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ONTARIO COURT OF APPEAL CLARIFIES APPRAISAL/DISPUTE RESOLUTION PROCESS

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Ontario Court of Appeal Clarifies Appraisal/Dispute Resolution Process

The recent Ontario Court of Appeal decision in ***Desjardins General Insurance Group v. Campbell*** 2022 ONCA 128 ("***Campbell***") clarified the appraisal process outlined in Ontario's *Insurance Act* (the "Ontario Act") to address disputes between insured and insurer regarding the value of an insured loss. Given the similarity of the legislation across the country, ***Campbell*** provides guidance for the interpretation and application of appraisal and dispute resolution legislation across Canada.

In British Columbia, the dispute resolution process is outlined in section 12 of the British Columbia *Insurance Act* (the "BC Act"). In BC, as in Ontario and other jurisdictions, when parties disagree about the value of an insured loss, they each appoint a "dispute resolution representative" or appraiser. If the representatives cannot agree on a value the dispute is submitted to an umpire and the appraisers each provide that person with their valuations. The written determination of any two of the appraisers and umpire determines the valuation for the insured loss.

One difference between the BC Act and Ontario Act is that the BC Act does not allow an insurer or insured, or their respective employees, to act as a representative.

Both the BC Act and the Ontario Act are silent on the role of the umpire. The practice in some jurisdictions, including British Columbia, is that the umpire decides the value of the insured loss by picking any reasonable amount they deem appropriate based on the evidence before them, regardless of the appraisal values given by the dispute resolution representatives.

In ***Campbell*** however, the Court addressed the role of appraisers and umpires. Appraisers do not have to be impartial and should be collaborative in their approach. Umpires are expected to be impartial and, in deciding disputes between appraisers, should choose one appraisers valuation over the other. The Court also concluded the appraisal process is not an adjudicative tribunal.

In light of ***Campbell***, it may be that parties in British Columbia and other jurisdictions must change how they conduct appraisals or dispute resolutions so that umpires select one of the valuations put before them,

rather than allowing umpires to choose whatever valuation they deem is appropriate.

Background

In ***Campbell***, the Campbell family (the "Insureds") disagreed with their insurer on the value of the cost to repair their home following a tornado. The insurer originally appointed the adjuster on the file as an appraiser and the Insureds appointed their lawyer. The appraisers in turn appointed an umpire.

An issue arose as to whether the lawyer could continue as an appraiser while being counsel on record for the Insureds' "bad faith" claim against the insurer. Eventually, the insurer brought an application to remove the lawyer as an appraiser, arguing the appraisal process was an administrative tribunal and that appraisers are required to be impartial.

The application judge agreed with the insurer that the appraisal process is an administrative tribunal, however ultimately ordered the Insureds could continue to have their lawyer as an appraiser, as there was no requirement for an appraiser to be impartial.

Ruling

The Court of Appeal in ***Campbell*** agreed with the application judge that the Insureds could use their lawyer as an appraiser as there is no requirement of impartiality, however it clarified an appraiser's and umpire's role in the appraisal process and overruled the application judge's finding that the appraisal process was an administrative tribunal.

The Court found that while the role of an appraiser is not to be disinterested or independent, that does not mean they are to be advocates. The purpose of the appraisal process is to provide an expeditious and cost-effective means for the settlement of insurance indemnity claims. The role of an appraiser is to attempt, in good faith, to reach a compromise with the other appraiser. While this involves some advocacy for each side to advocate their valuation, overall the role is more collaborative than adjudicative. Further, the Court found that the appraisal process itself provides a constraint on the appraisers' conduct because, if the appraisers are not objective, they harm their position by losing credibility in the eyes of the umpire.

The Court also noted that umpires are expected to choose one appraiser's valuation over the other, as the umpire is the tie-breaker if the appraisers cannot agree. This structure places a premium on each side to be reasonable and reach agreement and encourages compromise and collaboration between the parties as part of the process.

Finally, the Court found that the appraisal process is not an administrative tribunal. Tribunals are quasi-

judicial decision-making bodies tasked with determining issues on the facts and law in each case before them. There is no indication in the Ontario Act that the appraisal process is adjudicative or quasi-judicial in nature; rather the process is based on discussion and sharing of expertise in valuation. This finding supports that umpires are not intended to be akin to judges in sorting through the evidence before them in order for the umpire to exercise their own discretion in reaching a valuation.

Practical Considerations

With ***Campbell*** detailing the expectation that the appraisal or dispute resolution process is collaborative, and that an umpire is expected to choose one of the valuations before them, parties should come to the table with the fairest, most reasonable valuations possible.

While a dispute resolution representative can advocate for the party that appointed them, if they provide a wholly unreasonable valuation, they risk the umpire disregarding their position entirely in favour of the opposing representatives since umpires are expected to pick one valuation rather than any amount the appraiser deems appropriate. The best way to mitigate this risk is to provide reasonable allowances for the other party's position, which incentivizes parties to be reasonable.

Furthermore, approaching the dispute resolution process in an even-handed manner serves to keep costs down and provide for fast resolutions to disputes between insurer and insured. Thus, the findings in ***Campbell*** should lead to dispute resolution processes becoming more cost-effective and efficient.

For more information about this article, contact the author, Sabdeep Sidhu here.