



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Trinden Enterprises Ltd. v. The Owners, Strata Plan NW 2406*,

2020 BCCRT 807

B E T W E E N :

TRINDEN ENTERPRISES LTD.

APPLICANT

A N D :

The Owners, Strata Plan NW 2406 and Section 2 of The Owners,
Strata Plan NW 2406

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about elevator repairs in a strata corporation with sections.

2. The applicant, Trinden Enterprises Ltd. (Trinden) owns strata lots 26 (SL26) and 32 (SL32) in the respondent strata corporation, The Owners, Strata Plan NW 2406 (strata). The strata is comprised of 3 separate sections as defined under the *Strata Property Act* (SPA).
3. SL26 and SL32 are the only non-residential strata lots in the strata. Together, they form Section 3 of The Owners, Strata Plan NW 2406 (commercial section).
4. The other respondent in this dispute is Section 2 of The Owners, Strata Plan NW 2406 (townhouse section). I find the townhouse section is in default because it did not provide a Dispute Response despite being properly served. In addition, although the strata appears to speak on behalf of the townhouse section in its submissions, I find there is no agreement that the strata's submission was a joint submission with the townhouse section or that the strata represented the townhouse section. Therefore, I find the townhouse section is unrepresented and has not participated in these dispute proceedings. Specifically, it did not provide evidence or submissions.
5. Trinden is represented by one of its directors, Christopher Cocco. The strata is represented by a strata council member.
6. Trinden says the elevator that services SL26 and the townhouse strata lots located in the strata building having a civic address of 3960 East Hastings Street, Burnaby, BC (building C) requires upgrade and repair. For ease of reference, I will refer to the building C elevator simply as the elevator in these reasons.
7. Trinden says the strata and townhouse section have delayed addressing urgent elevator repairs. It also says the townhouse section refuses to commence the required elevator upgrades and repairs, contrary to the bylaws, and contrary to reports received about the condition of the elevator. Trinden says the elevator operation is crucial for its tenants, which include a medical office and physiotherapy office, and its tenants' clients.
8. Trinden asks for orders that the elevator upgrades and repairs be commenced based on a March 2019 cost estimate provided by GUNN Consultants Inc. (Gunn) of about \$205,000, and other quotations that are not in evidence. Trinden says the

cost of the upgrades and repairs should to be paid from the contingency reserve funds (CRFs) of the townhouse section and commercial section based on a 50/50 split of the expenses.

9. The strata denies Trinden's allegations and says at all times it made best efforts to comply with its obligations as required by the SPA and its bylaws. It says the townhouse section and commercial section agree the expense should be paid exclusively by the 2 sections but that the division of expenses is not agreed. The strata also says repair quotations obtained by Trinden in April 2019 require updating because they are over 1 year old. Finally, the strata says there is insufficient money in the townhouse section CRF to pay for the requested elevator upgrades and repairs.
10. The strata asks the Civil Resolution Tribunal (CRT) to determine the cost split for the elevator repairs in order that a general meeting can be called to approve an updated cost for the elevator upgrades and repairs and approve the expense payment from appropriate CRFs or by special levy.
11. For the reasons that follow, I find the current bylaws require the elevator upgrade and repair expenses to be divided among all strata lots by unit entitlement. I order the strata, in consultation with Trinden, to take steps to propose an alternate method of paying for the elevator upgrades and repairs by December 1, 2020, and to commence repairs set out below by January 1, 2021.

JURISDICTION AND PROCEDURE

12. These are the formal written reasons of the CRT. The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

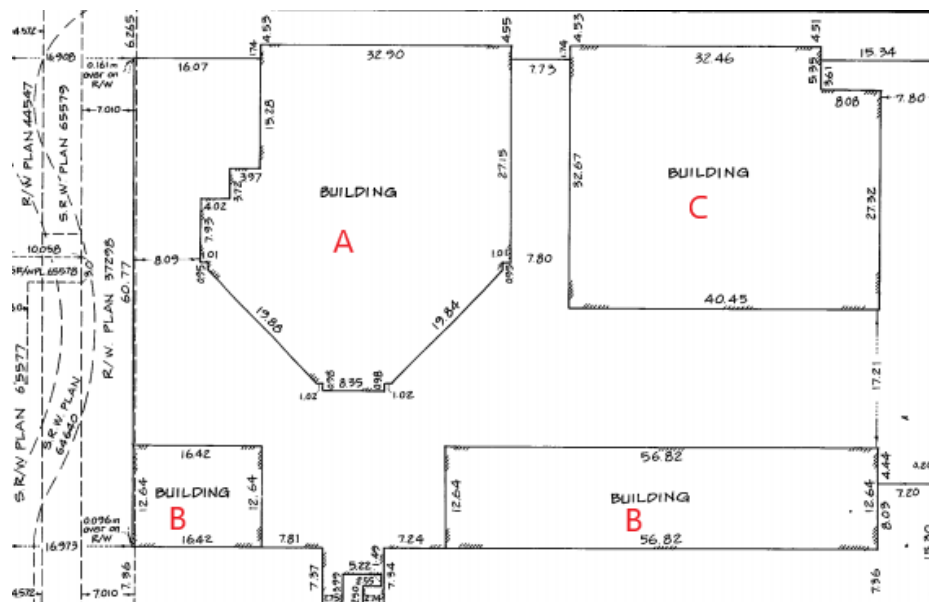
13. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
14. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
15. Under section 61 of the Act, the CRT may make any order or give any direction in relation to a CRT proceeding it thinks necessary to achieve the objects of the CRT in accordance with its mandate. In particular, the CRT may make such an order on its own initiative, on request by a party, or on recommendation by a case manager.
16. CRT documents incorrectly show the name of the townhouse section respondent as “Strata Corporation 2 of Strata Plan NW 2406”. Based on sections 2 and 193(4) of the SPA and strata bylaw 2.4, the correct legal name of the townhouse section is Section 2 of The Owners, Strata Plan NW 2406. Given the parties operated on the basis that the correct name of the townhouse was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the townhouse section’s correct legal name in these proceedings. Accordingly, I have amended the style of cause above.
17. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

18. The issues in this dispute are:
 - a. Who is responsible for the elevator repairs, maintenance and upgrades?
 - b. Should the CRT order the elevator be upgraded and repaired?

BACKGROUND, EVIDENCE AND ANALYSIS

19. In a civil proceeding such as this, the applicant Trinden must prove its claims on a balance of probabilities.
20. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
21. The strata was created in June 1986 under the *Condominium Act* (CA) and continues to exist under the SPA. It consists of 128 strata lots in 3 buildings located in Burnaby, BC. An explanation of the strata property layout is helpful. Below is an excerpt from sheet 1 of the strata plan on which I have marked the 3 buildings as A, B, and C, as identified by the strata.



22. I have described building C above, which is located in the northeast corner of the property. I will continue to use the building's letter descriptions for ease of reference, even though the strata plan itself does not identify the 3 separate buildings in any manner, including by letter.
23. Building A includes all of the apartment section strata lots and SL32. It is located in the north west corner of the property. Building B is located along the south portion

of the property and includes 2 levels of stacked townhouse-style strata lots that form part of the townhouse section.

24. Two levels of underground parking are below buildings A and C. Building B is terraced, so 1 parking level is below it and 1 parking level is beside it.
25. Building C includes SL26 and 10 townhouse-style strata lots that form part of the townhouse section. The 10 townhouse strata lots are also stacked with 5 strata lots on top of 5 other strata lots. All strata lots in building C are 2 levels.
26. Only the building C strata lot owners, tenants, visitors and guests require access to the elevator. The strata plan shows the elevator is common property (CP).
27. On October 28, 2005, the strata filed bylaws at the Land Title Office (LTO) that repealed and replaced all previous bylaw amendments, bylaws under Part 5 of the CA, and the Standard Bylaws under the SPA. The October 28, 2005 bylaws created the 3 separate sections I have identified above, consistent with section 195 of the SPA and Part 11 of the *Strata Property Regulation* (regulation). On November 16, 2007, the strata filed bylaw amendments that purported to create 3 essentially identical sections that also expressly identified the strata lots in each section by number, among other things. Given the October 2005 bylaw that first created the 3 sections was not repealed, I find the 3 sections were not “recreated” in 2007, but rather refined to include specific strata lots. Likely this was the strata’s intention in 2005.
28. I find the bylaws applicable to this dispute are those filed October 28, 2015 and November 16, 2017. I discuss below the bylaws I find are relevant, as necessary. Other bylaw amendments have been filed at the LTO, but I find those are not relevant to this dispute.
29. Given Trinden owns all of the strata lots in the commercial section, I find its submissions also represent the commercial section.

Who is responsible for the elevator repairs, maintenance, and upgrades?

30. Trinden says in 2014, the commercial and townhouse sections first created their own CRFs under the SPA for future capital expenses, expressly to include the elevator upgrades and repairs. The strata says the commercial and townhouse sections agreed to share the cost of the elevator upgrades and repairs, which I find supports Trinden's position. In further support, the strata provided minutes of a strata council meeting held November 20, 2014 that shows an installation of a new elevator door operator with the expense shared equally between the townhouse section and commercial section.
31. The strata argues the commercial section should pay proportionately more for future elevator repairs and upgrades because it has more parking stalls and more people associated with the elevator use than the townhouse strata lots located in building C.
32. Based on a February 2020 email exchange between a person I infer is a strata council member and the strata's lawyer, I find there was no consensus on how the elevator upgrade and repair costs should be apportioned. The emails state the townhouse section representatives discussed 2 options on how to divide the elevator upgrade and repair costs and were looking to the lawyer for assistance in determining an appropriate cost split. One option was to divide costs among only SL26 and 5 townhouse strata lots in Building C. The second option was to divide the costs based on total unit entitlement of the strata lots in each of the townhouse and commercial sections. The lawyer's response was that the elevator repairs were the responsibility of the strata because the elevator is CP, but did not provide reasons to support this opinion .
33. The strata appears to agree with its lawyer's response, and in its submissions says it needs time to call a general meeting for the purpose of amending its bylaws to make the commercial and townhouse sections responsible for the elevator, and approve the respective CRF expenses. In its submissions, Trinden states the lawyer's statements are "false" because the elevator repairs have "always been paid" by the commercial and townhouse sections. However, given Trinden's

requested resolution is for the elevator expenses to be paid from the CRF of the 2 sections', I find the strata and Trinden essentially agree on who should pay for the elevator upgrades and repairs.

34. While the intentions of the parties involved in this dispute have likely been sincere, I find the sharing of the elevator expenses must be governed by a method determined by the SPA, regulation and bylaws. I discuss below the potential for changing the strata's current requirements, but under the current legislation and bylaws, I find the elevator upgrade and repair expenses must be shared by all strata owners according to unit entitlement. My reasons follow.

The Law

35. Generally speaking, the strata is responsible for repairing and maintaining CP, such as the elevator, under section 72 of the SPA. This, together with the strata's responsibility for all common expenses under section 91, is the basis of the principle that in a strata corporation, "you are all in it together" as described by the Court in *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 at paragraph 35.
36. Based on that principle, the courts have found that common expenses of a strata corporation must be allocated in proportion to unit entitlement under section 99 of the SPA, unless:
- a. the strata corporation has by a unanimous vote agreed to use a different formula for the allocation of contributions to the operating fund and contingency reserve fund, other than those set out in s. 99 and the regulation (SPA, section 100),
 - b. the strata corporation has by a unanimous vote established a "fair division" of expenses for a special levy (SPA section 108(2)),
 - c. "sections" have been created under Part 11 of the regulation, or
 - d. the strata corporation has by a unanimous vote changed the unit entitlement of one or more strata lots (SPA section 261).

(See *Coupal v. Strata Plan LMS 2503*, 2004 BCCA 552 at paragraph 34, citing *Alvarez at paragraph 55*, and *Poloway v. Owners, Strata Plan K69*, 2012 BCSC 726 at paragraph 54.)

37. Further, in *Norenger Development (Canada) Inc. v Strata Plan NW 3271*, 2018 BCSC 1690 at paragraph 60, the Court found that section 72 of the SPA only limits the obligations that a strata can impose on “an owner”, not on a section. After further analysis of the parts of the SPA that apply to sections, the Court found, at paragraph 63, that the responsibility for repair and maintenance of CP that relates solely to a section can also be allocated to that section.
38. I would add to this list of exceptions: the creation of different types of strata lots and limited common property (LCP) expenses (regulation 6.4), and expenses of some but not all strata lots for which the strata has taken responsibility (regulation 6.5).
39. Here, the strata has not passed a unanimous resolution under section 100 of the SPA to calculate strata fees by a method other than by unit entitlement, or under section 261 to change the unit entitlement of any strata lot. Further, the elevator expenses do not involve regulation 6.4 or 6.5.
40. However, as earlier noted, the strata has passed bylaws creating sections. Once sections are created, section 195 of the SPA creates an allocation of expenses relating to a section that does not follow section 99 of the SPA. (See *Norenger* at paragraphs 81 and 82.)
41. Section 195 of the SPA states that any “expenses of the strata corporation that relate solely to the strata lots in a section are shared by the owners of the strata lots in the section” based on unit entitlement [my emphasis].
42. The SPA is silent on expenses that do not relate solely to strata lots of only 1 section of a strata corporation. However, in *Poloway*, the Court considered section 195 of the SPA when discussing expenses of townhouse and apartment sections of a strata corporation. At paragraph 33, the Court stated, “If the townhouses benefit from the cost of repairs to the apartment building, then arguably the expense does

not relate “solely” to the apartment-style units and is not an expense to be borne by only one section.”

43. Arguably, the discussion of section 195 in *Poloway* is *obiter dicta* (incidental to the issues decided) and therefore not a binding precedent. However, I find it provides specific and persuasive reasons on the meaning of “solely” under section 195 of the SPA.
44. As mentioned, the elevator services 1 of the commercial strata lots (SL26) and 10 of the townhouse-style strata lots. I find SL26, and the 10 townhouse-style strata lots located in building C all benefit from the elevator. Therefore, they would all benefit from the elevator upgrades and repairs. Under these circumstances, section 195 does not allow for more than 1 section to be responsible for the elevator expenses, given the meaning of “solely” as discussed in *Poloway*.
45. Although the elevator is CP, the responsibility for repair and maintenance of the elevator does not relate solely to any particular section because the elevator benefits strata lots that are located in more than 1 section. As a result, the exception expressed in *Norenger* also does not apply.
46. Section 195 also does not allow for expenses to be split based on use, as the strata argues. Rather, expenses must be split on unit entitlement, unless a section 100 resolution to provide a different calculation method has been properly passed, which is not the case here.

The bylaws

47. As for the strata’s bylaws, I find that the relevant bylaws are bylaw 12 about repair and maintenance required by the strata and bylaw 13 about repair and maintenance required by a section.
48. Bylaw 12.1(b) says the strata is responsible for repair and maintenance of CP that has not been designated as LCP for a section. This is consistent with section 72 of the SPA.

49. Bylaw 13.1(b) says a section must repair and maintain common property “appurtenant to” the section, among other things. The Black’s Law dictionary defines appurtenant as “belonging to, appended, or annexed to...”. Given my earlier conclusion that the elevator expenses do not relate solely to 1 section as discussed in *Poloway* and *Norenger*, I find the CP elevator is not captured by bylaw 13.1.
50. Bylaw 13.2 says that, without limiting the generality of bylaw 13.1, a section must do other things, some of which I find are included in bylaw 13.1. However, bylaw 13.2(b) says a section must “properly maintain fixtures and fittings, including elevators, and other apparatus and equipment” used in connection with LCP “appurtenant to the separate section, facilities common to the separate section, or other assets of the separate section”. I find that bylaw 13.2(b) purports to make a section responsible for certain common assets, including elevators. I find the case law above applies equally to common assets in that a section cannot be responsible for assets that are not that section’s sole responsibility. I say this because section 195 applies to expenses, which include expenses relating to both CP and common assets.
51. While bylaws 13.1 and 13.2 may apply to other CP, LCP, or common assets, I find they do not apply to the elevator.
52. For all of these reasons, and in the circumstances of this dispute, I find the strata is responsible for the elevator expenses, including upgrades and repairs. I also find the only method of allocating the elevator upgrade and repair expenses currently available to the strata is set out under section 99(2) of the SPA with such expenses shared by all 128 strata lots in the strata divided among them on the basis of unit entitlement.

Should the CRT order the elevator be upgraded and repaired?

53. Trinden says ThyssenKrupp Elevator (Canada) Ltd. (Thyssen) is the strata’s elevator service company. It says Thyssen first advised the strata in 2014 that the elevator had reached the end of its life cycle and that it should “prepare for [the elevator’s] inevitable demise”, as replacement parts were no longer available.

Trinden says it was at that time the commercial and townhouse sections created their own CRF's, presumably based on a misunderstanding of their combined separate responsibility for elevator expenses, to begin planned savings for the eventual elevator upgrades.

54. In December 2018, Trinden says that Thyssen advised the strata the elevator "could break down at any time". Based on a December 11, 2018 email from a Thyssen representative to the strata, I find that Thyssen expressed concern over the age of the elevator and enquired if the strata had set any funds aside "for this very old and worn out elevator" that was "on its last leg". I find Trinden's assertion that the elevator could break down to be an over exaggeration of Thyssen's email statement.
55. Trinden submits the March 2019 Gunn report referenced above, and Thyssen report dated April 10, 2019, recommend the strata initiate upgrades and repairs to the elevator. It says the Thyssen report also noted the elevator no longer met Building Code requirements and was a liability.
56. Finally, Trinden says that Thyssen recently expressed major concerns about possible personal injury resulting from an uncontrolled elevator decent and entrapment for extended periods of time. Trinden submits the elevator is a "major safety hazard" and the upgrades and repairs should be done immediately.
57. The strata says the quotations for the elevator upgrades and repairs obtained by Trinden in April 2019 are outdated and in need of update. It says the Gunn report does not indicate that immediate repairs were needed, and that it was not aware of any safety hazard associated with the elevator's operation.
58. I first note that both the Gunn and Thyssen reports involved a physical inspection of the elevator. While Gunn reported a different civic address for the elevator, I note the government identification numbers for the inspected elevator were identical in both reports. I find reports are for the subject elevator, but that Gunn noted an incorrect civic address in its report.

59. There is no question the elevator is old. The evidence confirms it was installed in about 1985 and was original at the time the building was constructed. It is undisputed that Thyssen has maintained the elevator since its was installed. It is also undisputed that the elevator has surpassed its expected life of about 25 to 30 years.
60. Aside from upgrading the elevator door operator in 2014, it appears very few, if any, upgrades have been done. There are no reports of major elevator breakdowns or repairs being done that are in evidence, so I conclude the elevator operation has generally been without any major incidents. This conclusion is supported by the Gunn and Thyssen reports, which I find do not support an immediate need for elevator upgrades and repairs. Rather, I find both the Gunn and Thyssen reports reach similar conclusions. Namely, the elevator equipment is old technology and modernization is suggested within 2 years of the report dates, or by about April 2021, to avoid potential breakdowns. Generally speaking, both reports state that a proactive approach to replace electrical equipment, the hydraulic cylinder, and to modernize that equipment should be taken as risk of equipment failure is increasing. The reports provide conflicting opinions on whether replacement parts are readily accessible. Thyssen reports that parts are not readily available while Gunn reports they are.
61. As for Trinden's submission that the Thyssen report said the elevator no longer meets Building Code requirements, I find this assertion is not entirely accurate. Thyssen did say that the elevator "does not meet current standards" but also said the elevator was not required to be brought up to current Code requirements unless it was modernized. Gunn reached the same conclusion stating, "the elevator met code requirements at the time of installation and no retroactive code required upgrades were noted at the time of inspection".
62. The basis for Trinden's submission about safety concerns appears to result from a May 20, 2020 letter from Thyssen to the strata. The author of the letter is the same Thyssen representative that authored the April 2019 report. The letter states that the risks identified in the Thyssen report remain, and describes a possible cylinder rupture which could potentially cause bodily harm to a person who was in the

elevator cab at the time of a rupture plus other environmental damage caused by hydraulic oil leaking into the ground. Thyssen suggests the strata take a proactive approach to replace the cylinder before it ruptures and reiterates its concern that replacement parts for the elevator controls are unavailable, which could result in entrapments and lengthy delays for completion of repairs.

63. It is unclear if Trinden or the commercial section requested the May 20, 2020 letter in an attempt to put pressure on the strata and townhouse section, but I find the letter does not say a cylinder rupture is imminent or the elevator upgrades and repairs are urgent. Rather, I find the letter is essentially a reiteration of Thyssen's reported findings and recommendation that elevator repairs and upgrades should be done in the near future and if they are not, the potential for an extended down time would exist.
64. Based on the Gunn and Thyssen reports, I find there is some urgency in upgrading the elevator, including replacing the cylinder and controls. I find that upgrades to the elevator cab and other aesthetic repairs are a decision of the strata. Both reports are consistent in recommending the upgrades and repairs be completed by about April 2021. Given Thyssen's statements that about the likelihood of increasing risk for injury if the cylinder is not replaced, and that both Trinden and the strata want the repairs should be done, I find the required upgrades and repairs should be completed.
65. Therefore, I order that the strata take steps to ensure the required elevator repairs and upgrades contained in the March 2019 Gunn report are commenced before January 1, 2021. I also order that the required elevator repairs and upgrades must be paid by all strata lots divided by unit entitlement unless a different method is approved by the strata owners.
66. Specifically, I order the strata to retain Gunn, or an alternate elevator consultant agreeable to Trinden, to provide a scope of required work recommended in Gunn's March 2019 report, tender that scope of work to the same contractors as provided bids to Trinden, and based on the bids received, choose a contractor in consultation with Trinden to complete the required work.

67. I find that both Trinden and the strata may identify aesthetic elevator upgrades for approval by the owners. I order the strata to obtain a separate quotation for any identified aesthetic elevator upgrades available for the elevator, such as interior cab upgrades so that aesthetic upgrades can be completed at the same time as the required work. Any aesthetic upgrades must first be approved by the strata owners at a general meeting as set out below. Finally, I order the strata must proceed with the required and approved aesthetic repairs, if any, using CRF funds or by way of a special levy, or a combination of both, without the need for a $\frac{3}{4}$ vote by January 1, 2021.
68. The time frame I set out below will allow for the strata to determine if the owners and sections wish to amend the strata bylaws or pass a unanimous resolution to allow for the cost of the repairs and upgrades to be paid by all strata lots by a method different than unit entitlement as discussed above. I note that due to the requirement under section 128(1) of the SPA, to amend its bylaws, the strata must obtain $\frac{3}{4}$ votes of both the residential and non-residential strata lots. There is no guarantee that proposed bylaw amendments or unanimous resolutions will pass. If the strata wishes to pursue an alternate method for payment of elevator expenses, it must pass and register at the LTO all appropriate bylaw amendments and approved votes before December 1, 2020.

FEES AND EXPENSES

69. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find Trinden has been partially successful in this dispute and is entitled to receive $\frac{1}{2}$ of the \$250 it paid in fees. It was successful in obtaining an order that the elevator upgrades and repairs be completed but not in the manner or time frame it requested. I order the strata to pay Trinden \$125 as reimbursement of fees it paid.
70. No party claimed dispute-related expenses, so I order none.

71. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Trinden.

ORDERS

72. I order the strata:

- a. within 14 days of the date of this order, to pay Trinden \$125 for fees it paid to the CRT,
- b. By November 1, 2020, to call a general meeting of its owners to consider any bylaw amendments or unanimous vote resolutions that might change the way the elevator expenses are shared,
- c. To retain Gunn, or an alternate elevator consultant agreeable to Trinden, to provide a scope of required work recommended in Gunn's March 2019 report (required work), and tender that scope of work to the same contractors as provided bids to Trinden,
- d. In conjunction with tendering the required work set out in paragraph b. above, obtain a separate bid for aesthetic elevator upgrades identified by the strata or Trinden (aesthetic work), if any,
- e. Based on the bids received and in consultation with Trinden, to choose a contractor to complete the required work and any aesthetic work,
- f. If bids have been obtained for aesthetic work, call a general meeting of its owners to approve the aesthetic work by December 1, 2020, and
- g. By January 1, 2021, proceed with the required work and approved aesthetic repairs, if any, using CRF funds or by way of a special levy, or a combination of both, without the need for a $\frac{3}{4}$ vote.

73. Trinden is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

74. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia. Under section 58 of the CRTA, the order can be enforced through the Provincial Court of British Columbia if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

J. Garth Cambrey, Vice Chair