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'THE APPRAISAL PROCESS 'An Update…'

This is the 9th iteration of the original research paper that was first published in 1996.

In recent years there have been a number of legal judgments which provide further guidance on a unique alternate dispute resolution process called "Appraisal". I have provided an addendum to this paper which provides a summary of these cases.

The Appraisal or Dispute Resolution process is a mandatory part of the Statutory Conditions of all property insurance policies in Canada. It has been part of the Statutory Conditions for decades but it did not attract widespread use until public adjusters started to utilize it during the early 1990's. Since then it's use has continually increased as an effective alternative to litigation.

Policyholders pay their premiums for something that they hope does not happen. But they rely on the "insurance promise" so that when something bad does happen their insurer will be there to help them repair or rebuild their property. And the reality is that the majority of property claims are settled in a quick, efficient fashion. This statement is validated by a number of different surveys that prove a high level of customer satisfaction.

In spite of best efforts, some claims do go 'off the rails'. There is a wide variety of reasons for this happening. The result can be both sides digging in on their respective positions while the damaged property is sitting dormant. Litigation is costly and time consumming. The appraisal or dispute resolution process is an excellent method to resolve matters. Still, the process is not widely known and understood.

The goals of this article are to:

1. Demonstrate how the 'Appraisal' process works.
2. Provide suggestions to appraisers on how to prepare their files so they are effective in advocating their position in this process.
3. Outline interaction that exists between insurers, public adjusters and lawyers. Part of this interaction has been crafted from legal decisions and this article will highlight key judgments that influence this very important ADR process.

PROVINCIAL INSURANCE ACTS

Each common law Province in Canada has an Insurance Act which governs activities of the insurers who are licensed to do business in their province.

When someone elects to purchase an insurance policy they create a contract between both parties.

All insurance contracts contain Statutory Conditions. Until recently, all referred to a dispute process known as "Appraisal". Much of this article will refer to this mechanism as it has only been in recent years that several Provinces have amended their Statutory Conditions to rename it as "Dispute Resolution". What has not changed has been the foundation that this mandatory section of the contract allows this process to determine:

1. The value of the property insured.
2. The value of the property saved.
3. The amount of the loss.

Beyond this, the wordings within each Act defines the process to be followed. And for the most part it follows the historical language that has been in place for decades. Each Act should be reviewed for its own idiosyncracies. Some differences include:

1. In B.C. and Alberta they renamed the Statutory Condition to-- "Dispute Resolution". Appraisers are now called "Dispute Resolution Representatives". Additionally, the representative cannot be the insured or insurer.
2. B.C. has also built in a mandatory requirement that where there is a disagreement as to the value of the loss they must give notice to the insured within 21 days of the dispute resolution process.
3. Manitoba, Newfoundland, PEI and Nova Scotia have all made changes where they are demanding impartiality of the appraisers and umpire. Their wording requires them to be "disinterested" parties. Several of them also go on to say the umpire must not only be "disinterested" but "competent".
4. Manitoba also has a curious inclusion at S. 123(3) of their Act, which seems to open the door for any party not happy with the appraisal process outcome to seek a re-hearing. Manitoba courts have not yet had to deal with this issue.
5. Statutes in Saskatchewan, Alberta and Manitoba specifically exclude hail insurance contracts from this process.

One can see that the legislators in some of the Provinces are attempting to ensure each claim gets a 'fresh face' when the matter enters appraisal. This might soften the entrenching of the positions of either party. It will be interesting to see if Ontario follows suit with any changes in the future.

While these changes are important to take note it can be argued that the changes have not had a substantive impact on the overall process that has been in place for decades.

THE SELECTION PROCESS

1. *The Appraiser*

In Ontario, the *insured* can choose whomever he or she wishes to act as appraiser. Some policyholders have acted on their own behalf. Others have elected to use a relative, contractor, public adjuster or a lawyer.

The *insurer* can also choose anyone they desire to be their appraiser.

As you move to other jurisdictions there are stronger rules in place on who can and can't be picked as an appraiser. These are significant changes.

When choosing an appraiser, you might consider:

- Whether the appraiser has the knowledge, experience and skill to deal with the issues in dispute. How many cases has the appraiser handled and what issues has he or she dealt with? Does the appraiser provide references? What umpires have heard

his or her arguments? Has the appraiser acted as an umpire? Has the appraiser taken or given any courses on mediation / arbitration or appraisal?

- Your appraiser should have strong advocacy skills? A subject matter expert in a certain discipline (i.e. contractor / engineer) does not necessarily make them the best choice if they cannot argue their position well before an umpire. You need someone who can debate / advocate well and in a professional, courteous manner. At the end of the day you are seeking to persuade the umpire of your point of view. Being overly aggressive may not win the day.
- What are the issues to be resolved? An example is an argument relating to the actual cash value (ACV) of a building loss. The insurer might believe that proper indemnification should be based on using a direct sales comparison. Should they hire a real estate appraiser to make that argument? Or, should they consider that the appraisal 'debate' might very well require their appraiser to be able to bring forward current legal cases to support their point of view? And, could other arguments come up in this case involving policy endorsements or exclusions where knowledge in these areas is critical?
- Consider the qualifications and competencies of the other appraiser. You should seek to match strength against strength.
- It is important to note which side triggered the appraisal process? Has the other side elected this process to remove or maneuver the insurer's adjuster off the file? If this is the case, perhaps a new face in the process will resolve matters without going to the umpire. Never doubt the power and impact a personality dispute might have in determining the "amount of the loss". This no doubt was one of the driving decisions behind some jurisdictions ordering the appraisers to be "disinterested parties".
- Understand your appraiser's knowledge of other issues that can come up during the appraisal session. These issues can include:
    - Statutory Conditions.
    - Proofs of loss.
    - Co-insurance.
    - Replacement Cost Endorsement.
    - Pre-judgment interest.
    - H.S.T.
    - Sales tax.
    - Prescription periods.
    - Construction costing.
    - Actual cash value.
    - Current case law.

When you consider the number of contractual and legal issues that can arise in the appraisal session, it makes sense to utilize an appraiser who has extensive knowledge on as many of the points listed above as you can. If the other appraiser is a lawyer or public adjuster, keep in mind their abilities to argue on all these points.

The wrong choice of your appraiser can impact the outcome of the process. For example, in situations in which a general contractor was selected as appraiser for the insurer, the contractor did a fine job arguing scope and pricing, however, when the debate turned to issues of replacement cost and ACV the contractor was not able to effectively argue the point of view of the insurer.

Bear in mind that once either party elects appraisal, they lose the right to opt out and must comply with the process. If they fail to do so, then a judge will appoint an appraiser and, if necessary, an umpire.

2. *The Umpire*

If both appraisers reach an impasse in their efforts to resolve issues in dispute, they need to agree on the a choice of an umpire. Generally each side proposes several names and eventually they agree on one. If they fail to agree on anyone, then the matter is referred to a motion court judge, who hears evidence from each party and makes decisions on appointing an umpire.

Choosing the right umpire to orchestrate a resolution is critical. Points to consider include:

- The umpire should have proven experience in leading the appraisal process.
- The umpire should be someone who has knowledge, skill and experience with respect to the issues for resolution.
- The individual should be impartial and unbiased. If the umpire has any potential conflicts of interest they should be declared up front. Both appraisers should be making an informed decision on their choice of umpire.
- The umpire should be up-to-date with respect to current case law. This is important so the umpire knows what decisions he can or cannot make in his role. For example- policy coverage issues are outside the jurisdiction of the process.
- The umpire must be very clear on his or her role. The umpire is not conducting an arbitration nor is he hearing evidence in the fashion of a courtroom setting. The umpire must stay clear of orchestrating decisions that are more properly decided in a court of law. The umpire is present to bring his own experience and knowledge to bear on the issues in dispute.
- At the end of the process, the umpire should strive to ensure that both sides felt they were treated fairly in the process and had appropriate opportunity to present their cases and argue their point of view.
- For the most part, the umpire, like a trial judge, is listening to both points of view. The umpire will take a passive or active role in asking questions and entering the debate. The purpose is for the umpire to get enough information where he or she can agree with one side or the other.

If the selection of an umpire goes to a motion court judge, both sides make written submissions to the court. The judge hears oral arguments and then makes a choice of an umpire. An example of the type of decision is found in:

1. Shinkaruk Enterprises Ltd. V. Commonwealth Insurance Co. et al, Saskatchewan Court of Appeal, June 28, 1990.
2. McPeak V. Herald Insurance Co., Alberta QB, A.J. 222, 1991
3. 265 Commercial Street Ltd. V. ING Insurance Co. et al, Nova Scotia S.C., Edwards F., Dec. 14, 2009

4. Matti V. Wawanesa Mutual, Queen's Bench, Alberta, Sullivan W.P., May 14, 2009

Several themes emerge from reviewing the case law on appraisals:

- An appraisal is a process to determine values. It is not an arbitration.
- Does the umpire have the "*special knowledge or skill"* and experience to deal with the specific issues that are involved in a particular case?
- Is there a potential for bias on the part of the umpire? Some umpires have worked for many years in the insurance sector- whether for an insurer or acting as a lawyer in litigation. The test is—does a reasonable apprehension of bias or partiality exist? Much like the process in qualifying an expert in court, each individual stands on his or her own merits in this regard.

3. Costs

Once the 'Appraisal' mechanism is triggered, the policyholder and insurer are required to pay 100% of their own appraisers costs. In addition, each side is required to pay 50% of the umpire's costs.

It is important that everyone understands early in the process the requirements for contributing to costs. Lawyers should also note that once the appraisal process is triggered if they elect to represent their client as the appraiser, their costs are paid 100% by their client regardless of the outcome.

HOW DOES 'APPRAISAL' WORK?

A proof of loss form must be filed before the process can be initiated. This submission should comply with the provisions laid out in Statutory Condition #6 (*Requirements of the Insured Following a Loss).*

A letter (notice) by either the policyholder or the insurer is all that is required to start the 'Appraisal' process. In this letter, the party making the demand would formally identify who will be acting as their appraiser in this process. The other party then has 7 clear working days to appoint their chosen appraiser.

With both appraisers picked, they have 15-days to agree on their choice of an umpire. This time period can be extended by consent of both appraisers as there may be additional time required for them to meet and identify the issues in dispute. The meeting of the appraisers may also result in some negotiations which could result in the resolution of some or all of the issues. There is no need for an umpire if the two appraisers reach an agreement. These initial meetings can be held on a "Without Prejudice" basis.

If the two appraisers cannot agree on an umpire they will go before a motion court judge to have someone selected.

With an umpire in place, the process will start and that will be driven by the umpire's "style" of conducting the session. There are no formal rules of conduct. It is up to the umpire's discretion.

Many umpires will begin the process by requesting that each appraiser submit a document brief of information that will be relied upon in the face-to-face tribunal:

- A narrative setting out the issues in dispute and the appraiser's opinions.
- Insurance policy details. Underwriting file if applicable.

- Repair estimates, drawings or opinions.
- Analytical charts comparing pricing.
- Proofs of loss/ payment list.
- Photographs / videotape.
- Engineering reports, if applicable.
- Key correspondence, if applicable.
- Any expert reports or opinions to support a point of view.
- Relevant case law, articles, or other material that might support a point of view.

No one should underestimate the importance of this brief of documents. You are providing the umpire with a first impression of your point of view. The appraisers should make an effort to agree beforehand on the submission of common documents to avoid duplications that might lead to an increase in costs..

The submissions should be made in duplicate to the umpire. To even the playing field, the umpire will ensure each side gets the other side's brief upon receiving them. In addition, any requests of the umpire should be made in writing, with a copy sent to the opposing appraiser. No one should communicate one-on-one with the umpire; to eliminate surprises, both appraisers and the umpire should be dealing with the same information flow.

While the documents and narrative might be set to a deadline several weeks before the tribunal there may be advantage in sending whatever documents you have on hand at an early date so the umpire has sufficient time to examine them. This can be decided on a case-by-case basis.

Disputes over the amount of loss might require the umpire to consider requests that might not be seen in other ADR mechanisms, including:

- Completing a site inspection.
- Attending a storage warehouse to inspect equipment, fixtures or other building contents.
- Engaging additional experts to determine the extent of damage.

In advance of the Appraisal session, appraisers should consider whether or not they wish to bring witnesses to the session. By consent of the umpire, others can be allowed into the session to provide information not evidence. This has included:

- A contractor to discuss his scope of damage or clarify pricing issues.
- An engineer to elaborate on their report or to clarify a specific point.
- The initial loss adjuster who might assist the insurer's appraiser in presenting a myriad of documents.
- A lawyer representing the policyholder who wished to be present to assist in the choice of appraiser.
- The policyholder to provide information on the claim that has been submitted. On these occasions the policyholder has been allowed to speak and the umpire

addressed questions on specific points. Allowing the insured his 'day in court' can be helpful to achieving a successful outcome for this process.

The umpire must strictly control who is allowed into the session and what input they have into the process. The only people with official status in this process are the two appraisers and the umpire. Each appraiser must feel comfortable that the process is being handled in a fair and even-handed fashion. It's part of the umpire's role to guide and direct this process.

In assessing the role and actions of the umpire, consideration might be given to the often quoted wording in Regina V. Sussex Justice; Ex Parte McCarthy, 1924, 1 Kings Bench:

> *"It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

This concept is reinforced in Kane V. Board of Governors for UBC, Supreme Court of Canada, 1980 where our top court analyzed the fairness of a tribunal and set out some guiding principles.

At the start of a session the umpire will review how the session will be conducted. These opening remarks set the ground rules for everyone including witnesses who may be in the room.

After opening remarks, many umpires take a mediation approach to resolving the issues. Both sides are given appropriate, uninterrupted time to present their arguments. The umpire will then control a debate between both appraisers. For those familiar with mediation procedures, this is an interest-based approach. As the discussion unwinds, most umpires will then gradually move to a "rights-based" approach in which the umpire will provide an opinion on an issue. The umpire's opinions may stimulate further discussion to see if some common ground can be developed with everyone or with one of the two appraisers.

The umpire must ensure the process stays within the limits of his or her authority and does not drift into areas that should properly be addressed in a court of law. For example, an appraiser for the insured might ask the umpire to agree with them that some goods were destroyed in a fire. The appraiser for the insurer argues the goods were not in the premises destroyed. An umpire can drive the process to reach a conclusion as to the value of the loss but cannot reach a conclusion as to whether the property was on the site or not when the fire happened. Any conclusion on that type of thing has to be left to a court of law. (Gebara V. Economical Insurance Company, Ont.S.C, Feb 1, 2017, ONSC 801.)

Usually, an Appraisal session is concluded in one meeting. Sometimes, more than one meeting is required, and the umpire also can adjourn the session while an appraiser develops and submits further documentation.

Most Appraisals cover many separate issues in dispute. The umpire might choose to try and settle the issues one-by-one. As each item is debated, situations may occur where:

- Both appraisers and the umpire reach unanimous agreement.
- The appraiser for the insurer and umpire agree.
- The appraiser for the insured and the umpire agree.

When two out of three parties agree on an issue it is deemed to be resolved. The Award Document that is created can reflect individual items or, by consent, the parties can use the issues they have resolved to arrive at a macro settlement number whereby at least two of the

three parties agree on the figures. There is some flexibility as to how the Award Document can be constructed but the final numbers are absolutely binding on both parties.

Each Umpire brings with them their own 'style' of managing / directing the process. Some umpires listen to the separate points of view and then write out lengthy "Reasons" as to how they arrived at certain numbers. Or, an umpire might start the process by stating what seem to be the imperical "facts" surrounding the case. Do both appraisers agree with the umpire? That could be a good starting point to a tribunal. If one of the appraisers agrees on the umpire's analysis then the matter is concluded. Other umpires treat the appraisal session as a mediation and keep the parties involved actively talking and negotiating until the matter reaches a final decision. There is no defined "right way" of running the process but the end result always involves convincing the umpire of a position or numbers.

The umpire and appraisers do not have to explain how they came up with final numbers to anyone. They embark on a process that does not have rules to it. They follow this journey and arrive at a result when two of three parties agree. Many sessions result in a one page document showing final numbers. That is all that is required.

LEGAL CASE REVIEW

As always we receive guidance from our courts regarding how an appraisal matter is to be conducted. There have been a growing number of cases in the past five years which have clarified or emphasized a number of key points.

The foundation of everything is that the insurance policy is a contract. It is binding on both parties. When the insured buys the policy they agree that in the event of a dispute as to the amount of the loss there is a mechanism that can be triggered by both sides that is designed to provide a quick, efficient method to resolve the matter without going to a court of law. While some of the decisions might seem difficult to reconcile, the courts have kept this guiding principle at the forefront of their decisions.

Consider some cases:

1. **What is the intent of Appraisal?** It is to provide quick, cost-effective settlements. It can determine the "fair price" of an item or a scope of work. What is the "worth, value or condition" of something?
    a. Shinkaruk Enterprises Ltd. V. Commonwealth Insurance Co. et al, Saskatchewan Court of Appeal, June 28, 1990 .
    b. O'Brien et al V. Lloyds et al, Alberta Queen's Bench, Dec. 23, 1991.
    c. What is appraisal?- Black's Law, Tenth Edition, Thomson Reuters, 2009.
2. **An Appraisal is not an arbitration.** There is no duty in this process to conduct a hearing. It is an appraisement of value. The function of the appraisers and/or umpire is not to hear evidence but to arrive at a decision that is based on using their own skill and experience. Legal issues or broader issues between the parties in the action are resolved in a court of law.
    a. Krofchick et al V. Provincial Insurance Co., Ontario High Court- Divisional Ct.- Southey, Steele & Craig, November 9, 1978.
    b. Shinkaruk Enterprises Ltd. V. Commonwealth Insurance Co. et al, Saskatchewan Court of Appeal, June 28, 1990.

c. Winnipeg Regional Health et al V. Temple Insurance Co., Queen's Bench of Manitoba, McCaulay J., April 21, 2011.

3. **Can an appraisal session turn into arbitration?** Yes. But there must be clear consent of both parties. They must understand that in moving from one ADR mechanism to another the governance also changes. The applicable Insurance Acts governs the appraisal session whereas the arbitration process is governed by the Arbitration Act.

    a. Andrews V. General Accident Assurance Co. of Canada, Alberta Queen's Bench, Fruman J., Nov. 22, 1993.

4. **Can either side elect 'Appraisal' if there are policy coverage issues at play?** Yes and No. Each case must be judged on it's own merits. If there are many issues at play a trial may be the preferred solution. **Can this extend to situations where the insurer claims the insurance policy is void?** Yes. Interpretation of coverage and policy term is for a 'trier of fact' and not the 'Appraisal' venue. This should not delay the process to determine the amount of loss.

    a. Viam Construction Ltd. V. Zurich Insurance Company, British Columbia Court of Appeal, 1984, 6 C.C.L.I.)
    b. David V. Canadian Northern Shield, British Columbia Supreme Court, I.L.R. 1306, 1994.
    c. Bnei Akiva Schools V. Sovereign General Insurance Company, Ont. S.C., Justice M.D. Faieta, Jan. 14, 2016, ONSC 383

5. **If a legal proceeding is underway does this preclude the matter from going to appraisal?** No. The fact that litigation is underway cannot stop this proces from being initiated. There are some arguments that appraisal is being selected "too late" in the litigation process but generally the courts will require the matter to go through appraisal if notice is given.

    a. A. Seed V. ING Halifax, Ont. Court of Appeal, Nov. 10, 2005.
    b. Canadian Northern Shield V. Edwards International, B.C. S.C., Affleck J., August 11, 2011.
    c. Greer V. Co-Operators General Insurance, (1999) O.J. No 3118.
    d. 56 King Inc. V. Aviva Canada, Ont. S.C., Lofchik T., 2016 ONSC 7139 Can. LII. This decision was appealed. Ont. Court of Appeal decided May 16, 2017. Motion judge did have jurisdiction to make an order to send this matter to appraisal. The Statutory Conditions impose no time limit on the insurer's right to invoke appraisal. The wording of the Act shows a clear preference to use appraisal to resolve issues on the amount of loss. The fact a judge "may appoint an appraiser or umpire" was simply to allow the court to ensure there was no abuse of the process.

6. **Does a proof of loss have to be filed before 'Appraisal' can be triggered?** Yes! Arguments have also been raised as to whether an incomplete proof of loss can still trigger the process. The cases cited below speak to the proof of loss being "complete" but the reality is this entire area is a 'gray zone' that the umpire can deal with prior to the 'Appraisal' session. Remember that the goal of the process is to provide a quick and efficient outcome.

    a. LeBlanc V. The Co-Operators, Ontario District Court, 1993.
    b. Lauzon V. Axa Insurance, Ontario S.C., Glithero J., Nov. 27, 2012

d. R. Hale V. Peel Maryborough Mutual, Ontario S.C., DiTomaso G., May 13, 2014.

7. **Can the insured file more than one proof of loss?** Yes. Statutory Condition no. 6 does not prevent the filing of more than one proof of loss.

    a. R. Hale V. Peel Maryborough Mutual, Ontario S.C., DiTomaso G., May 13, 2014.

8. **Can the insured delay the proceedings if they are demanding a response to a proof of loss they have filed?** No. The insured had filed an extensive list of damaged items. They refused to engage in the appraisal process until the insurer had responded with their position on items. The fact the insurer had not responded did NOT allow the insured to delay entering the process.

    a. Letts V. Aviva, Ontario Superior Court, James M., November 19, 2010.

9. **Does the "allegation of fraud" abort the ability of either side to embark on the 'Appraisal' process**? No! If an election is made the matter must go forward keeping strictly in mind the process that is to be followed. Many insurers who are involved with a possible fraud defence on a file resist 'Appraisal' as this ADR mechanism may confuse strategy on the file. This creates interesting dynamics for the umpire but there is no choice but to go the 'Appraisal' route if the process is triggered.

    a. Arlington Investments Vs. Commonwealth Insurance Company, B.C. Court of Appeal, I.L.R.,1-1901, 1985.

    b. Shinkaruk Enterprises Ltd. Vs. Commonwealth Insurance Co. et al, Sask. Ct. of Appeal, June 28, 1990.

    c. Lauzon V. Axa Insurance Co., Ontario S.C., Glithero J., November 27, 2012.

10. **After an award is made by an Appraisal Tribunal does that end the process requiring compliance with Statutory Condition #6- Requirements of an Insured After a Loss?** No. Are there genuine issues that require a trial to make a determination? Where a trial of fact needs to weigh evidence, evaluate the credibility of a witness or draw reasonable inferences from the evidence. This might happen if there is a question about the existence of items.

    a. Gebara V. Economical Mutual Insurance Co., Madame Justice A. Doyle, Ont. , Feb.1, 2017,S.C., ONSC 801

    In the Gebara decision several quotes from the trial judge are noteworthy:

    "As stated in Sagl v. Cosburn, Griffiths and Brandham Insurance Brokers Ltd., 2009 ONCA 388 (CanLII), [2009] O.J. No. 1879, the Ontario Court of Appeal stated, that the onus to recover for loss is on the insured, on a balance of probabilities, that the loss occurred and the amount of the loss. "The onus does not shift to the insurer merely because the insurer raises the defence of fraud". (para. 15.) See also Shakur v. Pilot Insurance Co. (1990) 1990 CanLII 6671 (ON CA), 74 O.R. (2d) 673 (Ont. C.A.). At para. 76, the Court stated:

    It is common ground that in the preparation of the proof of loss, an insured owes a duty to the insurer of honesty and accuracy. Indeed, the policy in this case, reproduced above at para. 30, expressly states that the policy is void if the insured "intentionally concealed or misrepresented any material fact relating to this policy

before or after a loss." Once fraud is established, no matter the amount, the entire claim under the proof of loss is forfeited: Britton v. Royal Insurance (1866), 4 F&F 905 at p. 909; Alavie v. Chubb Insurance Co. of Canada (2005), 2005 CanLII 5331 (ON CA), 195 O.A.C. 7 (C.A.), at para. 5; Dimario v. Royal Insurance Canada, (1987) 26 O.A.C. 370 (Ont. Div. Ct.), at para. 7. This rule follows from the general principle that a contract of insurance is one of utmost good faith: see Insurance Law in Canada at p. 9-16."

11. **When a party elects to go through the Appraisal process does it change the normal limitation period that might exist on the policy?** The simple answer is "No". Most property policies contain a one year limitation period on fire losses. Someone electing Appraisal or perhaps filing a proof of loss at the last minute does not extend the prescription date. An insurer may consider granting an extension to avoid either party incurring unnecessary legal costs but any waiver or extension in this area should be clearly communicated between both parties.

    a. Sadema Lumber Products Limited V. Hanover Insurance Company, Ontario Supreme Court, 1-1381, April 27, 1981.
    b. Feist V. Gore Mutual Insurance Company, Ont. Ct.-Gen. Div., Jan. 10, 1991.
    c. Terraco Industrites V. Sovereign General Insurance Company, Alberta Queen's Bench, March 1, 2006.
    d. DK Manufacturing V. CoOperators General Insurance Co., Ont. S.C., Stinson J., June 20, 2016, ONSC 3983.

12. **Can this process be used to handle multiple claims**? Yes. The motion court judge has the discretion to utilize the process to handle a number of claims for the same insured that had similar losses.

    a. Malholtra V. State Farm, Supreme Court of Canada, March 27, 2014.

13. **What happens if one party does not agree to participate in the process?** In these situations, the party initiating the process would apply to the court for the appointment of an appraiser to act for the other side. If the two appraisers could not reach a mutual agreement on the choice of umpires, it's back to the judge to have an umpire appointed.

    a. Trentmar Holdings Ltd. et al V. St. Paul Fire and Marine Company, Ontario Supreme Court, 1984. The policyholder's court-appointed appraiser refused to show up for the Appraisal session with the umpire. This appraiser felt he had "no instructions" so he was not prepared to participate. The 'Appraisal' went ahead and when the umpire and appraiser for the insurer reached consensus of opinion on damage issues, they executed an award document effectively concluding these issues as "two out of three" appraisers/ umpire had agreed. So, in spite of the lack of cooperation by one appraiser this matter concluded in a way that precluded further costs of litigation on damage issues.
    b. Saskatchewan Government Insce. V. Town of Nipawin et al, Sasktatchewan Court of Appeal, Dec. 31, 1998.
    c. A. Seed V. ING Halifax, Ontario Court of Appeal, Nov. 10, 2005. A number of delays led into the start of the appraisal process. When the appraiser for the insured was not granted an adjournment he walked out on the hearing. The Umpire and appraiser for the insurer reached an agreement on the amount of loss.

The Court of Appeal upheld that decision in spite of an argument raised at appeal that a failure to grant an adjournment created judicial unfairness.

14. **Can you argue about whom the either side picks as an appraiser?** Generally No. Either side can pick whomever they like. There was a novel case noted below where the insurer argued about the insured's choice of appraiser. It was a Manitoba case where selection must be a "disinterested" party. This meant to the judge someone who was "absent of bias, influence, impartial" etc. The judge did not interfere with the insured's choice of an appraiser.

    a. Ice Pork Genetics V. Lombard Canada et al, Menzies J., Court of the Queen's Bench of Manitoba, April 1, 2010

15. **Can you change your appraiser after the process has started?** Yes. But if the intention is to manipulate the process the umpire is not likely to agree to it. The umpire could seek court guidance on this, if needed. Fundamentally, there should be judicial fairness in how an appraisal is conducted.

    a. A. Seed V. ING Halifax, Ontario Court of Appeal, Nov. 10, 2005.

16. **How does a court choose an umpire?** Choosing an umpire should be given a wide definition. Some courts have leaned towards choosing someone who has expertise on the issues in dispute. For example, if it's a business interruption issue the lean might be towards appointing an accountant as the umpire. Cases have examined the 4 part test of our Supreme Court that relates to the qualifying as an expert witness. There are elements in this test that are helpful in examining an umpire's qualifications.

    a. Regina V. Mohan, Supreme Court of Canada, 1994 (expert test)
    b. Trudeau V. Royal Insurance Company, Ont. Court- General Division, Hurly P., March 3, 1999:
    "The applicant's concern is to avoid an umpire who apparent affiliation or relationships to the other side would raise an apprehension of bias. Yet, it proposes two candidates who, it would appear from reading between the lines of the correspondence, could not be said to have acted for one of the parties. The failure to agree on what by experience, appear to be capable candidates because of the fear or reasonable apprehension of bias leaves the Court with the option of appointing Mr. Gibson, whom, according to the evidence as being an umpire on many occasions involving appraisal issues. Mr. Gibson will therefore be named umpire…".
    c. Matti V. Wawanesa Mutual, Court of Queen's Bench, Alberta- Sullivan W.P., July 4, 2009.
    d. 265 Commercial Ltd. V. ING Insurance Co., Nova Scotia Supreme Court, Edwards F., Dec. 14, 2009.

17. **Does an umpire have to declare any previous dealings or relationships with either party to the appraisal process**? Yes! If, for example, the umpire is a loss adjuster he should be declaring any past dealings with the insurer who may be involved as a party to the process.

18. **Can a motion court judge's appointment of an umpire be challenged?** Yes. But in the cases noted, the insured was unsuccessful in appealing the original choice.

    a. Malholtra V. State Farm, Supreme Court of Canada, March 27, 2014.

b. Phyllum Corporation V. Dominion of Canada Insurance Co., Ontario Court of Appeal, Dec. 9, 2014.

19. **Can a motion court judge over-rule a request for Appraisal?** Yes. Rule 20 allows for a motion court judge to grant a summary judgment where there is NO genuine issue(s) that might require a trial. But a judge can decide that the best process would be a full trial where assessements of credibilty might be required to reach a fair and just determination. Of interest, in the case at hand, the parties agreed that if the motion was not granted they would go to Appraisal to determine the amount of loss.

    a. 2129152 Ontario Inc. V Aviva Insurance Co., Ont. ONSC 4713, Justice C. Brown, Aug 23, 2017.

20. **Can an umpire hear "evidence" in an Appraisal session?** Generally speaking No! As mentioned in the article, the umpire can allow certain people into the room to provide information or assist in clarifying a point but usually there is no testimony under oath. An exception did take place in the case noted below. In that case, the court determined that the appraisers could hear testimony under oath and receive evidence by way of sworn affidavits.

    a. Royal Insurance Co. of Canada V. Brown (unreported), B.C. County Court, April 28, 1985.
    b. Peak V. Herald Insurance Company, 48 C.C.L.I., 210, 1991.

    In a recent decision of Agro's Foods Inc. et al V. Economical Mutual, Justice D.C. Braid, Ont., March 24, 2016, S.C. 2016 ONSC 1169 there was a motion brought forward including to stop the appraisal process. There were significant issues of coverage relating to wind damage on a barn structure. Did the "wear and tear exclusion" apply? During the motion, the judge heard conflicting expert evidence. And with the two sides being so far apart on the replacement cost the judge challenged whether the Appraisal process would achieve a quick settlement. The judge went on to order the matter to a trial in front of him and put together instructions and timelines for both counsel. In his decision the judge commented:

    > *"The umpire in an appraisal process is not required to hold a "fair hearing" and hear evidence, argument of counsel or any of the trappings that one would associate with an arbitration process: Krofchick v. Provincial Insurance Company (1978), 1978 CanLII 1304 (ON SC), 21 O.R. (2d) 805 (Div. Ct.). They are permitted to hear viva voce testimony under oath and receive affidavit evidence, but they are not required to do so."*

21. **Can a public adjuster's fees to a policyholder form part of the insured's claim**? This will depend, of course on the policy wording if the claim is being made via a 'professional fee's endorsement'. Many insurance contracts do allow for certain fees to be paid but they exclude public adjuster fees.

    a. 854965 Ontario Ltd. V. Dominion of Canada Insurance Co., Ontario Superior Court, Kennedy J., March 17, 2003.
    b. Hog Haven Inc. V. North Waterloo Farmer's Mutual, Ontario Superior Court, MacLeod C., Aug. 22, 2016.

22. **Can restrictions be placed on the umpire as to what methods might be used to determine the "amount of loss"?** For example, on an ACV argument can the umpire be instructed on what method (i.e. market value; RC less depreciation; income approach) to be used to arrive at the "amount of loss"? "No"!

    a. Barrett et al Vs. Elite Insurance Company, B.C. Court of Appeal, March 27, 1987.

    e. Greer V. Co-Operators, Ont. Superior Ct. of Justice, J. Shawghnessy, August 12,1999. In this decision the judge said:

> *"There is no clause in the insurance contract which must be interpreted by this court. I am satisfied that qualified appraisers are quite capable of making that determination or in the event of a dispute an umpire chosen by the appraisers can properly determine the matter. There is no question of law for this court to decide and there is no need to provide directions."*

    c. Sehdev Vs. State Farm, Ont. Court of Appeal, Feb. 20, 1991. Both of these cases affirmed the umpire's ability to choose the path he wanted to go along to determine the "amount of loss".

23. **How important is the role experts have in this process?** The intention of each appraiser is to get the umpire to agree with them on some or all of the issues. Umpires, like judges, are influenced by the "best evidence" that is brought before them. You cannot underestimate how important it is to back up your opinions with the right "experts".

24. **Does the Appraisal process provide the authority to direct an insurer to take salvage?** No! This is not something the 'Appraisal' section of the Act provides the power to determine.

    a. I.C.B.C. V. Dawd Holdings Ltd., B.C.S.C., Nov. 15,1988

25. **Is the finding of the process binding on everyone?** For the most part, Yes! Any result of the process can be subject to judicial review but the courts have consistently held that in the absence of "fraud, collusion or bias", the decision will stand.

    a. Trentmar Holdings Ltd. et al V. St. Paul Fire & Marine, Rosenburg J., Ont. High Court of Justice, May 14, 1984.

    b. Pfeil Vs. Simcoe & Erie Insurance Co., Sask. Ct. of Appeal, 1986 also affirmed an umpire's award was binding and could not be set aside except for "fraud, collusion or bias".

    c. Shinkaruk Enterprises Ltd. Vs. Commonwealth Insurance Co. et al, Sask. Ct. of Appeal, June 28, 1990.

    d. Parslow V. Pilot Insurance Co., Ont. Ct. (Gen. Div.), Feb. 5, 1999 is a case where two appraisers resolved the ACV on a building and contents without using an umpire. A lawyer for the policyholder challenged the result. A judicial review of the decision was demanded. A panel of three Ontario Court justices concluded:

> "*Wrongdoing by the appraisers has not been alleged or proved. We can see no reason to go behind the appraisal. The application is dismissed with costs…."*

e. Barrett V. Elite Insurance Co., Ontario Court of Appeal, March 1997.
f. Peace Hills V. Doolaege, Alberta Queen's Bench, Lovecchio S., March 23, 2005. This case DID result in an appraisal award being set aside. The judge explored the process that was followed in this matter and did not feel that it resulted in judicial fairness. The decision of Kane V. Board of Governors for UBC, Supreme Court of Canada, 1980 was used to test whether this case met the test of fairness and in this instance the judge felt it had failed.
g. DK Manufacturing V. CoOperators Insurance Company, Ont. S.C., J. Stinson, June 20, 206, ONSC 3983. A motion was filed to strike two actions filed against the insurer after an appraisal award had been issued. Reference to the Seed V. ING Halifax case, (2002) O.J. No. 1976 (SC) where "…*the case law is clear that an Umpire's ruling constitutes a final determination of the issue and is binding on all parties".* Once the award had been given no further sums were recoverable by the insured.

26. **If there is a subrogation action against a tortfeasor is the appraisal award considered valid proof of the amount of loss in that action?** Not necessarily so. There is no contract of insurance between the wrongdoer and the insured. The question of damages in a third party proceeding is not within the appraisal process.

    a. Verlysdonk V. Premier Petrenas Construction et al, Ontario High Court- Divisional Appeal –Saunders, Hollingworth & Sutherland, June 5, 1987

CONCLUSIONS

The general insurance market in Canada is a $45 billion business. It handles and settles a huge volume of claims without the need for litigation. Still, there are always going to be situations where there is a dispute as the "amount of loss".

The use of Appraisal or Dispute Resolution is gaining a broader use across Canada. But, it is hard to imagine how this ADR process, that has been part of our Statutory Conditions for so long has not been utilized on a more regular basis earlier in the dispute. You can observe by reviewing the many legal cases that this process has been triggered well along the journey of the claim.

Of additional interest is that there are no specific rules on how an Umpire should conduct this process. Individual umpires have developed their own style on how they get the job done but it always boils down to two of the three parties involved in this process reaching an agreement. The vast majority of appraisals are concluded in a quick, efficient, cost-effective manner. The actual results of the process are rarely appealed and the few that have been have not resulted in the decision being overturned.

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