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B.C. COURT OF APPEAL WEIGHS IN ON LEGAL REPRESENTATION IN CRT PROCEEDINGS

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A recent Court of Appeal decision, *The Owners, Strata Plan NW 2572 v. Booth*, 2020 BCCA 153 (“Booth”) illuminates the tension between the exclusive jurisdiction of British Columbia’s Civil Resolution Tribunal (“CRT”) over certain disputes and an insurer’s duty to defend.

The Facts:

Strata council members are tasked with helping maintain a strata corporation’s common assets and property for the benefit of all owners. These duties can cause conflicts between council members and residents or owners of a strata. Most strata corporations carry directors’ and officers’ liability insurance policies that often respond to provide a defence to council members or the strata corporation when disputes escalate to litigation.

The CRT is a unique forum that has been operating in BC since July 13, 2016 with exclusive jurisdiction over a variety of strata matters. Its process relies on an electronic communication model that delivers online dispute resolution services. The CRT’s governing legislation creates a tension between an insurer’s duty to defend and the CRT process because s. 20 of the *Civil Resolution Tribunal Act* (the “Act”) requires parties to represent themselves unless they meet the requirements of specific exceptions to this rule. Two exceptions are where the other party has legal representation or the parties agree a lawyer can represent a party.

In *Booth*, owners Verna and George Booth commenced a CRT claim against The Owners, Strata Plan NW 2572 (the “Strata”) over \$700 in repairs to a sun room which they claimed the Strata was obligated to pay. Another \$300 for CRT related costs was also sought along with \$25,000 for six years of “loss of enjoyment of life, threats, abuse and stress.” The Strata’s D&O policy responded, counsel was appointed to defend the claim, and the lawyer filed a “Representation Request” seeking to represent the Strata in the CRT proceedings.

The Ruling:

The CRT denied the Representation Request (“the Decision”) for a variety of reasons, including: the Booths refused to agree to the representation and did not have counsel; there was “nothing exceptionally unusual





or complex about the subject-matter”, the purposes of the *Act* should not be “gutted” by routinely granting requests; and the terms of private insurance contracts could not be relied on to contract out of legislative requirements. The Decision noted that nothing prevented counsel from providing advice and assistance by: giving legal advice on the issues in dispute; organizing the Strata’s evidence; and, preparing its submissions.

The Strata applied to the British Columbia Supreme Court for judicial review of the Decision. The application was dismissed. The Court noted the \$25,000 sought involved issues that could make it “particularly important” to have counsel defend the claim, however, it accepted that assistance could be provided without formal legal representation in the CRT proceedings. The ability to access legal advice caused the Court to conclude the Strata was not deprived “of counsel’s assistance or the benefits of its insurance policy in any significant way.” The Strata appealed.

The Court of Appeal allowed the appeal. In doing so, the Court focused on the Decision’s reasoning and concluded it failed to recognize that the most significant portion of the claim involved damages for tort claims as opposed to a simple claim for strata related repairs. This raised potential jurisdiction issues, along with issues of tort law and vicarious liability, which could make legal representation very appropriate. The Court, in its analysis, was also critical of the suggestion that a “limited retainer” format was sufficient for two reasons. First, it gave the appearance of the CRT circumventing the *Act* in what was described as “a wink and a nod” to the issue of whether a party was truly represented by counsel and, further, resulted in a lawyer’s work product being provided without any recognition of the source. Second, it created the illusion that the delivery of a submission, as opposed to the preparation and content of it, was what ultimately influenced decision makers. This false illusion meant parties were not, in fact, on a level playing field if one was “represented” in the background while the other was not. Finally, the Court noted it had not, in the context of this appeal, been asked to “address the constitutionality” of the *Act* imposing limits on a party’s right to legal representation. The Representation Request was sent back to the CRT for re-consideration.

Practical Considerations:

While the issues raised in *Booth* are ripe for further litigation, insurers need to balance how to fulfill any duty to defend within the constraints of the current law in BC. Submitting Representation Requests remains critical, but the permitted scope of any “limited retainer” if the request is denied is now in doubt. Careful consideration of these issues will be important when handling any CRT claim. Underwriters are well advised to consider whether policies covering claims that are potentially within CRT jurisdiction need to clearly account for restrictions imposed by law on the insurer’s ability to provide a defence.





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