

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

File: MM-27-2024

Definity Insurance Company, previously known as Economical Mutual Insurance Company v. 725360 NB INC., previously known as 11257463 Canada Inc, 2024 NBKB 153

BETWEEN:

DEFINITY INSURANCE COMPANY, previously known as Economical Mutual Insurance Company,

Applicant

- and -

725360 NB INC., previously known as 11257463 Canada Inc.,

Respondent

DECISION

BEFORE: Madam Justice Christa Bourque
AT: Moncton, New Brunswick
DATE OF HEARING: May 13, 2024
DATE OF DECISION: July 26, 2024
APPEARANCES: H el ene L. Beaulieu, K.C., on behalf of Definity Insurance Company, previously known as Economical Mutual Insurance Company
Yanis Khiari, on behalf of 725360 NB Inc., previously known as 11257463 Canada Inc.

BOURQUE, J.

INTRODUCTION

- [1] The parties are embroiled in a dispute regarding the appointment of an umpire in accordance with Section 107(5) of the *Insurance Act*, RSNB 1973, c. I-12 (the “*Act*”). Consequently, the applicant urges the Court to appoint an umpire to enable the appraisal process under the *Act* to proceed.
- [2] This Court has witnessed a surge in such applications lately within a process intended to foster conciliation and avoid adversarial proceedings. Regrettably, the same individuals have found themselves entangled in conflicts regarding the appointment of their umpire, leading them to seek court resolution again and again. It is imperative for this Court to establish clear guidelines to dissuade parties from resorting to litigation, thereby promoting the primary objective of the appraisal process: resolution without judicial intervention.

FACTS

- [3] The facts of this case are simple. The applicant insured a property situated at 22 Church Street in Moncton, New Brunswick (the “property”), owned by the respondent corporation. On December 19, 2021, the property sustained partial damage from a fire caused by a homeless person.
- [4] A dispute arose when the respondent submitted its claim to the applicant. The primary issue in contention is the assessment of the loss to the property and the determination of salvageable portions.

- [5] On September 21, 2023, the respondent submitted its Proof of Loss to the applicant, initiating the appraisal process under the *Act*. On the same day, the respondent appointed its appraiser, and subsequently, the applicant followed suit. However, since then, the appraisers have been unable to reach an agreement on the selection of an umpire.
- [6] The applicant has proposed the following individuals as suitable candidates to act as the umpire: Brenda Lutz, K.C., Thomas Hanrahan, Pete Volaric and Glenn T. Gibson.
- [7] On the other hand, the respondent suggests the following individuals: Andrew Dunlap and Susan Delaney.
- [8] The Court has received the curriculum vitae of each of these individuals. However, it is not necessary to delve into detailed accounts of their education and experience unless directly relevant to the issues. In such case, they will be referred to below.
- [9] It is noteworthy that despite the respondent's request to appoint either Mr. Dunlap or Ms. Delaney, the applicant's appraiser proceeded with this application without acknowledging or considering the individuals proposed.

POSITION OF THE PARTIES

- [10] During the hearing, counsel for the applicant strongly advocated for the appointment of Ms. Lutz. The rationale behind this preference revolved around the fact that the other three candidates they propose reside out of province and charge higher hourly rates, potentially leading to increased overall costs. The applicant

emphasized that Ms. Lutz is highly suitable due to her reasonable hourly rate, extensive expertise in insurance law, impartiality, and previous involvement in the appraisal process. Furthermore, it was highlighted that Ms. Lutz was recently appointed as an umpire by this Court.

[11] Conversely, the respondent argues that while Ms. Lutz is knowledgeable in insurance law, it is paramount to appoint an umpire with expertise in the valuation of proposed repairs. The respondent asserts that Ms. Lutz may lack the ability to independently quantify the value of the loss and the salvaged property. In this context, the respondent proposes Mr. Dunlap, an experienced restoration contractor with 30 years of expertise in providing detailed estimates for the replacement cost of damaged property. Additionally, the respondent states Mr. Dunlap is skilled at quantifying such losses.

[12] As an alternative choice, the respondent suggests Ms. Delaney, who possesses extensive experience in the insurance field and expertise in quantifying property losses. Moreover, Ms. Delaney has prior experience serving as an umpire.

ISSUES

[13] This Court must determine two issues: who should be appointed as the umpire and what, if any, costs should be awarded.

LAW AND ANALYSIS

- Legislation

[14] Section 107 of the *Act* delineates the appraisal process to be followed when parties to an insurance contract reach an impasse:

Condition re-appraisal

107(1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.

107(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.

107(3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters.

107(4) Each party to the appraisal shall pay the appraiser appointed by him and shall bear equally the expense of the appraisal and the umpire.

107(5) Where,

(a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so,

(b) the appraisers fail to agree upon an umpire within fifteen days after their appointment, or

(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

a judge of the court sitting in the judicial district in which the appraisal is to be made may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer.

[15] Moreover, Statutory Condition 11 of the insurance contract clearly states:

Appraisal

11 In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall 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, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

- Purpose of the Appraisal Process

[16] There is a paucity of case law from courts in New Brunswick regarding the appointment of an umpire. Nevertheless, numerous cases from other provinces

offer valuable insight which inform this analysis, specifically those provinces where the legislation is similar.

[17] To begin this analysis, it is essential to understand the purpose of the appraisal scheme and what it aims to achieve.

[18] The appraisal process under the *Act* serves as a mandatory and expedient mechanism for settling indemnity claims and is triggered upon the request of either party. Its primary objective is to offer a swift and binding resolution to disputes concerning the valuation of losses. It is meant to ensure an impartial determination of the loss' value, salvage value, or damage quantification. While the process aims to provide a final determination, it's not intended as a comprehensive alternative dispute resolution method and does not encompass all issues between the parties. Courts have accorded significant deference to the appraisal process, acknowledging its efficiency and finality, while also underscoring its separate status from arbitration or adjudication. (See: *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc.*, 2021 ONSC 1684, *Seed v. ING Halifax Insurance et al.*, 78 O.R. (3d) 481 and *Wawanesa Mutual Insurance Co. v. Falahatparvar*, [2023] O.J. No. 2198)

[19] A comparison of the appraisal process to litigation is provided by the Court in *Arvanitopoulos v. The Wawanesa Mutual Insurance Co.*, 2022 ONSC 2613, at paragraph 73. This overview provides a helpful outline of the characteristics of the appraisal process in relation to insurance claims.

52 For present purposes, the points to emphasize about the separation of the appraisal process and the court process are as follows:

The appraisal process under the *Insurance Act* is a free-standing mandatory process that must proceed if either party requests it.⁸

The appraisal process is intended to be a final and binding determination of the loss.⁹ The appraisal process is mandatory, and unless waived by both parties or unless impossible to perform, there must be an appraisal before there can be recovery under the policy.¹⁰ The appraisal process is intended to facilitate a quick resolution of a dispute about the value of the property insured, the value of the salvage, or the quantification of the damage to the property, but it is not intended to be an arbitration or an alternative dispute resolution method that will resolve all the issues between the parties; all other non-valuation issues are outside the province of the appraisers and umpire to resolve.¹¹

The appraisal process is not an arbitration or an adjudication but is considered to be a binding valuation that determines the value of loss before there can be any recovery on the insurance contract.¹²

Where there is a dispute about the value of the insured's loss, s. 148 of the *Insurance Act* requires that the determination of the loss must be resolved before there can be any recovery on the insurance contract, and a court action may in appropriate circumstances be stayed pending the completion of the appraisal process.¹³ However, the appraisal process is typically available while the court proceedings are proceeding, and the appraisal process and the court proceeding may run concurrently, especially when there are issues outside the province of the appraisal process.¹⁴ The court will decide the interpretation and coverage issues and the interpretation can then be applied to the values as appraised.¹⁵

In *854965 Ontario Ltd. v. Dominion of Canada General Insurance Co.*,¹⁶ Justice Kennedy described the appraisal process under the *Insurance Act* as follows:

The appraisal process is contemplated, by the terms of statutory condition # 11, to take place prior to any recovery under the contract, whether there is any dispute as to the ability to recover on the contract, and independently of all other questions. The appraisal process commonly determines value but leaves question[s] of entitlement and defences to recovery under the contract to a lawsuit under the contract of insurance. The appraisal process can take place concurrently with a lawsuit dealing with the insured's claim to recover under the contract and an insurer's defences to payment.

The appraisal process is subject to judicial review, but it is not subject to the provisions of the *Statutory Powers Procedure Act*.¹⁷ The umpire decides the procedure for the appraisal process on a case-by-case basis.¹⁸

The court has inherent jurisdiction to make such procedural orders as are necessary to give effect to the statutory appraisal scheme in the *Insurance Act* and to prevent adjudication by ambush, to promote efficient and meaningful discovery as a means of reaching a just result, and to equip both sides as well as the umpire with the information needed to present a full answer and defence.¹⁹

[20] Finally, in the case of *Agro's Foods Inc. v. Economical Mutual Insurance Co.*, 2016

ONSC 1169 (CanLII) at paragraph 56, the Court emphasized that the appraisal

process focuses on evaluating the value of saved property, damaged property, and the extent of property damage, while legal matters, including disputed legal issues related to "value" are not within the jurisdiction of appraisers and the umpire to resolve. Parties must resort to litigation if they aren't able to resolve such legal issues.

- Nature of the Appraisal Process

[21] The appraisal process, as delineated in the jurisprudence, underscores the importance of collaboration between involved parties, with the aim of expediting and simplifying the settlement of insurance claims. In contrast to adversarial litigation, this process prioritizes collaboration, facilitating a joint effort by appraisers and the umpire to reach a binding decision. This ultimately serves the interests of both insureds and insurers in achieving prompt and equitable outcomes.

[22] In *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc.*, supra, Justice Perell stressed the collaborative nature of the appraisal process and discussed the procedural flexibility granted to the umpire throughout the proceedings. He said the following at paragraphs 27 and 29:

[27] The appraisal process is not an arbitration or an adjudication but is considered to be a binding valuation that determines the value of loss before there can be any recovery on the insurance contract.[17] The procedure for the appraisal process is not set out in s. 128 of the *Insurance Act*. The *Rules of Civil Procedure* have no application to the procedure mandated by the provisions of the *Insurance Act*. [18] The appraisal process is subject to judicial review but is not subject to the provisions of the *Statutory Powers Procedure Act*. [19]-[20] The umpire decides the procedure for the appraisal process on a case-by-case basis.

[29] The appraisal process is designed to be 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.[27] The umpire is the ultimate impartial decision-maker that makes a binding determination that removes the quantification of the loss from the court.[28] 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.[29]

[23] Justice Perell explained that the appraisal process varies from case to case, depending on the specific circumstances involved and the umpire has discretion over the procedural aspects of each appraisal.

[68] As noted above, the *Rules of Civil Procedure* do not apply to the appraisal process and the *Insurance Act* does not specify a procedure. The case law reveals that this lack of a rigid structure is by design. The flexibility of the appraisal process provides insureds and insurers an expeditious and easy means for the settlement of claims for indemnity under insurance policies. It is designed to remove a valuation issue from the court's jurisdiction if either party invokes the appraisal process.

[69] I agree with Justice M.E. Smith's very helpful analysis in *Campbell v. Desjardins General Insurance Group*, *supra* that each appraisal process is different and that the appraisal process depends upon the particular facts of the loss and upon how the umpire chooses to proceed.

[70] I agree with Justice Smith that the procedure for the appraisal process can range from a very informal debate with the debate winner selected by the umpire to something approaching the procedure that might be used in an arbitration or an adjudication with the examination of witnesses.

...

[73] In the immediate case, the exigencies of the case did require a more structured and formal appraisal process to provide the insured and the insurer procedural fairness having regard to the substantial amount of money involved and the difficulties of determining the costs of repairing and reconstructing a 25-storey building that had suffered substantial damages in a fire. The umpire's decision was to be a binding decision, and the decision was of considerable importance to both the insured and the insurer. A formal process was not precluded by the statutory scheme and a formal process would have been in the reasonable expectations of both the insured and the insurer and it was within the umpire's discretion to choose a more formal procedure given his expertise as a lawyer, arbitrator, and umpire who also had business school credentials.

[24] The above reasoning was subsequently adopted by the Ontario Court of Appeal in *Desjardins General Insurance Group v. Campbell*, 2022 ONCA 128 (CanLII) at paragraphs 38 and 39:

[38] The content of procedural fairness in the appraisal process is modest and flexible, and will depend upon the exigencies of the particular case, having regard to, for example, the amount of money involved in the dispute: *Northbridge*, at paras. 34, 71 and 73. There is no requirement that reasons for decision be provided: *Madhani*, at para. 41. The more complex cases may require a more structured and formal appraisal process: *Northbridge*, at para. 73. To that end, the umpire enjoys considerable discretion. Courts afford the umpire's choice of procedure considerable deference and will be reluctant to interfere unless there is proof of fraud, collusion, bias, or partiality on the part of the umpire, or the umpire or the appraisers exceed their jurisdiction under the Act: *Northbridge*, at para. 34, *Shinkaruk Enterprises Ltd. and Mr. Klean Enterprises Ltd. v. Commonwealth Insurance Company et al.*, 1990 CanLII 7738 (SK CA), 71 D.L.R. (4th) 681 (Sask. C.A.), at p. 688.

[39] This lack of a rigid structure is deliberate, intended to provide the insureds and the insurers with an expeditious and easy means for the settlement of claims for indemnity under insurance policies: *Northbridge*, at para. 68. It is in the best interests of appraisers to be objective in the appraisal process and not harm their position by losing credibility in the eyes of the umpire. In other words, the appraisal process itself provides sufficient constraint on the conduct of appraisers.

[25] It is important to acknowledge that the appraisal process varies from case to case, requiring the Court to consider each unique set of circumstances when selecting an umpire. Nevertheless, it's imperative for appraisers to collaborate under the guidance of the umpire to reach a resolution. Treating the process as adversarial litigation undermines its purpose by ultimately delaying any resolution and increasing costs for all parties involved.

[26] In *Desjardins*, supra, the Ontario CA provided these parting words:

[48] Moreover, while the process contemplates a valuation process that is comprised of the appraisers and the umpire, the ultimate decision maker if the parties are unable to agree is the umpire and not the appraisers. The fact that the umpire chooses one party's appraisal over another does not change this. Seen in the context of the process as a whole and its purpose, this reflects the premium put on collaboration and efficient process because, as discussed earlier, the process creates incentive for the parties to present reasonable valuations to the umpire to maximize the prospect that theirs will be chosen.

- Role of Appraisers

[27] In line with the nature of the appraisal process, appraisers play a crucial role in collaboration. The case law provides that while they represent their clients'

interests, they should do so with a focus on finding common ground rather than engaging in conflict. Appraisers should strive, in good faith, to reach compromises. Failing to do so undermines the purpose of the appraisal process.

[28] Once again in the case of *Desjardins*, supra, the Ontario Court of Appeal outlines the approach appraisers should adopt at paragraph 36:

[36] ... To fulfil the purposes of the appraisal scheme outlined above and to facilitate a collaborative process, an appraiser must attempt, in good faith, to reach a compromise with their fellow appraiser. That does not preclude the appointment of one party's lawyer as their appraiser as well, but the appraisal process presupposes that each appraiser work collaboratively. While this involves advocacy in the sense that each side may be expected to advocate their valuation to the other, their overall role within the appraisal process is more collaborative and less adversarial. The umpire will ultimately choose one side or the other. That places a premium on each side to be reasonable and also to reach agreement with the other side if possible.

[emphasis mine]

[29] Applying the same approach is crucial when it comes to appointing an umpire. As outlined in the *Act*, the two appraisers are obligated to jointly choose an umpire. This necessitates a commitment from each appraiser to collaborate and reach a decision together. (See: *Wawanesa Mutual Insurance Company v Falahatparvar*, supra)

- Role of the Umpire

[30] As one would expect, the umpire holds a pivotal position in the arbitration process. However, there are constraints on his/her authority regarding certain matters. Specifically, the case law provides that the umpire's role is to assess the value of the damaged property, the value of the property saved, and the extent of the

property damage. They lack the jurisdiction to adjudicate on other issues, such as legal matters concerning the loss, interpretation of the insurance policy, or legislative provisions. The purpose of the appraisal process isn't to serve as arbitration or an alternative dispute resolution method capable of resolving all issues between parties. Matters beyond valuation are outside the umpire's scope to address. (See: *Shinkaruk Enterprises Ltd. and Mr. Klean Enterprises Ltd. v. Commonwealth Insurance Company et al.*, 1990 CanLII 7738 (SK CA) at paras 16-17, *Madhani v. Wawanesa Mutual Insurance Company*, 2018 ONSC 4282 at para. 20 (Div. Ct.) and *Agro's Foods Inc. v. Economical Mutual Insurance Co.*, supra, at para. 56 and 63).

- [31] As previously mentioned, the umpire enjoys considerable discretion in guiding the process forward. Complex cases may necessitate a formal approach, while simpler ones may allow for a more informal procedure. Nevertheless, it's important to point out that regardless of the procedural approach, the umpire's jurisdiction remains consistent, focusing on determining the value of the loss.
- [32] In the case of *Northbridge*, supra, the parties were unable to resolve their dispute as to the value of the loss of a large condominium tower after it was substantially damaged by fire. It was going to cost in the millions of dollars to repair. In its decision, the Court examined the appraisal process entered into by the parties and referred to what was done as a "procedural shipwreck". In doing so, it examined several points to consider when an umpire chooses to proceed in a particular manner. The Court stated as follows at paragraphs 71 and 73:

[71] There are four subtle points to note about how the umpire chooses the procedure for the appraisal process that are significant to the immediate case of Ashcroft and Northbridge.

a. The first point to note is that although the appraisal process is not an arbitration or an adjudication, nevertheless, depending on the exigencies of the particular case, the umpire may choose a procedure that resembles an arbitration or an adjudication.

b. The second point is that although the appraisal process is not an arbitration or an adjudication, keeping in mind that the appraisal process does lead to a binding determination that removes the valuation issue from a court's determination, and also keeping in mind that the exigencies of the particular case are important, the umpire's choice of procedure is not an unbridled choice. The appraisal process is subject to judicial review and the appraisal process is subject to the principles of procedural fairness, which, in turn, are flexible and depend upon the exigencies of the particular case.

c. The third point, which is a corollary to the second, is that while the appraisal process is designed to afford insureds and insurers an expeditious and easy means for the settlement of claims for indemnity under insurance policies, depending on the exigencies of the particular case, the procedure may not be a cheap and cheerful procedure. It may approach a stern and expensive adjudicative procedure.

d. The fourth point is whether the procedure is casually informal or is strictly formal akin to an adjudication, the roles of the appraisers is to be partisans and the role of the umpire is to be an impartial decision-maker.

...

[73] In the immediate case, the exigencies of the case did require a more structured and formal appraisal process to provide the insured and the insurer procedural fairness having regard to the substantial amount of money involved and the difficulties of determining the costs of repairing and reconstructing a 25-storey building that had suffered substantial damages in a fire. The umpire's decision was to be a binding decision, and the decision was of considerable importance to both the insured and the insurer. A formal process was not precluded by the statutory scheme and a formal process would have been in the reasonable expectations of both the insured and the insurer and it was within the umpire's discretion to choose a more formal procedure given his expertise as a lawyer, arbitrator, and umpire who also had business school credentials.

[33] Although the Court's comments may appear to be at odds with the collaborative nature of the appraisal process, it's logical that the significant value of the loss in *Northbridge*, supra, would shape the umpire's approach. In such high-stakes scenarios involving millions of dollars, maintaining complete collaboration and simplicity throughout the appraisal process might be an unattainable ideal. What's

evident is the necessity to tailor the process to suit the unique circumstances of each case.

[34] On a separate but important note, the authority granted to umpires in the appraisal process differs across provinces. In Saskatchewan and Alberta, for instance, the powers are somewhat broader compared to those outlined in New Brunswick's legislation. Specifically, the Alberta and Saskatchewan *Insurance Acts* allow umpires to determine not only the value of the property but also "the nature and extent of the repairs or replacement." This distinction serves as a caution for those referencing cases from these provinces regarding the extent of umpires' jurisdiction.

- Considerations in Appointing an Umpire

[35] The overarching principle that emerges from a review of case law is the recognition that each appraisal case is distinct. This same principle applies to the selection of an umpire. In other words, an umpire who is deemed to be the best choice in one case may not be the most suitable candidate to act as umpire in another. To find the best umpire, courts have outlined certain qualities to look for in a candidate. These qualities were discussed in the case of *Falahatparvar*, supra, at paragraph 20:

20 The qualities of an appropriate umpire include:

(i) Expertise: *Giammaria v. Economical Mutual Insurance Company*, 2021 ONSC 963, at para. 12.

(ii) Experience: *Giammaria*, at para. 16.

(iii) Impartiality: *Desjardins General Insurance Group v. Campbell*, at para. 37: "The integrity of the process depends on the impartiality of the umpire."

It is important that an umpire not only be impartial, but also that the parties do not reasonably apprehend bias on the part of the umpire.

- [36] When parties seek to agree on an umpire, bias is a frequent concern. Suspicion arises when one party perceives the proposed umpire as having affiliations with the opposing party, casting doubt on their ability to be impartial. Therefore, as stated in the above quote, it is crucial to select an umpire who maintains independence from both parties to uphold the integrity of the appraisal process.
- [37] The Court in *Falahatparvar*, supra, further addressed the issue of the umpire's impartiality at paragraphs 21 and 22:

21 The umpire in this case must be both impartial in fact and seen by the parties to be impartial. Ms. Falahatparvar submits that she apprehends Mr. Gibson to be biased in favour of Wawanesa. The question then arises whether her claimed apprehension of bias is reasonable.

22 The test for determining whether a reasonable apprehension of bias exists is well established and not in dispute. The Supreme Court of Canada established the test for determining whether a reasonable apprehension of bias exists in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, at p. 394:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

- [38] According to the jurisprudence, the primary consideration for appraisers when selecting an umpire is to identify the unresolved issue and then seek out an individual with adequate expertise in the relevant field to serve as the umpire and settle the dispute. This implies that a legally trained umpire would only be necessary when the issue at hand demands legal expertise for resolution or perhaps experience in managing conflict. Similarly, a building appraiser would be suitable as an umpire only in cases where their expertise is specifically needed,

such as when there is agreement on the remedy of a repair but disagreement on its value. (See: *Matti v. Wawanesa Mutual Insurance Company*, 2009 ABQB 451, paragraphs 18-19).

[39] In the case of *Disante v Meloche Monnex Financial Services Inc.*, 2023 ONSC 3663 (CanLII), McLeod, J. provides an illustrative example of the careful evaluation that is required by the Court when selecting the most suitable umpire. While an individual may possess exceptional abilities in one area, they may lack the requisite expertise in another. Consequently, the court must evaluate the specific circumstances of the case at hand.

[11] I am required to select one of the proposed umpires because that is the statutory mandate of the Court under the Act. I consider that subject matter expertise in property damage claims and construction costs would be useful but it does not follow that alone is the deciding factor. An umpire must have sufficient expertise to quickly grasp the issues and understand the documents. They need not be qualified to do the work themselves and other expertise is also important. I consider that adjudication and dispute resolution expertise is also important. Experience in arbitration and dispute management would be helpful. Experience as an umpire would be beneficial. Ideally, the umpire should be a person in whom the parties themselves have confidence. In that regard, while no judicial decision should be arbitrary, a choice must be made between the proposed neutrals. All of them seem appropriate for different reasons.

[40] In light of the exhaustive discussion above, it is now appropriate to undertake a review of the candidates for umpire that have been proposed by the parties.

- Selection of the Umpire

[41] I have thoroughly considered the various criteria established in case law for the selection of an umpire in this case. Regarding the requirement for legal expertise, I do not find it to be a necessary qualification for this role. Although experience in dispute resolution might be beneficial, there is no stipulation that the umpire must possess legal knowledge to resolve this particular matter.

- [42] On the question of lack of neutrality and bias, I would not disqualify any of the proposed candidates on these grounds, as I find no evidence to suggest any inherent prejudice or partiality.
- [43] Considering the remaining criteria, I believe the two most crucial qualifications in this case are the ability to perform the necessary valuations and having relevant experience acting as an umpire. These qualifications ensure that the umpire can effectively and accurately assess the matters at hand and bring a wealth of practical insight to the appraisal process. In my view, the primary focus should be on the umpire's competency in valuation and familiarity with the process provided under Section 107 of the *Insurance Act*.
- [44] In reviewing the proposed candidates against the primary considerations of experience in the valuation of the proposed repairs, impartiality, and experience as an umpire, I have concluded that the most appropriate candidate is Susan Delaney. Ms. Delaney's resume demonstrates significant experience in the valuation of claims within the insurance context, spanning many years. This extensive background includes her work as an appraiser, and notably, over the last four years, she has served as an umpire. Her qualifications clearly align with the requirements of this role.
- [45] Furthermore, Ms. Delaney is currently retired and has no employment affiliations with any insurers, which bolsters her impartiality. There should be no concerns regarding bias, as neither party has identified any potential conflicts of interest.

[46] Given her extensive experience, demonstrated impartiality, and specific background as an umpire, Ms. Delaney stands out as the most suitable candidate for this role. Her expertise and unbiased position will significantly contribute to the fairness and accuracy of the appraisal process under the New Brunswick *Insurance Act*. I therefore select Ms. Delaney to serve as the parties' umpire.

COSTS

[47] On the issue of costs, I have considered the respondent's success in having its proposed candidate selected. However, I have also taken into account the fact that, until the hearing, the applicant did not respond to the respondent's proposed candidates. During the hearing, counsel for the applicant indicated that she did not have any substantial objection to Ms. Delaney but preferred her client's suggestion of Ms. Lutz.

[48] The applicant's failure to engage with the respondent's proposed candidate and the necessity of bringing the matter to a hearing undermine the fundamental purpose of the appraisal process. This process is designed for the appraisers to cooperate in the selection of the umpire, thereby avoiding the costs associated with court intervention. The applicant's lack of response and insistence on a hearing resulted in unnecessary expenses and defeated the goal of a cost-effective resolution.

[49] In light of these considerations, it is evident that the applicant's actions were contrary to the cooperative spirit intended by the appraisal process under the New Brunswick Insurance Act. Therefore, the costs incurred due to this hearing should

be appropriately assessed to reflect the applicant's failure to engage in the intended cooperative process. On that basis, I order the applicant to pay \$3,000 plus HST in costs to the respondent.

[50] This Court takes note of a recurring pattern in the filing of these types of applications, often involving the same parties displaying an inability to conduct themselves in a conciliatory manner. This adversarial approach runs counter to the intended spirit of the appraisal process.

[51] At the risk of repeating myself, the goal is for appraisers to work together to select an umpire. However, when parties consistently refuse to engage in good faith negotiations and instead resort to litigation, it not only defeats the purpose of the process but also imposes additional burdens on the judicial system.

[52] In some instances, the failure to compromise may lead to allegations or findings of bad faith. Persisting in such behavior can also result in increased costs awards. This Court cautions that continued refusal to compromise and cooperate in the selection of an umpire, as required by the appraisal process, may attract adverse cost consequences, including, where appropriate, solicitor and client costs.

DISPOSITION

[53] Susan Delaney is appointed to act as the umpire in this matter in accordance with Section 107(5) of the New Brunswick *Insurance Act*.

[54] The applicant will pay costs to the respondent in the amount of \$3,000 plus HST.

DATED at Moncton, New Brunswick, this 26th day of July, 2024.

Christa Bourque
Justice of the Court of King's Bench
New Brunswick, Trial Division