**Summary Consultation**

**on**

**Terminating a Strata**

**Date: 15 May 2014**

**Introduction**

The purpose of this summary consultation is to highlight three proposals from the British Columbia Law Institute’s *Consultation Paper on Terminating a Strata*. In the interest of brevity, background information and discussion of these proposals has been kept to a bare minimum. Citations and footnotes for the text have not been provided. If you wish to read about the issues raised in this summary consultation in depth, or if you want to comment on all of this consultation’s 21 tentative recommendations (or a greater range of those tentative recommendations than is offered in this summary consultation), then you are encouraged to obtain a copy of the full *Consultation Paper on Terminating a Strata* by downloading it for free from www.bcli.org or by contacting BCLI and asking for a hard copy to be sent to you.

**How to Respond to this Summary Consultation**

You may respond to this summary consultation by email sent to strata@bcli.org. Alternatively, you may send your response by mail to 1882 East Mall, University of British Columbia, Vancouver, BC V6T 1Z1, by fax to (604) 822-0144, or by linking to an online survey through our website www.bcli.org.

If you want your comments to be considered in the preparation of the final report for this project then we must receive them by **30 September 2014**. BCLI expects to publish the final report on terminating a strata in autumn 2014.

**About the British Columbia Law Institute**

The British Columbia Law Institute is British Columbia’s independent law-reform agency. Incorporated as a not-for-profit society in 1997, BCLI’s strategic mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform. After public consultations, BCLI makes recommendations for legislative changes to the provincial government. These recommendations may only be implemented by the passage of legislation by British Columbia’s legislative assembly.

**About the Strata Property Law (Phase Two) Project**

This consultation forms part of a broader BCLI project on strata-property law. The Strata Property Law Project—Phase Two builds on the research and consultation carried out in the phase-one project. Phase two is concerned with making legislative recommendations to reform the *Strata Property Act* in the following seven major 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. Work on phase two began in summer 2013 and will carry on until the final report for the project is published in December 2016.

BCLI is carrying out the phase-two project with the assistance of an all-volunteer project committee. The members of the 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 *(Executive Director, Condominium Home Owners Association)* |
| Tim Jowett *(Deputy Registrar of Land Titles, Land Title and Survey Authority)* | Judith Matheson *(Realtor, Coldwell Banker Premier Realty)* |
| Elaine McCormack *(Associate Counsel, Alexander Holburn Beaudin Lang LLP)* | Doug Page *(Manager, Housing Policy, Office of Housing and Construction Standards, Ministry of Natural Gas Development and Responsible for Housing)* |
| David Parkin *(Assistant City Surveyor, City of Vancouver)* | Allen Regan *(Vice-President, Bayside Property Services Ltd.)* |
| Stanley Rule *(Lawyer, Sabey Rule LLP)* | Sandy Wagner *(President of the Board of Directors, Vancouver Island Strata Owners Association)* |
| Ed Wilson *(Partner, Lawson Lundell LLP)* |  |

**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.

**About Strata-Property Law**

Stratas are created when a strata plan is deposited in the land title office. This act gives rise to three defining characteristics of a strata:

(1) The units in a strata property—in British Columbia these units are called *strata lots*—are owned outright by individual owners. Each gets a separate title in the land title office. For strata lots, think of apartments in a multi-unit residential building—though they could also be offices in an office tower, commercial spaces in a business park, or even rooms in a hotel.

(2) This individual ownership of strata lots is combined with collective ownership of the strata’s common property and assets. These common elements can include things like lobbies, hallways, pipes and other building components installed between strata lots, and elevators. All the strata-lot owners own these common elements through a form of shared ownership called tenancy in common. In addition to shared ownership of property and assets, strata-lot owners also share liability for the strata’s debts.

(3) Finally, depositing a strata plan results in the creation of a strata corporation, which is given the responsibility to manage and maintain the strata’s common property and assets for the benefit of all strata-lot owners. Each strata-lot owner is a member of the strata corporation.

In British Columbia legislation called the *Strata Property Act* provides for these distinctive characteristics and provides the rules for governance of stratas. The *Strata Property Act* is largely made up of ideas, concepts, and rules drawn from older bodies of law, such as property law, contract law, and corporate law.

**About Terminating a Strata**

This consultation is concerned with one set of issues that arise from the first area considered in the phase-two project, fundamental changes to a strata. It examines what the *Strata Property Act* formally calls cancellation of a strata plan and winding up of a strata corporation. This consultation uses the informal expression *termination* to describe the process.

Terminating a strata is a process that takes the three characteristics that legally define a strata and unwinds them. So termination eliminates individual ownership of strata lots, dissolves the strata corporation, and leaves the former strata-lot owners as tenants in common—that is, as shared owners of the former strata’s land and assets. (Or, in some cases, a liquidator, rather than the owners, ends up holding title to the strata’s lands and assets for the purposes of liquidating them and distributing the proceeds, first to the strata’s creditors, and, if anything is left over, to the owners.)

Why would anyone want to terminate a strata? There are many situations in which a strata might be motivated to terminate itself. Two examples crop up often in commentary on this legal issue. One example is when the strata’s buildings have deteriorated to the point where it is so expensive for the owners to repair them that terminating the strata becomes a financially viable option. The other is when zoning changes make it attractive to consider replacing a small or low-density strata with a higher-density development.

**Development of the Law in British Columbia**

Terminating a real-estate holding is an unusual concept for property law, which tends to value permanence, stability, and certainty, as opposed to flexibility in the face of changing circumstances or managing obsolescence. So it took some time for British Columbia’s strata-property legislation to really get a handle on this topic.

British Columbia has had strata-property legislation since 1966. Each version of the act from that original 1966 act up to the *Condominium Act* (which was the immediate predecessor of the *Strata Property Act*) dealt with termination in an awkward and unsatisfying way. The legislation allowed strata-lot owners to pass a special resolution (this required, depending on the version of the act in force, owners holding at least 75 percent of the voting power in the strata or owners casting at least 75 percent of the total votes cast at a general meeting to agree to the resolution) that would “deem” the strata to be destroyed. This was a legal fiction: the strata didn’t have to be destroyed in fact, or even to have suffered any physical damage. It was simply the way that the owners could demonstrate that they wanted to terminate the strata. Once the resolution was passed, the owners were required to make filings with the land title office, but the legislation was not clear on the exact procedural steps that needed to be taken. If problems were encountered, the solution was to take matters to court.

The *Strata Property Act* was developed throughout the 1990s as a comprehensive reworking of strata-property law in British Columbia. It’s been in force since 2000, and one of the areas of the law that it changed significantly was termination. In place of a vague procedure based on a legal fiction the *Strata Property Act* directly addresses termination with three detailed procedures.

The act’s three procedures are called: (1) voluntary winding up without a liquidator; (2) voluntary winding up with a liquidator; and (3) court-ordered winding up. These three procedures are closely modelled on existing procedures for winding up for-profit companies. The first two procedures are administrative in nature, which means that they can be pursued without engaging the civil-litigation system. They are voluntary in the sense that widespread agreement is needed for a strata to pursue them. If that agreement can’t be obtained, then a strata-lot owner or a creditor can go to court under the third procedure and argue that there is a case for terminating the strata.

A strata is much more likely to employ the first voluntary procedure than the second. This is because appointing a liquidator is expensive and can be time consuming. A strata would typically only take this step if it had creditors that were difficult to locate or if it were engaged in ongoing litigation or a dispute that could develop into litigation.

Procedurally, terminating a strata in British Columbia follows very closely the model set down in corporate legislation. But it does depart from that model in a couple of ways to accommodate the property-law aspects of stratas. So, for example, the detailed filings required under two administrative procedures are made with the land title office, rather than the corporate registry.

A more significant departure from corporate law comes in the requirements for initiating the administrative procedures. The decision to start the voluntary winding up process with or without a liquidator must be evidenced by a resolution of the strata corporation passed by a unanimous vote. This means that all the strata-lot owners must consent to terminating the strata. And, if the strata is proceeding without the appointment of a liquidator, it must also receive the consent of all holders of registered charges on title to land in the strata plan (or any land that the strata corporation happens to own, but which is not in the strata plan).

This high threshold for authorizing termination is out of step with corporate legislation. And it was a departure from the older British Columbia strata-property rule, which allowed owners to authorize termination by a special resolution. The threshold appears to have been ratcheted up out of a concern that someone’s property rights could be taken away in an administrative process. So there was a conscious effort to strike a balance between corporate-law procedure and property-law substance.

Of course, requiring a group of people of any size to all agree to something can be a tall order. In theory, one intransigent person can stand in the way of an overwhelming majority. The *Strata Property Act*’s answer to this dilemma is a special court process, which allows the majority to proceed over the wishes of a small minority (five percent of owners, for stratas with ten or more strata lots). And if the minority group is larger, or if it contains a registered chargeholder, then there is always the option to apply for a court-ordered winding up.

It’s easy to see that the *Strata Property Act*’s approach to terminating a strata is a considerable advance over what earlier legislation had to offer. The *Strata Property Act* provides much more certainty, by having three clearly defined and suitably detailed procedures, and more efficiency, by giving stratas the option of an administrative termination. But, as will be explained in the next section, now is a good time to ask whether the legislation we currently have strikes the best balance for strata-lot owners and others in the strata sector in British Columbia.

**Why Consult on Terminating a Strata Now?**

The committee believes for several reasons that the time is right to examine terminating a strata. Although the current rules have been used only sparingly, there are reasons to believe that this may change in the near future.

First and foremost, it is important to bear in mind that British Columbia has only had stratas since the first act on this topic was passed in 1966. This means that all those stratas built in the wake of that act—in the late 1960s and early 1970s—are about to enter the sixth decade of their existence. (And some stratas may be even older than the original act. This apparent oddity can occur in cases in which an apartment building was converted to strata title. These converted stratas may contain buildings that are 80 or 90 years old.) At this time, major building components can start to fail. Such failures can lead to the prospect of expensive repair bills for stratas. It’s at this point when terminating the strata and selling the underlying land for redevelopment can become a viable prospect.

Second, broader social and economic trends could also begin to encourage some stratas to consider termination. Land for housing has become increasingly scarce in many British Columbia municipalities. As a result, land values have increased. In addition, many municipalities have embraced policies encouraging infill residential development at higher densities. This combination of economic and social changes may militate in favour of terminating some stratas as a prelude to redevelopment.

Third, if the goals of the legislation are to create a certain and efficient termination process, then, as commentators have pointed out, it is possible to question some of the choices made in the *Strata Property Act*. The unanimous-consent requirements in the act have the effect of expanding the number of people with a veto over the termination process. There may be reasons for this, but it does make collective decision-making more fraught and difficult. And if those difficulties turn into conflicts, then the act’s remedy often requires an application to the supreme court. This raises concerns because once these types of property disputes hit the civil-litigation system and its adversarial process they have a disturbing tendency to take on a life of their own. The committee’s proposals, which are highlighted in the sections that follow, focus on these two aspects of the law on terminating a strata: requirements for unanimous consent and the appropriate degree of court oversight.

**What Voting Threshold Should Stratas Have to Meet to Authorize Termination?**

The *Strata Property Act* currently calls for all strata-lot owners to consent to termination as a condition to using either of the act’s two voluntary termination procedures (that is, without appointing a liquidator and with appointing a liquidator). There appear to be a number of reasons for adopting this approach. It notably provides the most protection for the interests of any owners who may dissent from a majority’s decision to terminate the strata. Such dissenting owners may have to justify their position before a judge, but in many cases their objection may be enough to stop the process (because the majority will balk at the time and expense involved in a court proceeding). Because termination involves the ending of property rights, a unanimous-consent requirement can be seen as protecting important principles on property rights.

But there is more than one side to consider in crafting rules on terminating stratas. If everyone is going to have a veto over the process, then there’s a good chance that in some cases a majority of owners are going to find their wishes thwarted. This can also have an effect on those owners’ interests. If the strata building’s condition is deteriorating, these owners can be placed in a difficult position. Obtaining financing to fund the necessary repairs may not be possible. But if the building continues to decline, the strata lots in it will also decline in value. Since a strata lot is a major investment for many people, this decline can be experienced as a form of impoverishment.

In the committee’s view, a supermajority requirement would strike a better balance than the one set by unanimous consent. It would guard against the prospect of a small minority group being able to impose its will on the majority, but would still ensure that the decision to terminate commands widespread support.

Most of the other Canadian provinces and territories use a supermajority requirement instead of unanimous consent. Their experiences can help in selecting the precise number for the requirement. The numbers vary from a high of 90 percent to a low of 66 2/3 percent. But the majority has settled on 80 percent.

In the committee’s view, 80 percent is also an appropriate figure for British Columbia. It is high enough to provide a good level of protection, without being so high as to be all but unreachable in practice. It is important to note here that the threshold of 80 percent that the committee is proposing would be set at 80 percent of all voters in the strata. In other words, although it would amount to a significant reduction of the current requirement of unanimous consent of all owners, it would not be applied in a manner similar to the rules on resolutions passed by a 3/4 vote. Such a resolution may be adopted by at least 3/4 of the votes cast at the general meeting considering it—and therefore could, in some cases, just have the support a small group of owners. This approach would not be appropriate for a resolution that authorizes termination of a strata.

***Proposal (1)*** *The Strata Property Act should allow at least 80 percent of the eligible votes to authorize terminating the strata.*

[ ]  **agree** [ ]  **disagree**

**comments:**

Readers may have noticed that this proposal uses the words *eligible votes* and wondered what is meant by the phrase. It is a nod toward the *Strata Property Act*’s flexibility in allowing stratas to craft voting rights. For the vast majority of residential stratas, the rule of one vote per strata lot prevails. But this isn’t necessarily the case for commercial and mixed-use stratas. These kinds of stratas often allocate voting power according to a different formula. So they can end up with some strata lots enjoying multiple votes while others have votes that only count as a fraction of one. Eligible votes is employed as a neutral term that can capture this range, and the other specific rules on procedure and voting in the act.

**What Range of Termination Disputes Should Be within the Oversight of the Court?**

If the *Strata Property Act* moves to an 80-percent threshold for authorizing termination, then the question of how to deal with the objections of any dissenting owners arises. Even though the supermajority requirement will provide some level of protection, its implementation still raises the prospect of a strata proceeding to termination over the objections of up to 20 percent of its owners.

It should be noted that even if nothing else is changed in the *Strata Property Act* there are still mechanisms in place to deal with situations in which the majority abuses its power. There is a general provision in the act that allows the supreme court to prevent or remedy significantly unfair acts. Courts interpreting the words *significantly unfair* have said that it means conduct that is “burdensome, harsh, wrongful, lacking in probity or fair dealing or ha[ving] been done in bad faith, unjust or inequitable or unreasonable.”

So the question here really is whether the law should provide remedies in cases in which the majority’s actions can’t be characterized as significantly unfair. Financial disputes likely form the major source of such cases. Since termination is often linked with redevelopment, the amounts that will be paid to strata-lot owners on termination may come under question. An owner may feel that the amount offered is too low, particularly if it is not enough for the owner to pay out any mortgages on the strata lot. Should that owner be able to apply to court for a remedy?

Some jurisdictions have crafted court procedures to respond to financial disputes that contain none of the hallmarks of unfairness. But these provisions may be responding to local conditions, which make financial disputes more of a factor in termination than they would be in British Columbia.

In the committee’s view, the existing provisions of the *Strata Property Act* and the case law that has grown up around them provide an acceptable level of protection for dissenting owners. They set a clear standard of good behaviour that a majority must comply with in pursuing termination.

***Proposal (2)*** *The Strata Property Act should not create a special court procedure for an owner who dissents from a decision of a strata to terminate. But this proposal does not mean, in and of itself, that a dissenting owner should be blocked from using any existing remedies in the Strata Property Act.*

[ ]  **agree** [ ]  **disagree**

**comments:**

**How Should the Interests of Registered Chargeholders Be Protected During Termination?**

The other major group that has a veto over decisions on terminating a strata are what the *Strata Property Act* calls “holders of registered charges against land shown on the strata plan and land held in the name of or on behalf of the strata corporation, but not shown on the strata plan.” For simplicity’s sake, this group will be referred to as *registered chargeholders*.

A *registered charge* is an interest in land that is less than the ownership interest and is registered on the owner’s title to land. For a concrete example of a registered charge, readers may think of a mortgage registered on title to a strata lot. But it should be borne in mind that the registered charge is much broader in meaning. Other types of creditors may be entitled to register charges on title to land. And registered charges may also derive from non-financial relationships. For example, a utility company that registers a right of way on title to land in a strata plan is a registered chargeholder. A registered charge does not include a charge that is not registered on title.

When a strata applies to the land title office to terminate itself without appointing a liquidator it must certify that its has the written consent to termination of all registered chargeholders. (If the strata takes on the added expense of appointing a liquidator to carry out the process, then this requirement does not apply—presumably because the liquidator will ensure that all registered chargeholders’, and other creditors’, interests are protected.)

Registered chargeholders are given a veto over the termination process apparently to protect their charges on title. This is especially the case for charges that take the form of security for loans. Because termination is often paired with redevelopment, there is an economic incentive to ensure that creditors are paid out and their charges discharged from titles.

The concern over this approach is similar to the concern over requiring the unanimous consent of owners. It allows a single registered chargeholder to call a halt to the process and thwart the will of the majority.

In the committee’s view, this consent requirement puts too much power in registered chargeholders’ hands. The committee favours moving to a system in which registered chargeholders are notified that strata-lot owners are considering termination and kept informed of developments in the process. Dissenting registered chargeholders would have a 30-day window, from the date on which the strata corporation gives them the outcome of the vote on the resolution, to apply to the supreme court. Enabling language would have to be inserted into the *Strata Property Act*, to allow for this new court application.

***Proposal (3)*** *The Strata Property Act should require that a strata corporation must give all registered chargeholders not less than 30 days’ notice of a resolution to authorize the voluntary winding up of the strata without liquidator and must give all registered chargeholders who request it notice of the outcome of the vote on the resolution. A dissenting registered chargeholder should have 30 days from the date on which the strata corporation gives notice of the outcome of the vote on the resolution to apply to the supreme court.*

[ ]  **agree** [ ]  **disagree**

**comments:**

**Conclusion**

The committee is interested in your thoughts on these proposals. And if you wish to pursue any of the ideas raised in this summary consultation in greater detail or depth, the committee encourages you to read and respond to the full consultation. Responses to the full and summary consultations received before **30 September 2014** will be taken into account in preparing the final report on terminating a strata, which BCLI plans to publish in autumn 2014.