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INSURANCE ACT APPRAISALS - A COURT'S GUIDE ON MECHANICS

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The Ontario Superior Court of Justice recently examined the interaction of various provisions in the *Insurance Act*, R.S.O. 1990, c.1.8 (the "Act") for the purpose of determining multiple issues before it that arose in the context of a statutory appraisal under the Act and a series of lawsuits commenced by insureds against their insurer for tornado damage done to their homes. In *Campbell v. Desjardins*, 2020 ONSC 6630 the court provides guidance to insurance professionals, lawyers, and adjusters on the various processes involved in an appraisal. Given the similarity of legislation concerning appraisal or dispute resolution processes across Canada, *Campbell* offers guidance to the entire nation.

The Facts

In *Campbell*, three families (collectively, the "Insureds") each owned homes that were damaged by a tornado that hit the city of Ottawa in September 2018. As a result of the tornado, two of the homes were deemed total losses and the other sustained significant damage.

All three losses were covered and in order to determine the amount of the losses the Insurer used both internal and external construction and property restoration personnel. The Insureds however chose to use different parties to assess and rebuild or repair their homes. While significant funds had been advanced to the Insureds under their respective dwelling, contents, and additional living expense coverages, the amount required to rebuild or repair their homes (which processes remained underway), remained at issue. In order to resolve these cost issues, and despite the fact that final proofs of loss had not been provided, appraisals under the Act were triggered by either the Insurer or the Insured.

Concurrently with the appraisal process, the Insureds commenced suit against the insurer. It was in the context of those suits that procedural disputes that arose within the appraisal processes came to be addressed by the court.

The Ruling

While *Campbell* stands as recommended reading due to its extensive overview of the appraisal process, the court's rules was focussed on three issues:





1. A party's right to retain a representative of its choice;
2. An insured's right to rely upon actual costs incurred as opposed to estimates of repair costs; and
3. Whether legal proceedings should be stayed until appraisal process is concluded.

In respect of the first issue, the court found that there was no restriction on a party's right to retain the representative of its choosing. In doing so it relied on the lack of limitation in the Ontario legislation's language. It also considered other jurisdictions' limiting language (ex. BC, NS, PEI and NL) and the overarching role of a representative being to be an advocate for its client. The representative's role was to be distinguished from an umpire's which was to weigh the competing positions advanced by the representatives and make a determination. As such, only the umpire must be impartial and independent.

In respect of the third issue, the court gave considerable weight to the consumer protection objective of appraisal legislation. This objective was found to outweigh the legislative requirement that an insured deliver a sworn proof of loss "as soon as practicable". The court held that an insured is entitled to rely upon actual costs incurred, provided that the insured has acted diligently and in good faith throughout with full transparency to the insurer. So long as an insured did not act in a manner that impeded the insurer's ability to investigate, monitor, and assess the progress of the repair or rebuild the insured was not running afoul of the requirement to deliver a proof of loss, final or interim. In the instant case no such impeding had occurred and thus the Insureds were entitled to conclude their repairs prior to submitting a proof of loss.

Finally, the court followed a long line of jurisprudence that stood for the proposition that a stay of proceedings would not be granted when a legal action entailed claims other than a valuation of lost property. Since the pleadings, as in most cases, disclosed claims beyond the valuation of the lost property (ex. breach of contract and fiduciary duty, bad faith, etc.) the lawsuits were allowed to proceed concurrently with the appraisals.

Practical Considerations for Insurers, Adjusters and Property Claims Professionals

As referenced above, *Campbell* stands as recommended reading for its overview of the appraisal or dispute resolution process. Caution however must be exercised as there are nuanced differences in the legislation across multiple Canadian jurisdictions. Just one of these differences may be found in limitations on the parties' right to choose their representatives.

We consider the court's decision to allow an insured to rely on actual costs instead of estimates in its proof of loss as a valid signal to insurers that the need for certainty and security of its insureds outweighs the need for expediency in this type of process. In situations where an insured wishes to delay the delivery of a proof of loss until actual costs are incurred insurers are well within their rights and well advised to work





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closely with the insured in respect of assessing the work being done and the costs for that work. Again, requirements and timing of proof of loss delivery varies across jurisdictions but the consumer protection aspect of this legislation is universal.

If correctly and scrupulously followed, the appraisal or dispute resolution process remains a cost-effective and efficient tool to resolve disputes regarding the value of an insured's loss or damage due to an insured risk.

Should you have any questions about this article, contact Insurance Lawyer, Ola N. Stoklosa here.



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