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BRITISH COLUMBIA
LAW INSTITUTE

STRATA PROPERTY LAW PROJECT—PHASE TWO

Backgrounder

Consultation Paper on Terminating a Strata

Date: 15 May 2014

INTRODUCTION

The British Columbia Law Institute began work on the Strata Property Law Project—Phase Two in summer 2013. The phase-two project builds on the consultation and research carried out in phase one of the project. It addresses legislative reform of the *Strata Property Act*. With the goal of promoting the development of the next generation of the act, the project's purpose is to make recommendations in the following seven areas: (1) fundamental changes to a strata; (2) complex stratas; (3) leasehold stratas; (4) common property; (5) selected governance issues; (6) selected insurance issues; (7) selected land-title issues.

The *Consultation Paper on Terminating a Strata* is about one aspect of the first area. It concerns what the *Strata Property Act* calls cancellation of a strata plan and winding up of a strata corporation, which this consultation paper labels, for simplicity's sake, termination of a strata. Termination can be considered the end of life for a strata—the ultimate fundamental change. The timing is right to consider termination, as the earliest stratas created in British Columbia, which date to the 1960s, may soon be encountering difficult choices over repairs, renewal, or termination.

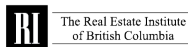
The consultation paper contains proposals for reform of the *Strata Property Act*. Readers may give their views on these proposals by a variety of means—filling out all or part of a response booklet, sending a letter to BCLI, or completing an online survey. BCLI plans to use these responses in crafting its final recommendations for reform. For a response to be considered in this process, BCLI must receive it by **30 September 2014**.

SUMMARY AND FULL CONSULTATIONS

There are two versions of the consultation paper available for public comment.

A summary consultation sets out highlights from the full slate of proposals made on terminating a strata. It contains little in the way of background information and no citation of

supported by



sources. The summary consultation is located in appendix B to the consultation paper. A freestanding copy may be downloaded from www.bcli.org.

The full consultation contains all 21 proposals made on reforming the law of terminating a strata. It also provides the detailed research that was relied on in making those proposals.

The remainder of this backgrounder describes only the full consultation.

OUR SUPPORTERS

The Strata Property Law Project—Phase Two has been made possible by project funding from the Real Estate Foundation of British Columbia, the Notary Foundation of British Columbia, the Ministry of Natural Gas Development and Responsible for Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, and the Vancouver Island Strata Owners Association.

THE STRATA PROPERTY LAW (PHASE TWO) PROJECT COMMITTEE

BCLI is carrying out the Strata Property Law Project—Phase Two with the assistance of an all-volunteer project committee. The members of the project committee are:

Patrick Williams—chair
(Partner, Clark Wilson LLP)

Larry Buttress
(Deputy Executive Officer, Real Estate Council of British Columbia)

Garth Cambrey
(President, Cambrey Consulting Ltd.)

Tony Gioventu
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*(President of the Board of Directors,
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Ed Wilson
(Partner, Lawson Lundell LLP)

BACKGROUND ON TERMINATING A STRATA

Introduction

The consultation paper contains two chapters setting out the background to the law on terminating a strata. One chapter describes the development of the law in British Columbia; the other provides a brief survey of how other jurisdictions in Canada, Australia, the United States, and Asia approach termination. But the paper begins with a short overview of the main issues at play in terminating a strata.

An Overview of the Issues

There are many reasons that may drive a strata to seek termination. For example, a strata may be motivated to terminate if the strata building requires extensive repairs or renewal, which may strain the financial means of strata-lot owners. Termination may also seem like an attractive option if the land the strata sits on could be rezoned to enable higher-density development.

Both of these situations crop up relatively rarely in British Columbia, but the first, in particular, may occur with increasing frequency in the near future. This is because the first wave of strata buildings in British Columbia are entering the sixth decade of their existence, a time when major building components may begin to fail.

The *Strata Property Act* borrows a number of corporate-law procedures to facilitate the termination of a strata. But its procedures may only be initiated with the unanimous consent of strata-lot owners. If this demanding standard cannot be met, then an application to the Supreme Court of British Columbia becomes the only option to move the process forward.

Development of the Law in British Columbia

The consultation paper discusses how termination of a strata has evolved in British Columbia from the first strata-property statute enacted in the 1960s to the present day. Legislative provisions on terminating a strata originated in rules that applied when a strata building was destroyed due to a catastrophic event. The act allowed for the extension of these rules by a legal fiction: strata-lot owners could “deem” their strata to be destroyed, even though the building had suffered no physical damage.

This approach persisted until the development of the *Strata Property Act* in the 1990s. With the enactment of that act, the legislation began to address termination directly. The act provides three procedures for terminating a strata: (1) voluntary winding up without a liquidator; (2) voluntary winding up with a liquidator; and (3) court-ordered winding up. These procedures are modelled on equivalent procedures for for-profit companies. But in a distinctive nod to real-property law, stratas were obliged to obtain the unanimous consent of strata-lot owners to use the two voluntary procedures. There is also extensive court oversight of the process, which especially comes into play if a strata cannot reach the unanimous-consent threshold.

The Law in Other Jurisdictions

The consultation paper examines how other jurisdictions approach termination issues. It shows that British Columbia's legislation is distinctive in Canadian terms in requiring unanimous consent and in the level of court oversight. A few other Canadian jurisdictions adopt unanimous consent as their threshold for terminating a strata, but most other provinces and territories allow for their procedures to be engaged upon the approval of a supermajority of owners.

The consultation paper also examines how a few international jurisdictions have sought to reform their laws on terminating a strata.

ISSUES FOR REFORM AND TENTATIVE RECOMMENDATIONS

Introduction

The consultation paper makes 21 tentative recommendations for reform of the *Strata Property Act's* approach to terminating a strata, which can be grouped into the following four areas: (1) general reform and voting threshold; (2) voting and procedural issues; (3) protecting the interests of dissenting owners and registered chargeholders; and (4) transitional and other issues.

General Reform and Voting Threshold

This chapter of the consultation paper begins by grappling with the basic question of whether the time is right to reform the act's termination provisions. Although those provisions are little used today, they may be called upon more frequently as strata buildings age. The committee proposes tackling reforms before problems arise, rather than in the midst of them.

Next, the consultation paper considers arguments for and against maintaining the voting threshold for authorizing termination at unanimity. While this threshold provides the strongest protection for individual property rights, it creates the possibility that a large majority of owners could be thwarted by the demands of a small minority group. When this occurs, it may be left to the courts to deal with an intractable dispute. In the committee's view, a supermajority threshold, requiring at least 80 percent support from eligible votes, would strike a better balance.

This chapter concludes by examining ideas for incorporating legislative flexibility into setting the voting threshold. One way to achieve this flexibility would be to allow stratas to set for themselves a higher threshold; another would be for the legislation to create different thresholds for different kinds of stratas. The committee viewed these ideas as interesting, but was not prepared to add to the complexity of the act by endorsing them.

Voting and Procedural Issues

The committee's proposal to adopt a different voting threshold for terminating a strata effectively creates a new type of resolution. This chapter is concerned with examining a number of gaps that could arise as a result of creating a new resolution and with making proposals to ensure that this resolution fits seamlessly into the structure of the *Strata Property Act*.

The chapter begins by defining the key phrase *eligible vote* by reference to a strata's Schedule of Voting Rights, or, if it doesn't have one, to the rule of one vote per strata lot. The committee proposes an extended notice period for meetings considering a resolution to terminate, which would be set at 30 days. Votes on this type of resolution should be calculated on the same total-votes basis as is used for resolutions requiring passage by a unanimous vote. Finally, the committee proposes that strata-lot owners should have the right to vote on a resolution authorizing termination, even if the owner is in arrears of certain fees or charges or if the owner's mortgagee ordinarily has the right to exercise the vote attached to the strata lot.

Protecting the Interests of Dissenting Owners and Registered Chargeholders

The two procedures for terminating a strata that do not involve an application to court require the consent of all strata-lot owners and (when the strata is proceeding without the appointment of a liquidator) all holders of registered charges in respect of the strata. Moving to different thresholds for approving termination raises the question of how to protect dissenting owners and registered chargeholders.

The chapter begins by examining the role of the courts in protecting dissenting owners' interests. In British Columbia, the *Strata Property Act* contains a general provision that allows the supreme court to remedy unfair acts. Some other jurisdictions go further, giving their courts oversight of termination disputes motivated by financial issues or other issues that can't be classified as unfair or bad-faith behaviour. The committee does not favour extending the British Columbia court's oversight in this manner. The committee also considered mandatory alternative dispute resolution for termination disputes, ultimately deciding that it is not appropriate for British Columbia's legislation.

The chapter then considers the rule that requires stratas to obtain the unanimous consent of registered chargeholders to termination, if the strata is proceeding without the appointment of a liquidator. The committee proposes replacing this rule with a requirement to give notice to registered chargeholders. Dissenting chargeholders would have an opportunity to

apply to court, if they continue to object to termination after the resolution authorizing it has been approved.

Transitional and Other Issues

The consultation paper concludes by examining two issues.

First, it considers the appropriate transitional rule for the committee's proposals. Some legislation does not apply to litigation, contracts, or other arrangements in place before the legislation comes into force. In the committee's view, this transitional rule is not appropriate for its proposals, as it would lead to a very long period before those proposals could begin to be consistently applied. The proposals should apply to all stratas, once they are implemented.

Second, the committee confirms that its proposals are meant to apply to bare-land strata plans. This proposal is included to ensure that there are no doubts on this point.

CONCLUSION

The committee encourages responses to its proposals. Public comments will be fully considered by the committee, as they play an important part in the process of crafting this project's final recommendations. Those final recommendations will be reviewed by the provincial government, for possible implementation by the legislative assembly.