THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

CBABC POSITION PAPER ON
THE CIVIL RESOLUTION TRIBUNAL AMENDMENT ACT, 2018 (BILL 22)

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Introduction

In April 2012, the government of British Columbia introduced Bill 44, which became the *Civil Resolution Tribunal Act*, SBC 2012, c. 25 (the "CRT Act"). The CRT Act created a new tribunal to resolve some strata claims and for certain small civil claims.

There are several underlying philosophies of the Civil Resolution Tribunal (the "CRT") that are supported by the CBABC. They include:

- Encouraging and facilitating the early resolution of disputes through facilitated settlement discussions and mediation;
- Using technology to facilitate access to justice without the need to attend in person at courthouses during business hours;
- The use of plain language, and the preparation of accessible legal information modules that can assist participants in exploring and understanding their options to find resolution to a legal dispute.

There were other areas as to which concerns were expressed by the CBABC and other organizations in 2012 and 2013, as the tribunal was established. The initial Act was introduced and passed without any consultation with the Bar or (to the understanding of the CBABC) the judiciary. The tribunal, and the quasi-judicial functions it undertakes, could very easily have been established as a part of or adjunct to the judicial branch of government – but that option does not appear to have been considered. Other concerns included:

- Section 20 of the CRT Act, which prohibits parties from having legal representation at tribunal proceedings without obtaining special permission; and
- A system where tribunal members are not independent, in the sense that they can be fired for cause by the Minister, their remuneration is set by Cabinet, and their terms of appointment are a minimum of two and a maximum of four years. While lack of independence is typical in administrative tribunals where the resolution of disputes is politicized, because the government has an interest in appointing tribunal members who will implement political agendas on certain issues, it is inappropriate for resolution of general civil claims which should not be politicized.
- The trade-off for the "rough justice" approach inherent in many administrative tribunals compared to courts is usually justified by the desirability of having a tribunal of specialists in the subject matter of the dispute; this is not possible for a tribunal that deals with a wide range of civil claims.

The CRT began hearing strata property disputes in 2016, and began hearing small claims matters in June 2017. It is thus at the very early stages of operation, and it is difficult to determine much from its record to date.

On April 23, 2018, the Attorney General introduced Bill 22 – a bill that would amend the CRT Act to significantly expand its jurisdiction and to insulate its decisions from appellate review. Bill 22 received second reading two days later.

Bill 22, among other matters, adds three new areas of jurisdiction for the tribunal:

- Claims under the *Cooperative Associations Act* in relation to a housing cooperative or a community service cooperative;
- Claims under the *Societies Act*, and
- Certain claims under the *Insurance (Vehicle) Act*, as well as claims for damages arising from motor vehicle accidents up to a $50,000 maximum.

Bill 22 retains the prohibition on legal representation before the tribunal, other than for motor vehicle accident claims. Its provisions give rise to increased concern about the independence of the tribunal. And of further significant concern, it eliminates the right of appeal for strata property matters and purports to insulate the tribunal from judicial review other than on the extremely limited ground of acts that are "patently unreasonable".

This Submission has been prepared on short timelines in order to provide feedback on some of the more significant changes that are proposed to the *Civil Resolution Tribunal Act*.

Lack of Legal Representation

Section 20 of the CRT Act sets out a general rule that "parties are to represent themselves in a tribunal proceeding", other than where a party is a child or person with impaired mental capacity. Otherwise, a lawyer may only represent a party with special permission from the tribunal.

With specific respect to strata corporations, a strata corporation must be represented at CRT proceedings by a designated member of the strata council. This is notwithstanding that claims made against strata corporations will often be covered by insurance, including a right to the costs of a defence by lawyers, and the strata council is under a duty to ensure that the strata corporation's interests are diligently and competently advanced.

We understand that for the first several months, the CRT was relatively flexible in allowing lawyers to participate in strata property proceedings. However, since late 2016 the CRT has almost invariably refused to allow participation by lawyers. It has actively attempted to ensure that lawyers are not even silent participants in proceedings to provide advice for those speaking on behalf of a strata corporation.

Among the situations we have heard about are two where lawyers, in their personal capacity, were owners of units and engaged in a dispute with their strata corporation. In both cases, the

strata corporation was not permitted legal representation. In one, the owner was one of the leading commercial litigation counsel in Vancouver, while the strata corporation had to be represented by its chair, a person who was also a volunteer caretaker for the strata.

There have been cases where strata councils have resigned en masse in order to avoid becoming unwilling participants in tribunal hears that they do not feel comfortable doing. Volunteer strata council chairs, when advised by their lawyers of the rules that will prevent representation by counsel at a hearing, have described their sense that they are being "blackmailed" or "kidnapped" – they have no confidence in their ability to participate in a hearing, but they are required to do so by virtue of having undertaken a volunteer role for their strata community. The same would no doubt apply to volunteer leaders of societies or co-operative housing associations under the proposed additions to the Act.

It should be noted that the CRT's jurisdiction over strata property matters has no monetary limitation. Some cases before the CRT involve common property issues where the amount in dispute is six or seven digits. The proposed jurisdiction over societies and co-operative housing associations is similarly unlimited. It is clearly inappropriate for legal disputes with hundreds of thousands of dollars at stake to be handled in a forum in which lawyers are prohibited.

However, it is submitted that there is no need for a ban on representation by counsel at all. Our legal system has seen increasing numbers of self-represented litigants in our justice system. In many cases they struggle to identify the real legal issues in a case and to understand and navigate the law and the legal system. Lawyers have a centuries-long tradition of assisting parties to navigate the system and, in many cases, to level the playing field where one party is less able to advocate on its own behalf. Lawyers regularly narrow the issues in cases, focus the evidence on what is properly relevant, and identify and present applicable legal principles in a digestible manner. Those skills are valuable – and promote fair resolution in accordance with the law – no matter what the amount in dispute. Market forces may well lead to minimal lawyer involvement in very small cases – but it is submitted that it is best left to the parties, and not to some tribunal official with minimal understanding of the individuals and issues involved in any particular case, to decide whether a lawyer should be retained.

Many of the small claims matters that come before the CRT have very small amounts in issue. Some of the strata property cases are similarly small in scope. But they are still important to those who are parties to them. While some parties will be comfortable in their ability to advance their own cases, many others will not.

In our submission, asking the government or the CRT to make decisions for the parties as to whether obtaining legal advice or representation is appropriate in a given case is unnecessary. Parties to disputes have, for centuries, been making those decisions on their own behalf, giving due consideration to the availability of insurance coverage, the amounts in dispute, the complexity of issues, and the available resources.

We would recommend that the restrictions on lawyer representation in section 20 of the Act be removed. If that is done, then there is no need to add section 20.1 as proposed in Bill 22.

Lack of Independence

A tribunal member is appointed by the Lieutenant Governor in Council for a term of at least 2 years and not more than 4 years. [CRT Act s. 68(3)] [The term of office for the Chair is longer, at minimum 3 and maximum 5 years: CRT Act s. 67(2)]

At present, the CRT has a Chair, two Vice Chairs, and two full time Tribunal Members. In addition, it has 37 part-time members, who are assigned cases from time to time based on need.

The remuneration of tribunal members is set by the Attorney General (s. 75), and members of the Tribunal may be terminated for cause (s. 74).

The CBABC made submissions with respect to the CRT in August 2013. At that time, we noted the following with respect to discussions with the Dispute Resolution Office (DRO) of the Ministry of the Attorney General:

> It is the view of the DRO that these features are consistent with the common law on independence of tribunals. The DRO points out that the level of independence required is variable depending on whether the tribunal is adjudicative or licensing or somewhere in between. The DRO relies on the fact that the CRT Act provides for security of tenure, financial security and administrative independence to support its view that the CRT is sufficiently independent for an adjudicative body. It also asserts that administrative tribunals are developed in part to implement the policies of government and so they are not independent as courts are. In essence, the DRO asserts that administrative tribunals are deliberately politicized in the sense that they are to make decisions in line with the policy positions of the government of the day.
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> With regard to this last point, the acceptability or advisability of politicizing an administrative tribunal depends on the subject matter of the tribunal. Highly specific subject matter tribunals with a high political or policy content to the decision making process, such as labour relations, have historically been political and their chairs and some tribunal members change with the governments (as does the legislation on some occasions). Whether this is a good thing or a bad thing is an interesting discussion, but a tribunal to deal with all matter of civil claims is not amenable to this model. There should be no general political agenda around the resolution of civil claims between private actors (government may not be a party to a CRT claim) and even if there were, the myriad of issues and types of claims preclude such an approach. It is destabilizing for society to have political agendas at play in the resolution of private disputes between citizens. The government should not be seen to be interfering by setting up a politicized tribunal to do so, especially when the option of having the same tools made available in provincial court, where the litigants benefit from judicial

> independence. Accordingly, there is no reason to politicize the resolution of such disputes and every reason to ensure they are depoliticized.
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> With regard to the other factors, it is clear that the CRT is purely adjudicative so a high level of independence must be afforded. In this case the chair's remuneration is set by the Minister and he or she is hired by Cabinet and may be fired by Cabinet for cause. Unlike in the *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884, a chair whose conduct is questioned by the government does not have a right to an independent review under the legislation. They may simply be fired and any relief is limited to JRPA proceedings. . . .
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> The CBABC is of the view that the structural lack of independence of the CRT is inappropriate for a purely adjudicative tribunal dealing with a wide variety of private disputes between private citizens.

These concerns remain true today. However, additional factors give rise to more significant concerns:

- The CRT as it has developed contains a number of part time members who are dependent upon the decision of the Chair or other CRT staff to assign them cases. Their remuneration is on a case-by-case basis and not a guaranteed salary for the duration of their term. There is simply no financial security for such members.

- At present, section 9 of the CRT Act states that "The government may not be a party to a tribunal proceeding." This made sense given that the CRT's adjudicators were all government employees. However, Bill 22 proposed to replace that with language that will allow claims to be made against the government in certain areas – primarily those involving motor vehicle accidents.

  More importantly, however, the proposed new jurisdiction over motor vehicle accident claims would provide the CRT with a steady flow of cases in which one party will be the Insurance Corporation of British Columbia, a Crown corporation reporting to the Attorney General – the same Minister to whom the CRT reports.

  This must be looked at within the current political context within British Columbia. There is strong pressure on the Attorney General, as Minister responsible for ICBC, to ensure that premiums are not permitted to increase significantly, which means that ICBC's own costs must be kept under control. It is not realistic to think that the performance of the CRT and its adjudicators in reviewing motor vehicle accident claims will not be viewed in light of these political priorities.

- As will be discussed further in the next section, the proposed deletion of provision for appeal of CRT decisions and the institution of provisions restricting judicial review will prevent the Courts from acting as an effective check on the work of the CRT.

For all of these reasons, we are even more firmly of the view that the lack of structural independence CRT remains a significant concern and that, in any event, it does not have sufficient independence to assume the proposed broad jurisdiction over motor vehicle accident claims.

Lack of Substantive Review by the Courts

The present CRT Act contains provisions for:

- a small claims decision of the CRT to be reviewed by the Provincial Court (ss./ 56.1 to 56.4); and
- the appeal of a strata property final decision on a question of law arising out of the decision (s. 56.5).

These provisions give the Courts the ability to ensure that decisions made are consistent with the law of British Columbia.

Bill 22 would not change the small claims provisions, but it would eliminate the right of appeal from any strata property final decision.

Instead, Bill 22 would provide a very limited ability to seek judicial review of any decision with respect to strata property matters, and also with respect to the proposed new jurisdiction over cooperative association claims, *Societies Act* claims, and motor vehicle accident claims.

In particular, under Bill 22, the CRT would be deemed to have "specialized expertise" in each of these areas.[1] In addition, the jurisdiction to decide whether an injury is a minor injury and to determine entitlement to Part 7 Benefits are both said to be "exclusive jurisdiction".[2] For all matters that are claims in which the tribunal is considered to have special expertise, or to be within its exclusive jurisdiction, the applicable standard of review is determined by section 58(2) of the *Administrative Tribunals Act*.[3]

As a result, a finding of fact or law or an exercise of discretion by the CRT could not be interfered with by a Court unless it was found to be "patently unreasonable". This is a high standard – requiring that the decision be considered "clearly irrational", "evidently not in

[1] Section 121(2) re strata property claims, s. 125(2) with respect to cooperative association claims, s. 129(2) with respect to Societies Act claims, and s. 133(2)(b) with respect to motor vehicle accident claims.
[2] Section 133(2)(a).
[3] SBC 2004, c. 45. This is mandated by s. 56.7(1) of the CRT Act as amended. The only exception to this is the jurisdiction to decide liability and damage in motor vehicle accident cases up to the prescribed maximum of $50,000. See Combined effect of s. 133(1)(c) and s. 56.7(2).

accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand".[4]

This standard is so hard to meet that the combined effect of these provisions will be to make the prospect of realistic judicial oversight of the CRT in these areas of jurisdiction mostly illusory.

Lack of Special Expertise

As noted in the previous section, Bill 22 purports to deem a number of different areas to be within the "specialized expertise" of the CRT. As noted in the CBABC's August 2013 submission:

> In some cases, the "rough justice" nature of specialized tribunals is an appropriate trade-off for the specialization and expertise that resides in specialized subject matter tribunal. Specialization can provide benefits in the form of procedural initiatives tailored for certain types of disputes and a cohesive body of law which allows the parties to predict with great certainty what the results will be and therefore facilitates early resolution. Such benefits cannot accrue in an arena where the disputes are of many different types and the parties are prohibited from being represented by counsel who have experience in the tribunal and can assist with predicting the outcome.

A specialized tribunal typically has a specific area of expertise. The broad range of jurisdiction which Bill 22 purports to confer on the CRT, with its disparate areas of responsibility, is the sort of jurisdiction that is typically associated with a superior court and may well run afoul of section 96 of the *Constitution Act*, 1867.

Moreover, while the statute may deem the CRT to have specialized expertise in each of these areas, such expertise does not in fact exist. The rationale of creating tribunals with expertise is that the Courts can be reasonably asked to defer to those tribunals because the tribunals in fact know more about the area of expertise than do the Courts. However, the CRT has no past experience in the proposed new areas of jurisdiction included in Bill 22 and will have to develop those – and they include areas like motor vehicle in which the British Columbia Supreme Court has decades of intensive experience. As noted by Mr. Justice Pearlman in one recent case, "relative to the Court, [the CRT] does not possess any specialized expertise for the determination of questions of law relating to strata property claims."[5]

Even within the area of strata property claims, the CRT's expertise has not yet been developed. The CRT has had jurisdiction in those areas for less than two years. Only one of its decisions has proceeded through the appeal process in that time – with the appeal being dismissed.[6] A recent article by Professor Harris of Allard Law School highlights some of the growing pains the tribunal is experiencing, as it has on at least one occasion departed from the law of British

[4] *Law Society of New Brunsick v Ryan*, 2003 SCC 20 at para. 52
[5] *The Owners, Strata Plan BCS 1721 v Watson*, 2018 BCSC 164 at para. 52
[6] The Owners, Strata Plan BCS 1721 v Watson, 2018 BCSC 164

Columbia.[7] The existence of these growing pains is confirmed by counsel who regularly provide advice (usually in the "background") to parties involved in proceedings before the CRT.

Lack of Consultation

The provisions of Bill 22 dealing with societies have been known to the public for less than two weeks. The CBABC's Charities and Not-for-Profit section would appreciate an opportunity for consultation on the provisions relating to matters under the *Societies Act* before they are enacted. The following preliminary comments have been received from that section:

- the approach of sections 129-130, by which the matters to be included in CRT jurisdiction are expressed broadly while the exclusions are very narrowly stated, may lead to unintended matters falling to the CRT;
- there is a risk that where a number of issues are in dispute, some may go before the CRT and some before the Court, resulting a multiplicity of proceedings;
- no explanation is given as to why the powers of the Registrar under s. 107 of the *Societies Act* to order disclosure of records are not sufficient – the imposition of the CRT will add complexity to issues surrounding record disclosure;
- more generally, only a handful of *Societies Act* dispute end up in Court each year with the majority of matters being worked out informally – the availability of the CRT for such disputes may have the unintended consequence of giving rise to more disputes going to external resolution;
- many *Societies Act* disputes are technical in nature and a tribunal that does not permit lawyers is not an appropriate forum for resolution; and
- the CRT has no expertise in this technical area of law, and the standard of review (patently unreasonable) is inappropriate for a brand new jurisdiction.

There may well be more questions and concerns for discussion once the section has had a chance for a more detailed review. What is important is that consultation is essential before the Act is finalized.

Conclusion

The rule of law in Canada is jealously guarded by the existence and effectiveness of both an independent judiciary and an independent bar. The current structure of CRT excludes, for the most part, participation of the independent bar in CRT proceedings where they could ensure that proceedings unfold according to law and provide fairness to the parties. Bill 22 would go further by effectively excluding oversight by our Courts.

[7] An Error of Law and the Credibility of the Civil Resolution Tribunal (http://canliiconnects.org/en/commentaries/61913)

As well, the CRT as structured does not provide adequate independence to tribunal members, and should not be adjudicating cases involving the government directly or Crown corporations for which it is responsible.

In our submission:

- section 20 of the CRT Act should be amended to remove restrictions on lawyer representation;
- the CRT should not be assuming jurisdiction over cases involving the government or ICBC;
- the existing provisions for appeal on questions of law with respect to decisions involving the CRT's jurisdiction over strata property matters should be maintained, and should be made applicable to any new areas of jurisdiction to be added; and
- consultation on the new areas of jurisdiction is essential before the Act is finalized.