

CITATION: Ward et al v. Intact Insurance Company, 2024 ONSC 3145
COURT FILE NO.: CV-23-091-00
DATE: 2024-06-03

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

George Merrit Ward and Kelly Gallant

Plaintiffs

- and -

Intact Insurance Company

Defendant

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) *Dylan Cox*, for the Plaintiffs
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) *Graham Sanson*, for the Defendant
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) **HEARD:** via Zoom on May 23, 2024, at
) Thunder Bay, ON

Madam Justice H. M. Pierce

Reasons on Motion to Appoint an Umpire

[1] The plaintiffs' rural home and Quonset hut near Thunder Bay were insured for loss by the defendant, Intact Insurance Company. When both buildings collapsed in 2022, they filed a proof of loss for each structure, claiming a loss of \$737,671.43. While certain parts of the claim have been resolved, the remaining dispute involves the cost of replacing the buildings.

[2] The plaintiffs rely on the statutory conditions under the *Insurance Act*, RSO 1990, c. I.8 that provide that disputes about the amount of a loss may be determined by appraisal. This process was triggered when the plaintiffs delivered their proofs of loss and made a specific demand to the defendant.

[3] The process, defined in s. 128 of the Act, is intended to be an expeditious and binding tool for dispute resolution. Under the procedure, the insured and the insurer each appoint an appraiser. The appraisers then identify points of disagreement. Points of disagreement are submitted to an “umpire” that the appraisers jointly appoint. The umpire is responsible for determining the process. He or she may make site visits, interview contractors, or conduct a hearing if so advised.

[4] A finding in writing by two of the three appointees determines the issue. However, if the appraisers cannot agree upon an umpire within fifteen days after their appointment, either party may ask a judge of the Superior Court to make the appointment pursuant to s. 128(5)(b) of the *Insurance Act*.

[5] In *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc.*, 2021 ONSC 1684, Justice Perell determined that an insured may appoint a partisan advocate as an appraiser. At paras. 28, Justice Perell observed:

A properly appointed umpire must be impartial and much like an expert at trial might be an expert in the field at issue between the parties either from special training or experience.

[6] At para. 29, Justice Perell described the appraisal process as

... collaborative and not adjudicative, and the process, which does not require a hearing with evidence, contemplates that the appraisers and the umpire will arrive at a binding decision based on their own knowledge and expertise. The umpire is the ultimate impartial decision-maker that makes a binding determination that removes the quantification of the loss from the court. As for procedure, the umpire may permit viva voce testimony under oath and may receive affidavit evidence but he or she is not required to do so.

[7] There is a dearth of case law on criteria that the court should apply to selecting an umpire. In a recent case, *Giammaria v. Economical Mutual Insurance Company*, 2021 ONSC 963, Justice Vella cited impartiality and experience as important factors: paras. 13 – 14.

[8] In this case, the plaintiffs have appointed their counsel, Mr. D. Cox of Toronto, as their appraiser. The defendant appointed Mr. F. Castaldo of Thunder Bay as its appraiser.

[9] In November 2023, Mr. Cox identified to Mr. Castaldo areas of disagreement based on the defendant's estimates, but Mr. Castaldo did not reply. The appraisers have not been able to agree on an umpire. Accordingly, the plaintiffs move for an order appointing an umpire.

[10] The plaintiffs propose either Glenn Gibson of Hamilton or D. Kevin Carroll of Barrie, as their nominees for umpire. The defendant proposes either Louie Pedron or Wayne Picard as its nominees. Both gentlemen live in Thunder Bay.

[11] The plaintiffs submit that their nominees have more experience as umpires and have worked for both insureds and insurers, whereas the defendant's nominees have worked exclusively for insurers. They contend there may be bias because of working only for insurers, whether or not it is conscious.

[12] The defendant submits that a local umpire will be familiar with suppliers, contractors, and local logistical concerns affecting the property. It also contends that a local umpire would be able to conduct site visits without incurring travel costs.

[13] The defendant relies on the unreported decision of Justice Fregeau in *Placken v. Intact Insurance Company* (February 17, 2011), Thunder Bay CV-11-0098 in which the court appointed Wayne Picard as umpire.

[14] In his one-page endorsement, Justice Fregeau identified experience in the local market, given the location of the property, and local logistics as being more important than a background in mediation.

[15] Respectfully, the brief endorsement does not identify the parties' nominees for umpire, their experience or qualifications, the size and location of the loss, or the arguments that the court considered in reaching its decision. As the case law indicates, each case is different, and must be decided on its merits.

[16] I am not persuaded that residence in Thunder Bay should be a determining factor in appointing an umpire in this case, whether because of costs of travel or familiarity with local construction markets. Electronic communication is widely available now, obviating the need for travel. In any event, given the size of the claim, travel costs from southern Ontario are not material.

[17] In my view, it is far more important that the parties have confidence in the impartiality of the umpire, which undoubtedly comes from breadth of experience. The defendant's nominees do

not have the experience of working for both insurers and insured, giving rise to the plaintiffs' concern about potential for unconscious bias.

[18] The defendant's nominee, Mr. Pedron, has never acted as an umpire while Mr. Picard has acted as an umpire only once in Thunder Bay. There is no indication about any other experience Mr. Picard has as an umpire. Both gentlemen have worked as senior insurance adjusters for the insurance industry in the Thunder Bay area.

[19] The plaintiffs' nominee, Mr. Gibson, has acted as an umpire over 350 times and has written professionally about the principles governing appraisals. The plaintiffs' second nominee, Mr. Carroll, retired from the practice of law in 2021 and works exclusively as an umpire and arbitrator. He worked frequently as an umpire from 2001 to the present.

[20] In my view, Mr. Gibson is the best qualified individual with the breadth of experience to overcome the parties' concern about unconscious bias. He is therefore appointed as umpire in accordance with s. 128(5) of the *Insurance Act*.

[21] The parties submit that the successful party shall have partial indemnity costs as agreed. The plaintiffs shall therefore have their costs fixed at \$6,000, inclusive of HST plus disbursements of \$2,863.42, payable within 30 days.

“originally signed by”

The Hon. Madam Justice H. M. Pierce

Released: June 3, 2024,

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Pierce J.

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