

The Peter A. Allard School of Law

## Allard Research Commons

---

Faculty Publications

Allard Faculty Publications

---

2018

### When Deciding Whether to Allow a Taking of Property We Need to Ask What We Want Property Rights to Do

Douglas C. Harris

*Allard School of Law at the University of British Columbia*, [harris@allard.ubc.ca](mailto:harris@allard.ubc.ca)

Follow this and additional works at: [https://commons.allard.ubc.ca/fac\\_pubs](https://commons.allard.ubc.ca/fac_pubs)



Part of the [Housing Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

#### Citation Details

Douglas C Harris, "When deciding whether to allow a taking of property we need to ask what we want property rights to do" (2 February 2018), online (blog): *CanLII Connects* <<[a href="https://canliiconnects.org/en/commentaries/54749">https://canliiconnects.org/en/commentaries/54749](https://canliiconnects.org/en/commentaries/54749)>>https://canliiconnects.org/en/commentaries/54749>.

This Response or Comment is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

## When deciding whether to allow a taking of property we need to ask what we want property rights to do

Douglas C Harris\*

In 2017, the strata corporation at The Hampstead, a 4-storey apartment building in Vancouver's West End, called a vote on a proposal to wind-up the strata corporation, terminate the individual strata lots, and convert the strata lot owners to co-owners of the whole. The catalyst for the vote was a developer's offer that, if accepted, would see the owners receive more than twice the assessed value of their strata lots.<sup>1</sup> The owners of 27 of the 33 strata lots voted in favour of dissolution. In another vote, they approved the collective sale.<sup>2</sup>

The developer's offer precipitated the dissolution vote, but other factors were involved, including the prospect of expensive renovations to the 30-year old building, the city's decision to allow higher density developments in the neighbourhood,<sup>3</sup> and the province's amendment of the *Strata Property Act* to lower the approval threshold for dissolution votes from unanimous consent to 80 percent.<sup>4</sup> The Hampstead vote met this lower 80 percent threshold, by one vote.

The reduced approval threshold facilitates the dissolution of strata property and, in doing so, enhances the capacity of owners, such as those at The Hampstead, to maximize the exchange value of their interests. However, abandoning the presumption that dissolution requires unanimous consent also makes it more likely that dissenting owners will have their property taken from them involuntarily.

In recognition of the dangers inherent to a regime that enables a majority of owners to terminate the individual property interests of a dissenting minority, the *Strata Property Act* requires that strata corporations secure court confirmation of dissolution votes.<sup>5</sup> Not surprisingly, the shift to a lower dissolution threshold, the rapidly rising land values in British Columbia's urban centres, and the increased costs of maintaining aging buildings, have precipitated a growing number of dissolution votes and a steady flow of applications to the British Columbia Supreme Court (BCSC) to confirm the votes.

The first two applications to confirm dissolution votes were uncontested, even though a number of owners had voted against dissolution in each instance.<sup>6</sup>

---

\* Professor and Nathan T Nemetz Chair in Legal History, The University of British Columbia, Peter A Allard School of Law.

<sup>1</sup> *The Owners, Strata Plan VR2122 v Wake*, 2017 BCSC 2386 [*Wake*] at para 18.

<sup>2</sup> *Ibid* at para 3.

<sup>3</sup> The City of Vancouver, [West End Community Plan](#) (20 November 2013), 52-54.

<sup>4</sup> *Strata Property Act, SBC 1998, c 43*, ss 272, 277. See Douglas C. Harris, "[Owning and Dissolving Strata Property](#)" (2017) 50:4 UBC L Rev 935, for detail on the statutory dissolution provisions and the early judicial interpretations of them.

<sup>5</sup> *Ibid* ss 273.1, 278.1

<sup>6</sup> *The Owners, Strata Plan VR140 v Harrison* (27 March 2017), Vancouver, BCSC S-1611558; *The Owners, Strata Plan NW698* (28 March 2017) Vancouver, BCSC S-171277.

Since then, the BCSC has heard two contested applications. Justice Milman denied the first, ruling in an application from the strata corporation at Bel-Ayre Villa that a procedural flaw invalidated the vote.<sup>7</sup> In doing so, he described non-consensual dissolution as “an involuntary taking of a home,” and ruled that statutes that authorize the taking of property must be interpreted strictly.<sup>8</sup> In this case, the procedural failing, although apparently not causing prejudice to the dissenting owners, nullified the vote.<sup>9</sup> Strata corporations had to follow the statutory requirements for dissolution to the letter because non-consensual dissolution produced a taking of property.<sup>10</sup>

In the second contested application—that of the strata corporation at The Hampstead—Justice Loo confirmed the dissolution vote.<sup>11</sup> In her reasons for decision, Justice Loo indicated that the statutory dissolution framework “balances various legal rights, so that property rights are not to be given priority over other legal rights.”<sup>12</sup> She is correct that the courts must balance competing interests when considering contested strata property cases, but pitting “property rights” against “other legal rights” misconstrues the choice that confronts the courts.

First, it is not clear what Justice Loo means by “other legal rights.” Strata property owners hold a private interest (usually a fee simple estate) in a separately identified parcel of land, a share of the common property, and a right to participate in the governance of the private and common property. This package of interests and an obligation to contribute to the maintenance of the common property are the essential features of strata property. The rights to participate in strata governance, including the capacity to vote on dissolution, are not “other legal rights” that need to be balanced against property rights; they are part of the strata property package.

Similarly, the wish to maximize the exchange value of a property interest does not fall within the category of “other legal rights”. It is simply a desire that must be weighed against the desire to remain in a home. As a result, where dissenting owners contest the dissolution of strata property, the task for the court is to determine what the institution of property protects. Justice Loo comes closer to identifying the issue when she concludes:

... I do not agree that property rights as a home should be given greater emphasis in the face of 80% or more of the owners who want to take advantage of the increased profit to be made as a result of rezoning and

---

<sup>7</sup> [The Owners, Strata Plan VR 1966](#), 2017 BCSC 1661.

<sup>8</sup> *Ibid* at para 41.

<sup>9</sup> *Ibid* at paras 36 and 42.

<sup>10</sup> See Douglas C Harris and Nicole Gilewicz, [“Dissolving Condominium, Private Takings, and the Nature of Property”](#) in B Hoops et al, eds, *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven International Publishing, 2015) 263 on non-consensual dissolution as a private-to-private taking of property.

<sup>11</sup> [Wake](#), *supra* note 1.

<sup>12</sup> *Ibid* at para 131.

redevelopment, particularly when the preponderance of the evidence is that the owners who want to remain living in the community can do so.<sup>13</sup>

The question in contested strata property dissolution cases is whether property rights in land protect “home” or the ability “to take advantage of the increased profit”. In the words of one of the owners, does The Hampstead provide him a “home for the rest of his life”,<sup>14</sup> or is it, in the words of another, “a hugely valuable commodity”?<sup>15</sup>

When courts grapple with this question, the *Strata Property Act* directs them to consider “the best interests of the owners” and whether confirming or not confirming the dissolution vote might cause “significant unfairness” or create “significant confusion and uncertainty.”<sup>16</sup> In most cases, the first two considerations—“best interests” and “significant unfairness”—will require the closest judicial attention, and the analysis of these standards should begin with recognition that to confirm non-consensual dissolution is to authorize the capacity of a majority of owners to take the property of a dissenting minority.

In considering “best interests”, if the starting point is that non-consensual dissolution results in the taking of property, then the courts should not simply equate “best interests” with “the greatest good for the greatest number.” The courts have generated the “greatest good for the greatest number” standard in disputes over the use and management of common property.<sup>17</sup> While it may be an appropriate framework to resolve disputes over common property, the taking of individual interests in land requires more attention to individual circumstances and interests, particularly of those who confront involuntary dispossession and the loss of home. In short, the courts should not consider an 80 percent vote to have determined the best interests of the owners. It may be evidence of best interests, but should not be determinative.

Turning to “significant unfairness”, if the non-consensual dissolution of strata property is understood to include a taking of property from dissenting owners, then courts should begin with the presumption that non-consensual dissolution creates significant unfairness. Indeed, the potential unfairness in the taking of property is the basis for the common law rule that statutes that authorize a taking must be strictly construed. This presumption of unfairness to a dissenting minority would place a burden on the proponents of dissolution to establish either that the taking would not create significant unfairness, or that not to allow the taking of property would create greater unfairness.

Justice Loo’s conclusion, based principally it appears on evidence led by the proponents of dissolution at The Hampstead, that there would not be significant unfairness because the involuntarily dispossessed owners could purchase other property the same neighbourhood—“all of the owners should be able to acquire

---

<sup>13</sup> *Ibid* at para 129.

<sup>14</sup> *Ibid* at para 56.

<sup>15</sup> *Ibid* at para 133.

<sup>16</sup> See Harris, “[Owning and Dissolving Strata Property](#)” *supra* note 4 at 952-63.

<sup>17</sup> [Gentis v The Owners, Strata Plan VR 368](#), 2003 BCSC 120 at para 24.

comparable units in the West End”<sup>18</sup>—appears to recognize that the burden to establish unfairness will be shared.

Non-consensual dissolution of strata property results in the taking of property from dissenting owners. This should be the starting point for the courts as they turn their attention to considerations of “best interest” and “significant unfairness” and, in the case of residential land, to the question of whether property rights should protect home or the capacity to maximize exchange value.

In making this choice, the courts must be attentive to context. Indeed, determining “best interests” and “significant unfairness” requires attention to the circumstances of individual owners, and this necessarily involves consideration of context. At present, two factors should receive particular attention.

First, the shift away from the presumption that dissolution required unanimous consent has fundamentally altered the terms of strata property ownership. At least in the near term, this significant and retroactive change should bear on how the courts interpret owner expectations. Justice Loo’s assertion that “[r]easonable expectations are not static,” and her conclusion that the owners at The Hampstead could not have “reasonably expected to live in their units as long as they wanted, or for the rest of their lives,” unduly minimizes the degree and significance of the shift in what it means to be an owner within strata property.<sup>19</sup> Before the amended dissolution provisions, it was entirely reasonable for strata property owners to expect that the termination of their strata lots required their consent. Non-consensual dissolution was possible, but difficult and rare. Indeed, this was a prominent justification for the lower dissolution vote threshold.<sup>20</sup> The courts should not minimize the degree of the change, or suggest that prior, well-founded expectations were somehow unreasonable.

Second, there is broad awareness that the rapidly rising cost of land in British Columbia’s urban centres, particularly Vancouver, has dramatically reduced the affordability of housing. There is much less agreement about whether the solutions to the affordability crisis lie in efforts to enhance the supply of housing, or to reduce land speculation, or both.<sup>21</sup> However, while governments at different levels grapple with broad policy choices, the courts have a more clearly defined, yet nonetheless difficult choice in reviewing contested strata property dissolution votes: does ownership within strata property protect the capacity to remain an owner or to maximize the exchange value? In determining which construction of property is in the owners’ best interests and does not create significant unfairness, the courts must address the availability of affordable housing. At a minimum, the current crisis should give them pause before they move too quickly to countenance the taking of existing homes by confirming the non-consensual dissolution of strata property.

---

<sup>18</sup> [Wake](#), *supra* note 1 at para 135.

<sup>19</sup> *Ibid* at para 133.

<sup>20</sup> See the British Columbia Law Institute, [Report on Terminating a Strata](#), BCLI Report No 79 (Vancouver: BCLI, 2015) at 51-52.

<sup>21</sup> See Thomas Davidoff, Joshua Gotlieb and Tsur Somerville, [“Can more housing supply resolve the affordability crisis in Vancouver?”](#), *The Globe and Mail*, 14 January 2018.