IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Interprint Systems Limited v. Co-operators General Insurance Company*, 2024 NLSC 29
Date: February 20, 2024
Docket: 201801G8744

BETWEEN:

INTERPRINT SYSTEMS LIMITED

FIRST PLAINTIFF

AND:

ELAINE STAMP

SECOND PLAINTIFF

AND:

CO-OPERATORS GENERAL INSURANCE COMPANY

FIRST DEFENDANT

AND:

CHRIS LEGER

SECOND DEFENDANT

AND:

QUINTON SMITH

THIRD DEFENDANT

Before: Justice Garrett A. Handrigan

Place of Hearing: St. John’s, Newfoundland and Labrador

Date of Hearing: January 30, 2024

Summary:

Interprint incurred losses when fuel oil leaked into its building. It had an all-risks, multi-peril insurance contract with Co-operators to which it submitted claims for those losses. Co-operators and Interprint disagreed about the values of some of the losses and Co-operators sought to initiate an appraisal process provided for in section 9 of the *Insurance Contracts Act*. Interprint declined to participate in the process and Co-operators applied for an order compelling Interprint to comply.

The Court dismissed the application. It found that Interprint was neither statutorily nor contractually bound to participate in the appraisal process. It ordered the costs of the application to be costs in the cause.

Appearances:

Kevin F. Stamp, K.C.	Appearing on behalf of the Plaintiffs
Robert Dowhan	Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Seed v. ING Halifax Insurance*, [2002] O.J. No. 1976, 2002 CarswellOnt 1663 (Sup. Ct. J.); *Burry et al. v. Co-operators General Insurance Co.*, 2003 NLSCTD 165; *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada et al.*, 2003 SCC 25; *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc.*, 2021 ONSC 1684

STATUTES CONSIDERED: *Insurance Contracts Act*, R.S.N.L. 1990, c. I-12; *Insurance Act*, R.S.O. 1990, c. I.8; *Fire Insurance Act*, R.S.N.L. 1990, c. F-10*; Automotive Insurance Act*, R.S.N.L. 1990, c. A-22; *Limitations Act*, S.N.L. 1995, c. L-16.1

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] Interprint Systems Limited ("Interprint") operated a retail print shop at 154 Military Road, St. John's, NL under the trade name "Copy Canada". The Co-operators General Insurance Company ("Co-operators") insured Interprint. Their policy offered Interprint indemnification for losses it incurred from various perils, including for property, its building, contents and operating equipment, as well as for business interruption and extraordinary expenses, crime and commercial general liability. It was, in effect, an all-risks, multi-peril policy, and Interprint renewed it for twelve months on November 18, 2016.

[2] On December 16, 2016, Interprint discovered fuel oil had leaked into its building at 154 Military Road. The source of the oil was not immediately apparent but its smell was pervasive and nauseating. Interprint contacted a local agent of Co-operators on December 23, 2016 who confirmed that its contract with Co-operators provided coverage for the incident. The agent referred Interprint to Co-operators' regional claims office in Moncton, NB.

[3] Co-operators responded to Interprint's claims for coverage over the next two years but never to Interprint's satisfaction, so that on December 18, 2018, Interprint and its sole shareholder, Elaine Stamp, filed a statement of claim in this Court suing Co-operators and two of its employees. Interprint asks for damages from Co-operators and its employees, who are defending themselves from Interprint's claim.

[4] Meanwhile, on June 17, 2022, Co-operators filed an interlocutory application in those proceedings asking for an order compelling Interprint to submit to an appraisal process to value some of the losses it claims. Co-operators believes that its contract with Interprint provides for the appraisal process and that section 9 of the *Insurance Contracts Act*, R.S.N.L. 1990, c. I-12 also obliges Interprint to comply.

[5] Co-operators invokes the appraisal process because of differences it has with Interprint over the valuation of the losses Interprint incurred from the oil that seeped into its building. Co-operators describes appraisal as "…a conventional dispute resolution process that is regularly relied upon to value insurance disputes in jurisdictions across Canada including in Newfoundland and Labrador" (para. 31 of the Memorandum of Fact and Law and Authorities that Co-operators filed on October 22, 2022). It also says that the appraisal process is mandatory, both by contract and by law.

[6] Interprint opposes the appraisal process. It says that neither its insurance contract with Co-operators nor the *Insurance Contracts Act* provides for appraisal; and it asserts that this application is no more than an attempt by Co-operators "…to divert the court process in which it fully participated up to the pre-trial conference date" (para. 45 of the Memorandum of Fact and Law that Interprint filed on January 13, 2023).

[7] I heard Co-operators' application on January 30, 2024 and reserved my ruling until now.

THE ISSUES

1. Is the appraisal process available to Co-operators, either statutorily or contractually?

2. If so, should I order Interprint to participate in it?

THE LAW

Statute – *The Insurance Contracts Act*

[8] Section 9 of the *Insurance Contracts Act*, provides:

> 9. (1) This section applies to a contract containing a condition, statutory or otherwise, providing, in the event of difference or disagreement between the insured and insurer, for appraisal to determine the matters specified in the condition.
> (2) The appraisal shall be made by 2 disinterested appraisers, the insured and the insurer each selecting an appraiser and the 2 so chosen then selecting a competent and disinterested umpire.
> (3) The appraisers shall determine the matters specified in the condition, and if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any 2 appraisers shall determine the matters.
> (4) Each party to the appraisal shall pay the appraiser selected by him or her and shall bear equally the expense of the appraisal and umpire.
> (5) Where
>
> (a) a party fails to name an appraiser within 7 clear days after being served with written notice to do so;
> (b) the appraisers fail to agree upon an umpire within 15 days after their appointment; or
> (c) an appraiser or umpire refuses to act or is incapable of acting or dies,
>
> a judge of the Trial Division may appoint an appraiser or umpire upon the application of the insured or of the insurer.

[9] I note that section 9(1) of the *Insurance Contracts Act* says that it "…applies to a contract containing a *condition, statutory or otherwise*, providing, in the event of difference or disagreement between the insured and insurer, for appraisal to determine the matters specified in the condition" [*emphasis added*].

[10] Co-operators claims that its contract with Interprint contains a "condition" that requires it and Interprint to resort to the appraisal process if they differ or disagree about "matters specified in the condition". It notes, in particular, that this statement appears under the heading "Property" on the " COMMERCIAL

PREMIUM NOTICE/OFFER TO RENEW" that it says it delivered to Interprint when it renewed its insurance on November 18, 2016:

> INSURING AGREEMENTS & EXCLUSIONS FORM NO. AB
> APPLICABLE TO ALL COVERAGES OF THIS PROPERTY SECTION
> [capitals in original, underlining added]

[11] These *categories* appear underneath that heading, together with coverage for each, deductibles that apply to the coverage, and applicable premiums:

> BUILDING
> OFFICE
> REPLACEMENT COST – BROAD FORM
> CONTENTS
> REPLACEMENT COST – BROAD FORM
> COMMERCIAL ADVANTAGE ENDORSEMENT
> ACTUAL LOSS SUSTAINED
> ORDINARY PAYROLL 90 DAYS

[12] Co-operators says that Form No. AB is an 8-page document whose provisions are "APPLICABLE TO ALL PROPERTY AND BUSINESS INTERRUPTION COVERAGES OF THIS POLICY". Form No. AB includes statutory condition 11, which provides a dispute resolution mechanism that invokes the same appraisal process the *Insurance Act*, R.S.O. 1990, c. I.8 provides for. Statutory Condition 11 reads thus:

> **11. IN CASE OF DISAGREEMENT**
>
> In the event of disagreement as to the value of the insured property or the value of the property saved, the nature and extent of the repairs or replacements or if made their adequacy, or the amount of the loss or damage, those questions must be determined by appraisal or the applicable dispute resolution process* 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, and independently of all other questions. There shall be no right to an appraisal or dispute resolution

> process until a specific demand for one is made in writing and until proof of loss has been delivered.
>
> *Dispute Resolution process applies in Alberta and British Columbia only. Appraisal process applies in all other jurisdictions.

CASE LAW

[13] Co-operators acknowledges there is no jurisprudence from this jurisdiction dealing with the availability of the appraisal process. However, counsel for Co-operators says there is an abundance of case law in other Canadian jurisdictions that is helpful. He notes, in particular, *Seed v. ING Halifax Insurance*, [2002] O.J. No. 1976, 2002 CarswellOnt 1663 (Sup. Ct. J.) which deals with the appraisal process in Ontario.

[14] This excerpt from *Seed* sets out how the appraisal process may be engaged, as well as its workings and the priorities that its results receive:

> The insured moves by way of motion in her action for an order staying the appraisal proceedings under Section 148 of the Insurance Act and directing the insurer to deliver its Statement of Defence in accordance with the Rules.
>
> The insurer brings an application purporting to be pursuant to Statutory Condition No. 11 of Section 148 of the *Insurance Act*, Section 128 of the *Insurance Act*, and Section 101 of the *Courts of Justice Act*, Section 106, etc., asking that the court require the parties to the appraisal to direct their respective appraisers to meet with the umpire on a date to be determined by him and to proceed with those proceedings failing which the umpire would be authorized to proceed in the absence of one party.
>
> The insurer also seeks an order requiring both the insurer and the insured to each pay one-half of any further accounts submitted by the umpire with respect to the appraisal.
>
> By Statutory Condition No. 11 of Section 148 of the *Insurance Act* and Section 128 of the *Insurance Act* the legislature has removed from the court the assessment of damages arising under these policies of insurance and has left damages to be determined by the longstanding procedure of "appraisal".

> This process is mandatory. No action for recovery under the policy may be taken until the issues in dispute as to damages are settled by the process of appraisal: "The intention of Statutory Condition 11 is unambiguous and cannot be unilaterally waived by either the insurer or the insured in the event of a disagreement. The Statutory Condition to which both parties agree is clear there must be an appraisal before then can be any recovery under the policy." (*Saskatchewan Government Insurance v. Nipawin (Town),* [1999] I.L.R. I-3652 (Sask. C.A.)). (*Seed v. ING Halifax Insurance,* paras. 5-9)

[15] The following definitions and comparisons between our *Insurance Contracts Act* and the Ontario *Insurance Act* assist in understanding Co-operators' claim that the approval process applies between it and Interprint:

- Section 128 (1) of the Ontario *Insurance Act* is identical to section 9 (1) of our *Insurance Contracts Act*.
- Section 148 (1) of the Ontario *Insurance Act* deems the statutory conditions in that section to be part of every contract in force in Ontario; of which statutory condition 11 in section 148 (1) is identical to statutory condition 11 in Form No. AB referred to in Interprint's "Commercial Premium Notice/Offer to Renew", that I set out above.
- Section 2 (f) of our *Insurance Contracts Act* defines "contract" as "…a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement".
- Section 2 (x) of our *Insurance Contracts Act* defines "statutory condition" as "…a condition required by a law of the province relating to insurance to be included in a contract.
- Section 3 of our *Insurance Contracts Act* says:

  > 3. Except where otherwise provided and where consistent with another Act or law of the province relating to insurance, this Act applies to every contract made in the province other than contracts of
  >
  > (a) accidents and sickness insurance;
  >
  > (b) life insurance; and
  >
  > (c) marine insurance.

- There is no equivalent provision in our *Insurance Contracts Act* to section 128 (1) of the Ontario *Insurance Act*, that deems the statutory conditions to be part of every contract in force in the province.
- Section 9 (1) of our *Insurance Contracts Act* does, however, make the appraisal process set out in subsections 9 (2) – 9 (5) applicable to a contract "…containing a condition, statutory or otherwise, providing, in the event of difference or disagreement between the insured and insurer, for appraisal to determine the matters specified in the condition". [underlining mine]
- Co-operators believes that the appraisal process it relies on is incorporated into its contract with Interprint by the reference to Form No. AB on Interprint's "Commercial Premium Notice/Offer to Renew".

[16] *Burry et al. v. Co-operators General Insurance Co.*, 2003 NLSCTD 165 (*Burry*) is relevant to this matter. *Burry* deals with whether a statutory condition setting a limitation period applied statutorily or contractually, or both, to "…an all-risks or multi-peril policy" (*Burry*, para. 1) where fire caused the insured's loss.

[17] This is the background to *Burry* as the trial judge stated in his reasons:

> On December 31, 2000, the insured property [the Plaintiffs' dwelling-house] was completely destroyed by fire.
>
> It was not until June 18, 2003, that the Plaintiffs commenced an action against the Defendant for the recovery of a claim under the insurance contract.
>
> The Defendant has filed a defence in this matter in which it states that the action or proceeding is absolutely barred pursuant to Statutory Condition 14 of the contract because it was not commenced within one year next after the loss or damage occurred to the insured property.
>
> (*Burry*, paras. 6-8).

[18] The trial judge stated the parties' respective positions this way:

> The Plaintiffs take the position that in order for the one-year limitation period to apply, the policy of insurance must be subject to the *Fire Insurance Act*… (*Burry*, para. 26).
>
> …

> The Defendant argues that the one-year limitation period under Statutory Condition 14 applies to a multi-peril insurance policy by statutory prescription. It points out that in this province the fire insurance legislation is contained in the *Fire Insurance Act*, *supra*, and the Statutory Conditions are set out in that *Act* (*Burry*, para. 14).

[19] Ultimately, the trial judge decided that the limitation period in Statutory Condition 14 did not apply to the plaintiffs, neither by the *Fire Insurance Act*, R.S.N.L. 1990, c. F-10, nor by their contract with Co-operators.

[20] The court focused on section 3 (1) (c) of the *Fire Insurance Act* which still reads as it did then:

> 3(1) This Act applies to insurance against loss of or damage to property arising from the peril of fire in a contract made in the province except
> ….
> (c) where the peril of fire is an incidental peril to the coverage provided; ..."
> (*Burry*, para. 17)

[21] The trial judge relied heavily on *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada et al.*, 2003 SCC 25, to support his conclusion that "[n]either linguistically nor historically can I accept that the legislature intended the multi-peril insurance policy, which we are dealing with, fall within s. 3(1) of our [*Fire Insurance*] *Act*.

[22] The trial judge also concluded that Statutory Condition 14 had not been contractually incorporated into the contract between the Plaintiffs and Co-operators:

> In conclusion on this point, I see no validity in the Defendant's argument that in this case there was a contractual incorporation of Statutory Condition 14. To impute such an interpretation with its consequent result upon the insured would fly in the face of resolving ambiguities in the favour of the insured. I do not believe that the law requires me to come to any such conclusion and accordingly, I find that the Defendant's arguments on this point fail. (*Burry*, para. 63)

[23] As to *Burry*, I note that our Court of Appeal upheld the trial judge's decision that Statutory Condition 14 did not apply to the insurance contract between the Plaintiffs and Co-operators. Roberts, J.A. wrote for the Court of Appeal, and the other two justices concurred with him:

> In summary, the reasoning in *KP Pacific* for the *Insurance Act* of British Columbia not applying to all-risks or multi-peril policies is equally pertinent to the *Fire Insurance Act*, and there is nothing in the language of the *Fire Insurance Act* to exempt it from *KP Pacific's* persuasive authority. The trial judge did not err in deciding as he did and the appeal on this ground is dismissed. (*Co-operators General Insurance Company v. Burry*, 2007 NLCA 52, para. 25)

[24] Roberts, J.A. also upheld the trial judge's finding that Statutory Condition 14 was not incorporated contractually into the contract between the Plaintiffs and Co-operators:

> I am satisfied that the trial judge made no error in deciding that Statutory Condition 14 had not been adopted contractually… (*Co-operators General Insurance Company v. Burry*, 2007 NLCA 52, para. 29)

[25] Roberts, J.A. relied as heavily on *KP Pacific* as did the trial judge, when he dismissed Co-operators' appeal; and likewise, I find that *KP Pacific* also warrants consideration.

[26] McLachlin, C.J. wrote the judgment for the Supreme Court in *KP Pacific*, with which all other justices concurred. She saw the issue before the Court this way:

> The result in this case depends on whether KP Pacific's policy falls within Part 5 of the *Insurance Act*, governing fire insurance, or within Part 2, the general part. If the policy falls within Part 5, the appellant is out of time. If not, it may pursue its claim. Which Part applies depends on how one reads the Act. To attempt to understand the Act's provisions, one must trace its history. (*KP Pacific*, para. 7)

[27] McLachlin, C.J. concluded that KP Pacific's policy fell within Part 2, the general part of the policy, and not Part 5 which dealt specifically with fire insurance, so that KP Pacific's claim on its insurance contract with Guardian Insurance was not time-barred:

> I conclude that s. 119 can be applied to comprehensive policies only at the costs of contrived reinterpretation and anomalous consequences. Whatever interpretation one seeks to put on Part 5's terms, however one struggles to apply it to this policy, one ends by acknowledging inconsistency. I cannot conclude either from the language of s. 119 or its history that the Legislature intended a multi-risk policy such as this one to fall within Part 5 with all the attendant consequences, including a shortened limitation period. It follows that this policy, like any other policy that does not fit into a specific category, is governed by Part 2, the section of general application. (*KP Pacific*, para. 19)

[28] The learned Chief Justice also rejected Guardian Insurance's claim that "…that even if Part 2 applies, the fact that the contract of insurance specifies a limitation period of one year from loss ousts the longer limitation period in Part 2" (*KP Pacific*, para. 21).

[29] She said that the "… [contractual incorporation] issue is governed by s. 3(a) of the [*Insurance*] *Act*" and she rejected it categorically:

> This provision does not permit the insurer to substitute harsher terms than those provided in Part 2. The plain language of the section indicates the Legislature's intent that the provisions in Part 2 operate as a floor of protection beneath which insurance contracts cannot descend. If a contract falls within one of the enumerated Parts, then that Part is engaged and provides a different floor. Otherwise, the insured is guaranteed, at a minimum, the statutory protections contained in Part 2. The insurer's attempt to argue that the shorter limitation period is more advantageous to the insured because it is more certain verges on the disingenuous. (*KP Pacific*, para. 21)

[30] Here Co-operators claims that Interprint must, both by statute and contractually, engage in the appraisal process that Co-operators wants to follow. Co-

operators' claim is analogous to the claims that the insurers advanced both in *Burry* and *KP Pacific*. In both matters the insurers said the claims were statute-barred by the shorter limitation periods set by statute and/or contractually.

[31] I will develop the analogies between *Burry* and *KP Pacific* and this matter more closely when I analyze the issues later in these reasons. For now, though, this is the law that I will apply to them. I turn now to that analysis, starting with the factual background.

ANALYSIS

Background

[32] Co-operators renewed insurance contract # 003074044 with Interprint on November 18, 2016 to run for one year to November 18, 2017. It billed Interprint $2,766.45 for the coverage it provided, including provincial sales taxes of $357.45. Co-operators issued the "COMMERCIAL PREMIUM NOTICE/OFFER TO RENEW" to Interprint and Interprint dutifully paid the premium in full.

[33] I set out the coverage that Co-operators provided to Interprint for "Property" earlier in these reasons and need not repeat it here. However, it bears noting that Co-operators provided more coverage than just for "Property", including:

CRIME
CRIME STANDARD CONDITIONS FORM NO. C
APPLICABLE TO ALL COVERAGES OF THIS SECTION

DISHONESTY, DISAPPEARANCE	C-7
COMMERCIAL BLANKET BOND	SEC – 1A
MONEY & SECURITIES-INSIDE	SEC-II
MONEY & SECURITIES-OUTSIDE	SEC-III
MONEY ORDERS/COUNTERF'T CURRENCY	SEC-IV

DEPOSITORS FORGERY COVERAGE	SEC-V
MONEY & SECURITIES-REDUCED LIMIT	C-7(B)
AUDIT EXPENSE	C-7(C)
LIABILITY	
COMMERCIAL GENERAL LIABILTY	D-1
BODILY INJURY & PROPERTY DAMAGE	COV A
AGGREGATE LIMIT 2,000,000	
PERSONAL INJURY	COV B
MEDICAL EXPENSES	COV C
TENANTS LEGAL LIABILITY	COV D
ADDITIONAL INSURED	D-1(F)
ADVERTISING INJURY LIABILITY	D-1(R)
FUNGI COVERAGE PRODUCTS/PEMISES	D-1(AA)
EMPLOYERS BODILY INJURY	D-1(E)
NON-OWNED AUTO	D-6

[34] For the coverage Co-operators charged these premiums: Property: $1,883; Crime: $25; Liability: $500; plus, provincial sales taxes (except on the premium for Crime), for a *bona fide* all-risks, multi-peril contract.

[35] On October 17, 2017 Co-operators paid Interprint $450,000, which it applied to four categories of loss:

Coverage	**Amount**	**Total**
Land and Water Pollution	$25,000	$25,000
Building	$149,986.04	$174,986.04
Out of Pocket Expenses	$15,000	$189,986.04
Equipment Replacement	$260,000	$450,000

[36] Co-operators notes that the policy limits, for Equipment Replacement, Land and Water Pollution, and Out of Pocket Expenses were $260,000, $25,000 and $15,000 respectively, while the limit for the building was $418,600.

[37] Further, on December 5, 2017, Co-operators says it offered to pay Interprint additional amounts, to be applied to three categories of loss:

Coverage	**Amount**	**Total**
Relocation Costs	$139,100	$139,100
Business Loss	$22,885	$161,985
Other Unspecified Costs	$135,900	$297,885

[38] However, Interprint refused to accept the payment, since Co-operators wanted Interprint to acknowledge that it was in full and final satisfaction of its claim. But on October 3, 2018, Interprint did accept payment of $275,000 from Co-operators, being the amounts that Co-operators offered on December 5, 2017 for "Relocation Costs" ($139,100) and "Other Unspecified Costs" ($135,900), less the $22,885 that Co-operators calculated for Interprint's "business loss". Co-operators says it based its offer to Interprint for "Business Loss" on the findings of a "third party independent forensic accountant" (para. 15 of the Memorandum of Fact and Law Authorities that Co-operators filed on October 22, 2022) that it engaged to calculate Interprint's business loss for the twelve (12) months from December 16, 2016.

[39] For its part, Interprint says that its business loss greatly exceeds the $22,885 that Co-operators offered to pay. Interprint responded to Co-operators' December 5, 2017 offer on December 20, 2017 with an email to which it attached a "Schedule of Adjustments", showing an additional business loss of $294,610 (Exhibit 38 to Patrick Stamp's affidavit filed January 13, 2023). Co-operators' general position is that it has paid Interprint more than Interprint is entitled to under the policy.

[40] This from paragraph 12 of Co-operators' defence pertains:

> 12. Co-operators pleads that it has paid amounts to Interprint in excess of the actual loss incurred and that no additional amounts are due and owing. The claim as advanced by Interprint has been satisfied. The amounts sought in this action are in excess of the loss actually incurred as further described below.

[41] Essentially, Co-operators says this matter in now simply a disagreement between it and Interprint about how much Interprint has lost; and Co-operators says that they should resort to the appraisal process to settle their differences. Co-operators acknowledges that Interprint's claim includes relief that falls outside of the contract, noting Interprint's claims for general, punitive, exemplary and aggravated damages, in particular. While Co-operators says that Interprint may still pursue those claims in Court, it insists that they should settle contractual differences by employing the appraisal process, which Co-operators endorses as the statutorily and contractually required option.

[42] Interprint opposes Co-operators' application vigorously, attacking it on several fronts, including:

- The 30-day period Justice Noel gave Co-operators to file this application expired on June 12, 2022, so the application is out of time.
- Section 9(1) of the *Insurance Contracts Act* only applies to contracts containing a condition "…for appraisal to determine the matters specified in the condition" and Interprint's policy does not contain that condition.
- To the extent that Form No. AB may apply to Interprint's contract, Co-operators never provided the Form to Interprint.
- Condition 11 on Form No. AB directs that the appraisal process as provided for in the *Insurance Act* be employed for disagreements between insured and insurer, but there is no statute of that name in this jurisdiction.
- Section 5(1) of our *Insurance Contracts Act* requires that all contractual terms and conditions be set out in the insurance contract, which Co-operators failed to do.
- Several of Interprint's losses – business interruption, payroll protection, some non-legal fees, waste removal charges and premium rebate, in particular – are not covered by Condition 11 in Form No. AB.
- Co-operators forfeited the appraisal process as an option to value Interprint's losses when it paid $725,000 to Interprint.
- The Condition 11 appraisal process can only be employed when one of the parties makes a specific demand for it in writing, which Co-operators has not done.
- The parties filed a Certificate of Readiness in this proceeding on February 28, 2022, certifying that all pre-trial applications had been taken and they were ready for trial.

- The Condition 11 appraisal process can only be invoked after a Proof of Loss has been delivered and none has been presented here.
- Co-operators has applied for an order that Interprint engage in the appraisal process almost six years after the loss on December 16, 2016 and after the certificate of readiness was filed, so that this application is an abuse of the process of the Court.
- Interprint summarizes its objections to the appraisal process this way:

> 46. The relief requested by Cooperators, if granted, would serve only to delay final resolution of the within claim, with portions of the damages addressed in an appraisal process, the nature of which process is undefined, and leaving the valuation of other losses and damages outside of the "property coverage" items left to be determined by the Court.

(I drew the bulleted objections to the appraisal process from paras. 8-45 of the Memorandum of Fact and Law that Interprint filed on January 13, 2023)

[43] This is the background to Co-operators' Interlocutory Application. I turn now to discuss the issues I stated earlier against this background.

DISCUSSION

Statutorily

[44] Co-operators offers a circuitous route to the appraisal process, based on these criteria:

1. Subsection 9(1) of the *Insurance Contracts Act* makes the appraisal process applicable to a "…contract containing a condition…providing, in the event of difference or disagreement between the insured and insurer, for appraisal to determine the matters specified in the condition".
2. The contract between Co-operators and Interprint refers to Form No. AB, as an "endorsement" to it.

3. Condition 11 of Form No. AB directs the insured and insurer to settle their differences or disagreements "by appraisal or the applicable dispute resolution process as provided under the *Insurance Act*".
4. Section 9 of the *Insurance Contracts Act* enacts the appraisal process.
5. Subsections 9(2)-9(5) of the *Insurance Contracts Act* delineate it.
   [underlining mine]

[45] Based on Co-operators' theory, Interprint should have deduced that it was obliged to engage in the appraisal process by this reasoning:

- Interprint is deemed by law to know that section 9 of the *Insurance Contracts Act* makes any condition contained in an insurance contract requiring appraisal applicable when the parties disagree on value.
- Interprint's contract with Co-operators contains Condition 11 that makes appraisal mandatory when the parties disagree.
- Interprint is informed by Condition 11 to engage in the process as delineated in the *Insurance Act*.
- There is no *Insurance Act* in this jurisdiction.
- But there is an *Insurance Contracts Act* in this jurisdiction that provides for appraisal in its section 9 and Interprint should accept that section 9 in that *Act* applies even with the differently named legislation.

[46] Moreover, even assuming that Interprint had received Form No. AB and was advised of its contents, and Condition 11, in particular, how might Interprint have reasoned through the condition that section 9 of the *Insurance Contracts Act* applied to its disagreements with Co-operators? If Interprint had examined Condition 11 and followed the direction it provided, it may have looked for an *Insurance Act* to see how the process worked. Of course, Interprint would have learned there is no *Insurance Act* in this jurisdiction; and if by happenstance Interprint had discovered our *Insurance Contracts Act* would it have reasoned back through Condition 11 to say that section 9 applied here?

[47] As I follow the logic that Co-operators uses to insist that Interprint is bound by the appraisal process in Section 9 of the *Insurance Contracts Act*, I am reminded

of what McLachlin, C.J. said in *KP Pacific*, after reciting the history of the legislation at issue in that case:

> Insurance practices, by contrast, have changed. A dominant policy in today's world is the "all-risks" or "multi-peril" policy, which covers a panoply of perils. This is good for consumers. It minimizes the number of policies they need to buy and ensures comprehensive coverage at lower cost. But it is bad when legal issues arise. The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories. The result is continued uncertainty about what rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. (para. 4)

[48] Interprint purchased an "all-risks" or "multi-peril" policy from Co-operators. The *Insurance Contracts Act* purports to apply to those contracts, although it does not refer to them *per se*. One may deduce, however, that it would apply to "all-risks" or "multi-peril" policies in that, section 3 says "…this Act applies to <u>every contract</u> made in the province <u>other than</u> contracts of (a) accidents and sickness insurance; (b) life insurance; and (c) marine insurance" [underlining added]: none of which apply here. So that contracts, as the one that Interprint has here, are included in the *Insurance Contracts Act* more by default, than by intent.

[49] Section 9 of the *Insurance Contracts Act* makes no reference to "all-risks" or "multi-peril" policies but it links the availability of the appraisal process to a "condition" in a policy that provides for appraisal. Thus, an insured or insurer would have to follow the logic that Co-operators offers to Interprint so see if it applies to any contract.

[50] Co-operators refers to our *Fire Insurance Act*, and *Automotive Insurance Act*, R.S.N.L. 1990, c. A-22 when it contends that the appraisal process is a "…conventional dispute resolution process that is regularly relied upon to value insurance disputes in jurisdictions across Canada including in Newfoundland and Labrador". Co-operators also acknowledges that the "…right to an appraisal is set out in the statutory conditions that are <u>incorporated by statute</u> into every policy of fire insurance and automotive insurance made or renewed in the province of

Newfoundland and Labrador" [underlining mine] (para. 31 of the Memorandum of Fact and Law and Authorities that Co-operators filed on October 22, 2022).

[51] Co-operators is correct in both observations. I note, for example, that section 8 of the *Automotive Insurance Act*, provides: "The conditions set out in this section are statutory conditions and shall be considered to be part of a contract and shall be printed in a policy with the heading 'Statutory Conditions' "[underlining mine]. I note, as well, that Statutory Condition 4(8) obliges the parties to engage the appraisal process set out in the *Insurance Contracts Act* "in the event of disagreement". The *Fire Insurance Act* contains similar directions in its section 8 and in the Statutory Conditions that appear as a Schedule to the *Act*.

[52] It is clear that the appraisal process applies to fire insurance and automotive contracts, but that is directly attributable to the lead that the legislature has applied to each. The legislature did nothing of that kind for "all-risks" or "multi-peril" contracts as Interprint has with Co-operators; so that parties are left here to the circuitous logic that Co-operators proposes to insist that appraisal is obligatory for "all-risk" or "multi-peril" policies.

[53] The issue for the trial judge in *Burry* was whether a limitation period contained in a statutory condition became part of a multi-peril policy by section 8 of the *Fire Insurance Act*. He concluded that it did not and found that the appropriate limitation period was set out in the *Limitations Act*, S.N.L. 1995, c. L-16.1. The same logic applies here: There is nothing in the *Insurance Contracts Act* that includes the appraisal process in a multi-peril policy as the *Fire Insurance* and *Automotive Insurance Acts* do for their respective industries.

[54] It defies logic and good sense and is fundamentally syllogistic to insist that the reference in section 9(1) of the *Insurance Contracts Act* to a "condition … providing, in the event of difference or disagreement … for appraisal" can ultimately be construed so broadly as to engage Statutory Condition 11 in Form No. AB and to draw the appraisal process described in section 9 into disagreements between insurers and insureds.

[55] It is also reminiscent of what McLachlin, C.J. said that legislators had to do in *KP Pacific* to remedy the deficit in the British Columbia legislation that she considered:

> The *Insurance Act* was passed in 1925 (S.B.C. 1925, c. 20). Despite repeated housekeeping amendments, it remains essentially unchanged. It was designed for a world where insurers issued policies geared to specific risks and subjects, such as fire insurance, theft insurance, business loss insurance, and so on. Accordingly, it lays down rules, including limitation periods, based on different and discrete categories of insurance. (para. 3)

[56] And elsewhere in the same judgment:

> The comprehensive policy at issue on this appeal cannot be shoehorned into the Part 5 fire insurance section without contrived reconstruction and anomalous consequences. It simply does not fit. (para. 6)

[57] I will co-op the words of the learned Chief Justice, and with the utmost respect for her, say this of the solution that Co-operators would impose on Interprint here by insisting that it is statutorily bound to accept the appraisal process: The appraisal process at issue in this application cannot be shoehorned into section 9 of the *Insurance Contracts Act* without contrived reconstruction and anomalous consequences. It simply does not fit.

Contractually

[58] While Interprint acknowledges that Form No. AB is referred to on the "COMMERCIAL PREMIUM NOTICE/OFFER TO RENEW" it received from Co-operators on November 18, 2016, Interprint says it did not receive Form No. AB from Co-operators when it renewed the contract. Patrick Stamp filed an affidavit on January 13, 2023 in response to Co-operators' application in which he discussed, amongst other things, receiving insurance forms from Co-operators.

[59] Mr. Stamp said that Elaine Stamp, Interprint's primary representative, had an exchange with Peter Wakeham, who Mr. Stamp identified as "a registered Co-operators' agent/service office in St. John's", on March 20, 2017. Mr. Stamp says that Ms. Stamp became concerned from that conversation about insurance forms containing conditions about their policy with Co-operators they might not have received from Co-operators. He described Ms. Stamp's response:

> 32. Elaine [Stamp] surmised there were other forms [than the one she discussed with Mr. Wakeham on March 20, 2017] she had not received from the insurer that were pertinent to her policy for 154 Military Road. On March 22, 2017 she visited Wakeham's office and requested a copy of all forms containing terms and conditions that related to her policy. She asked why she had not received them previously. She was told that she would have received forms when she purchased a policy many years previous but that it was not the practice to send them out annually with renewals. Wakeham's office pointed out that while the forms as well as form names and numbers change from time to time, policyholders are not sent the revisions unless they request them. It also said they don't keep printed copies of the forms on hand but undertook to send her digital copies by email.

[60] And then in the next paragraph of his affidavit, Mr. Stamp described how Interprint became aware of Form No. AB:

> 33. On March 24, 2017, Interprint received an email from Wakeham's office, containing a series of forms under the subject heading 'policy wordings'... . Received in direct response to Elaine's [Stamp] request of March 22, [2017] for a copy of all terms and conditions governing her policy, the compilation of forms was taken to be complete. It was not until mid-June 2022 that Plaintiffs became aware that the package of forms was incomplete. One form that had been omitted was Form AB. This form was not in Interprint's files, the company had no record of ever having received it, and Elaine was not aware of its existence. Having not been in Interprint's possession, it was not among other insurance forms included in the Plaintiff's List of Documents; nor was it included in the List of Documents conveyed to the Plaintiffs by the Defendants. Indeed, in more than five and a half years from the date of Interprint's loss, Co-operators made no reference to Form AB. The insurer's first mention of it was not until the Defendants cited it in advance of the interlocutory application of June 15, 2022.

[61] Mike Buckley, an employee of Co-operators "with carriage of this matter" replied to Mr. Stamp's affidavit with one of his own on January 25, 2023 (para. 1). While Mr. Buckley did not specifically address the concerns that Mr. Stamp set out in the preceding paragraphs 32 & 33 about missing insurance forms, Form No. AB, in particular, he did attach as Exhibit C "…the statutory conditions of the policy", fully 44 pages of them but even they do not include Form No. AB and Statutory Condition 11.

[62] Overall, Co-operators has offered no evidence to show that it ever informed Interprint that Form No. AB and the eight pages of conditions that it contains - Condition 11, most importantly - applied to their contract; beyond stating this under the heading "PROPERTY", as a one-line entry on their renewal form: "INSURING AGREEMENTS & EXCLUSIONS FORM NO. AB APPLICABLE TO ALL COVERAGES OF THIS PROPERTY SECTION".

[63] Moreover, even assuming that Interprint received Form No. AB and was advised of its contents, and Condition 11, in particular, it follows that the appraisal process would only apply if Interprint followed the circuitous logic that Co-operators offers. That reasoning starts with the *Insurance Contracts Act*; the *Act* introduces Form No. AB; Condition 11 Form No. AB adverts to the *Insurance Act*; ergo, Interprint must link to section 9 of the *Insurance Contracts Act*, in the absence of an *Insurance Act*? That is simply too much to reasonably expect Interprint to read into its contract.

[64] In the absence of evidence from Co-operators that Interprint received Form No. AB it is fundamentally unfair for Co-operators to insist that Interprint should be bound by any notice that the Form may contain about the availability of the appraisal process. Even if, Co-operators could show that Interprint received Form No. AB, it would be in no better position to insist that Interprint is bound by the appraisal process contractually than it is statutorily.

[65] In the Memorandum of Fact and Law and Authorities that Co-operators filed to support its interlocutory application, it discussed some of the "…fundamental principles of interpretation [Canadian courts have developed] as a means of ensuring

that … [reasonable consumers who purchase insurance policies indemnification] are treated fairly and that their reasonable expectations are protected" (para.29 of the Memorandum, filed October 31, 2022). Co-operators referred to several cases for those "fundamental principles", including *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[66] This quotation from *Consolidated Bathurst* is *apropos* of this matter:

> Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract (page 899).

[67] It is equally trite here to say that there are most assuredly ambiguities in the terminology of the contract between Co-operators and Interprint and those ambiguities should be construed against Co-operators. I will not revisit those ambiguities. I have already tracked and underscored them several times in these reasons and repeating them here would contribute nothing more to the discussion.

[68] I turn once more to the trial judge's decision in *Burry* to use his words to express the impropriety of the insured being bound contractually by what he is not bound by statutorily:

> In my view, it is a misapprehension of the law to in essence read into this situation an acquiescence to be contractually obligated under what is prima facie set up as a legislative statutory framework. I believe that if the statutory framework proves to be inadequate, insufficient or ineffective then that should be the end of the matter. The insured should not find himself "out of the frying pan and into the fire". (para. 59)

[69] In the result, I find that Interprint is neither bound statutorily nor contractually to submit to the appraisal process to resolve any differences or disagreement it has with Co-operators over the value of its losses.

Other Considerations

[70] One of the reasons Co-operators offers to justify the appraisal process is its fairness and efficiency. This is as Co-operators expressed it in its Memorandum of Fact and Law and Authorities:

> Courts have found that no prejudice arises for the insured by having the value of the covered loss adjudicated by the appraisal process. Rather, it is likely that the appraisal process may enable a determination to be made more expeditiously than determination of the issue at trial and allows for the selection of an umpire who is well-versed in matters of the kind. (para. 42)

[71] Co-operators optimism about the dynamism and efficiency of the appraisal process may be misplaced. There is considerable friction between the parties over what Interprint may recover from Co-operators, both on its contract and outside of that contract. I note, for example, that Interprint filed a statement of claim that ran to 69 paragraphs and that both parties rallied significant resources in presenting and responding to this application.

[72] I anticipate Co-operators and Interprint would heavily monitor the selection of appraisers and an umpire and in determining the process that they would follow to establish their values; and that neither side would be averse to challenging all aspects of the process on an interim basis. Moreover, and at least by Co-operators' reckoning, there is little, if anything that Interprint is entitled to under the contract and what is principally outstanding between them is extra-contractual; so that the appraisal process might have little to engage upon.

[73] In *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc.*, 2021 ONSC 1684, Perell, J. of the Ontario Superior Court of Justice, terminated the appraisal process that Northbridge had initiated under section 128 of the *Insurance Act*, R.S.O. 1990, c. I.8., which is essentially the same as section 9 of our *Insurance Contracts Act*. He found that the process was "…was ultimately very dysfunctional, which as the description below will reveal can be blamed on all involved, namely, the umpire, the two appraisers, and the lawyers acting for the insured and the insurer" (para. 5). The result is no surprise since he began his judgment ominously, with this terse signifier: "Saga of a procedural shipwreck to follow" (para. 1).

[74] I would not prejudge how an appraisal process between Co-operators and Interprint might unfold but it has potential to be as dysfunctional as the Northbridge-Ashcroft version.

[75] I dismiss Co-operators' interlocutory application and declare that Interprint does not have to comply with it.

COSTS

[76] The costs of this interlocutory application will be costs in the cause of this matter.

SUMMARY AND DISPOSITION

[77] Interprint incurred losses when fuel oil leaked into its building. It had an all-risks, multi-peril insurance contract with Co-operators to which it submitted claims for those losses. Co-operators and Interprint disagreed about the values of some of the losses and Co-operators sought to initiate an appraisal process provided for in section 9 of the *Insurance Contracts Act*. Interprint declined to participate in the process and Co-operators applied for an order compelling Interprint to comply.

[78] The Court dismissed the application. It found that Interprint was neither statutorily nor contractually bound to participate in the appraisal process. It ordered the costs of the application to be costs in the cause.

ORDER

[79] In the result, I order that:

1. Co-operators' Interlocutory Application filed on June 17, 2022, is dismissed.

2. The costs of the Interlocutory Application will be costs in the cause of this matter.

GARRETT A. HANDRIGAN
Justice