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BRITISH COLUMBIA
LAW INSTITUTE

STRATA PROPERTY LAW PROJECT—PHASE TWO

Summary Consultation

on

Common Property, Land Titles, and Fundamental Changes for Stratas

Date: 7 December 2018

Introduction

The purpose of this summary consultation is to highlight three proposals from the British Columbia Law Institute's *Consultation Paper on Common Property, Land Titles, and Fundamental Changes 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 25 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 Common Property, Land Titles, and Fundamental Changes 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. 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 common property, land titles, and fundamental changes for stratas, then we must receive them by **28 February 2019**. BCLI expects to publish this report in 2019.

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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. 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 six 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. Work on phase two began in summer 2013. This consultation is the fifth and final consultation for the project.

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
(Partner, Clark Wilson LLP)

Veronica Barlee (Jul. 2014–present)
(Senior Policy Advisor, Housing Policy Branch, Ministry of Municipal Affairs and Housing)

Larry Buttress (Oct. 2013–Jun. 2016)
(Deputy Executive Officer, Real Estate Council of British Columbia)

Garth Cambrey
(Real Estate Institute of British Columbia)

Tony Gioventu
(Executive Director, Condominium Home Owners Association)

Ian Holt (Oct. 2016–Apr. 2017)
(Realtor, Re/Max Real Estate Services)

Tim Jowett
(Senior Manager, E-Business and Deputy Registrar, Land Title and Survey Authority)

Alex Longson (Jul. 2016–present)
(Senior Compliance Officer, Real Estate Council of British Columbia)

Judith Matheson (Oct. 2013–Oct. 2016)
(Realtor, Coldwell Banker Premier Realty)

Elaine McCormack
(Partner, Wilson McCormack Law Group)

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- couver)</i>	Allen Regan <i>(Vice-President, Bayside Property Services Ltd.)</i>
Garrett Robinson (Apr. 2017–present) <i>(Realtor, Re/Max Crest Realty— Westside)</i>	Stanley Rule (Oct. 2013–Sep. 2016) <i>(Lawyer, Sabey Rule LLP)</i>
Sandy Wagner <i>(President of the Board of Directors, Vancouver Island Strata Owners Asso- ciation)</i>	Ed Wilson <i>(Partner, Lawson Lundell LLP)</i>

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 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 common property

Common property is one of the unique features of a strata property. There is nothing like it in other areas of real-estate law. Its unusual nature makes common property a difficult concept to define.

As British Columbia's strata-property law has evolved since its inception in the 1960s, its definition of common property has grown more and more complex. Its starting place was with the straightforward observation that property depicted on a strata plan may be either a strata lot or common property. So one way to define common property is simply to say that it is something depicted on a strata plan that isn't a strata lot.

This simple observation still forms the basis of the definition of common property. And, in practice, many issues can be resolved by applying this black-and-white test, asking whether some part of the land and buildings is shown on the strata plan as a strata lot. If it isn't, then it must be common property.

But, as the years went by, people came to appreciate that there are some grey areas that can't be analyzed using this clear-cut distinction. These grey areas tend to arise in connection with specific types of property, which are listed in the act: "pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services." One problem concerns the location of these listed things. Sometimes they are located in a boundary between two strata lots, between a strata lot and common property, or between a strata lot or common property and some other parcel of land (outside the strata property). It isn't easy to say whether these boundary cases are parts of a strata lot or not. The clear-cut distinction breaks down here, as a case could be made that boundary cases take on the qualities of both a strata lot and common property. So, in order to address them, the act was amended in the 1970s to expand the definition of common property to embrace the boundary cases.

A second grey area concerns the usage of these listed items of property (pipes, wires, etc.). Sometimes these items are clearly located partially or even wholly within a strata lot but they still may come within the definition of common property. This is because when the *Strata Property Act* was enacted it expanded the definition of common property even further to embrace these cases, "if [the listed item of property is] capable of being and intend-

ed to be used in connection with the enjoyment of another strata lot or the common property.” Court cases have said that if the property is connected to other property that is used to service other strata lots or is otherwise part of an integrated whole, then it meets this usage test and is common property. This is potentially a very wide-ranging conception of what common property is.

Should the definition of “common property” be amended?

This last point generates the issue for reform to consider. In some people’s view, the extension of the definition of common property to cover even property that is wholly located within a strata lot has caused confusion in practice and led to disputes. It has made the definition more frustrating and uncertain to apply. Modifying the definition in such a way that it is rolled back to a simpler division between property within a strata lot and common property outside it could alleviate these problems. An amended and simplified definition could help to clarify responsibilities to repair and maintain the property, as between the strata corporation and strata-lot owners.

But there could be downsides to this proposed reform that are worth considering. It’s possible that there might be some cases in which a system for servicing all the strata lots depends on property that is located wholly within a given strata lot. It could be risky to turn over responsibility for repairing and maintaining such property to the individual owner. If that owner neglects this responsibility, then serious consequences could fall on other owners and on the strata corporation as a whole.

It’s these kinds of concerns that ultimately led the committee to propose retaining the status quo. British Columbia’s definition of common property is complex in large part because its strata-property sector is so varied and sophisticated. While the committee has considerable sympathy for participants in the strata sector who have experienced frustration in applying this complex definition, it was ultimately given pause by the potential to unleash further grief and disputes across the sector by changing one of the basic building blocks of strata properties.

Proposal (1). *The Strata Property Act’s definition of “common property” should not be amended.*

agree

disagree

comments: _____

About land titles and stratas

British Columbia’s *Land Title Act* is a longstanding statute, with roots that go back to the 19th century. Its core purpose is to establish security of title to land and to facilitate trans-

fers of interest in land. But over the years it has branched out to address many other areas of interest to real-estate law.

When the *Strata Property Act* was developed in the 1960s it was intended to have a symbiotic and mutually beneficial relationship with the *Land Title Act*. As both statutes have grown so has the potential that they may become out of sync.

One area of recent concern for such conflict between the two acts is subdivision. Subdivision is the process of dividing a parcel of land into smaller pieces, which can then be transferred to other owners. Subdivision is almost always the precursor to the development of real estate. Because of subdivision's importance to land development there is a comprehensive legal framework for subdivision of land found partially in the *Land Title Act* and partially in local bylaws. At the centre of this legal framework is the role of a public official—called the approving officer—who must review and consider each subdivision application for approval.

Depositing a strata plan in the land title office is a form of subdivision. There are essentially two kinds of strata plans. One is called a bare-land strata plan. It concerns the subdivision of land. The other is commonly referred to as a building strata plan. It concerns the subdivision of a building.

The *Strata Property Act* and its regulations provide that a bare-land strata plan must meet the legal requirements applied to other subdivisions of land. These requirements include review and approval by an approving officer.

But there is a lighter regulatory framework for building strata plans. If these strata plans concern a building that hasn't been previously occupied, then they don't have to go before the approving officer for approval.

This difference in regulatory approaches has created an incentive to try to characterize what are functionally bare-land strata plans as building strata plans. A fringe element of strata-property developers has tried to exploit this incentive. For example, in one notorious case, a developer purported to stratify a postal box using a building strata plan. The "strata lots" (really slots for letters) were then each given the benefit of exclusively using large areas of land (suitable for parking recreational vehicles) as "limited common property." While the registrar of land titles refused to register this strata plan (a decision that was upheld in court), there are still concerns that slightly less extreme cases would be harder to turn aside under the current law.

Should a strata plan that depicts the boundaries of strata lots as the exterior surface of a floor, wall, or ceiling, or as a point external to a building, be held to the same approval requirements that apply to a bare-land strata plan?

There are essentially two approaches that can be taken to address the concerns about subdivision approval discussed above. The first would be a general approach, which would require all building strata plans to meet the same requirements as those imposed on bare-land strata plans. The second would be a targeted approach, which would identify only specific types of building strata plans as needing to be approved in the same manner as bare-land strata plans.

The committee favoured taking a targeted approach to this issue. In its view, taking a general approach would cast too wide a net. It would expose too many people to unnecessary costs and delays. The number of strata plans that try to exploit this loophole in the subdivision-control system is relatively small. In the committee's view, it's possible to identify their qualities and ensure that they must meet the same requirements as those imposed on bare-land strata plans.

The drawback of the targeted approach is that it may be too limited in scope. Rogue developers might change their practices and find a new loophole. In this view, only a general approach to this issue would ensure that the underlying problem is completely addressed.

Proposal (2). *The Strata Property Act should provide that a strata plan that depicts the boundaries of strata lots as the exterior surface of a floor, wall, or ceiling, or as a point external to a building, must meet the same approval requirements for a bare-land strata plan.*

agree

disagree

comments: _____

About fundamental changes

Fundamental change is a descriptive term that's meant to describe a set of transactions that have an all-embracing transformative effect on a strata property. For this consultation, the focus is mainly on those fundamental changes that can only be authorized by a resolution passed by a unanimous vote.

A *unanimous vote* is the *Strata Property Act's* term for its highest voting threshold. It is only achieved if all the strata-lot owners agree to attend an annual general meeting or a special general meeting in person or by proxy and vote in favour of a unanimous resolution. If an owner doesn't vote for the resolution—or even if an owner abstains or just doesn't attend

the meeting—then the unanimous-vote threshold hasn't been cleared and the resolution fails.

The *Strata Property Act* has 14 provisions that call for a resolution passed by a unanimous vote. Most of them concern changes to the strata plan or one of the documents that must accompany the strata plan when it's deposited in the land title office, such as the Schedule of Unit Entitlement. Changes to these documents can affect property rights or financial responsibility within the strata property.

Until recently, the *Strata Property Act* had two other provisions that required a resolution passed by a unanimous vote. These provisions had to do with terminating a strata property. As a result of an earlier report in this project, the act was changed to lower the voting threshold for these provisions. They now call for an 80-percent vote. The overriding question for this part of the consultation is whether any of the remaining provisions should be treated similarly, lowering their voting thresholds to an 80-percent vote.

Should the Strata Property Act continue to require a resolution passed by a unanimous vote to authorize amending a strata plan to designate limited common property?

The main advantage of lowering the voting threshold is that it would give the strata corporation greater flexibility. By requiring a unanimous vote, the act allows small factions of owners (as little as one) to frustrate the will of a vast majority. Even though in some cases a minority may be overridden by a court order, this still imposes considerable costs and delays on the strata corporation. Lowering the voting threshold to an 80-percent vote can be seen as striking a better balance. It would still impose a high hurdle for the strata corporation to clear if it wanted to amend the strata plan. The vast majority of the owners would have to agree with the change. But the amendment could only be blocked if a significant minority opposed it.

In the committee's view, amending the strata plan to designate limited common property is a case in point, where a lower voting threshold could bring benefits. Amending the strata plan to designate limited common property requires a resolution passed by a unanimous vote, so it's hardly ever undertaken in practice. Strata corporations rely on a simpler procedure, which only requires a resolution passed by a 3/4 vote. But what can be simply done can also be simply undone, by passing another resolution to remove the designation by a 3/4 vote. This leaves the owners who benefit from limited common property designated using the simpler procedure vulnerable. Making the more durable procedure more widely available might help a range of strata corporations. Note that this reform could go hand-in-hand with retaining the requirement for a unanimous vote to remove a designation of limited common property created by an amendment to the strata plan, which would provide maximum protection for strata-lot owners who benefit from the designation. (In fact, the project committee has made a tentative recommendation in the full consultation paper for the act to continue to require that amending a strata plan to remove a designation of limited common property be approved by a resolution passed by a unanimous vote.)

That said, there may be downsides to this proposal. It could be argued that an amendment to a strata plan affects the property rights in a strata property and should therefore only be authorized if every strata-lot owner is in agreement with the amendment.

Proposal (3). *The Strata Property Act should require a resolution passed by an 80-percent vote to authorize amending a strata plan to designate limited common property.*

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 the 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 **28 February 2019** will be taken into account in preparing the final report on common property, land titles, and fundamental changes for stratas.