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Umpires: Qualifications, etc.

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Cases Considered:

Matti v. Wawanesa Mutual Insurance Company, 2009 ABQB 451

This is a post about insurance, not baseball. Umpires decide certain types of financial disputes between property owners and insurance companies in particular circumstances. Insurance claims involve umpires when the insured and insurer disagree about the value of damaged or destroyed property or the amount of the insured's loss. The insured and the insurer each appoint an appraiser and the appraisers appoint an umpire. If the appraisers cannot agree on how to resolve the dispute, then the two appraisers submit their arguments to the umpire. The decision of two of those three persons decides the matter, which means, in effect, that the umpire decides. If the appraisers cannot agree on an umpire, then the insured or insurer can ask the court to appoint one. What qualifications should these decision-makers have? That question has not been the subject of much judicial consideration in Canada and so this decision by Mr. Justice W.P. Sullivan is a welcome one. But it still leaves open many other questions about insurance appraisals; they are a rather ill-defined process.

The facts and the law

In this case, the insured, Ryadh Matti, was unfortunate enough to have endured a sanitary sewer system back-up that soaked portions of his home's drywall, baseboards and flooring in November of 2007. He and his insurance company could not agree on the value of the damage that was caused by the sewer back-up. Therefore, they each appointed an appraiser under section 514 of the *Insurance Act*.

Section 549(2) of the *Insurance Act*, RSA 2000, c. I-3, contains the "Statutory Conditions" which are deemed to be part of every fire insurance contract in force in Alberta. Condition 11 is entitled "Appraisal." It states that in the event of a disagreement between the insurer and the insured as to the value of the property insured those questions shall be determined by appraisal as provided under the Act. Section 514 of the *Insurance Act* outlines, in very general terms, how an appraisal is conducted:

> 514 (1) This section applies to a contract, other than a contract of hail insurance, containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.
> (2) The insured and the insurer must each appoint an appraiser, and the 2 appraisers so appointed must appoint an umpire.

(3) The appraisers must determine the matters in disagreement and, if they fail to agree, they must submit their differences to the umpire, and the finding in writing of any 2 determines the matters.
(4) Each party to the appraisal must pay the appraiser that the party appointed, and each party must bear equally the expense of the appraisal and the umpire.
(5) If

(a) a party fails to appoint an appraiser within 7 clear days after being served with written notice to do so,
(b) the appraisers fail to agree on an umpire within 15 days after their appointment, or
(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

the Court may appoint an appraiser or umpire, as the case may be, on the application of the insured or of the insurer.

The purpose of this appraisal process is encourage settlement of insurance claims and expedite the trial process by providing the trial judge with a valuation based upon the expertise of an appraiser or umpire: *O'Brien v. Madill*, [1992] I.L.R. 1-2828 (Alta. Q.B.). In this case, however, the appraisers appointed by Mr. Matti and Wawanesa could not agree on the value of the damage. The contentious issue was simple enough: did the drywall, baseboards and flooring soaked by the sewer back-up need cleaning or replacing? The appraiser appointed by Mr. Matti believed that replacement of the damaged property was necessary. The appraiser appointed by Wawanesa believed that the damaged property only required cleaning.

The issue

Because the party-appointed appraisers disagreed, they needed to submit their differences to an umpire that they needed to appoint. However, they could not agree on an umpire either. The appraiser appointed by Mr. Matti nominated a lawyer with extensive experience in alternative dispute resolution. Because an umpire has a quasi-judicial role, they argued an umpire needed legal knowledge and experience to ensure impartiality. Wawanesa did not think the nominated lawyer (and perhaps any lawyer) was qualified to be the umpire because s/he had no expertise in determining if property had been damaged by sewer back-up. The appraiser appointed by Wawanesa nominated an appraiser with extensive appraisal experience and a strong background in the insurance industry. They thought an umpire needed expertise in the field at issue. Mr. Matti did not think this appraiser (or perhaps any appraiser) was qualified because he thought that s/he had a personal connection to Wawanesa.

The parties therefore applied to the court under section 514(5) of the *Insurance Act*. On the day of their appearance before Justice Sullivan, each party-appointed appraiser put forward another nominee for umpire. However, Mr. Matti's appraiser merely nominated another lawyer with a background and experience similar to that of its first lawyer-nominee and Wawanesa's appraiser merely nominated another appraiser with experience and a background similar to its appraiser-nominee. Not surprisingly, each party rejected the other's nominee for umpire, leaving it up to the court.

The decision

However, although section 514(5) states that "the Court may appoint an … umpire … on the application of the insured or of the insurer," Justice Sullivan did not do so. Instead, he directed

the parties on what type of umpire they needed to choose. He told them what kind of expertise and experience an umpire needed to have to determine their particular dispute and left it to the parties to agree on who to appoint. If they could not do so, they could apply to the court again.

Although Justice Sullivan's decision not to appoint an umpire himself risks increased litigation, delay and cost between these two parties, it is in keeping with the wording of the statute, the parties' conduct before him, and the spirit of the alternative method of dispute resolution specified by the *Insurance Act*. Section 514(5) states that the court "may" appoint an umpire on application of the parties; it is optional, not mandatory. On the date of the hearing, the parties' appraisers were still nominating possible umpires and apparently still trying to agree and Justice Sullivan's direction about qualifications gives them another chance to do so. The appraisal method allows the insured and insurer a measure of autonomy and control over the settling of their dispute and Justice Sullivan's order respects party autonomy.

What qualifications should an umpire have to decide whether property damaged by sewer back-up needed replacing or cleaning? That was the concrete question Justice Sullivan considered. Thus, the qualifications Justice Sullivan thought were appropriate were far more specific than those contemplated by the parties (quasi-judicial decision-making or insurance decisions in general).

Justice Sullivan held (at para. 18) that "the key for appraisers when nominating an umpire is to determine the issue that cannot be resolved, and then find a person with sufficient expertise in the field to act as an umpire to resolve the dispute." That meant that both of the party-appointed appraisers' nominees for umpires had the wrong qualifications. A legally trained umpire would only be necessary if a decision-maker would need legal expertise to understand the issue. (And because umpires appointed under section 514 of the *Insurance Act* cannot interpret an insurance contract, it is difficult to see why someone with only legal and ADR expertise would ever be appointed.) An appraiser would only be necessary if the parties or their appraisers had agreed on the remedy — replacement or cleaning — but could not agree on the cost of that remedy. In this case, however, when the disagreement was about the necessary remedy, Justice Sullivan directed that an appropriate umpire would have expertise in the field of "home rehabilitation or home reclamation" (at paras. 21, 23 and 24). Thus someone with experience in evaluating what it takes to restore homes after fires, floods and other disasters was what was required. And that someone had to be capable of acting neutrally as well (at para. 22).

Open questions about umpires

As Justice Sullivan noted (at para. 12) there is "very little legal guidance as to what the property qualifications of an umpire are." There is also very little guidance on other aspects of an umpire's task that are related to the question of qualifications. This is so despite the fact that provisions similar to those in Alberta's *Insurance Act* are common across North America, in either statutes or policies. There has been some recent writing on the topic of property insurance appraisals in the United States. For reviews of the issues and the U.S. case and statutory law on the subject, see, generally, Jonathan Wilkofsky, *The Law and Procedure of Insurance Appraisal* (Ditmas Park Legal Pub. 2003), and, for a more critical analysis (based at least in part on responses to hurricane Katrina in 2005), Timothy P. Law and Jillian L. Starinovich, "What is it Worth? A Critical Analysis of Insurance Appraisal" (2006-2007) 13 Connecticut Insurance Law Journal.

What are an umpire's qualifications?

The Saskatchewan Court of Appeal decision in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co*. (1990), 71 D.L.R. (4th) 681 is one of only a few cases to discuss what qualifications an *Insurance Act* umpire should have. They indicated, in an apparently blanket statement, that the appropriate expertise was expertise in the sphere of property values. However, Justice Sullivan noted (at para. 14) that the issue in *Shinkaruk Enterprises* was a question about the value of the damage. He distinguished *Shinkaruk Enterprises* on this basis and stated that the expertise required of an umpire is dependent on the factual dispute between the parties. Thus, if the dispute is about the value of the damage caused, as it was in *Shinkaruk Enterprises*, then an umpire should have expertise in the field of property valuation. If the dispute is about the appropriate remedy for restoring property, as it was in *Matti*, then the umpire should have expertise in property restoration.

In addition to expertise in the subject matter of the parties' dispute, an umpire must also be capable of acting impartially. An umpire cannot have a pecuniary interest in the dispute or be biased or partial toward either party. The issue of bias was the key issue in *McPeak v. Herald Insurance Co. et al*., [1991] I.L.R. 1-2774. The umpire in that case denied that he either knew or had business dealings with either party but the plaintiffs knew the umpire and his wife and had been involved in real estate transactions with them. Justice Andrekson held that the relationship between the plaintiffs and the umpire, and the umpire's failure to disclose it, gave rise to a reasonable apprehension of bias and a reasonable apprehension of bias was sufficient to set aside the decision of the umpire.

Bias, or at least a perception of bias, is always a problem when one of the parties to a dispute is a repeat player. Insurance companies are often aware of the past decisions of umpires and appraisers, but policy holders do not have easy access to that information. The disparity in knowledge and familiarity with the appraisal process may create a perception that the process favours the insurer. For more on this issue, see Judith A. Snider and C. Kemm Yates, "Alternative Dispute Resolution": Use and Abuse of Information and Specialized Knowledge (1995) 33 Alta. L. Rev. 301.

What background is necessary for expertise?

The question of what makes a person an expert in a field was also addressed by Justice Sullivan. He found (at paras. 15-16) that the dictionary definition of an expert as someone with "special knowledge or skill in a subject" was in accord with a portion of the Supreme Court of Canada's requirements for expert witnesses, namely, that they must "have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (citing *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 31). Applied to the *Insurance Act* appraisal context, an umpire's experience may arise either from special training or from sufficient experience.

Is an umpire an arbitrator?

Is an umpire under the *Insurance Act* an arbitrator? The answer to this question is important not just for the qualification issue, but also in determining the procedures to be followed, the extent of judicial review, etc. Appraisals have often been confused with arbitration. Both are alternative dispute resolution methods — alternative to court procedures. Both are intended to effectively and cost efficiently resolve disputes.

In *The Law and Practice of Commercial Arbitration*, Richard A. McLaren and Earl E. Palmer (Toronto: Carswell, 1982) (at page 1) observed that arbitration legislation in Canada does not define when a proceeding is an arbitration so as to bring it within the scope of the statutes that deal with either domestic or international arbitrations. Instead it has been left to the courts to determine when a proceeding is an arbitration or a valuation. The courts have developed criteria by which arbitration can be distinguished from valuation — a functional approach — rather than set out a definition of arbitration.

Much of the argument in *McPeak v. Herald Insurance Co. et al*. and *Precision Drilling Corp. v. Matthews Equipment Ltd*., 2000 ABQB 499 was directed toward this issue. Both decisions canvassed the leading case on the distinction between an arbitration and a valuation, *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564. In *Sport Maska*, the respondents had prepared an erroneous valuation. If the valuation could be characterized as an arbitration, then in the absence of fraud or bad faith, the respondents could not be sued. If, however, the respondents performed simply a valuation function, then they could be sued for negligence.

After a thorough review of the law, Justice L'Heureux-Dubé noted (at page 585) that the common law has recognized two concepts as characteristic of arbitration: the existence of a dispute and the intent of the parties to submit that dispute to arbitration. On the requirement of an existing dispute, she quoted with approval (at page 588), the following statement by Lord Simon in *Arenson v. Casson Beckman Rutley & Co*., [1975] 3 All E.R. 901 at 912: "[I]n my view the essential prerequisite for him to claim immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve." On the second aspect, the intention of the parties to submit their dispute to arbitration is to be inferred from the function entrusted to the decision-maker: "The greater the similarity existing between the reference to the decision-maker and the judicial process, the greater the likelihood that the reference will be characterized as an arbitration." Justice L'Heureux-Dubé outlined (at page 604) a non-exhaustive list of factors which, if present, would tend to suggest that arbitration was intended:

- the parties have the right to be heard, to argue and to present testimonial or documentary evidence;
- lawyers are present at the hearing;
- reasons for the award are required and that the decision is final and binding on the parties;
- the decision-maker has to decide between opposing arguments presented by the parties on a given point as opposed to merely supplying a necessary component of the contract for example;
- the decision-maker is called upon to choose among the various positions put forward by the parties as opposed to making a decision in light of his personal knowledge;
- impartiality is demanded.

In the context of an *Insurance Act* appraisal, the Saskatchewan Court of Appeal, in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co*. decided that as a result of the reasoning in *Sport Maska* and in light of its previous decisions in *Pfeil v. Simcoe & Erie General Insurance* (1986), 24 D.L.R. (4th) 752 and *Gorieu v. Siminot* (unreported April 15, 1986), the law in that province was settled: an appraisal under Saskatchewan's *Insurance Act* is a valuation and not an arbitration.

J. Brian Casey, in *International and Domestic Commercial Arbitration* (Scarborough: Carswell, 1993) (at 1.4(d)), notes that valuation is used to avoid disputes, rather than to settle or decide disputes that have arisen. In his opinion, a valuator is not an arbitrator and is not required to hear any evidence from the parties because a valuator brings his or her own skills and judgment to provide an answer to a question.

Although Justice Andrekson in *McPeak v. Herald Insurance Co. et al*. was not required to decide the question, Justice Mason in *Precision Drilling Corp. v. Matthews Equipment Ltd* was and did. He held that "[v]aluation utilizes the expertise and knowledge of an expert to provide an expert opinion as to value or assessment in order to avoid a dispute. The key factor is that the third party makes a decision founded on personal expertise, rather than an assessment of evidence and argument presented by the parties."

If an umpire — a valuator — is differentiated from an arbitrator because of their ability to make a decision based on their personal knowledge, then Justice Sullivan's approach in *Matti* must be correct. The umpire must have the expertise in the subject matter of the dispute in order to decide based on his education and experience, rather than based on the appraisers arguments.

What procedures, if any, must an umpire follow in determining value?

If the procedural formalities of arbitration are inapplicable, how should an appraisal proceed before an umpire? There is nothing in Alberta's *Insurance Act* about such matters as hearings, or evidence, or the parties' ability to appear, or viewing the property. Section 514(3) merely states that the appraisers "must submit their differences to the umpire, and the finding in writing of any two determines the matters." Thus, the function of an umpire appears to be to resolve the difference between the party-appointed appraisers. According to cases that describe the procedures used, the umpire meets with the appraisers and they correspond with him to define and narrow the areas of disagreement and to make formal written submissions. However, the discussion of the difference between an arbitrator and a valuator made it clear that an umpire is to decide based on his or her own expertise, and not on the arguments of the appraisers. It is the Act's requirement that the umpire and one appraiser need to agree that would necessitate the involvement of both of the appraisers and their arguments.

In *Pfeil v. Simcoe & Erie General Insurance Co*, the Saskatchewan Court of Appeal decided that the similar appraisal process in their *Insurance Act* was a valuation, and not an arbitration. As such, the Court of Appeal also held that the proceedings did not require that there be a hearing: "The function of the appraisers is to arrive at a decision on the basis of their own skill, knowledge and expertise. There is no obligation to hold and conduct a hearing."

If appraisals were formalized with hearings and the like they would meet more of the criteria set out by Justice L'Heureux-Dubé in *Sport Maska* and might become arbitrations. In *Precision Drilling Corp. v. Matthews Equipment Ltd*. Justice Mason considered (at para. 27) whether a valuator can hear the evidence of witnesses without crossing into the role of an arbitrator. He refers to an old Supreme Court of Canada decision in *Campbellford, Lake Ontario and Western Railway Company v. Massie* (1914), 50 S.C.R. 409 at 412-13. That court found that valuers who were required to fix the compensation for damage to lands were entitled to view the premises and decide the question submitted, with or without the aid of witnesses not under oath. There is some suggestion in *Precision Drilling* and the case it relies upon therefore that the presence or absence of procedural formalities is a relatively unimportant issue; what count in valuations is whether or not the umpire makes his or her decision based on personal experience. If an umpire cannot

make a decision based on the evidence or arguments of the appraisers without becoming an arbitrator, then why should he or she hear much evidence or arguments? Mr. Justice Lovecchio's discussion of the procedural formalities required of administrative decision-makers in *Peace Hills General Insurance Co. v. Doolaege*, 2005 ABQB 217 therefore seems misplaced.

Does an umpire have jurisdiction to determine legal questions?

On the issue of appointing a lawyer or other person with legal training to be an umpire, Justice Sullivan indicated (at para. 19) that their expertise would only be required when the issue between the parties requires legal expertise to understand the issue. However, it may be that this type of expertise is never required. A question arises as to whether or not an umpire has the power to decide legal questions which might be necessary to determine the value of property. Can they determine all legal and factual questions which might be necessary in order for them to determine the value of the property insured?

In *Peace Hills General Insurance Co. v. Doolaege*, Mr. Justice Lovecchio held (at para. 54) that the role of the umpire is to determine values, not legal issues. However, he had little more to say about the question. In *Shinkaruk Enterprises Ltd. et al. v. Commonwealth Insurance Co. et al.* Chief Justice Bayda considered the matter at some length. He concluded that an umpire cannot deal with legal questions:

> He should have left to the trial judge the function of resolving all legal questions. Instead, he appears to have resolved whatever legal questions arose from an examination of the Saskatchewan *Insurance Act*, an application of the appropriate jurisprudence and a construction of the insurance policy. He appears to have resolved, impliedly if not expressly, whether the insured's loss as contemplated by the policy consisted of the loss of the entire building or only the loss of that portion that was actually damaged. He appears to have determined, impliedly if not expressly, whether in the light of the terms of the policy (which are quoted below), the statute law and the common law, the insured was entitled to recover as his loss the value placed on the "insured property" immediately before the fire (i.e., the market value before the fire), the cost of replacing the entire building with an allowance for depreciation, the cost of replacing the entire building without an allowance for depreciation, or the cost of repairing only that portion that was damaged with an allowance for depreciation, or the cost of repairing the damaged portion without an allowance for depreciation. These are all legal questions not within the umpire's province.

That reasoning and conclusion was approved of by the majority of the Alberta Court of Appeal in *Miller v. CIGNA Insurance Co. of Canada*, 2004 ABCA 67, although that case involved statutory condition 15 (not 11) and a hail insurance policy. In *Miller*, the court held (at para. 3) that the question of whether damage to the seed set can fall within the scope of the policy is a question of law which necessarily involves an interpretation of the scope of the subject insurance contracts. As such, and as stated in *Shinkaruk*, "[t]here is nothing in the express wording or in the intent or object of the statutory provision which would justify or even suggest leaving to an appraiser or an umpire disputed legal questions ... about which there is no reason to believe the appraiser or umpire would have any expertise."

Can the parties enlarge an umpire's authority with a written agreement to submit to arbitration?

There appears to be nothing in the *Insurance Act* to prevent the insurer and insured from entering into an arbitration agreement that gives the appraisers and umpire broader authority than does the Act. However, in *Shinkaruk*, the Saskatchewan Court of Appeal held that going beyond the valuation of the loss to make a disposition of the entire controversy between the parties went beyond the jurisdiction of the umpire and removed the binding nature of the umpire's decision.

To the contrary is *Andrews v. General Assurance Co. of Canada*, 16 Alta. L.R. (3d) 205 21 C.C.L.I. (2d) 16. The case involved an application for a declaration that the award of an alleged arbitration panel was final and binding, but the process leading to the award started as an appraisal under the *Insurance Act*. Justice Fruman held that the evidence did not disclose an intention between the parties to convert the appraisal procedure into an arbitration to be subject to the provisions of the *Arbitration Act*. She did not, however, cast doubt on the idea that the parties could have converted the process. The issue of whether the insured and insurer may convert the appraisal process to an arbitration with a written submission is therefore an open one.

Is an umpire's decision subject to judicial review?

An umpire's decision is obviously subject to judicial review, given the cases cited in this post that have ruled on other issues. This question was discussed at some length by Justice Wacowich (as he then was) in *O'Brien v. Madill*. One of the issues before him was whether an appraisal of the value of damage to a roof was final, binding and conclusive with respect to the quantum of loss claimed. The matter had been considered earlier by Justice Medhurst in *L. & A. Holdings Ltd. v. Prudential Assurance Company* (1978), 6 Alta L.R. (2nd) 125 (D.C.), who had held that if the appraisal was done in compliance with the *Insurance Act*, then it was conclusive and binding. For Justice Wacowich, that merely raised the question of when an appraisal is not in compliance with the *Insurance Act*: "Does an unreasonable appraisal mean that the appraisal is no longer in compliance . . . and therefore not binding? Is something further required amounting to misconduct of the appraiser or umpire to constitute non-compliance?"

Justice Wacowich noted that the Saskatchewan Court of Appeal had conducted a detailed analysis of this issue in *Pfeil v. Simcoe & Erie General Insurance Co*. They decided in *Pfeil* that an appraiser's determination of value was binding absent fraud, collusion, bias or disqualification by way of interest or lack of impartiality. That decision was elaborated upon in *Gorieu v. Simmet* (unreported, Saskatchewan Court of Appeal, April 15, 1986), where the failure of an umpire to give both appraisers the opportunity to participate in the compilation of the umpire's appraisal rendered the umpire's appraisal non-binding. These two Saskatchewan Court of Appeal decisions were summarized in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.* (at 688) by Chief Justice Bayda, and quoted by Justice Wacowich in *O'Brien v. Madill:*

> These two decisions should be interpreted to mean that the validity of an appraisal is subject to challenge on the ground that the umpire (or appraisers, as the case may be) had no power (i.e., jurisdiction) to do what he (or they) did. Fraud, collusion, bias or disqualification by reason of partiality will deprive him of that power. It is elementary that the same result will follow where the umpire does something which the empowering statute under which he is purporting to act does not empower him to do.

Justice Wacowich therefore concluded that the state of the law in Saskatchewan was reasonably settled with respect to an umpire's authority:

> The decision resulting from the appraisal process is prima facie binding unless there is proof to indicate the appraisers or umpire exceeded their jurisdiction. An appraiser or umpire may exceed their jurisdiction through fraud, collusion, bias, partiality or defects in the appraisal process itself. What is not clear from the Saskatchewan cases is whether an unreasonable valuation robs the appraiser or umpire of jurisdiction.

Justice Wacowich did not need to decide if an unreasonable valuation robs the appraiser or umpire of jurisdiction, and did not do so. He did, however, note that the Saskatchewan cases went a long way towards answering the question left open by *L. & A. Holdings Ltd. v. Prudential Assurance Company:* when is an appraisal process in compliance with section 514 of the *Insurance Act*? Subsequent Alberta cases appear to have accepted Justice Wacowich's statement of the law in Saskatchewan as being an accurate statement of the law in Alberta as well.