

## Insurance

# Insurance appraisers need not be impartial when evaluating loss: lawyer

By Terry Davidson

(March 8, 2022, 1:12 PM EST) -- An Ontario court decision involving a dispute between an insurance company and a homeowner whose house was destroyed by a tornado "puts to rest any suggestion" that an appraiser must be impartial in assessing the value of a loss, says a lawyer.

The Feb. 15 Court of Appeal for Ontario ruling in *Desjardins General Insurance Group v. Campbell* 2022 ONCA 128 centred on a long legal battle between the insurance company and Ruth Campbell, whose Ottawa home was totalled by a twister that touched down in the city on Sept. 21, 2018.

According to the written decision, the appeal came out of "a number of applications and motions involving three separate insurance claims for damages" caused by the storm.

The issue before the Appeal Court was whether the applications judge was wrong to not replace Campbell's appraiser, who is also her lawyer, with one considered to be independent and impartial in assessing the damage to Campbell's home.

After her home was destroyed, Desjardins presented Campbell with damage estimates. Campbell consulted with those who built her home, disagreed with Desjardins' estimates, and she requested an appraisal be done.

Desjardins tapped one of its adjusters to be its appraiser, while Campbell chose Joseph Obagi, who happens to be her lawyer.



Joseph Obagi, Connolly Obagi LLP

In efforts to break the impasse, both appraisers agreed to appoint an umpire. During the first case conference, Obagi said he was considering bringing a bad faith claim against Desjardins relating to the company's "adjustment of [Campbell's] file."

The umpire then suspended the appraisal process pending direction from the province's Superior Court after raising concerns around Obagi's ability to be impartial in his appraisal. The umpire raised the same concerns about Desjardins' choice of appraiser.

Desjardins removed its appraiser and chose another employee instead. After the umpire expressed concerns about this solution, Desjardins appointed an appraiser from outside the company.

But Campbell and her family did not want to replace Obagi as their appraiser, to which Desjardins brought a court application to remove him as Campbell's appraiser, arguing that "the appraisal process is an administrative tribunal and the two appraisers and the umpire must all be impartial."

But the applications judge found s. 128(2) of the *Insurance Act* places no restrictions on who can act as an appraiser, pointing to the common practice of insurance companies appointing an employee as their appraiser and insured people appointing "a lawyer, a public adjuster, or even themselves to act" as theirs.

Desjardins appealed, arguing that the applications judge was wrong to find that "an appraiser is an advocate and not a decision maker because this offends the principle of impartiality and breaches procedural fairness."

In response, Campbell argued that the Act "expressly permits the parties to an appraisal to appoint an appraiser of their choice and that choice need not be 'neutral', 'non-partisan' or 'independent' of the parties."

Appeal Court Justice Alison Harvison Young, with Justices Mary Lou Brown and David Brown concurring, found the applications judge made the right call.

"In short, the flaw in the appellants' argument that appraisers must be independent is that it collapses the roles of the umpire and the appraisers," wrote Justice Harvison Young. "The integrity of the process depends on the impartiality of the umpire. The structure of the process, according to which the umpire ultimately chooses one appraisal over the other, encourages compromise and collaboration between the parties."

Justice Harvison Young went on to find that the "purpose of the appraisal scheme under the *Insurance Act* is to provide an easy, expeditious, and cost-effective means for the settlement of claims for indemnity under insurance policies."

"It is designed to be collaborative and not adjudicative. ... To fulfil the purposes of the appraisal scheme ... 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.”

Obagi told *The Lawyer’s Daily* the ruling “puts to rest any suggestion that an appraiser, under the *Insurance Act*, needs to be an impartial or disinterested individual.”

“The appraiser is a representative of the party who hires them, and that’s the way the system is intended to operate,” said Obagi, a partner with Connolly Obagi LLP. “Both sides hire an appraiser. That appraiser is charged with advancing the interests of the party who hired them. Just like I am, of course, as Ms. Campbell’s lawyer I am charged with advancing her interests; just like the insurance company adjusters, they are charged with pursuing the insurance company’s interests. And if we can reach an agreement at the table, great. If we can’t reach an agreement at the table, then ... we jointly appoint a third-party umpire ... and that umpire resolves the difference.”

Obagi also said legal significance also lay in the fact that “it is the first time that the Court of Appeal had an opportunity to comment on the inner workings of the appraisal provisions of the *Insurance Act*.”

“The very role of the appraiser in the *Insurance Act* appraisal scheme is for each side to have someone who is going to put forward their view of the value of the loss, and if they can’t agree amongst themselves, then you appoint an umpire, who is then going to be the impartial player because the umpire has to be appointed by both parties and clearly needs to be impartial. The umpire, they become the ‘judge’ in regards to the value of the loss.”

Desjardins’ lawyer, Pasquale Santini, of Kelly Santini LLP, was asked for comment.

“What I can say is that it is groundbreaking in that we had no appellate guidance on appraisals and that this is an area that has not been fully developed,” said Santini in an e-mail. “The guidance from the court on the dual role of counsel who also acts as an appraiser in the same case is very helpful in that this was a totally unclear area of the law.”

Santini said he and his clients have not yet decided whether to seek leave to appeal to the Supreme Court of Canada.

*If you have any information, story ideas or news tips for The Lawyer’s Daily, please contact Terry Davidson at t.davidson@lexisnexis.ca or call 905-415-5899.*