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PROPERTY LOSS UPDATE

Editorial

Statutory Conditions form part of every property policy that is issued in Canada. In recent years, many provincial governments have amended these conditions with respect to Statutory Condition #11- Appraisal. The Province of Ontario has lagged behind in making changes but "Appraisals" are gaining in popularity as more people are becoming aware of this effective ADR mechanism.

The authority to trigger the process is found under s. 128 of the *Insurance Act*, R.S.O. 1990, c. I.8. The statutory conditions contained in the insurance contract that provides for appraisals (Statutory Condition 11) says:

> "*In the event of a disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the Insurance Act before there can be any recovery under this contract whether the right to recover on the contract is disputed or not and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after a proof of loss has been delivered."* *[Emphasis added].*

The *Insurance Act* requires that if the parties fail to appoint an appraiser or the appraisers fail to agree on an Umpire, the *Insurance Act* gives the Superior Court jurisdiction to appoint an appraiser or Umpire.

There is no mechanism to "appeal" an appraisal result. But because the Umpire's decision involves the exercise of power granted under statute, it is subject to judicial review under the *Judicial Review Procedure Act*, RSO 1990, c. J.1 ("*JRPA*"). Under the *JRPA*, the Ontario Superior Court of Justice has jurisdiction to:

> "*…grant any relief that the applicant would be entitled to in… proceedings…in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power."*

Under section 2(4) of the *JRPA*, the court has the power to set aside an appraisal decision on an application for judicial review. While most of us might consider this process an "appeal" of an appraisal decision, it is technically a judicial review which is a very fine distinction which one should be mindful of throughout the process. Any such review is significant as the application is conducted by three Superior Court judges sitting together as a panel for the Divisional Court which is an appeals court a level below our Court of Appeal.

A recent decision of the Divisional Court is highlighted in this article.

***Madhani v. Wawanesa Mutual Insurance Company*, 2018 ONSC 4282**
Ontario Superior Court of Justice – Divisional Court, July 10, 2018

A house fire destroyed the building and contents on November 6, 2014. The matter became subject of litigation. In October 2016, Justice E. Belobaba issued a referral order to put the damage issues into the appraisal process. Appraisers for each party were appointed and an Umpire was agreed upon.

Anyone can be appointed as an "appraiser". Section 128(2) of the *Insurance Act* states "*[t[he insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an Umpire."* In this matter, an adjuster was appointed to act for the insurer as their appraiser. A lawyer acted for the policyholder as the appraiser on the contents portion of the loss. The policyholder also hired a contractor to act as appraiser on the building loss. This was unusual but agreed upon by all parties.

Both sets of appraisers produced briefs for the Umpire. There were several phone conferences but no other meetings prior to all appraisers meeting in person with the Umpire on July 12, 2017. Both sets of appraisers attended before the Umpire to speak to their brief of documents, provide witnesses, and argue their opinions. During this process, the Umpire expressed oral reasons behind his opinions. There was no request made prior to or during the process for written reasons.

The appraisal process dealt with eight specific issues. The appraisers and the Umpire agreed on only two of the issues. The remaining six issues were agreed upon by the "majority" of the Umpire and appraiser for the insurer. On conclusion, the Umpire issued a 2-page award document entitled, "Appraisal Findings". In the application for judicial review, the insured took issue with three specific Appraisal Findings:

1. -The actual cash value ("ACV") of the building ($430,000);

2. The percentage depreciation (20 per cent) applied to the replacement cost value ("RCV") of the building to arrive at the ACV of the building ($430,000); and

3. The RCV of the contents ($100,000). The insured had submitted a claim for $239,000.

What was the basis for the application for judicial review?

The insured raised two issues:

1. Was the insured denied "procedural fairness" because the Umpire did not include "reasons" for applying a 20% depreciation rate?

2. Did the Umpire exceed his "jurisdiction" when he declined to accept the extent of the contents claim?

The best evidence before the Divisional Court was an affidavit from the appraiser for the insurer wherein he provided his description of the process that was followed to reach an award. There were several things of note in the decision:

1. The lawyer for the insured (who was also the appraiser for the insured on the contents claim) focused her attention on the errors as being those of the Umpire. The Court noted at para. 14 that, "[i]n fact, the Umpire does not act alone and the aspects of the appraisal attacked by the Applicant [insured] are decisions of the majority and were made in accordance with the appraisal process described by the [Insurance] Act." [Emphasis added].

2. A review of other cases showed that the "[c]ourts afford substantial deference to an appraisal under the Act and to the appraisal process." To successfully appeal a decision one must have proof of either misconduct or the appraisers and Umpire exceeding their jurisdiction. [See para. 15. Emphasis added].

3. The Divisional Court felt that the appraisers and umpire in this case had the jurisdiction to handle the issues at hand. They then turned to several things they needed to consider:

    a) Was the finding of the majority in this process on the contents loss "reasonable"?
    b) Was the appropriate level of procedural fairness provided?

The Divisional Court noted that issues such as legal entitlement under the policy or dealing with the validity of a claim (fraud etc.) were not part of the appraisal process and should be determined in a trial. It is only the valuation that is at issue in the appraisal process.

On the judicial review application, the lawyer for the insured did not file the document brief they relied upon with respect to the contents loss, which the Divisional Court noted may have been helpful. The court was also concerned about the appropriateness of the lawyer acting as counsel on the judicial review application also being the appraiser for the insured. In other words, the lawyer was her own witness and the court expressed their apprehension of such conduct.

The insurer's appraiser provided evidence in an affidavit. The affidavit described the process and explained that the Umpire and the appraiser for the insurer agreed on an RCV for the contents claim of $100,000. An ACV was also agreed upon by them for $75,000. This was significantly short of the insured's claim ($239,000). In the "Appraisal Finding" for contents, the Umpire specifically noted that (at para. 10 of the court's reasons):

> *"…. no comprehensive proof of loss has been submitted but the insured provided in his appraisal brief extensive schedules listing contents items. These were supported by: the insured's verbal information*

> *provided today; the insured's written statement; extensive printouts identifying similar items to those insured claims were lost in the fire; photographs which in some cases show remnants of items listed in the schedules. No receipts were available today for either original (pre-loss) purchases or for replacement purchases. The extent of the contents items claimed to be present in the premises is not accepted. We have not identified which specific items did not exist."* [Emphasis added].

Clearly, the umpire wasn't impressed by the information the insured used to support their claim. The process was empowered to determine the valuation or "amount of loss" on the contents, including whether certain property was present on the premises. The process does not, however, determine legal entitlement. The Divisional Court found (at paras. 25-26) that:

> *"On the part of the majority there was no finding of legal entitlement or any determination of disputed legal issues.*
> *…..*
> *the majority has not made findings about items that did not exist The appraisal process determines the value of the property lost or damaged, the value of the property saved, and the extent of the property damage. Here, the majority was not satisfied with the extent of the contents items claimed to be present; that factor was considered in the valuation of the contents on a global basis. That valuation is entitled to deference."* *[Emphasis added].*

The Divisional Court said that if they had received more information to better assess the insured's position they might be in a better position to assess their arguments but based on what they had before them on this matter they did not find the valuation to be "*unreasonable*" and they did not feel the majority had acted "*improperly*". [At para. 27. Emphasis added].

In reaching the decision it did, it is important to note that the Divisional Court commented on the British Columbia decision of *Ferrier v Maplex General Insurance Co.*, [1992] I.L.R. 1-2806 (B.C.S.C.) ("*Ferrier*"). *Ferrier* was a motion for directions brought about because there was a serious dispute about an allegation of fraud on a contents loss. There was also a dispute over interpreting coverage. The motion court judge ruled that the "*…determination of quantity and the interpretation of the contract should be left to the trial judge."* The Divisional Court concluded, however, at para. 30 that "*Ferrier is not binding on us and we would not follow it.*" The valuation conclusion of the majority in the appraisal process was therefore reasonable when it considered only those items it concluded were lost in the fire.

The Divisional Court then went on to decide whether there was procedural fairness when the Umpire did not release written reasons behind the depreciation rate used to determine the ACV of the building loss. There are a few key points expressed:

1. The appraisal process is not subject to the *Statutory Powers Procedures Act,* R.S.O. 1990, c. S.22. Subsection 17(1) of that legislation says that a tribunal "….*shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing*

therefor if requested by a party."

2. The Divisional Court applied the factors to be considered in assessing procedural fairness which were identified by the Supreme Court of Canada in their landmark decision of *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. Those factors are:

    a. What is the nature of the decision being made? What is the process being followed in making it?
    b. What is the nature of the statutory scheme being administered?
    c. What is the importance of the decision to the affected individual?
    d. What are the legitimate expectations of the person challenging the decision?
    e. There should be respect for the choice of procedures made by the administrative agency itself.

3. In applying these requirements, the Divisional Court made some good points regarding the appraisal process:

    a. Appraisal is <u>not</u> an arbitration.
    b. Appraisal is a property valuation process. It does not determine legal rights.
    c. There is no requirement to hold a hearing or to hear evidence.
    d. The appraisal process is not adjudicative. Discussions are encouraged to facilitate a quick settlement. Discussions are directed at reaching consensus.
    e. There was no specific determination as to specific items that were or were not lost in the fire.
    f. There was nothing said by the Umpire that would give rise to an expectation that written reasons would be required. In fact, the *Insurance Act* does not state reasons must be given – only that the findings/conclusions must be reduced to writing. There were no requests made by the appraiser for the insured for written reasons.
    g. There were oral reasons given in the tribunal by the Umpire.
    h. The appraisal does not result in a determination of rights under the insurance policy.

All this pointed to a conclusion that the requirements of procedural fairness had been met through this appraisal process. The appraisal findings were validated.

Case Summary

This is an important decision that provides some guidance to appraisal processes. Perhaps most importantly, the Divisional Court specifically declined to follow *Ferrier*, thereby clarifying that in assessing "*the amount of the loss*" the appraisal process can make a *"determination of quantity,*" *i.e.*, the quantity of items claimed can be assessed in the appraisal process.

There are a few additional things to ponder in reading the decision:

1. It does not appear that the insurer insisted on a sworn Proof of Loss being filed that was backed strongly by the conditions imposed by Statutory Condition #6- Requirements of An Insured After a Loss. The insurer seems to have waived the need to do this before agreeing to the appraisal. The Divisional Court did not seem to feel this was an issue at all as all parties agreed.

2. The lawyer launching this review was also one of the appraisers on the loss. She chose not to file her appraisal document brief with the court. One wonders what impact this might have had on the Divisional Court decision if she had. This would have provided greater insight into the gap between what she was claiming the RC was on the contents loss.

3. The Divisional Court referenced the need to view the results in terms of whether the findings were reasonable? The findings should be fair and sensible. They should be rational and logical where the end result if both credible and believable.

4. No appeal exists of the majority decision arising out of an appraisal. The only route for redress is an application for judicial review which incurs significant legal costs and limits the issues that may be addressed. Given the substantial deference given to the appraisal result and its limited purpose (valuation of the loss), a successful judicial review will only occur in the most rare and exceptional of circumstances.

It is not unusual for appraisers and Umpires to be faced with situations where the insurer is taking an 'off-coverage' position on coverage for all or a portion of the loss. This creates a fine line for the Umpire as it is very clear from case law that the Umpire is not a trier of fact. While this whole area of law emerges it is clear from the direction given by the three judges in the case at hand-- the appraisal process will be given "*substantial deference*".

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