would give the Tenant rights to possession and occupation of the premises but would not confer any interest in the land. Finally, it argued that the Landlord should be estopped from raising the validity of the Lease as an issue in this case because the Landlord failed to raise this issue in the two previous lawsuits involving the Lease.

The court rejected each argument. It refused to imply a condition precedent to the Lease because ". . . such terms may involve major expense and the Court cannot be confident that had the parties thought of the subdivision issue, they would have provided for it in a particular way."[11] The court then weighed the second and third arguments against the policies underlying section 73 and found, in both cases, that it could not accept the argument with-

7. *Supra* note 1 at para. 15.

8. *Ibid.* at para. 17.

9. *Ibid.* at para. 18.

10. *Ibid.* at para. 22.

11. *Ibid.* at para. 31.

out undermining the policies.[12] As a result, the court "with some regret" set aside the decision of the chambers judge and found the Lease to be void *ab initio*.[13]

III. CRITICISMS OF THE *TOP LINE* CASE

Lawyers and others expressed concerns about this finding of invalidity almost immediately after *Top Line* was decided. These concerns can be divided into two types. First, a number of commentators have criticized the court's reasoning in arriving at the result in *Top Line*. Second, several critics have worried about the effect that the decision would have both on existing leases and on leases concluded after *Top Line*.

The most commonly-heard complaint about the reasoning in *Top Line* was, as one commentator put it, that "[t]he court overstated the evils which s. 73 seeks to restrain."[14] Another critic remarked, "[t]here has been no demonstrable harm"[15] caused by leases in contravention of section 73. The damage has been contained because restrictions on subdivision are not the only tool that local governments have to control real estate development. The forerunner of section 73 was enacted in 1919.[16] Since that time, local governments have imposed numerous licence and permit requirements—such as building permits and business licences—in order to regulate land use and development. In addition, zoning requirements have progressed since 1919.[17] As a result, restrictions on subdivision are no longer the only or even the primary means that local governments have at their disposal to control real estate development.

It has also been observed that an arrangement that is substantially similar to the one in *Top Line* could be achieved by other means. For example, a landlord can enter into a lease of a

12. *Ibid.* at para. 35; para. 40.

13. *Ibid.* at para. 41.

14. Ashley F. Hilliard, "Commercial Leases," in Continuing Legal Education Society of British Columbia, *Business Law Practice '98 Update* (Vancouver: Continuing Legal Education Society of British Columbia, 1998) 5.1 at 5.1.14.

15. Woolley, *supra* note 2 at 517.

16. *Land Registry Act Amendment Act, 1919*, S.B.C. 1919, c. 40, section 3 (*see* section 92A). The first reference to leases in this provision appeared in *Land Registry Act*, S.B.C. 1921, c. 26, section 83.

17. British Columbia municipalities were first granted comprehensive zoning powers in 1925: *see Town Planning Act*, S.B.C. 1925, c. 55. Prior to the enactment of the *Town Planning Act*, municipalities were only authorized to adopt zoning bylaws that regulated specific industries and businesses, such as laundries. *See Carrick* v. *Point Grey (Corporation of)*, (1926) 38 B.C.R. 92, [1927] 1 D.L.R. 446 (S.C.), *aff'd*, (1927) 38 B.C.R. 481, [1927] 3 D.L.R. 909 (C.A.). *See also* William Buholzer, *British Columbia Planning Law and Practice*, looseleaf (Markham, ON: Butterworths, 2001) at §§ 1.6–1.9.

building with a tenant and grant that tenant an easement or a licence over part of the remaining land. By finding the lease in *Top Line* to be void, the court could be said to be favouring form over substance.[18]

Leases such as the one in *Top Line* also appear to pose little threat to the integrity of the land title system. Since such leases cannot be registered, there is no practical encouragement to enter into them. It is difficult to raise funds from lenders on the strength of an unregistered lease. Absent fraud, a subsequent purchaser of the land will take title to it unencumbered by the lease. Finally, the *Land Title Act* does not dictate the harsh result of invalidity; it only provides that such leases cannot be registered.

Critics have questioned other aspects of the reasoning in *Top Line*. One lawyer has argued that *Top Line* was wrongly decided because it failed to consider relevant statutory provisions.[19] Absent an agreement to the contrary, sections 5 and 7 of the *Property Law Act*[20] require a landlord to provide a tenant, under a lease with a term in excess of three years, with a registrable lease. In order to do this, the landlord must carry out the steps required for a valid subdivision of the property. These statutory provisions have an effect similar to the implied term discussed and rejected in *Top Line*. They "remove the taint of illegality from the Lease."[21] Another lawyer has argued that the court misapplied the doctrine of *res judicata* in *Top Line*.[22] According to this argument *Top Line* was wrongly decided because ". . . the court should have held that once a case of *res judicata* was made out the cause of action disappeared and no public policy could save it, even one embodied in a statutory provision such as section 73."[23]

Other criticisms of *Top Line* have focussed on the effect that the decision could have on commercial leasing. The court touched on these concerns when it referred to ". . . the

18. *See* Hilliard, *supra* note 14 at 5.1.14.

19. Rhys Davies, "Was *Top Line* Wrongly Decided?" (2002) 60 Advocate 187.

20. R.S.B.C. 1996, c. 377.

21. *See* Davies, *supra* note 19 at 187; 190–91. *See also* Victor Di Castri, *Registration of Title to Land*, looseleaf, vol. 1 (Toronto: Carswell, 1987) at para. 148. This argument has received some attention from the courts—*see infra* notes 32–34.

22. Joel Nitikman, "*Res Judicata* and Statutory Provisions: A Case Comment on *International Paper Industries Ltd.* v. *Top Line Industries Inc.* and a Cautionary Tale for Tax Practitioners" (1997) 55 Advocate 191.

23. *Ibid.* at 195.

desirability of holding parties to their contractual obligations. . . ."[24] A declaration that an agreement is void *ab initio* can cause a disaster for one party and a windfall for the other.[25] Even in the absence of a windfall, parties to leases similar to the one in *Top Line* may have an incentive to litigate. Increased litigation would cast doubt on existing commercial leases. Avoiding potential litigation could also add time and expense to the process of negotiating new leases.

IV. DEVELOPMENTS SINCE THE *TOP LINE* CASE

There has been no legislative response to *Top Line*. All the developments since the case was decided have taken place in the courts. A number of decisions have considered *Top Line*. While no dominant position on the case has emerged, several trends can be summarized briefly.

The first point to note is that there has been an increase in litigation. Before *Top Line* was decided only three cases had considered the application of section 73 to leases.[26] The number of cases that consider section 73 since *Top Line* is more than triple this number.

The approach of these cases to *Top Line* has not been entirely consistent. A number of cases have simply applied the conclusion in *Top Line* that a document purporting to be a lease, which is in contravention of section 73, is void *ab initio*.[27]

In other cases, though, courts have tried to fashion remedies that limit the harsh effects of a finding of invalidity. A number of cases have fastened onto a comment in *Top Line*: "[i]t bears emphasizing that this result is without prejudice to any entitlement the Tenant may have to sue for whatever other remedies might be available to it on other branches of the

24. *Top Line*, *supra* note 1 at para. 1.

25. *See e.g. Master Contract Services Ltd.* v. *Altamar Developments Corp.*, 2000 BCSC 644, Boyd J. [*Altamar*] (defendants seizing goods and chattels from plaintiff's building; court denying claims in trespass, conversion, and unjust enrichment as being founded on illegal lease). *See also* Hilliard, *supra* note 14 at 5.1.14 ("The tenant in [*Top Line*] sold its building to the landlord in the expectation of receiving back a long-term lease of the land and building. Although there is no evidence in the case to that effect, one can speculate that had the tenant known it would only be in occupation of the premises for a short period of time, it would have asked more for its building than it did."); *Top Line Industries Ltd.* v. *International Paper Industries Ltd.*, (2000) 184 D.L.R. (4th) 534, [2000] 3 W.W.R. 496, 2000 BCCA 23, Newbury J.A. (for the court) (denying the Landlord's claim for damages for the Tenant's use and occupation of the Landlord's lands and premises pursuant to the Lease).

26. *See supra* note 6.

27. *See Altamar.*, *supra* note 25; *Abbott Street Holdings Ltd.* v. *McFarlane*, (2000) 34 R.P.R. (3d) 33, 2000 BCSC 1067, Brenner C.J.

law."[28] *R& R Ginseng Enterprises Ltd.* v. *Layton Bryson Outfitting and Trailriding Ltd.*,[29] for example, involved a document described as a lease and crop sharing agreement for an unsubdivided portion of the landlord's land. Pursuant to this agreement, the tenant had attempted to cultivate a crop of ginseng. The parties fell into a dispute before the crop was harvested. The court noted that this case was on point with *Top Line* and expressed some regret that simply declaring the lease and crop sharing agreement to be invalid ". . . may preclude the court from effecting substantial justice between the parties."[30] In the result, the court indicated that it would consider a claim for a constructive trust as an example of one of the "other remedies" allowed under *Top Line*.[31]

Some cases have gone even further and considered whether *Top Line* was decided incorrectly. One case accepted the proposition that the failure to cite any provisions of the *Property Law Act* indicated that *Top Line* was decided *per incuriam* and thus is not binding.[32] This conclusion was sustained on appeal.[33] Another decision of the Supreme Court, though, has rejected the proposition that *Top Line* was decided *per incuriam*.[34]

Finally, the courts have not adopted a restrictive view of section 73 (3), which exempts leases of buildings or parts of buildings from the requirement of obtaining subdivision approval. In two cases *Top Line* was not applied because the lease at issue was classified as a lease of a building, even though the building had yet to be constructed.[35] One of these

28. *Supra* note 1 at para. 41.

29. (1997) 10 R.P.R. (3d) 313 (B.C.S.C.), Grist J.

30. *Ibid.* at para. 17.

31. *Ibid.* at paras. 21–26. The state of the pleadings in the case did not allow the court to determine the claim for a constructive trust in the present application. For an example of another case exploring "other remedies" *see S.G.W.* v. *D.W.W.*, [1998] B.C.J. No. 840 (S.C.) (QL), Downs J. (granting tenant remedies in trust, *quantum meruit*, and aggravated damages; also granting tenant licence to occupy land until 30 days after monetary component of judgment satisfied).

32. *Russell* v. *Pfeiffer*, [1998] B.C.J. No. 973 (Prov. Ct.) (QL), de Villiers Prov. Ct. J.

33. *Pfeiffer* v. *Russell*, [1999] B.C.J. No. 2253 at para. 54 (S.C.) (QL), Drost J.

34. *BC Rail Ltd.* v. *Domtar Inc.*, (1999) 71 B.C.L.R. (3d) 242, 26 R.P.R. (3d) 308 (S.C.), Boyd J. An application to have an appeal of this case heard by a five-justice panel of the Court of Appeal (which would have been in a position to overrule *Top Line* on the basis that it was decided *per incuriam*) was dismissed on the ground that no live issues remained for determination between the parties. *See BC Rail Ltd.* v. *Domtar Inc.*, (2001) 86 B.C.L.R. (3d) 48, 2001 BCCA 117, *per curiam*.

35. *456559 B.C. Ltd.* v. *Cactus Café Maple Ridge Ltd.*, (2001) 93 B.C.L.R. (3d) 224, 44 R.P.R. (3d) 217, 2001 BCCA 622, Hollinrake J.A. (for the court) [*Cactus Café* cited to B.C.L.R.]; *Bowen Island Properties Ltd.* v. *Rogers*, (2003) 14 R.P.R. (4th) 259, 2003 BCSC 1595, Satanove J.

cases went slightly further and said that a patio (for a restaurant) may form part of a lease of a building for the purposes of section 73 (3).[36] The sequel to the other case[37]—which found that the tenants were strictly limited in the land that they were entitled to occupy to the boundaries of the building and refused to grant equitable relief—illustrates some of the shortcomings of this approach.

V. CONSULTATION

A. The Consultation Paper

The Law Institute published the *Consultation Paper on Leases of Unsubdivided Land and the Top Line Case*[38] in October 2004. The consultation paper asked readers for their views on whether reform of the law was needed in response to *Top Line*. It also presented a range of options for reform for readers to consider. These options were:

(1) An amendment to the *Land Title Act*. The consultation paper included, for discussion purposes, a proposed new subsection for section 73 reading "a purported lease executed in contravention of this section is capable of taking effect as a licence for the purpose of creating personal rights and obligations among the parties to it."

(2) Leave the matter to the courts. The consultation paper noted some of the attempts by the courts to develop remedies that temper the harsh conclusion of *Top Line* and observed that an argument could be made that this development should be allowed to continue, and should not be pre-empted by legislation.

(3) Consider *Top Line* in the context of a legislative response to illegal contracts generally. An example of general illegal contracts legislation is the *Uniform Illegal Contracts Act*, which was recently endorsed by the Uniform Law Conference of Canada.[39]

The primary mode of publication of the consultation paper was via the British Columbia Law Institute website. In addition, paper copies were distributed to a select group of people comprising lawyers who acted in the *Top Line* case and all subsequent British Columbia court cases that considered it, members of the real estate section of the British Columbia branch of the Canadian Bar Association, and leading real estate industry associations.

36. *Cactus Café*, *ibid.* at paras. 12–16.

37. *Bowen Island Properties Ltd.* v. *Rogers*, (2004) 26 R.P.R. (4th) 284, 2004 BCSC 1219, Satanove J.

38. (CP No. 14) (Vancouver: The Institute, 2004), online: British Columbia Law Institute <http://www.bcli.org/pages/projects/property/TopLine/Leases_Unsubdivided_Land_CP.pdf>.

39. *See*, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/Uniform_Illegal_Contracts_Act_En.pdf>.

B. Responses to the Consultation Paper

The Law Institute received 15 responses to the Consultation Paper. Many of these responses were detailed and well thought out; they showed evidence of long consideration of the issues raised by *Top Line*. The responses were of great assistance to the Law Institute in formulating its final recommendations in this report. We wish to thank all those who took the time to respond to the consultation paper.

The responses provided us with anecdotal evidence of the difficulties faced by landowners and their legal counsel in the wake of *Top Line*. There was some variation in describing the extent of these difficulties. Several respondents made the point that *Top Line* is well-known among real estate lawyers. They have developed strategies to plan around its effects. Those persons who do not seek the advice of real estate lawyers, however, may fall into trouble. Other respondents said that *Top Line* continues to cause difficulties for all concerned. For example, one respondent claimed that *Top Line* ". . . is a real problem in day to day practice, particularly (I suspect) in smaller centers where flexibility in such situations as family arrangements are most common." Another observed that he has ". . . acted for a large number of clients over the years, who as a result of the decision, have had to incur tens of thousands of dollars in additional costs that are unwarranted and are not productive for [his] clients nor for the B.C. economy."

The responses strongly favoured legislative reform of the law in response to *Top Line*. By a wide margin, the preferred method of reform was by amending the *Land Title Act*. Only one respondent was in favour of leaving reform to the courts. There was little mention of the *Uniform Illegal Contracts Act*. A running theme in the responses was that the problems here are involve a discrete set of issues, which may be addressed directly by specific legislation.

There was an even division among respondents over the content of the amendment to the *Land Title Act* that would bring about the best resolution to the issues raised by *Top Line*. One group of respondents favoured an amendment substantially in the form of the amendment set out for discussion in the consultation paper, which would permit the courts to enforce a lease that is in breach of the subdivision requirements of section 73 as if it were a licence creating only personal rights and obligations. Another group took a different approach. This approach focussed on section 73 (1) (b), which reads:

> **73** (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> . . .
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.

The gist of the proposal was to raise the maximum term from three years to a higher number, such as five years, 10 years, or 21 years.

For ease of reference, these two options for reform will be referred to as the "licence option" and the "term option." Their strengths and weaknesses will be canvassed in formulating our recommendations for reform.

VI. Recommendations for Reform

A. Legislative Reform

The overriding question posed in the consultation paper was whether support existed for a law reform project involving a legislative response to the *Top Line* case. The results of the consultation indicate that there is such support. The vast majority of respondents told us that they favoured legislation.

In addition to the opinions expressed in our consultation, there is other evidence that a legislative response to *Top Line* would be desirable. The respondents confirmed that *Top Line* causes difficulties in practice. This anecdotal evidence is bolstered by the increased litigation involving section 73 since the *Top Line* case was decided. Difficulties in planning and increased litigation speak to heightened costs in both time and money, which should be remedied by legislation.

The Law Institute recommends that:

> *1. The legislature enact legislation to address the difficulties created by the* Top Line *case.*

B. Type of Legislation

In the consultation paper, we noted that there is a range of legislative options that may be considered in response to *Top Line*. This range of options runs from highly-specific amendments to the *Land Title Act* to legislation of general application, such as the *Uniform Illegal Contracts Act*.

We have decided to narrow this range to an amendment to the *Land Title Act*. Although *Top Line* can be addressed within a general approach to illegal contracts, it is not necessary to have legislation of general application in place to remedy the concerns raised by respondents to the consultation paper and by critics of the decision. These concerns may be directly addressed by amending Part 7, Division 2 of the *Land Title Act*—the division of the legislation the deals with subdivision of land and that contains section 73. There is no need to delay addressing the problems created by the *Top Line* case for the time it would take to consider enacting legislation that is wider in scope.

The Law Institute recommends that:

> *2. The legislation enacted in response to* Top Line *take the form of an amendment to Part 7, Division 2 of the* Land Title Act.

C. Amendment to Part 7, Division 2 of the *Land Title Act*

Our consultation left us with two leading options to consider for amending the *Land Title Act*—the licence option and the term option. We have decided to recommend reform based on the licence option for the following reasons.

In *Top Line* the court said that it was presented with a stark choice between "the desirability of holding parties to their contractual obligations" and "the public interest in municipal control of real estate development that lies behind section 73."[40] The difficulties created by *Top Line* all flow from this perception of what was at stake in the case. The critics of *Top Line* have consistently tried to show that the court did not have to make an all-or-nothing choice between municipal control of real estate development and holding people to the bargains they have made. It is possible to reach an acceptable compromise position, which would allow for the core of both policies to be upheld.

Both the licence option and the term option are examples of such a compromise. Where the options differ is in how they reach that compromise. The licence option primarily focusses on the contractual issues raised in the *Top Line* case. It is in the tradition of proposals for legislative reform in response to judgments that have felt compelled to take a restrictive view of the court's powers when confronted with an illegal contract.[41] The term option is focussed more broadly on issues that arise in connection with subdivision of land and the operation of the land title system. The contractual focus of the licence option makes it the more proportionate solution.

The licence option is a proportionate response because it directly addresses the main criticism of *Top Line*, the conclusion that courts are compelled to find that a lease that infringes section 73 is void *ab initio*. It gives the parties a mechanism to avoid the harsh consequences of such a finding. The licence option is proportionate in another sense, as well. Although this area of the law was not completely settled before *Top Line*, the consensus of practitioners and commentators was that leases that contravene section 73 could neverthe-

40. *Supra* note 1 at para. 1.

41. *See e.g.* Law Reform Commission of British Columbia, *Report on Illegal Transactions* (LRC 69) (Vancouver: The Commission, 1983); British Columbia Law Institute, *Proposals for a Contract Law Reform Act* (Rep. No. 4) (Vancouver: The Institute, 1998).

less be enforceable as between their parties.[42] The licence option would not introduce a radical break into the law; rather it would bring the law into line with the position it was seen to hold before *Top Line*.

There are a number of criticisms of the idea of deeming a lease to take effect as a licence. The court in *Top Line* reviewed the major ones: first, a licence to occupy the unsubdivided land would still cause too great an impairment of municipal control of real estate development; second, a third party purchaser could defeat the licence, or end up "purchasing a lawsuit"; and third, the door would be opened to abuses of other provisions of the *Land Title Act*.[43] In our view, none of these criticisms deals a severe enough blow to the licence option to prevent us from recommending it.

The *Top Line* court said that allowing a tenant to occupy land under a licence without obtaining subdivision control would circumvent ". . . the requirements as to access, highway allowances, drainage, flooding, erosion, environmental impact, and future subdivision listed in section 86 [of the *Land Title Act*]. . . ."[44] This point goes to the heart of the project. As critics of *Top Line* have pointed out, these concerns can be addressed through other channels, such as the procedures set out in the *Transportation Act*,[45] the *Environmental Management Act*,[46] and the *Local Government Act*.[47] These alternative procedures provide an adequate level of protection of the policy goal of maintaining control over land use development. They may not cover all the issues that are addressed by subdivision control, but, for the purposes of reaching an acceptable compromise that also promotes the goal of contractual certainty, they are sufficient.

Concerns about third party purchasers are relevant whenever someone is allowed to occupy land under an unregistered interest. The application of the governing provisions of the *Land Title Act*—sections 23 (1) (i) and 29—has proved to be difficult. There is uncertainty over whether actual notice, in and of itself, will always amount to fraud for the purposes of

42. *See e.g.* Buholzer, *supra* note 17 at § 13.24 ("Prior to the Court of Appeal's 1996 decision in *International Paper Industries Ltd. v. Top Line Industries Inc.* it was generally thought that such a lease, though not registrable in the Land Title Office because of non-compliance with s. 73, still created enforceable rights and obligations between the landlord and tenant." [footnote omitted]).

43. *Supra* note 1 at para. 34.

44. *Ibid.*

45. S.B.C. 2004, c. 44, Part 4 (highways).

46. S.B.C. 2003, c. 53.

47. R.S.B.C. 1996, c. 323, Part 26 (planning and land use management).

the legislation.[48] This jurisprudence appears to apply to unregistered licences.[49] The difficulties in the jurisprudence, though, do not spring from any inherent defects in the licence option. Instead, they are the result of the difficulty of making a determination of fraud, which must proceed in each case from a careful examination of a unique set of facts and circumstances.

The *Top Line* court said that, by treating a defective lease as an operative licence, ". . . the door would be opened, if only a crack, for arguments in other cases by landowners and developers in whose interest it would be to remain or appear ignorant of the requirements of the *Land Title Act*."[50] This type of slippery slope argument appears to be related to concerns over judicial reasoning and deference to the policy choices of the legislature. It has little force when the legislation itself authorizes this result.

The term option has strengths that should be considered. Raising the maximum term under section 73 would provide a very predictable and certain response to *Top Line*. This predictability would assist real estate lawyers in advising their clients. The term option could also be employed to bring section 73 into line with prevailing commercial leasing practices[51] and with the law in a number of other provinces.[52]

There are several reasons why we are not recommending reform based on the term option, either alone or in combination with the licence option. Raising the maximum allowable term of a lease does not directly address the facts of the *Top Line* case. In *Top Line* the parties drafted the Lease without legal advice. They were unaware of the requirements of the *Land Title Act*. In the result, the Lease would have exceeded any maximum allowable term under Canadian legislation. This situation could still occur, even if the maximum term were raised. In addition, the three-year limit in section 73 ties into other provisions in British Columbia legislation. A lease with a term that does not exceed three years (where

48. *See* Gerald W. Ghikas, "The Effect of Actual Notice Under the British Columbia Land Title System" (1980) 38 Advocate 207 (reviewing conflicting decisions on actual notice and fraud).

49. *See Stiles* v. *Tod Mountain Development Ltd.*, (1992) 88 D.L.R. (4th) 735, 64 B.C.L.R. (2d) 366 at paras. 49–61 (S.C.), Huddard J. (discussing whether section 29 protects holders of a personal licence against purchasers with notice). *See also Anglican Synod of the Diocese of British Columbia* v. *Tapanainen*, *supra* note 6 (purchaser with actual notice of the personal rights and obligations created by a defective lease may nevertheless be bound by its terms; overruled by Court of Appeal in *Top Line*).

50. *Supra* note 1 at para. 34.

51. The prevailing practice is to enter into leases with terms of five years or multiples of five years.

52. *See* Ontario, *Planning Act*, R.S.O. 1990, c. P.13, section 50 (21 years); Manitoba, *The Planning Act*, R.S.M. 1987, c. P80, C.C.S.M. c. P80, section 60 (3) (d) (21 years); Saskatchewan, *The Planning and Development Act, 1983*, S.S. 1983–84, c. P-13.1, section 134 (8) (a) (10 years).

there is actual occupation under the lease) is one of the exceptions to indefeasibility of title in the *Land Title Act*.[53] A lease with a term of three years or less is also an exception to the requirement that contracts affecting land or an interest in land be in writing.[54] To the extent that there is a deliberate policy to deploy a three-year maximum term across real estate law, it could be frustrated by raising the maximum term in section 73.

Finally, and most importantly in our view, the term option appears to strike at broader complaints about subdivision control than those at issue in *Top Line*. In doing so it echoes a theme that is present in some academic commentary about the role of subdivision restrictions in land use planning. For example, one textbook on planning comments as follows:[55]

> For subdivision control to come into effect there must be the creation of a new interest in land, that is, the subdivision of it. Subdivision control thus contrasts dramatically with zoning and development control—these latter techniques bear no relationship to land titles. Tying subdivision regulation to the passing of an interest in land has resulted in innumerable problems with title in property and the creation of schemes to circumvent the controls. It is obviously more desirable to impose land use controls without consideration of title but the technique . . . seems so ingrained that it is unlikely to be abolished.

The responses to the consultation paper occasionally touched on similar discontents with the effect of subdivision control on agricultural land. In particular, there was a sense that it is onerous to require farmers to apply for subdivision approval in cases where the land will continue to be used for agriculture after a transaction.

These concerns cannot be adequately addressed in a focussed report on a very specific issue. They would be more at home in a broader study of the role of subdivision control or, even, of the relation of the land title system to real property law.

For these reasons, we have chosen to base our recommendations on the licence option.

The responses we received to the consultation paper led us to add several refinements to our original version of the licence option. A number of respondents made the point that the licence option is not "sufficiently certain." In a sense, the lack of certainty found by these respondents is the inevitable result of stating—as the proposed amendment in the consulta-

53. *Supra* note 3, section 23 (2) (d).

54. *See Law and Equity Act*, R.S.B.C. 1996, c. 253, section 59 (2) (a)–(b). *See also*, Di Castri, *supra* note 21, vol. 2 at § 797 ("In deciding on the three-year period, the apparent analogy is with the Statute of Frauds, under which a lease or an agreement for a lease not exceeding the term of three years from the making need not be in writing." [footnote omitted]).

55. Stanley M. Makuch, Neil Craik, and Signe B. Leisk, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson Carswell, 2004) at 225.

tion paper stated—that a purported lease executed in contravention of section 73 *is capable of* taking effect as a licence, rather than stating that it *must* take effect as a licence. We are of the view that the concerns expressed about certainty are of sufficient importance to require drafting the proposed legislation in mandatory terms. The permissive language in the draft legislation included for discussion in the consultation paper would have the effect of leaving difficult problems of interpretation and application to the courts. Eventually, a court would have had to formulate a standard to determine when a defective lease is capable of taking effect as a licence and when it is not capable of taking effect as a licence. By using mandatory language, this problem is avoided. This decision should not create an incentive for persons deliberately to enter into such defective leases, secure in the knowledge that they will be enforceable as licences, because there are many practical and regulatory barriers to relying on an instrument that does not convey an interest in the land.[56]

Another change to the licence option involves including a declaration that clarifies that the legislation is not intended to prejudice any claims that the parties may have for breach of contract. This change is intended to make it clear that nothing in the licence option, or the manner in which it operates, is intended to bar any such claims for damages.

One respondent observed that the licence option should be made retroactive, in order to apply to leases that were entered into before its coming into force. This suggestion is a helpful one and it has been incorporated into the final version of the licence option in this report. We have made one change to it, though. The legislation should make it clear that its retroactive effect is not intended to revive disputes that are or have been before the courts.

The final version of the licence option has been cast in the form of draft legislation, which is set out in Appendix B.[57]

The Law Institute recommends that:

> *3. Part 7, Division 2 of the* Land Title Act *be amended by adding a new section that is substantially in the form of the draft legislation set out in Appendix B.*

56. *See* Woolley, *supra* note 2 at 917 ("There are many practical restraints that do not permit the proliferation of this practice. Lenders do not normally lend on unsubdivided portions. Ultimately, permits are required from municipal authorities.").

57. *See*, below, at 18.

VII. List of Recommendations and Conclusion

The Law Institute recommends that:

> *1. The legislature enact legislation to address the difficulties created by the* Top Line *case.*
>
> *2. The legislation enacted in response to* Top Line *take the form of an amendment to Part 7, Division 2 of the* Land Title Act.
>
> *3. Part 7, Division 2 of the* Land Title Act *be amended by adding a new section that is substantially in the form of the draft legislation set out in Appendix B.*

We encourage implementation of these recommendations at the earliest opportunity.

APPENDIX A

Section 73 of the Land Title Act

Restrictions on subdivision

73 (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of

(a) transferring it, or

(b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.

(2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.

(3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.

(4) A person must not grant an undivided fractional interest in a freehold estate in land or a right to purchase an undivided fractional interest in a freehold estate in land if the estate that is granted to or that may be purchased by the grantee is

(a) a fee simple estate on condition subsequent, or

(b) a determinable fee simple estate

that is or may be defeated, determined or otherwise cut short on the failure of the grantee to observe a condition or to perform an obligation relating to a right to occupy an area less than the entire parcel of the land.

(5) Subsection (4) does not apply to land if an indefeasible title to or a right to purchase an undivided fractional interest in

(a) a fee simple estate on condition subsequent in the land of the kind described in subsection (4), or

(b) a determinable fee simple estate in the land of the kind described in subsection (4)

was registered before May 30, 1994.

(6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

APPENDIX B

Draft Legislation

LAND TITLE (AMENDMENT) ACT, 2005

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

1 The Land Title Act, R.S.B.C. 1996, c. 250 is amended by adding the following section:

73.1 (1) A purported lease executed in contravention of section 73 must take effect as a licence for the purpose of creating personal rights and obligations among the parties to it.

(2) Nothing in subsection (1) affects the right of the purported lessee to claim damages for breach of contract.

(3) Subsection (1) applies to purported leases executed before or after the subsection comes into force, unless the purported lease is the subject of a proceeding commenced before the subsection comes into force.

Commencement

2 This Act comes into force by regulation of the Lieutenant Governor in Council.

OUR SUPPORTERS

The British Columbia Law Institute wishes to thank all those individuals and firms who provided financial support in the past year.

Partner

The Advocate
Canadian Bar Association, B.C. Branch

Benefactor

James M. MacIntyre, Q.C.
Hon. Mr. Justice Grant D. Burnyeat
Blake, Cassels & Graydon LLP
Borden Ladner Gervais LLP
Steele Urquhart Payne
Stikeman Elliott LLP
Lawson Lundell LLP

Associate

Hon. Bryan Williams, Q.C.
Hon. Martin Taylor, Q.C.
Hon. Chief Justice Donald C.J. Brenner
Hon. Mdm. Justice M. Anne Rowles
Hon. Mdm. Justice Risa Levine
Fasken Martineau DuMoulin LLP

Supporter

Hon. Chief Justice Lance G. Finch
Hon. Mr. Justice Randall S.K. Wong
Kerry-Lynne D. Findlay Chapman, Q.C.
Gerald J. Lecovin, Q.C.
Donald J. Sorochan, Q.C.

Friend

Hon. Mdm. Justice Carol Huddart
Master Ronald Barber
Hon. Mr. Justice Duncan Shaw
Margaret Ostrowski, Q.C.
Hon. Mr. Justice Kenneth Smith
Taylor Jordan Chafetz
Hon. Mr. Justice Frank Maczko
Ian Donaldson, Q.C.
Hon. Mdm. Justice Marion Allan
J. Parker MacCarthy, Q.C.
Hon. Mdm. Justice Heather Holmes
Arthur Close, Q.C.
Hon. Judge David R. Pendleton
Hon. Mdm. Justice Kirsti M. Gill
Hon. Associate Chief Judge Anthony J. Spence
T. Murray Rankin, Q.C.
Hon. Mdm. Justice Sunni S. Stromberg-Stein
Hon. D.M.M. Goldie, Q.C.
Hon. Mr. Justice Kenneth C. Mackenzie
Hon. W.A. Esson
AnnaMarie Laing
Gregory G. Blue
Trevor Todd
Gordon Sloan
Waddell Raponi
Karen Nordlinger, Q.C.

Anonymous Donations

Support in Kind

Faculty of Law, University of British Columbia
Bull Housser & Tupper LLP