

# **Balancing the Needs of Society with Private Property Rights**

**PRESENTATION TO THE LEGISLATIVE ASSEMBLY**

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*British Columbia  
Real Estate Association*

## **MISSION STATEMENT**

**The British Columbia Real Estate Association  
represents the interests of the real estate boards  
and their licensees on all provincial issues.**



## Executive Summary

The British Columbia Real Estate Association (BCREA), its member boards and 12,000 REALTORS are alarmed at the frequency with which the bundle of rights traditionally acquired when one purchases land is unbundled. All levels of government compromise private property rights as the need for legislation designed to protect, enhance or restore the environment, or preserve our culture and heritage increases.

BCREA is concerned that buyers are often uninformed about the various use restrictions that exist on the properties they consider for purchase, which puts them at a disadvantage when attempting to determine fair market values. REALTORS who market these properties are at a similar disadvantage if information regarding land use restrictions is not on title and not easily accessible. BCREA is also concerned about the impact on existing owners when legislation adversely affects the values of their properties.

To that end, BCREA makes detailed recommendations on the legislative process generally and on several specific pieces of legislation. In part, BCREA recommends the provincial government:

- Entrench the protection of property rights in provincial legislation as a guiding principle and at the time policy and legislative enactments are being considered:
  1. The legislative and policy drafting process should require a formal review of property rights issues and development of an impact statement, which includes the cost of the proposed legislation to property owners.
  2. The proposed legislation should require that administrative arrangements be simple, avoid costly procedures and burdensome compliance requirements.
  3. A stakeholders committee should be established to review the legislation, property rights impact statement, proposed procedures and compliance requirements, and this committee should be mandated to make recommendations on how to reduce the impact on individual property rights. BCREA would be pleased to have a representative on this committee.
- File notices against title in the Land Title Office with respect to all provincial and local government legislation that may affect the use of a parcel of land, whether or not the legislation creates an interest in land.
- Introduce a range of mechanisms to reduce the impact of future legislation on property values, and adopt compensation for adversely affecting the market value of property as a property owner's right.
- Continue with its guarantee to defend the integrity of private title during treaty negotiations, and offer compensation to individuals who have their property taken, or the use of their property significantly impacted, as part of an Aboriginal land claims settlement.
- Move a resolution to add "enjoyment of property" to the federal *Charter of Rights and Freedoms*.



## The Issue

By the terms of our *Constitution*, property and civil rights within the province are regulated by the provincial government. In many cases, the provinces have delegated large portions of their property powers to municipalities, which in turn pass bylaws regulating property within their jurisdictions. As a result, hundreds of laws limit our rights as property owners, and these may vary from one municipality to another. Arbitrary land-use restrictions are rapidly increasing and they are the major property rights concern among REALTORS and their clients today.

BCREA congratulates the Attorney General and Minister Responsible for Treaty Negotiations for his commitment to protect private property rights and prevent the government from expropriating assets without fair compensation.<sup>1</sup> However, this commitment does not address government actions that leave a property virtually unusable but fall short of actual expropriation.

The public and the real estate industry perceive that property can be held hostage by a range of land-use restrictions that may be enforced arbitrarily, unfairly and without compensation. If left unchecked, this will negatively impact an industry that is a key indicator of economic activity and recovery.<sup>2</sup>

As the BC real estate market begins to rebound after years of consumer angst and economic uncertainty, buyers and existing owners must know they will receive financial protection when action is taken to protect our heritage and our environment.

The absence of a constitutional guarantee means care must be taken to ensure any statute that sanctions either a full or partial taking of private property protects the rights of property owners.

For the purpose of this brief, BCREA defines “property rights” as:

*The guarantee that every person has the right to the enjoyment of their property, the right not to be deprived of their property unless they are given a fair hearing, paid fair, timely and impartially-fixed compensation, and the right to appeal to the courts if their property rights have been infringed upon or denied.*

## Industry Recommendations

### A. Property Rights Concerns as Part of the Policy and Legislative Enactments Process in BC

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<sup>1</sup> Ministry of Attorney General and Minister Responsible for Treaty Negotiations *Service Plan Summary 2002/3-2004/5*, [www.gov.bc.ca/prem/down/core\\_review\\_02/attorney\\_general.pdf](http://www.gov.bc.ca/prem/down/core_review_02/attorney_general.pdf) (accessed: February 1, 2002).

<sup>2</sup> In 2000 there were 400,000 property transactions in Canada, representing \$61 billion in economic activity. Speech to the Federal Standing Committee on Environment and Sustainable Development, The Canadian Real Estate Association (April 3, 2001), [www.crea.ca/english/realtor/political/SARA\\_presentation.htm](http://www.crea.ca/english/realtor/political/SARA_presentation.htm) (accessed: February 4, 2002).



BCREA expects the amount of legislation impacting property rights to increase as society grapples with environmental concerns, Aboriginal land claims, resource management and the need to protect and preserve our culture and heritage. However, many REALTORS believe the effect of proposed legislation on individuals' use of private property, including the potential for adverse affects on the market value of affected properties, is not adequately considered by those drafting the legislation.

**BCREA recommends the government:**

1. Entrench the concept of protecting property rights in provincial legislation as a guiding principle.
2. Require, as part of the legislative and policy drafting process, a formal review of property rights issues and development of an impact statement that includes the cost of the proposed legislation to property owners.
3. Require proposed legislation to contain administrative arrangements that are simple, and avoid costly procedures and burdensome compliance requirements.
4. Establish a stakeholders committee to review the legislation, property rights impact statement, proposed procedures and compliance requirements. This committee should be mandated to make recommendations on reducing the impact on individual property rights. BCREA would be pleased to have a representative on this committee.

**B. The Need for a Notice Board at the Land Title Office**

The Land Title Office maintains records of all of the estates and interests or charges on the title of individual properties. However, provincial and local governments pass legislation that does not create a legal estate or interest in land but does affect the use of the land. It is no longer sufficient to know of the charges registered against the title to land. A prospective buyer needs to know what affects the property and what may affect the use of the property to determine the appropriate purchase price.

Currently, the government does not offer a consistent approach to notifying the public about legislation that affects the use of property. BCREA believes the Land Title Office should develop a notice board system whereby all legislation that may impact real estate, whether or not estates or interests are created, are referenced on all potentially affected titles. For example, owner-builder declarations are required as part of the ten-year warranty coverage period introduced by the Homeowner Protection Office. They impact the buyer of the property, but the buyer may not be aware of their existence. If such a declaration were on the title, the buyer could make an informed decision.

Many statutes provide for a notation to be made against the title to the property. These notations can include references to statutes restricting the use of the land, such as the *Agricultural Land Commission Act*, the *Highway Act* the *Ministry of Transportation and Highways Act* and the *Local Government Act*. While such notices may be registered on title to some properties, they often are not.<sup>3</sup>

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<sup>3</sup> August 2001, *Report from Council* (Real Estate Council of British Columbia), p.2



For example, archaeological sites are not commonly noted on the title of affected properties. Neither are agricultural land reserves nor heritage building notices consistently noted on title.

**BCREA recommends the government:**

1. File notices against title in the Land Title Office with respect to all provincial and local government legislation that may affect the use of a parcel of land, whether or not the legislation creates an interest in land.
2. Ensure that such notices provide information directing title searchers to the proper source of information or authority on items highlighted against titles.
3. Make Land Title Office records available online on a 24 hours a day seven days a week basis.
4. Evolve the Vancouver Land Title Office into part of a fully interactive “super registry” for all business-related searches (e.g., company, personal property security), as district land title offices are closed.

**C. Compensation for Adversely-Affected Property Values**

Traditionally, governments have not compensated owners where non-use legislation negatively impacts property values, unless the impact of the legislation is to sterilize the property or restrict the use of the land to a public use. BCREA is not interested in reopening the discussion on compensation for past legislative enactments.

However, because we expect the amount of this type of legislation to increase, we believe the government should acknowledge the negative effects such legislation has on property values and, in the future, provide compensation.

BCREA believes the government has a moral responsibility to pay fair compensation to property owners whose values are adversely affected as a result of legislation passed for the benefit of society as a whole.

**BCREA recommends the government:**

1. Make available to property owners a range of mechanisms to reduce the impact of legislation on property values, including:
  - compensation
  - tax incentives
  - public-private partnerships, such as purchases with non-government agencies
  - incentive-based approaches, such as eliminating capital gains tax on property gifted to the crown
  - a transferable tax benefit for dedicating affected lands to the crown, or improving the land to maximize the benefit intended by the legislation (e.g., restoring land to its original state)
2. As a general rule, award compensation for the excess amount of the loss where the burden created by legislation adversely affects property values by more than ten per cent of the market value.
3. Determine the quantum of the award on an individual case basis.
4. Implement an efficient, transparent, impartial and binding dispute resolution process to deal with disagreements over compensation.

**D. Aboriginal Land Claims**



Uncertainty caused by unresolved land claims continues to create economic instability for resource industries and leads owners and buyers of residential property to worry about their property rights. In his *Service Plan Summary*, the Attorney General and Minister Responsible for Treaty Negotiations promises to “fully protect private property rights and resource tenure rights in treaty negotiations.”<sup>4</sup> This reflects the government’s numerous statements that private lands are not subject to land claims.

However, given the rulings of the Supreme Court of Canada in *Delgamuukw* and other cases, the probability that treaty negotiations in British Columbia will not be concluded without some impact on private property rights seems high, especially with respect to sacred or heritage sites on lands currently owned by non-Aboriginal individuals.

**BCREA recommends the government:**

1. Continue with its guarantee to defend the integrity of private title during treaty negotiations.
2. Define private property broadly to include tenants of lands taken, or the use of which is significantly impacted.
3. Outline its concept of the status of privately-deeded land and clarify whether freehold property owners might be displaced by treaty settlements.
4. Compensate individuals whose property is taken, or whose property use is significantly impacted, as part of an Aboriginal land claims settlement.
5. Adopt the *Principles of Third-Party Compensation*<sup>5</sup> developed by the Treaty Negotiations Advisory Committee (TNAC), under which an independent administrative tribunal would adjudicate claims of inadequate or unsatisfactory compensation from third parties aggrieved as a result of settlement of Aboriginal land claims, treaties and/or pre-treaty measures.
6. Ensure that settlement agreements include adoption of the Torrens System of Land Registration for all lands within British Columbia to ensure consistency and predictability for consumers.
7. Require that all policies, programs and procedures developed as part of the settlement agreements be clear, transparent, and provide as much certainty and finality as possible.

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<sup>4</sup> Ministry of Attorney General and Minister Responsible for Treaty Negotiations, *Service Plan Summary 2002/3-20004/5*, [www.gov.bc.ca/prem/down/core\\_review\\_02/attorney\\_general.pdf](http://www.gov.bc.ca/prem/down/core_review_02/attorney_general.pdf) (accessed: February 1, 2002).

<sup>5</sup> Treaty Negotiations Advisory Committee (TNAC), *Principles of Third-Party Compensation*, January 2001.



## E. Specific British Columbia Legislation

### *Heritage Conservation Act*

The Archaeology Branch of the Ministry of Sustainable Resource Management lists approximately 22,000 archaeological sites across the province to which 800 to 1,000 new sites are added annually. Archaeological sites are not commonly noted on the titles of affected properties, though. BCREA congratulates the Ministry of Sustainable Resource Management in its announced plans to register archaeological sites with the Land Title Office.<sup>6</sup> BCREA is concerned, however, that many local planning authorities advise that they do not have complete records.

#### **BCREA recommends the government:**

1. Register notices on title as soon as possible. BCREA would be pleased to provide representation to any stakeholder working group required to assist in the completion of this project.
2. Exempt suspected, yet unregistered, sites from use restrictions until they are registered against the title.
3. Bear the costs for inspections, reports, archaeological excavations and other related costs required to determine the actual existence of an archaeologically-relevant site.
4. Develop an inexpensive and efficient system to help owners determine whether the possible sites actually exist and, if not, to remove the notice from title and archaeological register.
5. Provide the public with access to archaeological maps through local governments, Land Title Offices and the Archaeological Branch online, and ensure that the computer systems in use by these three organizations are compatible and integrated.
6. Provide future compensation for lands that become substantially impacted by use restrictions.

### *Streamside Protection Regulation*

BCREA strongly supports legislation that protects, restores and enhances our urban and rural environments, including fish habitat. This can be achieved through the application of the principles of sustainable development that call for balancing today's environmental, social and economic needs without compromising the ability of future generations to meet their own needs. The *Streamside Protection Regulation* (SPR), enacted in January 2001 under section 12 of the *Fish Protection Act*, does not meet these principles.

BCREA had the opportunity to participate in the *Streamside Protection Regulation* Advisory Group (SPRAG) report process with the provincial government, Union of BC Municipalities (UBCM), Department of Fisheries and Oceans (DFO), Urban Development Institute (UDI), National Association of

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<sup>6</sup> Ministry of Sustainable Resource Management, *Service Plan 2002/02-2004/05*, [www.gov.bc.ca/prem/down/core\\_review\\_02/sustainable\\_resource\\_management.pdf](http://www.gov.bc.ca/prem/down/core_review_02/sustainable_resource_management.pdf) (accessed February 3, 2002).



Industrial and Office Properties (NAIOP) and others. Consensus was reached on several issues relating to the SPR and BCREA hopes this unity will not be lost. However, BCREA believes the SPR is unworkable without significant redrafting and should be repealed.<sup>7</sup>

BCREA agrees with its real estate industry colleagues on SPRAG that any regulation dealing with fish habitat protection must be based upon a science-driven system, with the government setting objective standards that are applied by qualified consultants.

This approach requires the development, with the cooperation of federal authorities, of objective and reasonably detailed “no net loss” principles that a consultant could use to meaningfully develop and sign off on a fish protection package for a property. Such principles could be used on a site-by-site basis, with the DFO *Policy for the Management of Fish Habitat*<sup>8</sup> as the starting point.

**BCREA recommends the government:**

1. Repeal the *Streamside Protection Regulation* under the *Fish Protection Act* and draft a regulation that creates a fair and equitable process to balance good environmental laws, fish protection, and the broader needs of the community.
2. Partner with the real estate industry and other stakeholder groups to draft a regulation utilizing a science-based approach to protecting fish habitat for use by property owners.
3. Clearly define the roles of each level of government and the private sector in the new regulation, as follows:
  - Provincial government - set and monitor science-based performance standards and provide an inexpensive and efficient mechanism for appeals.
  - All levels of government - harmonization between the federal and provincial governments would ensure that local governments are not unduly burdened with the implementation of the regulation, and reduce some of the existing regulatory requirements surrounding approvals.
  - Private sector - hire certified professionals to ensure the provincial government’s science-based performance standards are met for each site-specific circumstance.

*Proposed Community Charter*

The government’s planned *Community Charter* will be founded on the principle that municipalities must be recognized as an “order of government” within British Columbia.<sup>9</sup> Regulatory powers will be broadened to include powers to authorize,

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<sup>7</sup> BCREA, UDI and NAIOP called for the repeal of the *Streamside Protection Regulation* in a joint letter dated March 1, 2002, to the Honourable Joyce Murray, Minister of Water, Land and Air Protection.

<sup>8</sup> Department of Fisheries and Oceans Canada, *Policy for the Management of Fish Habitat*, [www.ncr.dfo.ca/habitat/Policy/english/index\\_e.htm](http://www.ncr.dfo.ca/habitat/Policy/english/index_e.htm) (accessed: March 4, 2002).

<sup>9</sup> The Minister of State for Community Charter, *The Community Charter A Discussion Paper*, p.10, [www.mcaws.gov.bc.ca/charter/pdfs/ccpaper.pdf](http://www.mcaws.gov.bc.ca/charter/pdfs/ccpaper.pdf) (accessed: February 6, 2002).



control, inspect, limit and restrict the actions of the person, property or thing being regulated. Significantly, it also includes powers to prohibit and impose requirements in relation to persons, property, things and activities.<sup>10</sup> These are strong powers and BCREA believes care must be taken to ensure that any regulations affecting uses of private property adequately protect the property owner.

**BCREA recommends the government:**

1. Require the *Community Charter* to ensure consistency among local governments in their approaches to land-use bylaws.
2. Harmonize the *Community Charter* and *Vancouver Charter* to ensure consistency across the province.
3. Ensure that the *Community Charter* provides compensation for imposition of substantial non-use bylaws.

**F. Urge the Federal Government to Entrench Property Rights in the *Charter of Rights and Freedoms***

Section 7 of the Canadian *Charter of Rights and Freedoms*, proclaimed as part of the *Constitution* in April 1982, states, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The right to own property is missing, having been sacrificed to obtain the support of the provinces for the rest of the Charter.

The BC Legislature unanimously approved a property rights resolution in September 1982, introduced by then Intergovernmental Affairs Minister Garde Gardom.

In 1993, the federal Mulroney government included property rights in its constitutional reforms, known as the Charlottetown Accord. Again, they were dropped because of provincial opposition.

Without a constitutionally-enshrined right to private property, any existing rights can be regulated out of existence, without either compensation for the loss or the right of property owners to question the legislation.

**BCREA recommends the government:**

1. Raise the issue of entrenchment of property rights at meetings with the federal government, and confirm property rights in federal-provincial agreements dealing with property regulations.
2. Move a resolution similar to that passed in 1982 stating that:

*The Province of British Columbia authorizes the Governor General to issue a Proclamation under the Great Seal Of Canada to amend section 7 of the Canadian Charter of Rights and Freedoms so that it reads as follows:*

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<sup>10</sup> The Minister of State for Community Charter, *The Community Charter A Discussion Paper*, p.11, [www.mcaaws.gov.bc.ca/charter/pdfs/ccpaper.pdf](http://www.mcaaws.gov.bc.ca/charter/pdfs/ccpaper.pdf) (accessed: February 6, 2002).



*Everyone has the right to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”*

and urge the Legislative Assemblies of all other provinces and the Senate and the House of Commons to pass similar resolutions.

## **Conclusion**

The REALTORS of BC applaud initiatives designed to protect, enhance or restore the environment, or preserve our culture and heritage as adding to the appeal of British Columbia and making this province a desirable place to visit, invest in and reside. BCREA puts the above recommendations before the provincial government to ensure that, as new legislation is contemplated and introduced, appropriate consideration is given to the potential impact upon individual property owners who have chosen to invest their savings by purchasing land in BC.

BCREA looks forward to the government's response on this issue.

### **For further information, please contact**

Liz Tutt, President

[ltutt@uniserve.com](mailto:ltutt@uniserve.com)

or

Robert Laing, Director of Government Relations

[robertl@bcrea.bc.ca](mailto:robertl@bcrea.bc.ca)

British Columbia Real Estate Association

6<sup>th</sup> Floor, 2695 Granville Street

Vancouver, BC, V6H 3H4

phone: (604) 683-7702; fax: (604) 683-8601

[www.bcrea.bc.ca](http://www.bcrea.bc.ca)