CCI Vancouver Chapter
Condo News

President's Message

PRESIDENT'S MESSAGE – WINTER 2014

It does not feel like we are half way through our fiscal year with so many projects and events still on the go for the balance of 2014! Where has the time gone?

As I write this edition of the CCI Vancouver newsletter I am able to say that so far 2013/2104 has been good to CCI Vancouver. Our membership numbers are at an all time high and our various committees have been working hard to complete the tasks and mandates for the fiscal year. We have held one successful seminar earlier this year on sustainable building upgrades and energy incentives. Warren Knowles of RDH Building Engineers along with representatives of BC Hydro, Fortis B.C. and Houle Electric spoke about the benefits of identifying and implementing important building upgrades that not only improve the value and "curb" appeal of a building but also greatly reduce the energy consumption costs incurred by strata corporations. You will find a very informative article from RDH on this subject in this edition of the newsletter.

CCI Vancouver has another educational seminar coming up on April 5th. Speakers have not yet been finalized but one of our speakers will be from the HPO office who will be speaking about the do's and don'ts of buying into a new building and things that purchasers into strata corporations should be looking at. Stay tuned for more details on our website.

For years CCI Vancouver has looked at ways of presenting a comprehensive educational program aimed at strata council members and owners with an interest in the governance and administrative aspects of operating and managing a strata corporation. We are pleased to announce that CCI Vancouver will be presenting "Strata 101", through the downtown campus of Vancouver Community College, starting May 1, 2014. The course will run on Thursday nights for 3 hours per night for 8 weeks, starting Thursday May 1, 2014. The cost of the course is expected to be $300.00 and will include a complete set of course materials. You can register online on the Vancouver Community College website. Please also continue to check our website for more updates in the coming weeks.

Jamie Bleay – President CCI Vancouver

Inside this Issue

CASE LAW UPDATE

By Phil Dougan

The Owners, Strata Plan VR 390 v. Harvey, 2013 BCSC 2293

This is a very large case to read. Running to 35 pages, and having taken up eleven days of hearing, it is definitely one of the bigger strata cases by sheer volume.

The Strata petitioned the court to have the defendants removed from the Strata Corporation – or at least to be forbidden to occupy their unit in the strata. The matter was heard over the time period in which the *Jordison* matter was before the court of appeal, in which that court ordered an owner to sell her unit and move away.

In this case, however, Madam Justice Gray determined that the defendants were not in such an egregious breach of the bylaws that they should be ordered from their home. However, from the orders that Madam Justice Gray did make, it is clear that she was not prepared to give the defendants the opportunity to continue with their difficult behaviour. That behaviour was repeated renovations without Strata approval and renovations of common property without notice or approval.

The Judge ordered that the defendants were prohibited from further renovations, demolitions or changes to common property or parts of the strata lot that the Strata insures. If they breached that order, the Strata was empowered to enter the strata lot and change things back. If the defendants tried to stop them, they were to be arrested by the VPD. If they would not open the door, a locksmith could be called to gain access.

The problems arose between the parties when the defendants wanted to make changes to their unit and common property and the Strata either wanted to control or disallow changes that the defendants wanted.

The court in prior proceedings, sided with the Strata saying the strata must enforce its bylaws and must consider what is best for all the owners.

The Strata was trying to complete an envelope remediation process to stop water ingress problems while the defendants actively delayed and interfered with that work, and all the time wishing to complete their own repairs and renovations.

The defendants took steps to change plumbing and venting arrangements; changed exterior walls; renovated common property areas as a solarium; removed landscaping; changed outdoor drains; moved outdoor pavers; installed heating on an outdoor deck; and numerous other unauthorized repairs and changes.

Over time, the Strata fined the defendants $22,400.

The court found the defendants in breach of prior court orders or the bylaws, on a number of these changes made by the defendant.

The Strata argued that pursuant to s. 173 of the *Strata Property Act* and the Court of Appeal decision in *Jordison* the defendants unit should be sold, so that their endless breaches of the bylaws and court orders could be brought to an end.

The court determined that:

[152] An order for forced sale of one's home is a severe and extreme remedy. The TR's wrongful conduct has been continuing and in knowing disregard of the court orders. For example, Mr. Edgar's email of March 10, 2012, threatening to do work on the West Deck acknowledges that it would be work on common property.

[153] It is apparent that the relationship between Mr. Edgar and members of Council is characterised by hostility. Some of this appears to be the reasonable reaction of Council members to Mr. Edgar's continued disregard for the court order, the SPA, and the bylaws, compounded by his voluminous and often sarcastic email communications.

[154] However, all the misconduct related to renovation work in the Townhouse which has been completed, with the possible exception of the bamboo trimming. The opportunity for friction between the SC and the TR is now significantly diminished. The Townhouse is a separate unit, although it is connected to common property. There is no evidence of the TR engaging in ongoing intolerable behaviour like creating unacceptable loud and unnecessary noise as in *Jordison November 2013*. The need for future interaction between the TR and Council should be limited to items such as maintenance and repair.

[155] I am not prepared to make an order for forced sale of the Townhouse at the present time. The court should first have the opportunity to punish the TR for contempt. If the TR persist in breaching any court order following such punishment, it may be appropriate for the court to order the forced sale of the Townhouse.

This case shows that even difficult owners are not going to be removed from a strata complex, if the nature of the problem is such that it can be regulated by a court order. The order given is clearly still a

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draconian one (including orders for arrest if the order was breached) but because the problem was perceived by the court to be coming to a settled end, the final measure of a *Jordison* order was deemed unnecessary.

So, if you are contemplating a court application to force a sale – make sure there really is no other option; otherwise the court is unlikely to grant your request.

STRATA CONFLICTS – CRYING OUT FOR ADR

By Jamie Bleay

Introduction:

Strata/condominium corporations have been around in B.C. for almost 50 years. Once upon a time I heard someone describe condominium living as the "carefree homeownership lifestyle" and condominium living was perceived to be a kind of panacea for people who wanted to own a "piece of the rock" without all of the hassles, trials and tribulations of owning free-standing home with lawns to look after, gutters to clean, a roof to repair, etc. In addition, the condominium lifestyle was thought of as a way for single family home owners to get away from their troublesome neighbours who thought they had the unfettered right to use their homes as they wished, whether as a parking lot for old dilapidated cars, a place to store their "junk" or as a place where they could play loud music, have lots of parties and otherwise carry on without regard to their neighbours. Unfortunately that is not the lifestyle that many strata owners enjoy!

According to Statistics Canada (2012) approximately 1 in 8 Canadian Households live in a strata/condo, either as owners or renters. In B.C. there are approximately 29,000 strata corporations. Most of these strata corporations are residential and represent approximately five hundred thousand residential strata lots. With a population in B.C. of 4,606,375 as of October 1, 2013 (www.bcstats.gov.bc.ca) the percentage of our population that live in residential strata lots is likely in the range of 25% and in Metro Vancouver it is quite possible that upwards of 55% of our population live in residential strata lots.

It's no secret that living in what is in essence a communal arrangement will not always be harmonious. One has only to look at some extreme examples of the "difficult people" who have been the subject matter of condo/strata litigation to know that this kind of living arrangement can be a ticking time bomb for conflict.

1. Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh, 2010 ONSC 4448;
2. The Owners, Strata Plan LMS 4255 v. Newell, 2012 BCSC 1542 (CanLII), 2012-10-22;
3. The Owners of Strata Plan LMS 2768 v. Jordison, 2013 BCCA 484 (CanLII), 2013-11-12;
4. Blackmore et al v. the Owners, Strata Plan VR 274, 2004 BCSC 97 (CanLII), 2004-01-15.

All of these cases involve people who have invested their hard-earned money into their homes. In the *Korolekh* and *Jordison* cases the conflict festered to the point where the only way to resolve the conflict was through judicial intervention at considerable cost to all parties. After years of conflict it was decided in each case that it was impossible for these owners to be able to remain in their homes because of the turmoil and strife they had caused in their capacity as property owners, in the face of the collective rights of others.

In *Jordison*, supra, Mr. Justice Donald of the B.C. Court of Appeal had this to say about the ongoing conflict between the owner, Ms. Jordison, and the strata corporation:

"The appellants have repudiated the co-operative foundation of strata living and their intolerable behaviour has brought about the forced sale," [paragraph 27]

He also stated that at paragraph 25:

"The old adage "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting. In Principles of Property Law, 5th ed. (Toronto: Carswell, 2010) at 366, the learned author, Bruce Ziff, writes:

> *Participation in condominium projects necessarily involves a surrender of some degree of proprietary independence. An owner is at the mercy of the rules enacted through the internal decision-making process. That is only logical. … Likewise, uses that directly and adversely affect the physical enjoyment of neighbouring properties need to be regulated. These are problems that occur in all communities, and one of the attractions of the condominium lifestyle is that there can be a measure of control over the petty annoyances that often occur in urban habitats.*

These are but three of thousands of strata conflicts, some of whom are between owners while the majority are between owners (or occupants) and their strata/condo corporations, on the 'books' across Canada. A quick word search on CanLII B.C. resulted in over 2,600 cases being identified by the words under "Condominium Act" and over 2000 cases being identified under the words "Strata Property Act". Appreciating that there is likely some overlap in these numbers and the likelihood that not all cases are precipitated by disputes between owners and their strata/condo corporations it is evident that the condominium lifestyle seems to attract lots of conflict.

Strata conflicts come in all shapes and sizes and fact patterns. Leaving aside the "leaky condo" conflicts which involved multiple parties but did not pit owners against owners or owners against their strata corporations the following is a list (by no means exhaustive) of the types of strata disputes I have either encountered as counsel or picked up around the "water cooler" when talking to other legal counsel, strata owners or strata managers:

- Brothels in strata corporations;
- Feeding of birds;
- Strata lot/common property alterations;
- Hot tubs;
- Hoarders;
- Pets – too many, too big, too noisy, not allowed by the bylaws;
- Smoking;
- Parking and storage;
- Noisy owners, noisy tenants;
- Water beds;
- Water leaks;
- Window coverings;
- Signs;
- Flags;
- Illegal activities;
- Day care operation;
- Failure to repair and maintain (by owners, by strata corporations);
- Conflict of interest by council members;
- Employment;
- Human rights issues;
- Proxy votes;
- Chargebacks (for repairs, for insurance deductibles);
- Use of common property and limited common property;
- Storage of prohibited goods;
- Children in adult-only buildings;
- Rentals;
- Voting irregularities;
- Charging and collecting fines;
- Budget irregularities;
- Strata management issues.

Last year the Provincial Court of British Columbia alone received in excess of 230,000 new cases. Without knowing how many of those cases might be "strata" related cases the court system is clearly overloaded. With strata ownership on the rise and with that the reality of conflict within strata communities is it any wonder why strata conflicts are crying out for ADR?

Legislative overview:

Strata/condominium corporations have been around in British Columbia since 1966. They were first governed by the *Strata Titles Act* (the "STA") which was more or less the same legislation that was in place to govern condominium corporations in New South Wales, Australia. The STA had provisions that provided for court access to address disputes/conflicts (the word "court" was defined to mean the Supreme Court of British Columbia) and arbitration [section 24].

The STA was followed by the *Condominium Act* (the "CA") which governed strata corporations in B.C. from 1979 until June 30, 2000. The CA had provisions similar to the STA whereby disputes/conflicts could either end up in court (again, the word "court" was defined to mean the Supreme Court of British Columbia) or before an arbitrator [sections 44 and 45 of the CA].

On July 1, 2000 the *Strata Property Act* (the "Act") came into force. While the Act has been much maligned for adding another 180 sections to the CA it made some significant strides, at least on paper, in terms of addressing dispute resolution. While access to the courts (Supreme Court for strata fee/special levy recovery, including forced sale and disputes over governance and Provincial Court for such things as disputes over fines and chargebacks) continues to be a traditional dispute resolution tool the Act was tweaked in some respects to open the door for more ADR opportunities.

Internal alternative dispute resolution under the Act:

In its wisdom the legislative drafters of the Act also included, as part of the schedule of standard bylaws, the following bylaw:

Division 6 — Voluntary Dispute Resolution

Voluntary dispute resolution

29 (1) A dispute among owners, tenants, the strata corporation or any combination of them may be referred to a dispute resolution committee by a party to the dispute if

(a) all the parties to the dispute consent, and

(b) the dispute involves the Act, the regulations, the bylaws or the rules.

(2) A dispute resolution committee consists of

(a) one owner or tenant of the strata corporation nominated by each of the disputing parties and one owner or tenant chosen to chair the committee by the persons nominated by the disputing parties, or

(b) any number of persons consented to, or chosen by a method that is consented to, by all the disputing parties.

(3) The dispute resolution committee must attempt to help the disputing parties to voluntarily end the dispute.

There are a number of pre-conditions to the availability of this bylaw which include:

1. All parties to the dispute must consent to the dispute which must involve the Act, the regulations, the bylaws or the rules; and
2. A dispute resolution committee must be organized.

While it sounds simple enough it would appear, based on my experience, that strata corporations and/or owners are not willing to invoke this bylaw for the purpose of resolving any manner of disputes that involve the Act, the regulations, the bylaws or the rules. The process seems simple enough; each party to the dispute nominates someone and those two people choose a third person to be the chair OR the parties all consent to some other method of choosing the dispute resolution committee. However distrust over the choice of the persons nominated and/or the chair likely lies at the heart of why to date this bylaw is a little used tool when it comes to dealing with internal strata conflicts.

The Act permits bylaw amendments. One strata corporation I am aware of has taken it upon itself to create its own version of a voluntary dispute resolution bylaw (which is registered in the land title office) which states:

Voluntary Dispute Resolution

1. Voluntary dispute resolution

1.1 In any dispute which may arise between residents, council and the strata corporation, or the employees, agents, representatives or invitees of any of them, residents must conduct themselves in the same manner as they themselves would wish to be treated in the same circumstances.

1.2 Where a resident believes another resident or that resident's visitor is contravening the Act, its regulations, or these bylaws or rules in a manner which affects the resident's use and enjoyment of a strata lot or common property, such resident must first attempt to seek an end to the perceived contravention by way of direct contact with the offending resident. If such contact is impossible or unsuccessful, the resident may request action or a decision from the strata corporation to end the perceived contravention.

1.3 Where a resident wishes to request an action or a decision from the strata corporation in respect of that resident's use and enjoyment of a strata lot or common property, such resident must as a first step give written notice to the strata corporation's property manager, with a copy to the current council chair and to any other resident who may be materially affected by the requested action or decision.

1.4 If a resident is unsatisfied with an action or decision of council, or with a lack of action or decision, such resident, or council, may refer the unresolved dispute to a "dispute resolution committee", but only if

(a) the dispute involves the application of the Act, the regulations to it, these bylaws or the rules;

(b) the initiating party describes the matter or matters in dispute, and the requested action or decision, in writing; and

(c) all the other parties to the dispute accept the description of the dispute and agree to have it referred to a "dispute resolution committee".

1.5 A dispute resolution committee must consist of three owners who do not have a special interest in the dispute: one chosen by each party to the dispute, and one additional owner selected by the first two committee members.

1.6 The dispute resolution committee must, as part of its procedure, meet in person with all parties to the dispute, but may otherwise adopt any method or procedure it chooses.

1.7 If the strata corporation is a party to the dispute or is interested in it, it may be represented at any meeting of the dispute resolution committee by up to two strata council members. The dispute resolution committee must attempt, in good faith and without compensation, to assist the disputing parties to voluntarily settle the dispute, but without having any power to make a binding decision.

1.8 No settlement reached under this voluntary dispute resolution process, and no statements made by any party, may be used in a court of law, in an arbitration or in any other legal proceeding.

1.9 No settlement reached under this process may be used by any party as a precedent for the resolution of other similar disputes.

1.10 At the request of any participant in a dispute resolution process, all participants must keep all statements, discussions, settlements or other resolutions in strict confidence.

1.11 The use or attempted use of this voluntary dispute resolution process does not affect a person's powers, duties or rights including, without limitation, the right to commence legal proceedings.

Regardless of which "template" is used it seems logical for strata corporations to take seriously the ability to use an ADR bylaw to resolve a dispute "in-house" before it gets out of hand.

Another "internal" ADR tool available to strata corporations and owners is section 34.1 of the Act which states:

Request for council hearing

34.1 (1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.

(2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.

(3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing.

So why would an owner or tenant request a hearing? The question is perhaps rhetorical; the owner or tenant has a "dispute" of some description, perhaps with the strata corporation, perhaps with another owner that they want the strata council to "hear". Pursuant to section 4.01 of the regulations to the Act a "hearing" means an opportunity to be heard in person at a strata council meeting! A face to face meeting between an owner/occupant and their strata council provides an early opportunity for the strata council to look at the options available to it to resolve (in the case of almost any type of dispute) matters through the use of a voluntary dispute process before the matter escalates. Perhaps it is time to consider providing some level of dispute resolution education to the strata community if the goal of the "hearing" is to promote the resolution of disputes that require the use of section 34.1.

External dispute resolution under the Act:

It goes without saying that access to our court system (both to Provincial Small Claims Court and Supreme Court) is still available as a dispute resolution tool for strata corporations as well as owners and tenants [see Part 6 – Division 6 – money owing to Strata Corporation and Part 10 – Legal Proceedings and Arbitration].

Note: Strata conflicts that arise under the Act that end up in B.C. Supreme Court, whether between an owner and the strata corporation or owner and owner, are increasingly becoming the subject of mediation pursuant to the Notice to Mediate regulations. In my practice I am seeing more and more strata conflicts that begin in Supreme Court end up before a mediator.

When it comes to arbitration of disputes (that fall within the parameters in the Act) nothing much has changed from the days of the CA. The arbitration sections under the Act still permit the use of ADR tools for disputes/conflicts that fit within the appropriate sections in the Act. What has changed is the inclusion of section 181 (of Part 10) of the Act which states:

"Before holding a hearing, the arbitration **must** advise the parties of the possibility of a mediated dispute".

Many mediators and arbitrators I have spoken to about this section of the Act have expressed some concern about the wearing of two different hats in the same "proceeding". Practically speaking I have, as counsel for numerous strata corporations that have been named as respondents in an arbitration notice issued under the Act, seen this section used quite successfully. The ability to mediate (even if

for a limited time with the threat of the arbitration looming) allows the parties (and the mediator) the opportunity, perhaps for the first time, to sit across the table from each other, communicate with each other and to think "outside the box" for the purpose of resolving their conflict or dispute. Even if efforts at a mediated negotiated settlement in the midst of preparing for the arbitration prove to be unsuccessful at least the opportunity for the parties to the strata conflict/dispute to get to "yes" without the time, trouble and expense of arbitration is a step in the right direction. That being said arbitration as an ADR tool for strata disputes under the Act continues to be a viable option in place of the traditional judicial system. The prospect of expediency and the prospect of reduced costs make both mediation and arbitration attractive options to owners and strata corporations alike.

Other ADR options for strata conflicts:

1. Pre-litigation mediation:

From time to time one party or another to a dispute has threatened litigation and has steadfastly refused to utilize the Act to assist with dispute resolution. Polarized positions and distrust may be to blame. However over the past few years the suggestion of and use of a pre-litigation mediation appears to be on the rise in B.C. Strata managers are generally the first to hear about a dispute, whether between two owners or between an owner (or tenant) and the strata corporation. More often than not they do not necessarily have the required resources to properly investigate and resolve the conflict. The same can be said for a strata council which is elected from and among the ownership in a strata development. Strata managers and strata councils alike need to be aware of the availability and benefits of pre-litigation mediation. It goes without saying that trained mediators will bring a skillset to the table that offers an alternative to the court system at a much reduced cost and frankly, with a goal to facilitating whatever form of resolution the parties are willing to agree to for the purpose of ending the conflict. This is where "thinking outside the box" may prove to be invaluable as the parties, with the assistance of a mediator, can work toward a resolution that might not be possible in a formal court process. For example, in a dispute involving complaints of noise between two owners a lot of "he said she said" does little to diffuse the situation. Pre-litigation mediation could be used as a tool to save time and money. Third party expertise can assist the parties in deciding how to best resolve their differences. While the suggestion from one owner to another to purchase area rugs to cut down on noise transfer might seem inappropriate as the dispute heats up the ability of a mediator to use his or her skills to "sell" such a resolution allows the parties to put their differences aside. Perhaps more importantly their agreement can remain confidential. As more and more people move into residential strata lots the likelihood of conflict increases. Strata managers and strata councils alike will benefit greatly from having access to pre-litigation mediation ADR.

2. Civil Resolution Tribunal:

Having been introduced into the B.C. Legislature on May 7, 2012 Bill 44, also known as the Civil Resolution Tribunal Act of British Columbia (the "CRTA"), received Royal Ascent on May 31, 2012. In a short period of time the Honourable Shirley Bond, then Minister of Justice and the Attorney General for British Columbia was able to put in place legislation which has, as one of its mandates, to "provide dispute resolution services in relation to matters within its authority in a manner that (a) is accessible, speedy, economical, informal and flexible".

This mandate mirrors some of the statements made by Ms. Bond in the Legislature while the CRTA moved from the first to its final reading. On May 7, 2012 during debate on first reading Ms. Bond said:

This bill will allow strata cases and, on a voluntary basis, civil matters to be moved out of traditional adversarial litigation and into the hands of experts who are trained to resolve cases early and collaboratively. This is particularly important for strata disputes, where early resolution is critical to preserving and possibly rebuilding the relationships of people who live in strata communities.

This bill will assist in moving forward our justice reform initiative by taking more cases out of the courts and freeing up judge and court time. This builds capacity into our court system and will allow our system to work more efficiently.

On May 8, 2012 while moving second reading of Bill 44 Ms. Bond went on to say:

The bill before us today does set out the authority to establish a new civil resolution tribunal. The tribunal's job will be to resolve strata property disputes and small claims, but more than that, the tribunal represents a new way for British Columbians to gain access to justice.

On Wednesday May 30, 2012 when questioned about the use of online technology to facilitate the resolution of disputes she had this to say:

Yes, it does involve on line potentially. It means that you could engage in this process from your home, using technology. It is a mix of in person and on line. Again, people who are not comfortable with looking at this model still have the option to use the court process if that is more appropriate for their particular perspective.

In these three statements Ms. Bond nicely encapsulated what she expected the dispute resolution services available under the CRTA would look like. Section 2(2)(a) of the CRTA states:

(2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that

(a) is accessible, speedy, economical, informal and flexible,

The use of online services, such as online forms, educational tools, dispute resolution resources and online dispute resolution or ODR, is also one of the mandates of the Act. Section 2(2)(c) of the CRTA states the dispute resolution services will be provided in a manner that:

(c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal.

It is the aim of the B.C. Government, with the assistance of the acting Chair who is currently working with a CRT advisory group and representatives of the Government to finalize the rules necessary to formalize the administrative processes needed to make the CRTA work efficiently and effectively, to offer online dispute resolution services as an alternative to the court system.

There will be several stages or phases available to those who have consented to the Tribunal's dispute resolution services, including:

1. A website that will assist a person to identify and manage potential disputes before they reach the critical stage where dispute resolution is required;

2. Use of an online dispute resolution (ODR) service which, for a nominal fee, will be available to guide, with the Tribunal's assistance, the parties through an online negotiated settlement process; and

3. If all else fails, the use of the formal dispute resolution online services which is broken down into two phases, being:

   a. The case management phase; and

   b. The tribunal (formal) hearing phase.

It is proposed that all disputes will be adjudicated by a Tribunal member with evidence and arguments presented using the Tribunal's online services. At this stage it might be necessary to conduct a telephone hearing or, in certain circumstances, a face-to-face hearing might be required. The Tribunal member adjudicating the dispute will have the discretion to decide if something that the Tribunal's online services will be required.

The general rule (section 20 of the Act) is that the parties to a dispute are to represent themselves. The Tribunal's rules will likely dictate the extent to which lawyers may represent a party in a tribunal proceeding failing which it will be up to the Tribunal member who can allow a party to be represented by a lawyer in certain circumstances including if it is "in the interests of justice and fairness."

Strata disputes that the Civil Resolution Tribunal will have authority to handle (according to the Ministry of Justice website) will include:

- strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as:
  - non-payment of monthly strata fees or fines;
  - unfair actions by the strata corporation or by people owning more than half of the strata lots in a complex;
  - uneven, arbitrary or non-enforcement of strata bylaws (such as noise, pets, parking, rentals);
  - issues of financial responsibility for repairs and the choice of bids for services;
  - irregularities in the conduct of meetings, voting, minutes or other matters;
  - interpretation of the legislation, regulations or bylaws; and
  - issues regarding the common property.

According to the website the tribunal will not handle matters that affect land, such as:

- ordering the sale of a strata lot;
- court orders respecting rebuilding damaged real property;
- dealing with developers and phased strata plans;
- determining each owners' per cent share in the strata complex (the "Schedule of Unit Entitlement").

The website states that these matters will continue to be heard in the Supreme Court, as will the following matters relating to significant matters in a strata complex:

- appointment of an administrator to run the strata corporation;
- orders vesting authority in a liquidator;
- applications to wind up a strata corporation;
- allegations of conflicts of interest by council members; or
- appointment of voters when there is no person to vote in respect of a strata lot.

Owners and tenants with strata disputes will be able to decide whether or not to utilize the tribunal; at this time strata corporations will be required to participate in the process when an owner or tenant makes a request for dispute resolution under the CRTA.

At this time work is ongoing to address some outstanding policy and legal issues and to finalize an operational budget. Knowledge engineering for the online self-help dispute resolution tool for strata disputes is underway. This online tool is being designed in such a way that owners, tenants and even strata corporations will be able to "diagnose" and even manage their disputes, without the need to use the services of the tribunal. There will be no charge for the use of this tool. Because of the enormous breadth and scope of the types of strata disputes that will fall within the jurisdiction of the tribunal considerable effort is being made at this time by the advisory groups and a group called the CRT Toolkit Committee, to identify and establish the details and content of this tool. One of the goals the tribunal is to have this diagnostic tool go live in December, 2014. Another goal is to have this tool function as an ADR mechanism that will help to resolve a significant number of disputes before they reach the tribunal.

At some point in time if the online self-help tool and/or online dispute resolution is unsuccessful the "formal" process under the CRTA will allow participants to pay a fee and participate in the active ADR process that will be handled by the tribunal case managers. The process will utilize, at least at the early stage, a mediation-type approach. It is premature to speculate on the tribunal case manager selection process but in order for the process to be effective the tribunal case managers will need to have the appropriate skill set to discuss the dispute with the parties (online and by telephone) and try to negotiate a settlement.

The last step in the process will be the formal adjudication process. The Tribunal Chair will appoint qualified adjudicators to "hear" the dispute, review the documents the parties have submitted through the online process and make decisions. It is not known how many of these formal adjudications will turn into face to face hearings but the adjudicators will be empowered to conduct those hearings if necessary and to make binding decisions, including payment of expenses.

Conclusion:

ADR will undoubtedly continue to have a significant role to play in dealing with strata conflict. The Act has provided strata corporations and owners alike with mediation and arbitration dispute resolution tools. There is easy access to mediators and arbitrations through such organizations as the British Columbia Arbitration and Mediation Institute, the Arbitrators Association of British Columbia and Mediate BC Society to name a few. Many mediators who have cut their teeth as mediators dealing with strata disputes in Provincial Court are gaining the knowledge and expertise to play a crucial role in strata conflict resolution. Mediators and arbitrators alike are becoming more and more aware of the unique nature of strata conflict and the need to identify ways to heal the wounds between the parties. In hindsight what might have been done, through the use of ADR, to resolve matters between Ms. Jordison and her strata corporation or Mr. Newell and his strata corporation? While not all strata conflicts can or will be resolved through the use of traditional ADR tools the use of ADR, which now includes the processes and structures under the CRTA for dealing with strata disputes, will become more and more common. As Ms. Bond stated when introducing the CRTA back in 2012 *"This bill will allow strata cases and, on a voluntary basis, civil matters to be moved out of traditional adversarial litigation and into the hands of experts who are trained to resolve cases early and collaboratively. This is particularly important for strata disputes, where early resolution is critical to preserving and possibly rebuilding the relationships of people who live in strata communities."*

Each year will see more and more people purchasing and living in residential strata lots; with this growth will undoubtedly come more and more conflict. Early resolution of strata disputes/conflicts, through the use of mediation, arbitration and the CRTA, is truly "critical to preserving and possibility rebuilding the relationships of people who live in strata communities".

ASBESTOS – NO BIG DEAL RIGHT?

By Gerry Fanaken

Not all, but many strata corporations have asbestos contaminants in drywall, flooring and other building materials. There is no legal requirement to remove such material; however, there are legal requirements to be followed if and when building materials are being removed. This occurs when the strata corporation is undertaking repairs or improvements to the common property and it also applies to strata lot owners when they renovate or upgrade their own premises.

Prior to embarking on an expensive decontamination process, a relatively inexpensive testing protocol should be employed to determine whether or not asbestos is present in the existing infrastructure. Typically (but not always) in new buildings there is no asbestos but in older properties (pre 2000) there is a possibility. When a positive test is undertaken by a qualified, professional hazardous materials firm or laboratory, the asbestos readings appear to be very small – i.e. single digit percentages. Often this very small number is perceived by strata councils and strata lot owners as being "no big deal" and they then simply carry on with the contemplated work without employing the (very expensive) protocols for removal of the asbestos-contaminated materials by specialized hazmat firms.

The cost is very significant and acts as a major deterrent to compliance with the law (WorkSafeBC). That, of course, is a serious error and strata councils should never let the cost factor impede their decisions on how to proceed when asbestos is located either in common property or within strata lots. It is, admittedly, very difficult to control what goes on inside a strata lot; however, that does not relieve a strata council (or management company) from its obligations to provide a safe and hazard-free environment. So, for example, when a strata lot owner requests consent to modify or renovate his or her strata lot, that owner should be alerted as part of the approval process to ensure that testing is first done and, if positive, to ensure that proper removal procedures are followed. It is quite conceivable to have situations where owners undertake renovations without obtaining prior consent and council only becomes aware of the possible contamination issue when chunks of drywall, etc. are being hauled out of the building through common property by either the strata lot owner or their contractor.

Contractors know the law, or at least are supposed to know the law, but often the "one-man shows" pretend that everything is just fine or they simply plead ignorance. It is inexcusable and a strata council knowing that its building does have asbestos and then observing a contractor hauling out drywall, lino, etc. without regard for the WorkSafeBC regulations, should quickly pick up the phone and call WorkSafeBC. This is the only way to catch and nail the violators.

Asbestos is a big deal. As a strata council, you have an obligation to ensure that the matter is handled properly – i.e. in accordance with the law.

BREAKING THE DEADLOCK

By Shawn M Smith, B.A., LL.B

An all too familiar scenario which has played itself out in various strata corporations is one in which repairs (be it to pipes, the roof or the building envelope) are desperately needed but cannot be done because a resolution approving a special levy to raise the required funds cannot be passed. Thus far the only solution to that scenario (other than calling yet another general meeting in the hope that someone will change their mind) was for one or more owners, at their own expense, to go to court and ask the court to approve the resolution imposing the special levy and authorizing the work to be done. In most cases the court would do so since it was clear the repairs were needed and the failure to do them put the strata corporation in breach of its duty under s.72 of the *Strata Property Act* to repair and maintain the common property. With the recent proclamation into force of s.171(2) – (4) of the *Strata Property Act*, things have changed.

Sections 171(2) – (4) were passed as part of the Strata Property Amendment Act in 2009. However, they were not in force until just recently. Those sections provide that:

> (2) If, under section 108 (2) (a),
>
> (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
>
> (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2) (a),
>
> the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.
>
> (3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.
>
> (4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the strata corporation may proceed as if the resolution had been passed under section 108 (2) (a).

In short, if the strata corporation puts forward a resolution to approve a special levy to carry out repair work and the resolution receives between 51% and 74% approval, the court, on application of the strata corporation, can choose to approve the resolution.

There are some important things to note about this provision, however. First, given the reference to s.108(2)(a), it applies only to a resolution to pass a special levy. It does not apply to a resolution to borrow money or to spend it from the Contingency Reserve Fund. Second, the resolution in question must relate to repairs to the common property that are necessary to ensure safety or to prevent significant loss or damage. Beautifying the lobby doesn't count. (Although the language here mirrors that of s.98(3), there is no restriction that the sum to be raised be the "minimum amount" necessary to ensure safety). Last, the application to the court must be made within 90 days of the defeat of the resolution.

The order which can be sought under s.173(2) is discretionary. In other words, the court does not need to approve it simply because the strata corporation applied for approval and the resolution received more than 51% support. The court may look at some of the same factors it does when it considers an application by an owner for an order approving the levy. Primarily the court will need to be convinced (potentially by way of expert evidence) that there is a safety issue or that significant loss or damage may occur. If that hurdle cannot be overcome, then no order can be made.

The question which has been left unanswered by the amendment is what type of approval is required to bring such an application? S.171 of the *Strata Property Act* requires approval by way of a ¾ vote before a strata corporation can commence any type of court proceeding (one notable exception to this rule is a petition under s.117 of the *Strata Property Act* to enforce a lien). Recently in *The Owners, Strata Plan BCS3699 v. 299 Burrard Developments Inc*. 2013 BCCA 356 the Court of Appeal confirmed that the ¾ vote requirement of s.171 applied to an application brought under s.173 (as it read before the enactment of subsections (2) – (4)).

However, is that what the Legislature intended when it passed the amendments? Arguably not. If the resolution approving the special levy can't achieve a ¾ vote, how would a resolution to seek court approval which requires the same margin of approval pass? In the writer's view, the intention was to permit the strata corporation to bring the application without approval of the owners. The decision in *299 Burrard* puts that in question.

However, the Court of Appeal in *299 Burrard* may have left open a way around that problem. In its judgment the court said the following about the recognized exceptions to the ¾ vote requirement of s.171:

> "Both ss. 117 and 174 deal with summary procedures, whose intent is inconsistent with requiring the authorization of a sizeable majority of the owners."

An application under s.173(2) arguably falls within that same scope. Requiring a ¾ vote to seek approval of a resolution that failed to achieve a ¾ vote makes no sense. The purpose of s.173(2) is clearly to avoid a small group of naysayers standing in the way of needed repairs. If a ¾ vote is required to seek approval of that same resolution by the court, that same group of naysayers could defeat such an application and the strata corporation would be no better off than before the enactment of s.173(2).

How often strata corporations will resort to s.173(2) will remain to be seen. Will there be that many resolutions that fall within the scope of s.173(2)? Will strata corporations be willing spend the money to seek such approval? However, where there are deadlocks, the amendments do provide a valuable option for breaking them.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for a variety of strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.

THE BELMONT POISED TO BECOME TEMPLATE FOR AGING RESIDENTIAL BUILDING UPGRADES

By Jean Sorensen

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Cities in North America are facing the common problem of how to best retrofit older and aging multiple-unit residential buildings (MURBs) to achieve maximum energy efficiencies. The National Institute of Building Sciences estimates that over 70% of today's existing buildings will be present in 2030. This year's recipient of the APEGBC Sustainability Award, RDH Building Engineering (RDH), tackled the problem with innovative solutions set out in a multi-phase energy upgrade of The Belmont, a 26-year-old Vancouver structure with 13 storeys and 37 suite owners.

The Belmont has gone through an extensive $3.6 million upgrade, with the initial phases focusing on its building enclosure and a further planned mechanical upgrade in 2014.

"The work on The Belmont is the accumulation of knowledge that we have gained over hundreds of buildings," says RDH Principal and Senior Building Science Specialist Warren Knowles, P.Eng. Over the past decade, RDH has looked at and studied buildings in the Metro Vancouver and Victoria areas in an effort to determine which upgrades yield the most energy savings and when is the best time to undertake such upgrades to achieve cost efficiencies.

While RDH's research with The Belmont has been geared towards older MURBs, the research can be applied to newer structures too as the findings impact general building design. "It creates a template that can be applied to thousands of other buildings," says Knowles. It is RDH's hope that The Belmont's study results will play a role in providing governments and utility providers with information when considering incentives or other energy efficiency programs related to retrofits of existing buildings. "We are hoping this building will become a case study for anyone considering implementing incentives," says Knowles.

After eight months of monitoring energy consumption, the renewal project is expected to result in a 20% reduction in total building energy consumption and a 90% reduction in in-suite space energy. The retrofit will nearly eliminate the need for baseboard heating used in the suites today. Energy prices are expected to continue to rise and residents in such buildings will reap further cost-savings.

The projected savings in the suites from heat alone are significant. "We are estimating a potential reduction of over 70%," says BC Hydro Power Smart Energy Engineer and Technology Integrations manager Gordon Monk, P.Eng., one of the study's alliance partners. As mentioned, RDH hopes this reduction will climb to 90%.

The Belmont study would not have occurred without the support of the local strata council. It was led by president Robert Kendrick, a retired chemical engineer and UBC graduate who himself has tracked his utility savings for over five years. He estimates his savings at $350 to $900 for the first year of the project completion. But, the value comes not only in the suite savings but in general over-all building comfort. "It has been tremendous," he says.

RDH's work on The Belmont may also be used as a benchmark in MURB sustainability. "Sustainability doesn't always have to be associated with a new building," says RDH's Graham Finch, P.Eng., Research Specialist on The Belmont. "The Belmont is really a pilot project showing what can be done to improve the energy efficiency of a MURB and the same things can also be applied to new buildings."

Finch attributes the savings in heating to the replacement of the old double-pane aluminum windows to triple-pane units with low heat conductivity frames. BC Hydro's Monk agrees. He cites an earlier RDH study conducted on over 39 older MURBs that found these buildings had less heat loss than more modern structures. The main reason, says Monk, was that MURBs built 30 – 40 years ago oft en had less window area on the exterior wall. With today's "jewel box buildings," the external wall-to-window ratio has changed drastically. Monk notes that while windows are more energy efficient, there is a greater area leaking building warmth. The Belmont became an ideal research specimen, with windows that covered more than 50% of the exterior walls.

Other reasons for heat loss in newer buildings include higher ventilation rates or make-up air requirements, with much of it escaping into stairwells, elevator shafts, and kitchen and bathroom exhausts, says Monk. Balconies are also a culprit, drawing out heat "like the fins on the head of a cylinder on a motorcycle engine," and contemporarily, dwellers are interested in larger balcony and patio spaces as compared to older structures.

Building Enclosure Process

The Belmont deep enclosure upgrade started when the building's council called in RDH to assess the building exterior. It was not a leaky condo, but, as Kendrick says, the construction featured windows that sweat and dripped water and an exterior with visible cracks and some minor water ingress.

"The building needed some work," Kendrick says, especially with the new provincial government requirement that strata councils file depreciation reports on key elements within the building.

Knowles and other RDH staff members had repelled down the building's face to assess it. "They gave us three options— the first was what I would call a Band-aid, the second was more complete but not as complete as the third $3.6 million one," Kendrick says. After some debate amongst the 37 owners, a 75% majority was reached and owners opted for the deep building enclosure makeover. "If you didn't do the project, you would have to discount the building if you sold your unit because there were problems and something needed to be done."

Before RDH assumed a role as construction manager and started work, it realized The Belmont would be an ideal case study candidate. RDH assembled a number of partners who would also benefit from the research to help with the energy assessment at various phases. They included BC Hydro, FortisBC, Homeowner Protection Office (Branch of BC Housing), Natural Resources Canada, surrounding municipalities, and various industry organizations.

RDH used both suite owner's in-suite electricity bills as well as the utility figures in the common areas to estimate how building changes would impact energy savings, says RDH's Susan Hayes, P.Eng. "We had undertaken energy modelling to predict what the upgrades would do," she says. So far, the real data coming back parallels the savings indicated in the modelling. "The biggest thing we have learned is that cost-efficient, energy efficient retrofits are possible."

RDH was able to direct some of its research funds into an incentive program for suite owners to opt for the triple-pane windows. Each owner was given the difference in price between the double-pane fibreglass windows and the triple-pane units.

But the deep building enclosure update included not just windows, but exterior insulation that was added to the exposed concrete walls, then over-clad with stucco, and metal panels were attached using f breglass clips to minimize thermal bridging. The existing exterior walls of The Belmont had exposed concrete cladding with two inches of foam insulation with an overall R-value of R-4. The renewal project saw the concrete walls over-clad with 3.5 inches of mineral wool insulation behind stucco and metal cladding which took the building's walls to an R-16 rating. The overall building rating is now R-9.

Knowles says that RDH worked to reduce thermal breaks where possible. Because of these specially manufactured fibreglass clips that held the cladding and insulation, the building exterior walls lost less heat and RDH was able to reach the R-16 rating.

Doors and other areas where warm air could leak out were addressed and the building enclosure's air tightness was enhanced. An applied liquid air and water barrier was placed over cracks in the concrete with improved detailing at windows and interfaces also restricting air flow. These improvements allowed the team to improve the building's air-tightness by more than 50%.

Benefits Accrue from The Belmont Research

The value that the upgrade brought to The Belmont was realized in many different ways, but especially in the overall market value to the property owners. "It's a beautiful building now," says Kendrick, as the building looks better, has a more comfortable environment, and the strata council's decision has increased the asset value to the building owners. "Even people who were critical at first of the plan are happy now."

Knowles says that The Belmont has also shown that energy savings enhancements are best achieved when buildings go through some kind of upgrade. "We found that this was the most cost-effective time to make these improvements."

He says: "These projects have the potential to change the marketplace. There is also a lot of long-term motivation for developers to build more energy-efficient buildings, especially if they are responsible for the operating costs."

Funding partner FortisBC has research interests similar to those of BC Hydro. "We are interested in gathering the quantified monitored results from the project to provide us with the performance data on several energy efficiency upgrades that may lead to the development of future energy and conservation programs," says Jim Kobialko, Innovative Technology Manager at FortisBC. The Belmont is a case study that FortisBC hopes it can use as tangible results for strata owners to adopt energy conservation measures. This kind of case study and data have been lacking in the past.

"MURBs represent a huge opportunity; they are the low hanging fruit," Kobialko says, as energy savings can be achieved. While The Belmont is a deep retrofit, Kobialko also believes that the multi-phase approach with the detailed collection of information can help building owners make decisions on different phases of an energy retrofit.

"There could be energy savings through a period of time," he says, as owners phase in different aspects of a retrofit rather than undertaking the whole program such as with The Belmont.

The Belmont's results will also provide the utility company with the information that will make new incentive programs successful. "They will serve as a potential launching pad on which to build new programs," Kobialko says.

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Phone: ( ) Fax: ( ) Email:

Annual Fee: ☐ $180.00

■ SPONSOR/TRADE SERVICE SUPPLIER MEMBERSHIP

Company:

Name: Industry:

Address: Suite #:

City: Province: Postal Code:

Phone: ( ) Fax: ( ) Email:

Annual Fee: ☐ $400.00

■ INDIVIDUAL CONDOMINIUM RESIDENT MEMBERSHIP

Name:

Address: Suite #:

City: Province: Postal Code:

Phone: ( ) Fax: ( )

Email:

Annual Fee: ☐ $110.00

Cheques should be made payable to:
Canadian Condominium Institute - Vancouver Chapter
P.O. Box 17577 RPO The Ritz, Vancouver, BC V6E 0B2
Tel: 1-866-491-6216, Ext. 108 • Email: contact@ccivancouver.ca

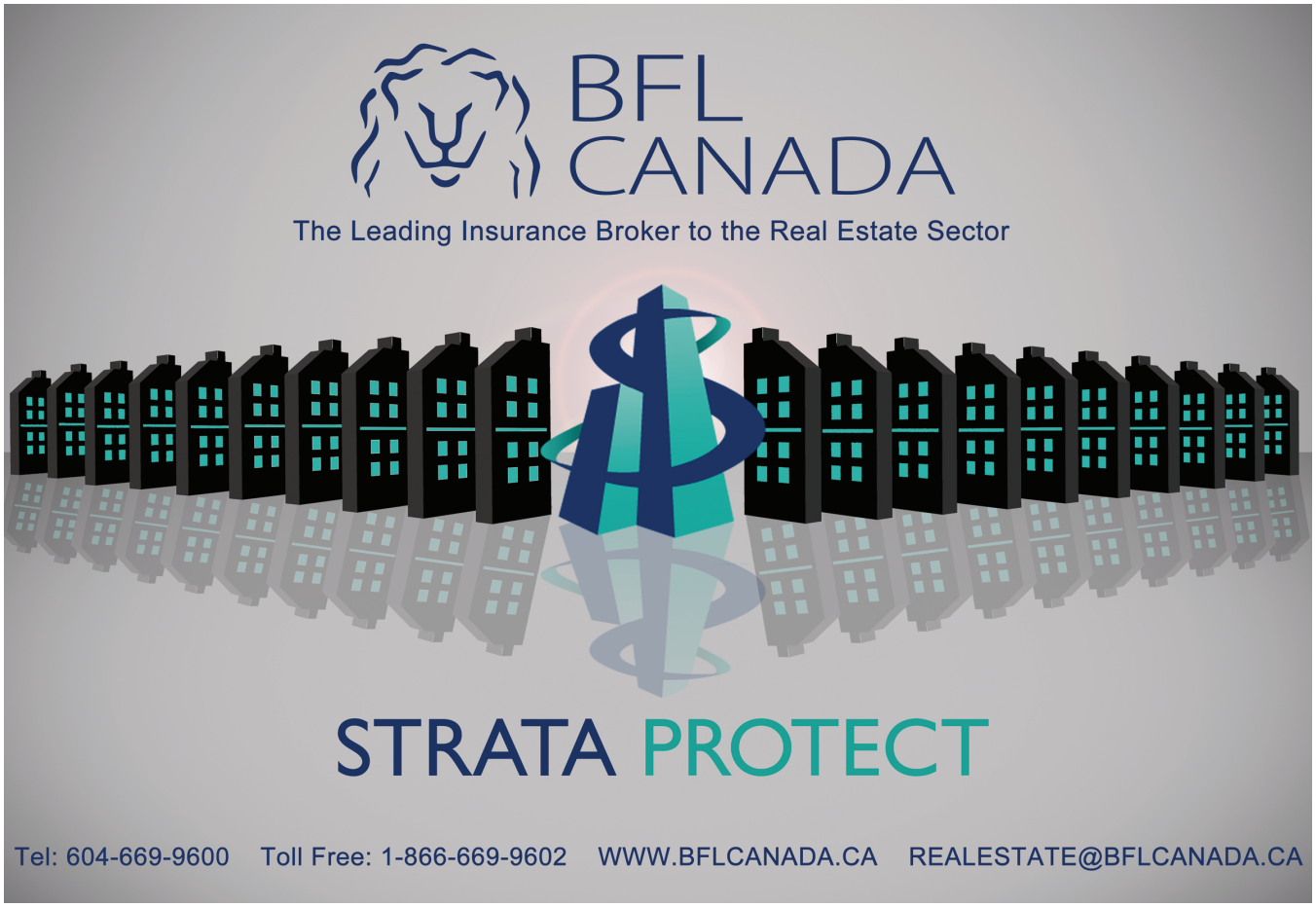
Method of Payment:

☐ Cheque Charge to: ☐ VISA ☐ MasterCard

Card #: Exp Date: /

Signature:

PLEASE NOTE: Charges will appear on your credit card statement as **Taylor Enterprises Ltd.**



Advertising Submissions

Please provide photo quality advertisement in either electronic or camera-ready format suitable for scanning (inkjet print-outs are not acceptable). Scanned images must be in high resolution of at least 300 dpi. Electronic files must be submitted in tiff or pdf format. **Note: PDF** files should not be converted from colour to black & white. If the ad is to be in black & white, the original file must be in black & white. If the ad is to be in colour, the original file must be in colour. The ad copy submitted should be sized to the ad requirements (see above ad sizes). Please call or e-mail for additional specifications. If you do not have an advertisement already prepared, setup is an additional charge at $50.00 per hour. Please send advertising submissions to the attention of Jamie Bleay at:

CCI Vancouver Chapter
Suite 1700 – 1185 West Georgia Street
Vancouver, B.C. V6E 4E6
or to the chapter's e-mail address at: contact@ccivancouver.ca

MAKE CHEQUE PAYABLE TO CCI VANCOUVER AND MAIL TO:
P.O. Box 17577 RPO The Ritz, Vancouver, B.C. V6E 0B2

OR BY CREDIT CARD:

Credit Card: _____ Visa _____ Mastercard

Credit Card Number: _____

Expiration Date: _____ / _____

Name on Card: _____

Signature: _____

Note: Charges will appear on credit card statement as Taylor Enterprises Ltd.