

# Court of Queen's Bench of Alberta

**Citation: Matti v. Wawanesa Mutual Insurance Company, 2009 ABQB 451**

**Date:** 20090724  
**Docket:** 0901 05956  
**Registry:** Calgary

Between:

**Ryadh Matti**

Applicant

- and -

**The Wawanesa Mutual Insurance Company**

Respondent

---

**Reasons for Judgment  
of the  
Honourable Mr. Justice W.P. Sullivan**

---

## **1. Introduction and Facts**

[1] On November 15, 2007 Ryadh Matti (the "Applicant") experienced a sanitary sewer system back up. The back up soaked portions of his home's drywall, baseboards, carpets, and other flooring. The Applicant duly notified his insurance company (the "Respondent") of the loss.

[2] As the Applicant and the Respondent could not agree on the value of the damage caused, each party obtained an appraisal as contemplated by the *Insurance Act*, R.S.A. 2000, c. I-3 (the "*Act*"). However, the appraisers could not agree on the appropriate action to remedy the damage, as the Applicant's appraiser believed replacement of damaged property was required, while the Respondent's appraiser believed only a cleaning was required.

[3] The *Act* requires that when the appraisers cannot agree on an issue that they are to appoint an umpire to resolve the dispute.

[4] The Applicant's appraiser nominated a lawyer who had extensive experience with alternative dispute resolution. This nominee was deemed unsuitable by the Respondent, because the nominee lacked the expertise to determine what property had been damaged by the sanitary sewer back up.

[5] The Respondent's appraiser nominated an experienced appraiser who had an extensive background in the insurance industry to be the umpire. This nominee was deemed unsuitable by the Applicant, as the nominee was perceived to have a personal connection to the Respondent.

[6] Therefore, on May 14, 2009 I heard an application to determine the appropriate umpire for the parties. At the application, the Applicant's appraiser nominated another lawyer with a similar background and experience as the first nominee. The Respondent again found this nominee to be unacceptable. Further, at the application the Respondent's appraiser nominated another appraiser with a background in insurance. However, this nominee was also rejected by the Applicant on account of potential bias.

[7] After hearing submissions this Court provided an oral decision directing the parties to choose an umpire who has sufficient expertise, in the field of home rehabilitation or home reclamation, to act as the umpire. What follows are additional reasons to this decision.

## **2. Legislation**

[8] Section 549(1) statutory condition 11 of the *Act* provides that when an insurer cannot agree with their insured about a valuation issue the issue can be resolved by an appraisal:

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 recovery 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.

[9] Section 514 of the *Act* outlines the scheme that is to be followed when obtaining an appraisal:

(1) This section applies to a contract, other than a contract of hail insurance, 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.

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

(3) The appraisers must determine the matters in disagreement and, if they fail to agree, they must submit their differences to the umpire, and the finding in writing of any 2 determines the matters.

(4) Each party to the appraisal must pay the appraiser that the party appointed, and each party must bear equally the expense of the appraisal and the umpire.

(5) If

- (a) a party fails to appoint an appraiser within 7 clear days after being served with written notice to do so,
- (b) the appraisers fail to agree on an umpire within 15 days after their appointment, or
- (c) an appraiser or umpire refuses to act or is incapable of acting or dies,

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

### **3. Position of the Parties**

[10] The Applicant submits that the above mentioned provisions of the *Act* create a quasi-judicial role for an umpire, which requires an umpire to have legal knowledge and experience to ensure impartiality. The Applicant therefore seeks to have a lawyer with extensive experience in alternative dispute resolution appointed to be the umpire.

[11] The Respondent conversely submits that above mentioned provisions of the *Act* require an umpire to have knowledge and experience in the field that is at issue between the parties. Therefore, the Respondent submits that an experienced appraiser is the best person to act as an umpire for this dispute.

### **4. Analysis**

[12] An umpire's role under the *Act* is in the nature of a binding arbitration award. This means that an umpire's decisions, absent fraud, collusion, or bias, is not open to review by a court; see *Burke v. Co-operative Fire and Casualty Co.* [1977] A.J. No. 63 (D.C.) and *O'Brien v. Non-Marine Underwriters, Lloyd's, London* (1991), 128 A.R. 165. This means that an umpire has a very important role to play in disputes like the one at bar. However, there is very little legal guidance for parties as to what the proper qualifications of an umpire are.

[13] In *O'Brien*, at p. 7 the Court approvingly quoted the Saskatchewan Court of Appeal in *Shinkaruk Enterprise Ltd. v. Commonwealth Insurance Co.* (1990), 85 Sask. R. 54 (C.A.) for the proposition that umpires should have expertise in the sphere of property values:

The intent and object of a statutory provision like the ones under scrutiny here are twofold: to encourage a quick settlement of the insured's loss and to facilitate the use of the expertise of an appraiser (or an umpire) in the sphere of property values.

[14] It is important to note that the issue between the parties in *Shinkaruk* was the value of the damage caused, which is different than determining what is the appropriate remedy to restore property to its condition prior to being damaged as is the issue at bar. Therefore, it would be wrong to interpret the principle from *Shinkaruk* as a blanket statement that an umpire must only have expertise in the sphere of property values, as what expertise is required will depend on the factual dispute between the parties.

[15] This means that expertise for the purposes of appointing an umpire should be given a wide definition. In this regard the plain dictionary definition of an expert should be employed. According to *Canadian Oxford Dictionary*, (Don Mills: Oxford University Press, 2004) at p. 523, an expert is someone who has:

“special knowledge or skill in a subject”

[16] This definition is very much in line with part four of the four part test endorsed by the Supreme Court of Canada for taking of expert evidence at trial, as in *R. v. Mohan* [1994] 2 S.C.R. 9 at para. 31 the Court held that an expert witness must:

“have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.”

[17] Therefore, a properly appointed umpire, much like an expert witness at trial, should be an expert in the field at issue between the parties. The expert's expertise can come either from special training, or from sufficient experience.

[18] Accordingly, the key for appraisers when nominating an umpire is to determine the issue that cannot be resolved, and then find a person with sufficient expertise in the field to act as an umpire to resolve the dispute.

[19] This means that a legally trained umpire will only be required when the issue between the parties requires legal expertise to understand the issue. Likewise an appraiser will be an appropriate umpire only in situations where the expertise of the appraiser is required, like when the remedy of a repair is agreed but the value of the repair is disputed.

[20] The case at bar involves a dispute about the appropriate remedy to repair the damage caused by a sanitary sewer back up. The Applicant's appraiser's nominee has extensive alternative dispute resolution expertise, but this expertise is of nominal value for the actual issue between the parties. Likewise the experience of the nominee of the Respondent's appraiser is of nominal value, as the issue between the parties is not whether the appraisals were done correctly

but rather what is the appropriate remedy to restore the Applicant's home to its condition prior to the sanitary sewer back up.

[21] Given that the appropriate manner in which the Applicant's home should be repaired is the issue, the umpire should have sufficient experience in home rehabilitation or home reclamation. For an expert in the field will best know if property is in need of replacing or if the damaged property can be sufficiently restored with a simple cleaning.

[22] Of course in addition to expertise the umpire must be capable of acting impartially, so, this too must be a consideration when selecting an umpire.

## **5. Conclusion**

[23] As the true issue between the parties requires the umpire to determine the appropriate manner in which to repair the Applicant's home, an expert in home rehabilitation or home reclamation should be appointed.

[24] If the parties cannot agree on a suitable expert in home rehabilitation or home reclamation, the parties may apply to the Court.

[25] The parties shall bear their own costs for this application.

Heard on the 14<sup>th</sup> day of May, 2009.

**Dated** at the City of Calgary, Alberta this 23<sup>rd</sup> day of July, 2009.

---

**W.P. Sullivan**  
**J.C.Q.B.A.**

## **Appearances:**

Jeffrey Smith  
for the Applicant

Mark C. Freeman  
for the Respondent