CLARK WILSON LLP
BC's Law Firm for Business

Appraisals Under B.C.'s *Insurance Act*: Practice and Procedure

by

Nigel Kent
Clark Wilson LLP
tel. 604.643.3135

and

Steven Donley
Clark Wilson LLP
tel 604.891.7716

September 2008

** An earlier version of this paper was prepared by another Clark Wilson lawyer, Robert J. Lesperance.*

TABLE OF CONTENTS

APPRAISALS UNDER B.C.'S *INSURANCE ACT*: PRACTICE AND PROCEDURE

In 1994, British Columbia's *Insurance Act* was revised to provide for a *mandatory* appraisal procedure in cases of certain quantum disagreements between insurers and insureds. Over the past 14 years the appraisal process has become an important mechanism for resolving many disagreements between insurer and insured, largely due the efficiency and cost-effectiveness it provides.

On April 30, 2008, the B.C. government introduced Bill 40, the *Insurance Amendment Act, 2008*, a 91-page document that will substantially change a number of key rules in B.C. insurance law. The proposed amendments, representing the first substantive revision to the *Insurance Act* since the 1960s, seek to harmonize the act with contemporary insurance practices in B.C. and across Canada.

Presently, the *Insurance Act* carefully regulates key insurance contracts entered into by consumers (fire, life, accident & sickness, and automobile) while adopting a "hands-off" approach to general insurance typically negotiated by commercial parties of more equal bargaining strength. This approach is somewhat inconsistent with the multi-peril policies offered by insurers in today's market[1]. Hence, the Bill 40 amendments, if passed in proposed form, will result in a softening of this distinction and extension of the consumer protection provisions into a broader variety of general insurance areas.

Enactment of Bill 40 will also see a revision of the Part 5 appraisal process into a dispute resolution process of broader application. For the assistance of those currently involved in the appraisal process, this paper will briefly review the current appraisal process and the proposed dispute resolution process under Bill 40.

1. THE CURRENT APPRAISAL PROCESS

THE STATUTORY PROVISIONS

Part 5 of the *Insurance Act* applies to "contracts of fire insurance" and section 126 of the Act deems certain statutory conditions to be part of every such contract in force in the province. Statutory condition 11 deals with appraisal and provides:

> 11. 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 must 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,

[1] For example, see the Supreme Court of Canada's criticisms in *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada* [2003] 1 S.C.R. 433 and *Churchland v. Gore Mutual Insurance Co.* [2003] 1 S.C.R. 445.

> and independently of all other questions; but there is no right to an appraisal until a specific demand for it is made in writing and until after proof of loss has been delivered.

The provision applies to "disagreements" respecting "value of the property insured" or "the amount of the loss". Any such disagreements must be determined by the appraisal process stipulated in the *Insurance Act*. However, the right to an appraisal does not arise until two conditions have been met, namely, the delivery of both a written demand and proof of the loss.

Since the 2003 Supreme Court of Canada decisions in *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada*[2] and *Churchland v. Gore Mutual Insurance Co.*[3], it has been settled law that Part 5 of the *Insurance Act* applies only to single-risk "contracts of fire insurance". Multi-risk policies, even though they may provide insurance against fire, are governed by Part 2 of the *Insurance Act* along with all other general insurance policies that do not fall into a specific category for the purposes of the Act. As the section 126 Statutory Conditions do not apply to Part 2 policies, the appraisal process is not automatically incorporated into multi-peril policies.

As discussed below, the insurer may, under subsection 9(1)(c) of the *Insurance Act*, adopt the appraisal process as a mechanism for resolving any disagreement by expressly stating so in the contract of insurance. Since *KP Pacific Holdings Ltd.*, it has become common practice for multi-risk insurance policies to adopt the appraisal process for claims arising from fire.

The appraisal procedure referred to in Statutory Condition 11 (be it incorporated into the contract as a matter of law or otherwise) is found in section 9 of the *Insurance Act* (formerly section 11) which provides as follows:

> 9 (1) This section applies to a contract that
>
> (a) provides insurance against loss or damage
>
> (i) by fire, lightning or explosion, or
>
> (ii) from any of the other perils referred to in section 120,
>
> (b) provides insurance against loss of rents or profits or loss from business interruption, resulting from a peril referred to in paragraph (a), or
>
> (c) contains a condition, statutory or otherwise, that requires that a disagreement in respect of specified matters be determined by appraisal.

[2] [2003] 1 S.C.R. 433
[3] [2003] 1 S.C.R. 445

(2) An insurer must give notice to an insured of the availability of the appraisal process established by this Act within 21 days after the insurer becomes aware that,

(a) in respect of a contract referred to in subsection (1) (a) or (b), there is a disagreement between the insurer and the insured as to the value of the property insured, the value of the property saved or the amount of the loss, or

(b) in respect of a contract referred to in subsection (1) (c), there is a disagreement between the insurer and the insured as to a matter for which an appraisal is required in the contract.

(3) The value or amount in dispute in a disagreement referred to in subsection (2) (a) or the matter in respect of which there is a disagreement referred to in subsection (2) (b) must, unless the insurer and the insured are able to resolve their disagreement, be determined by an appraisal under this section.

(4) An appraisal under this section must not be conducted until

(a) the insured has delivered to the insurer a proof of loss, and

(b) one of the parties to the disagreement has delivered to the other a written demand for an appraisal.

(5) An appraisal must be conducted under this section

(a) before any recovery is made under the contract,

(b) independently of any other question, and

(c) whether or not the right to recover on the contract is disputed.

(6) For an appraisal under this section, the insured and the insurer must each appoint an appraiser, and the 2 appraisers appointed must appoint an umpire.

(7) 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.

(8) Each party to the appraisal must pay the appraiser appointed by that party and must bear equally the expense of the appraisal and the umpire.

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

The majority of insurance policies in today's market contain various conditions requiring certain disagreements to be determined by appraisal (i.e. triggering section 9(1)(c) of the Act). Consequently, the mandatory appraisal process plays an important role beyond property valuation in respect of the policies specified in sections 9(1)(a), (b) and Part 5 of the Act.

THE APPRAISAL PROCEDURE

The legislation requires the insurer to notify the insured of the availability of the appraisal process within 21 days after the insurer becomes aware of the disagreement between the parties respecting the value of the insured property, the amount of the loss or any other matter for which the policy requires an appraisal. The notice does not have to be in writing although it would no doubt be prudent to adopt such a procedure. Similarly, although not technically required, it would also be prudent for the insurer to ensure that the notice is received i.e. registered mail, a follow-up phone call, etc.

In order to invoke the appraisal process, the following conditions must be satisfied:

1. there must be a disagreement between the insured and insurer respecting a matter required by the policy to be resolved through appraisal;

2. there must be a written demand for an appraisal delivered by at least one of the parties; and

3. a Proof of Loss must have been delivered by the insured.

Each party appoints one appraiser. The two appraisers then appoint an umpire. The appraisers then attempt to resolve the matters in disagreement between the parties. If they are unable to agree, however, then their differences are submitted to the umpire. Ultimately a written decision is rendered and, as in the Court of Appeal, the majority determination prevails.

In the event one of the parties fails to appoint an appraiser within 7 days following service of the appraisal demand, an application may be made to the Supreme Court for an appraiser to be appointed. Similarly, if the appraisers are unable to agree on an umpire within 15 days after their appointment or an appraiser/umpire refuses to act or is unable to act, a similar application can be made to the Court to make the necessary appointment.

The insurer and the insured each pay the costs of their own appraiser and they are also required to equally absorb the expense of both the appraisal process and the umpire.

THE ROLES OF THE PARTIES

The *Insurance Act* does not require appraisers or umpires to be impartial, nor does it require them to have any special expertise. It may therefore be advantageous for a party to appoint an appraiser who will represent that party's interests. There are a number of reported decisions in which Courts have permitted parties to appoint their lawyers, who are legally bound to serve their client's interests, to act as appraisers[4].

The umpire is appointed by agreement between the appraisers, or by the Supreme Court where agreement cannot be reached. Accordingly, the umpire's impartiality is not mandated by legislation but is achieved in practice. It has been suggested that the first goal of an umpire is to try to assist the two appraisers to reach a consensus on the value of the property insured. In a sense, the umpire is to act as a kind of mediator to assist the appraisers in "determining the matters in disagreement".

The procedure to be followed by the appraisers and umpires is not specified in the *Insurance Act* either. Generally speaking, they are expected to bring their own experience or knowledge to bear on the issues in dispute. The appraisers and the umpire are not required to hold a hearing, administer oaths to witnesses, receive viva voce testimony under oath or even receive evidence by sworn Affidavit. Counsel do not appear before them to argue the issues. In *Re Krofchick v. Provincial Insurance Company*[5], the Court held that the appraisers and the umpire were not required to hold "a fair hearing" and hear evidence, argument of counsel or any of the trappings that one would associate with the arbitration process.

However, courts have permitted appraisers to hear viva voce testimony under oath and receive evidence by way of sworn Affidavits[6]. Presumably the same would apply to umpires.

As mandated by subsection 9(2)(a), the appraisal process applies only to a "disagreement between the insurer and the insured as to the value of the property insured, the value of the property saved or the amount of the loss". Accordingly, there are statutory limits to the appraiser's and umpire's ability to determine issues other than the value of the property insured or the extent of the loss.

Where the appraisal process is required by a provision of the insurance contract under subsection 9(1)(c), the limits on the umpire's role will be specified in the policy and be interpreted in accordance with ordinary contract principles.

In *B.C. Insurance Corp. v. Dawd Holdings Ltd.*[7], the appraisal process was invoked through the statutory conditions incorporated into a fire policy under Part 5 of the

[4] For example see: *Granpac Limited v. American Homes* [1982] I.L.R. 1-1478 (Alta. C.A.) and *Sovereign General Insurance Co. v. McNeill* [2007] B.C.J. No. 1490 (B.C.S.C.).
[5] (1978) 21 O.R. (2d) 805
[6] *Royal Insurance Company of Canada v. Brown* (unreported) April 28th, 1985 (B.C. Co. Ct.)
[7] (1989) 35 C.C.L.I. 193

Insurance Act. The umpire and appraisers agreed on a final valuation of goods damaged in a fire, subject to an allowance of salvage to the insurer. The Court held that the jurisdiction of the appraisal process was limited to (a) the value of the property insured, (b) the value of the property saved, and (c) the amount of the loss. Consequently, the appraisers and umpire were found to have exceeded their jurisdiction in purporting to determine the disposition of the salvage.

A more detailed example of the issues commonly faced by appraisers and umpires is illustrated in the case of *Ferrier v. Maplex General Insurance Co.*[8]. In that case, Justice MacKinnon considered an application to determine the procedure to be followed by an umpire. The Plaintiff claimed under a fire insurance policy following the destruction of a restaurant. The Plaintiff was a lessee and the claim centred on leasehold improvements, equipment and stock, which the Plaintiff claimed had a replacement value in excess of $350,000.00. The insurance companies involved declined to pay and an action was commenced. One of the defences the insurance companies put forward was fraud or wilful misconduct and they essentially took the position that, at the date of the fire, the Plaintiff did not possess or own most of the items claimed. The parties put the appraisal process in motion and got bogged down over an issue concerning the umpire's authority to conduct a hearing to consider the methods of calculating the loss.

Mr. Justice MacKinnon confirmed the appraisal process was an efficient method for experts to resolve valuation issues, therefore avoiding delay and duplication at trial. In the case before him, there was a serious dispute over quantities and interpretation of the contract referencing the method of evaluation. The umpire insisted on holding a hearing relying on whatever information he saw fit to determine the actual quantities involved and used "industry standards" to answer the disputed issue of the valuation. The Defendant in that case did not dispute the umpire's authority to value, but argued that it should be based on either agreed quantities or alternate scenarios and the Trial Judge was to determine what was appropriate.

Mr. Justice MacKinnon considered the decision of *Arlington Investments v. Commonwealth Insurance*[9], which is authority for the principle that allegations of fraud did not preclude the appointment of an umpire and, where there is dispute over methods of calculation, as was the case situation before him, the appraisers could make an assessment on each alternate method, leaving the Trial Judge to select the method that he or she found the most appropriate. Mr. Justice MacKinnon determined that the question of quantity and the interpretation of the reference to valuation in the insurance contract were matters for the Trial Judge. He held further that it offended the concept of a fair hearing to permit an enquiry to proceed that has no right to counsel, no right to cross examine, or any of the usual safeguards available to parties. Therefore, if there are disputes about quantities or method of calculation, appraisers are to determine the value based on a number of equations or alternate methods. It is for the Trial Judge to decide these issues. If the umpire believes that the quantity will affect value, then he or she is entitled to make assumptions and qualify the value by those assumptions. There could be cases where the umpire determines that he or she cannot act at all because there are too many qualifications

[8] (1991) 5 C.C.L.I. (2d) 150 (B.C.S.C.)
[9] [1985] I.L.R. 1-1901 (B.C.C.A.)

which must be first answered by a Court, but, ultimately, the process is up to the umpire, provided he or she sticks to valuation.

THE EFFECT OF A DECISION UNDER THE APPRAISAL PROCESS

Pursuant to subsection 9(5)(a) of the *Insurance Act*, the appraisal process is a condition precedent to any recovery under a policy to which the appraisal process applies. However, by virtue of subsections 9(5)(b) and (c), the appraisal process is entirely independent of other questions between the parties including any grounds on which coverage under the policy might be disputed.

In *Viam Construction Ltd. v. Zurich Insurance Co.*[10], the BC Court of Appeal held that, even if an insurer claims that an insurance policy is void, this does not preclude the insured from invoking the appraisal provisions under the *Insurance Act*. The Court held that the appraisal process is a mandatory scheme. If an insurer claims that the contract is void, then that issue (the validity of the policy) must be determined by the Courts in due course.

The appraisal process is not a bar to the institution of legal proceedings between the parties nor does it give rise to any stay of proceedings: *David v. Canadian Northern Shield Insurance Co.*[11].

The value arrived at through the appraisal process is binding on the parties[12], subject to the matters noted above in *Ferrier v. Maplex General Insurance Co*. However, a decision made under the appraisal process does not, without something more, create any legally enforceable obligation on the insurer to pay. To enforce payment the insured must commence an enforcement action in the courts. In the enforcement proceeding, the insured will be bound by the valuation arrived at through the appraisal process.

For example, in *Pfeil v. Simcoe & Erie General Insurance Co.*[13], the Saskatoon insurance policy at issue contained a statutory condition similar to the British Columbia's Statutory Condition 11 for contracts insuring against hail damage. After the umpire had agreed with the insurer's appraiser, the insured commenced an action to recover monies for hail loss. The insurance company applied to the Court for an Order that the parties were bound by the umpire's award. The Court held that the appraisal process was binding on the parties although a party was not barred from commencing an action in contract to recover the amount found due by the umpire. The award of the umpire could not be set aside except for fraud, collusion, bias or disqualification for lack of impartiality on the part of the umpire. Although the party can commence an action to recover the amount that was awarded by the umpire, it cannot recover an amount greater than that fixed by the umpire.

---

[10] (1984) 6 C.C.L.I. 285
[11] [1994] I.L.R. 1-3106 (B.C.S.C.)
[12] *Re Kofchick v. Provincial Insurance Company* (1978) 21 O.R. (2d) 2805
[13] (1986) 2 W.W.R. 710 (Sask. C.A.)

The same result occurred in *Trentmar Holdings Ltd. v. Williams*[14]. This case stands for the proposition that, once an appraisal process is in place and the umpire follows the appropriate procedure to value the damaged property, there is virtually no appeal from that decision. In that particular case, the insured refused to appoint an appraiser. The insurer applied for Orders that the Court appoint both an appraiser and an umpire. This was done and eventually, after due consideration the valuations reached by the two appraisers, the umpire agreed with the valuation of the appraiser appointed by the insurer. The insured brought an action against the appraisers challenging the award and seeking to set the award aside. On application of the insurer, the Ontario Court struck out the Statement of Claim. The Court concluded that, since there was no allegation of misconduct by any of the appraisers or the umpire, the award was final and binding on the parties.

As the appraisal process does not contain a mechanism for enforcement, it is important that insured observe the applicable limitation periods. Section 22 of the *Insurance Act* and Statutory Condition 14 proscribe a one year limitation period for claims under Part 2 and Part 5 policies respectively. If the appraisal process is not completed within the limitation period, the insured must issue suit to avoid the claim being statute barred: *Gautron v. Wawansea Mutual Insurance Co.*[15]. On its face, subsection 9(5)(a) appears to preclude an action being brought until the amount of the loss has been ascertained. The courts have addressed this problem by staying proceedings until the appraisal process is complete.

Where the insurer and insured make a collateral agreement to use the appraisal process (i.e. an agreement contained outside the contract of insurance), the limitation period may be inapplicable to an insured's suit to enforce the appraisal process and payment of the appraised amount.

In *Terroco Industries Ltd. v. Sovereign General Insurance Co.*[16], the insured claimed in respect of fire damage to a motor vehicle. The insurer admitted liability, however the value of the damaged vehicle was disputed. The Alberta *Insurance Act* required the value to be determined by appraisal. A further provision required the insurer to make payment within 15 days of the decision being made under the appraisal process. The appraisal process was commenced, but dragged out beyond the one year limitation period. At expiry of the limitation period, the insurer closed its file. The insured issued suit outside the limitation period.

To circumvent the limitation period, the insured argued that the parties had entered into a collateral agreement to have the quantum of the loss "arbitrated" according to the appraisal procedure set out in the *Insurance Act*. The trial judge found that, on the facts, a collateral agreement had been reached. This finding was approved of by the Appeal Court.

The trial judge held that the limitation period was suspended after the appraisal process was invoked. Hence the trial judge held that the claim was not statute barred. The reason

[14] (1984) 6 C.C.L.I. 176 (Ont. S.C.)
[15] (1995), 2 B.C.L.R. (3d) 330 per Clancy J at paras. 25-27.
[16] [2007] A.J. No. 463

given was that it was "inconsistent" for the limitation period to continue when neither party had control over the timeliness of the appraisal process.

The Appeal Court overruled the trial judge on this point. The Appeal Court found that the limitation periods in the *Insurance Act* applied only to disputes arising from the contract of insurance. As the agreement to submit to appraisal was collateral, the limitation period was found not to apply.

Interestingly, the Appeal Court made it clear that the limitation period applies where the insurer merely invokes the appraisal process pursuant to the statutory conditions (and not in accordance with a collateral agreement). As appraisal was required by the *Insurance Act* in the absence of any collateral agreement, it is not clear from the decision in *Terroco Industries Ltd.* what the insurer did to remove the process from routine application of the statutory conditions and place it in the realm of a collateral agreement.

The lesson to be learnt from the above case law is that the parties, including appraisers and umpires, must be clear about the procedure to be followed in the appraisal process and the intended outcomes. As can be seen, failure to do so may lead to a multiplicity of litigation to determine the appropriate forum to resolve the components of the dispute.

REVIEW OF APPRAISAL DECISIONS

The proper way to review an umpire's decision is by way of Petition pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996 c. 241. The relief claimed should be in the nature of *certiorari* and for declaration that certain determinations made by the umpire or appraisers are void and of no effect.

As set out above, overturning an umpire's decision is a difficult task for a petitioner. Per *Re Kofchick v. Provincial Insurance Company*, the umpire is not obliged to provide a "fair hearing" in the curial sense, and hence it is difficult to review an umpire's decision on the basis of procedural unfairness. Further, as stated in *Pfeil v. Simcoe & Erie General Insurance Co.*, an umpire's decision may be unreviewable in the absence of fraud, collusion, bias or lack of impartiality.

However, the body of case law concerning the standard for review of an umpire's decision is not well developed at present. This may suggest that a majority of parties who invoke the appraisal process obtain satisfactory outcomes through careful selection of a fair and impartial umpire. As discussed below, we anticipate the procedural standards applicable to umpires will develop in the wake of the proposed amendments to the appraisal procedure.

2. THE PROPOSED PROCESS UNDER BILL 40

THE STATUTORY PROVISIONS

Under Bill 40, Part 5 of the Act, currently applying to "contracts of fire insurance", will be repealed. Contracts of fire insurance will be regulated by an amended Part 2 that will govern all contracts of insurance except specified life insurance, A&S insurance and those contracts specified in Part 7. An amended group of statutory conditions will be imposed on Part 2 contracts under a new section 27.1. In relation to the dispute resolution process, the new Statutory Condition 11 will provide:

> 11. (1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act, whether or not the insured's right to recover under the contract is disputed, and independently of all other questions.
>
> (2) There is no right to a dispute resolution process under this condition until
>
> (a) a specific demand is made for it in writing, and
>
> (b) the proof of loss has been delivered to the insurer.

Thus mandatory appraisal in accordance with the Act, now called "dispute resolution", will be preserved, as will the preconditions to invoking the procedure (demand in writing and delivery of proof of loss). Further, dispute resolution will continue to apply independently of all other questions including the insured's right to recover under the contract.

Under the new Statutory Condition 11, the jurisdiction of dispute resolution is expanded to include "the nature and extent of repairs or replacements required, or, if made, their adequacy".

Under Bill 40, section 9 will be amended. Each party will continue to appoint a person to assist in the resolution of the dispute, however the appointed person will be called a "representative" instead of an "appraiser" to reflect the wider variety of disputes to be resolved under the new appraisal process. The umpire's role will remain unchanged.

The key difference in the amended section 9 will be that the representatives appointed by the parties must apply to the Superintendent of Financial Institutions instead of the Court for the appointment of an umpire. The parties may each suggest three umpires to the Superintendent. The Superintendent must select one umpire from those suggested by the parties. It remains to be seen how the Superintendent will approach the appointment of umpires and whether the appointment can be challenged through judicial review.

The appointment of representatives will remain within the Court's jurisdiction, with the Court given power to award "special costs". It seems probable the Courts will award special costs against parties who do not approach the dispute resolution process in good faith or do not make any bona fide attempt to appoint a representative.

NEW PROCEDURE

In light of the above, we anticipate the case law relating to the appraisal procedure and outcome will continue to apply in the new dispute resolution process. However, the procedure will now be invoked in a wider variety of policies, and in relation to a wider variety of quantum and valuation issues. We therefore anticipate a wider role for "dispute resolution representatives" and development of further appraisal rules in the wake of the amendments.

3. CONCLUSION

The appraisal process continues to offer an efficient and cost-effective way of dealing with many disagreements that arise between an insurer and an insured. Except for limited appeal by way of judicial review, the process is binding upon the parties.

The amendments to B.C.'s *Insurance Act* currently before parliament under Bill 40 will expand the appraisal procedure to a "dispute resolution" procedure applicable to a wider range of general insurance policies.

Those seeking advice on how to get the most out of the appraisal process, or how to transition to the new process proposed in Bill 40, are encouraged to contact the authors for further advice.

Nigel Kent and Steven Donley

Appraisals Under B.C.'s *Insurance Act*:
Practice and Procedure
T. 604.643.3135

CWA54101.1