



# BRITISH COLUMBIA LAW INSTITUTE

1822 East Mall, University of British Columbia

Vancouver, British Columbia V6T 1Z1

Voice: (604) 822 0142 Fax: (604) 822 0144 E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)

Website: [www.bcli.org](http://www.bcli.org)

BRITISH COLUMBIA  
LAW INSTITUTE

STRATA PROPERTY LAW PROJECT—PHASE TWO

## Summary Consultation on Governance Issues for Stratas

Date: 13 March 2018

### Introduction

The purpose of this summary consultation is to highlight three proposals from the British Columbia Law Institute's *Consultation Paper on Governance Issues for Stratas*. 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 83 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 Governance Issues for Stratas* by downloading it for free from <https://www.bcli.org> or by contacting BCLI and asking us to send a hard copy to you.

### How to respond to this summary consultation

You may respond to this summary consultation by email sent to [strata@bcli.org](mailto:strata@bcli.org). Alternatively, you may send your response by mail to 1822 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 <https://www.bcli.org>.

If you want your comments to be considered in the preparation of the final report on governance issues for stratas, then we must receive them by **15 June 2018**. BCLI expects to publish this report in mid-2018.

### 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

supported by



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. BCLI's recommendations can only be implemented by British Columbia's legislative assembly, which is responsible for the enactment of legislation.

## 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) selected governance issues; (4) common property; (5) selected land-title issues; (6) selected insurance issues; (7) leasehold stratas. Work on phase two began in summer 2013 and will carry on until the conclusion of the project, which is projected for June 2018.

BCLI is carrying out the phase-two project with the assistance of an expert project committee. The members of the committee are:

Patrick Williams—chair <i>(Partner, Clark Wilson LLP)</i>	Veronica Barlee (Jul. 2014–present) <i>(Senior Policy Advisor, Housing Policy Branch, Ministry of Municipal Affairs and Housing)</i>
Larry Buttress (Oct. 2013–Jun. 2016) <i>(Deputy Executive Officer, Real Estate Council of British Columbia)</i>	Garth Cambrey <i>(Real Estate Institute of British Columbia)</i>
Tony Gioventu <i>(Executive Director, Condominium Home Owners Association)</i>	Ian Holt (Oct. 2016–Apr. 2017) <i>(Realtor, Re/Max Real Estate Services)</i>
Tim Jowett <i>(Senior Manager, E-Business and Deputy Registrar, Land Title and Survey Authority)</i>	Alex Longson (Jul. 2016–present) <i>(Senior Compliance Officer, Real Estate Council of British Columbia)</i>
Judith Matheson (Oct. 2013–Oct. 2016) <i>(Realtor, Coldwell Banker Premier Realty)</i>	Elaine McCormack <i>(Partner, Wilson McCormack Law Group)</i>
Susan M. Mercer (Sep. 2016–present) <i>(Notary Public)</i>	Doug Page (Oct. 2013–Jul. 2014) <i>(Director of Legislation, Housing Policy Branch, Ministry of Municipal Affairs and Housing)</i>
David Parkin <i>(Assistant City Surveyor, City of Van-</i>	Allen Regan <i>(Vice-President, Bayside Property Services)</i>

<i>couver)</i>	<i>Ltd.)</i>
Garrett Robinson (Apr. 2017–present) (Realtor, Re/Max Crest Realty— Westside)	Stanley Rule (Oct. 2013–Sep. 2016) (Lawyer, Sabey Rule LLP)
Sandy Wagner (President of the Board of Directors, Vancouver Island Strata Owners Asso- ciation)	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 Municipal Affairs and 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, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

## About strata-property law

When a landowner wants to develop a strata property this owner-developer must have a professional land surveyor create a strata plan. The owner-developer deposits this strata plan in the land title office. This act gives rise to the three defining characteristics of a strata property:

- (1) The units in a strata property—in British Columbia these units are called *strata lots*—are owned outright by individual owners. Each strata lot 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 sets out the rules for governance of strata properties. The *Strata Prop-*

*erty 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 strata-property governance

Strata-property governance is concerned with the third item on the list from the previous page: the strata corporation. The strata corporation is the law’s vehicle for coordinating the views of a diverse group of property owners. When it is functioning as planned, the strata corporation allows those owners to grapple with issues facing the strata property and to make timely and effective decisions.

In plain terms, *governance* can be defined as an organization’s system or method of managing itself. As such, it is a huge, potentially never-ending, topic for strata corporations. The *Strata Property Act* narrows its range somewhat by containing a dedicated part on “Strata Corporation Governance.” But even this part (which comes in at a lengthy 40 sections) doesn’t fully capture the issues at stake in this public consultation.

In the committee’s view, the areas of strata-corporation governance that called for immediate review and potential reform were:

- bylaws and rules, which are the third pillar supporting the legal framework for strata corporations (after the *Strata Property Act* and its regulations) and which often spell out crucial provisions for the operation and management of the strata corporation;
- statutory definitions, which may be used to clarify that legal framework;
- general meetings and strata-council meetings, where decisions get made and much of the business of operating and managing the strata is done;
- finances, including both strata-corporation finances and the public system of fees set out in the regulations; and
- notices and communications between the strata corporation and its members.

Stepping back to take in the broad view, the committee is interested in a number of big-picture questions. Can the procedures governing strata meetings be made clearer, as a way to make those meetings a more effective vehicle of collective decision-making? Are there ways to further empower eligible voters’ participation in meetings and decision-making? Can the act enhance the accountability of the people given the responsibility to implement the collective’s decisions? Does the strata corporation have the right legal tools to enforce its decisions?

The three proposals in this summary consultation highlight aspects of these questions. They tackle clarifying an important document often used in strata-corporation meetings, confirming an effective method to elect strata-council members, and enhancing one part of the strata corporation’s toolkit for enforcing its decisions.

## Should the Strata Property Act require a defined form of proxy appointment?

The *Strata Property Act* calls a person who stands in for an absent strata-lot owner at a strata corporation's general meeting a *proxy*. The document that gives the proxy the authority to represent the owner is called a *proxy appointment*.

When an owner signs a proxy appointment that executed document creates what the law refers to as an agency relationship between the owner and the proxy. The broad outlines of this relationship are defined by the *Strata Property Act*, which says that “a proxy stands in the place of the person appointing the proxy, and can do anything that person can do, including vote, propose and second motions and participate in the discussion, unless limited in the appointment document.”

The presence of proxy appointments in the act has been justified for two reasons. First, they're seen as a way to encourage greater owner participation in collective decision-making. Second, they're felt to be needed to help strata corporations meeting their quorum requirements. (A *quorum* is the minimum number of owners who must be present to constitute a valid meeting.)

In recent years, many people have begun to criticize aspects of the proxy-appointment system. Rather than deepening open and democratic involvement in the strata corporation, proxy appointments (in the critics' view) have been leading to the opposite result. They have been entrenching control by unrepresentative factions that manipulate both owners' apathy and proxy laws to keep themselves in power.

The full consultation paper explores issues concerning proxy appointments in their full dimensions. The proposal highlighted in this summary consultation tackles one aspect of a multifaceted problem.

This aspect concerns the proxy-appointment document itself. This document plays a critical role in defining the agency relationship between an owner and a proxy. But the document is subject to few requirements. The act only holds that the document must be in writing and that it must be signed by the owner appointing the proxy. There is a form of proxy appointment prescribed in the regulation, but its use is “optional.”

In the eyes of some critics, this approach to the central document defining the agency relationship creates a grey area that can be exploited. But even in the absence of exploitation, vagueness on the terms of the proxy appointment can lead to misunderstandings and disputes, eroding the effectiveness of a general meeting.

The proposal to address these concerns is to create a standard form of proxy appointment. A standard form would clarify the terms of the agency relationship, filling in gaps and clarifying uncertainties. In this way, it would cut down on exploitation.

And a standard form may have other benefits. By clearly defining the scope of the proxy's authority, a standard form could help to foster and support owners' participation in making collective decisions. A standard form would give owners' greater confidence that the proxy appointment is being used in accordance with their wishes, and not as a means to entrench some unrepresentative faction in the strata corporation's governance. A standard form could also result in a proxy system that, in the long run, would be easier for strata corporations to administer and would be less susceptible to disputes.

But there might also be drawbacks to requiring the use of a standard proxy appointment. British Columbia has a vast number of strata corporations. These strata corporations can differ greatly in their composition. Designing a standard proxy appointment that would be simple to use and that would respect the range and diversity of British Columbia's strata corporations could be a considerable challenge.

There could also be implementation issues with a standard proxy appointment. Strata corporations and strata managers would have to be educated on the existence and use of the form. While their learning curve would probably not be steep, they could still encounter some confusion and conflict, particularly in the short term.

Finally, limiting proxy appointments to one standard form could make it less attractive for owners to authorize proxies for general meetings. This could lead to apathy and difficulties for strata corporations in meeting their quorum requirements.

The committee considered these advantages and disadvantages and decided that British Columbia should move toward a standard form of proxy appointment for strata corporations. A standard proxy appointment should help to clarify the agency relationship between an owner and a proxy. Clarity on this relationship should, in turn, help to allay the concerns of critics of the proxy system.

Adopting a standard form also creates an opportunity to clarify the role of the strata corporation in that system. When disputes over proxy appointments arise, often people look to the strata corporation to take a position on them or to resolve them. But this isn't the strata corporation's role.

Finally, a clearly defined form should reduce the number of disputes over proxy appointments, by spelling out what constitutes a valid proxy appointment. In the committee's view, this benefit will flow from making use of the form mandatory.

***Proposal (1) The Strata Property Act should require the appointment of a proxy to be made using a standard form with the following features: (a) a warning that the strata corporation has no obligation to ensure that the proxy votes in accordance with any instructions set out in this proxy appointment; (b) a space to record either the grantor’s strata-lot number or unit number and street address; (c) check boxes to indicate whether the proxy appointment is a general appointment or an appointment for a specific meeting; (d) a space to record the date on which the proxy appointment is signed; (e) a signature block; (f) a space to record any voting instructions, labelled “optional.”***

agree

disagree

comments: \_\_\_\_\_

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## **Should the Strata Property Act expressly provide that election to a strata council requires a majority of the ballots cast?**

One of the most important things that the owners do at each annual general meeting is elect a strata council. According to the *Strata Property Act*, and unless the act, its regulations, or a strata’s bylaws say otherwise, “the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.”

Given the important responsibilities of the strata council, it’s somewhat surprising that the act doesn’t clearly define what election to council entails. Intuitively, people may have a sense of what an election is about—it’s essentially a contest to attract votes. But the courts have held that, in the absence of legislation that spells this intuitive sense out, the meaning of *election* in this context is actually much broader in scope. This ruling opens the door to practices such as electing a council by acclamation (which is essentially the appointment of a slate or group of individuals as council members without the owners voting on any of them, because the slate or group is smaller than the number of available council slots).

Electing a council by acclamation, and other, similar practices, have been criticized as tending to undermine the accountability of the strata council and the democratic spirit of the strata corporation. Proposals that forge a clearer link between the voters at an annual general meeting and the representatives they are electing have come up in strata-property law, and in corporate law generally.

These proposals are intended to act as a safeguard against an entire group being acclaimed as a strata council without the opportunity for individual consideration. The main advantages of the proposal are that it clarifies the process of election and it gives owners a chance to evaluate each candidate. In this way, a blow may be struck against a common governance problem for stratas, which is having a clique entrench itself in power. In addition, because there is a clearer connection between owners voting at the annual general

meeting and entry onto council, it may also foster a greater sense of accountability among strata-council members.

There are downsides to this approach. It could slow down elections, making them more rule bound and difficult to administer. At the extreme end, it could result in failed elections, where no candidate is able to attract a majority.

The committee decided that the current law is rather open-ended and somewhat vague. This could lead to irregularities and even abuses. Tightening up what is meant by a strata-council election would be beneficial.

In coming to this decision, the committee did take some pause over the downsides to this approach. It wasn't willing to go as far as some proposals being considered in the corporate sector, which would insist on individual election of corporate directors by separate resolutions, each passed by a majority vote. In the committee's view, simply having a legislative provision that requires that each strata-council member must be elected by a majority of the ballots cast would strike the right balance. Many well-run strata corporations already use this procedure, so its implementation likely wouldn't cause significant disruption at the level of practice. But it would clarify the legislation and would give owners another tool to root out problems.

***Proposal (2) The Strata Property Act should require that each strata-council member must be elected by a majority of the ballots cast.***

agree

disagree

comments: \_\_\_\_\_

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**Should the Strata Property Act provide strata corporations with a limitation period that is longer than the basic limitation period of two years in which to enforce claims for money owing from a strata-lot owner to the strata corporation?**

A limitation period is a period of time, set out in legislation, that bars a person from bringing proceedings in a court or tribunal. When a limitation period has elapsed, a person with an otherwise valid legal claim may be left with no legal means to enforce that claim.

The *Strata Property Act* has nothing to say about limitation periods. When a strata corporation wants to find out about a limitation period that applies to a claim it may have, it has to turn to a statute of general application called the *Limitation Act*.

Strata corporations rely on a constant flow of money from strata-lot owners to meet the duties and obligations they have under the *Strata Property Act*. If that flow is interrupted, even by one owner refusing or failing to pay, then it is critical that the strata corporation act on its legal rights and enforce its claim against the delinquent owner. Otherwise, the strata corporation may fall into default or the other owners will have to pick up the slack left by the debtor owner.

In recognition of the importance of this cash flow from owner to the strata corporation, the *Strata Property Act* gives strata corporations some enhanced enforcement tools. The most important of these tools is the lien that a strata corporation may place on title to a delinquent owner's strata lot. When an owner fails to make certain specified payments (for strata fees, special levies, a reimbursement of the cost of doing work under a work order, or a share of judgment against a strata corporation), then the strata corporation may secure this debt against the value of the strata lot. And if the strata lot is ultimately sold under a court order, then the strata corporation has a privileged priority position in claiming the proceeds of that sale vis-à-vis any other creditors.

But all this is subject to proceeding within the *Limitation Act's* basic limitation period of two years ("a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered"). Some commentators have said that this relatively short limitation period creates hardships for strata corporations. The up-front costs of enforcing most strata-corporation claims are high. Proceeding within two years often makes little financial sense. So there have been calls for a special limitation period, which would be applicable just to strata-corporation claims.

The rationale for a special limitation period is that it would reflect the special position of strata corporations. The relationship between a strata corporation and a delinquent owner is fundamentally different from the standard creditor-debtor relationship. That standard relationship is best seen in a consensual lending transaction, in which a creditor agrees to lend money to a debtor. In a strata, on the other hand, there is no such loan, simply an owner who refuses or fails to pay required fees, levies, or the like. When one owner fails to pay the harm ultimately falls on the other owners, who must either make up for the lost funds themselves or run the risk of having the value of their own strata lots decline.

The difficulty with these arguments is that there might not be enough that sets strata corporations apart from other creditors and warrants special treatment under the law. After all, most creditors would prefer to have the benefit of more time and greater flexibility in pursuing their claims.

The *Limitation Act* is a relatively new statute. It's only been in force since 2013. One of its hallmarks was a move to a new, shorter basic limitation period (cutting what had previously been a six-year period down to two years). It's likely that the government will need particularly strong reasons to start carving out exceptions to this new basic limitation period.

In general, limitation periods are intended to promote certainty and finality in court and tribunal proceedings. They're also intended to guard against stale claims coming before a

court or tribunal. The longer the limitation period, the greater the likelihood of a stale claim. This can force the court or tribunal to have to make decisions in the face of lost or disposed-of records or fading memories. Stale claims are one more burden on an already overburdened justice system.

In the end, the committee decided to propose a special, four-year limitation period for strata-corporation claims that come within the *Strata Property Act's* lien. In the committee's view, these claims have enough special characteristics to set them apart from the broad run of creditor-debtor cases. The current law has caused problems for strata corporations, and the simplest way to alleviate those problems is with a dedicated, longer limitation period.

***Proposal (3) The Strata Property Act should provide for a special limitation period for claims of money, capable of being subject to a lien under section 116, owing from a strata-lot owner to a strata corporation, of four years.***

agree

disagree

comments: \_\_\_\_\_

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## 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 paper. Responses to the full and summary consultations received before **15 June 2018** will be taken into account in preparing the final report on governance issues for stratas, which BCLI plans to publish in 2018.