SUPREME COURT OF NOVA SCOTIA

Citation: *New Dawn Enterprises Limited v. Northbridge General Insurance Corporation*, 2020 NSSC 150

Date: 20200504
Docket: Hfx No. 487448
Registry: Halifax

Between:

New Dawn Enterprises Limited

Applicant

v.

Northbridge General Insurance Corporation, and David Babineau, in his capacity as Umpire, and Richard J. Escott, in his capacity as Appraiser

Respondents

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	December 12, 2019, in Halifax, Nova Scotia
Final Written Submissions:	January 17, 2020
Counsel:	David S. Green, for the Applicant Colin D. Piercey, for the Respondent Northbridge Leon S. Tovey, for the Respondent Escott

By the Court:

Introduction

[1] On March 17, 2017, the Holy Angels Convent in Sydney, Nova Scotia, suffered extensive water damage as a result of a sprinkler line failure. At the time, the Convent was one of several properties owned by New Dawn Enterprises Limited and insured under a policy of insurance issued by Northbridge General Insurance Corporation. Shortly after the damage occurred, New Dawn and Northbridge each selected an appraiser to determine the "actual cash value" of the Convent. When those appraisers failed to agree, a third appraiser, David Babineau, was appointed as umpire, pursuant to s. 32 of the *Insurance Act*, R.S.N.S. 1989, c. 231. In his decision dated March 19, 2019, Babineau attributed an actual cash value to the Convent of $258,000. The appraiser for Northbridge accepted the umpire's finding, making it binding under the Act. New Dawn brings this application for judicial review seeking to set aside the umpire's decision on procedural and substantive grounds.

Background

[2] The Holy Angels Convent is located at 170 George Street in Sydney. The Convent was originally built in 1885 with an addition constructed in 1907. The building was used as a convent until 2010 or 2011.

[3] The Convent is part of a larger property in downtown Sydney consisting of 14 adjoining parcels of land improved with a house, the Convent and the former Holy Angels High School. From the time the Convent closed until 2013, the entire property was listed for sale by the Congregation of Notre Dame with asking prices ranging from $1.6 million to $650,000. Although there was some reported interest from several potential purchasers with an eye to renovating and repurposing the buildings, or demolishing the buildings and redeveloping the site, there were no offers put forward to the vendor. In 2013, the vendor accepted an offer of $250,000 from New Dawn. The Congregation of Notre Dame was willing to accept New Dawn's offer because its intended use of the property for non-profit community purposes was compatible with the vendor's own vision for the property.

[4] Following its purchase of the property, New Dawn embarked on a comprehensive plan to redevelop the Convent as the Cape Breton Centre for Arts,

Culture and Innovation. Architectural drawings were prepared for costing of the renovation. In a brochure prepared in February 2017, New Dawn described its vision for the Convent building:

> In 2013, New Dawn Enterprises purchased the former Holy Angels Convent and High School from the Sisters of Notre Dame. The acquisition was driven by a desire to preserve the buildings that had physically and programmatically contributed a great deal to the spirit and character of the Northern, Sydney, and Cape Breton Island. Through subsequent conversations with the community two distinct needs began to emerge – the need for a centre that could host the Island's growing innovation community and that of a tangible home for Cape Breton's deep-rooted tradition of arts and culture.
>
> Since 2013, the former Holy Angels High School has temporarily housed tenants working in both the innovation and the arts and culture sectors. It is our hope that the former convent … will become a vibrant new home to dancers, musicians, writers, theater companies, recording studios, innovators, entrepreneurs and many others driven by the desire to create, collaborate, and change the Island, and the world.

[5] Until fall of 2016, the Convent space contained the Cape Breton Food Hub, the Cape Breton Escape Room, Cape Breton Orchestra events, Outer Space Rehearsal, and Enter Left Productions, a professional stage production company. Outer Space Rehearsal and Enter Left Productions had occupied spaces in the Convent since the fall of 2014 on a year round basis. The Food Hub operated in the space each year between June to November. The Escape Room was there for four months in 2016. The remaining spaces had been vacant since the property was acquired in 2013.

[6] In fall of 2016, the Convent was vacated (with the insurer's knowledge) and all non-essential building systems were shut down to avoid heating costs over the winter. The building was still vacant on March 7, 2017, when the sprinkler line failed.

The insurance policy

[7] Pursuant to Commercial Insurance Policy No. CBC 0905539, effective July 1, 2016 to July 1, 2017, Northbridge provided comprehensive coverage, including property coverage, to New Dawn for 53 buildings. The Convent was identified as "Location #52" in the coverage schedule appended to the policy. Part I of the policy, entitled "Property Insured", provides in part as follows:

1. Indemnity Agreement

In the event that any insured property is lost or damaged during the policy period by an insured peril, we will indemnify you, subject to the terms and conditions of this Policy, against the direct loss or damage so caused to an amount not exceeding whichever is the least of:

(a) the replacement cost value of the property at the time of the loss or damage, as defined and limited in **Part I Section 11. Replacement Cost Basis of Settlement Provisions;**

(b) your interest in the property;

(c) someone else's interest in their personal property (including leased personal property) which is in your care, custody or control as described in **Part I Section 2. Insured Property (b)(i);**

(d) the amount of insurance specified on the "schedule" for the lost or damaged property.

The inclusion of more than one person or interest will not increase our liability.

[Bolding in original]

[8] Correspondence from MacCoy Insurance Brokers Limited, New Dawn's broker, enclosed a renewal proposal for the 2016 – 2017 policy period for the insured properties, including the Convent. The letter stated that "renewal coverage is based on Commercial Broad Form Coverage, Replacement Cost on Buildings and Contents and Actual Cash Value on Stock, 90% Co-Insurance, subject to a $2,500 Deductible". The coverage schedule attached to the policy's declaration page, however, disclosed the inclusion of an "Actual Cash Value Endorsement" for several buildings, including the Convent. The endorsement provides:

Part I: Actual Cash Value Endorsement

This endorsement modifies insurance provided under Part I – Property Insured. When this endorsement is attached to a location on the Schedule of Part I, the basis of settlement will be Actual Cash Value for all property insured at that location.

1. We agree to amend the basis of settlement from "replacement cost" to actual cash value.

2. Any reference to 'replacement cost in a Co-Insurance Clause in this Form is deemed to be a reference to the actual cash value of the property insured.

All other terms and conditions of the Policy remain unchanged.

[9] The policy does not contain a definition of the term "Actual Cash Value". The concept is referenced, however, in section 11 of Part I, under the heading "Replacement Cost Basis of Settlement Provisions". Section 11(a)(v) states:

> Failing compliance by you with any of the foregoing provisions, settlement will be made on the basis of actual cash value of the property at the time of the loss or damage and the loss or damage will be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and will in no event exceed what it would then cost to repair or replace the same with material of like kind and quality and any reference to "replacement cost" in **Part I Section 4. Co-Insurance Clause** will be deemed to be a reference to the actual cash value of the insured property.
>
> [Underlining added]

[10] After being notified of the water damage at the Convent and New Dawn's claim under the policy, Northbridge retained ClaimsPro in Sydney to adjust the claim. Shane Walker was the ClaimsPro adjuster assigned to the file.

The appraisals

[11] Within days of the loss, Northbridge retained Turner Drake & Partners Ltd. to inspect the Convent and provide an opinion on the "Replacement Cost New" ("RCN") and the "Actual Cash Value" ("ACV") of the building. The Turner Drake report dated April 10, 2017, was prepared by Richard (Rick) J. Escott.

[12] In his report, Escott defined "Replacement Cost New" as follows:

> "the cost of replacing, repairing, constructing, or reconstructing the buildings on the site with new buildings of like kind and quality and for a like occupancy without deduction for depreciation". Costs include a number of site specific and process related costs that are experienced when rebuilding after a loss. These additional expenses are related to repair/restoration contractors, construction process, time urgency, limited site mobility, adjoining non-construction areas, insured's property, economies of scale, dangerous/hazardous materials and mold concerns.
>
> (p. 1)

[13] He defined "Actual Cash Value" as follows:

> "The Market Value of the building. Market Value is the price the property would bring on the open market if sold by a willing seller to a willing buyer. The land

> value has to be deducted from the market value of the property to isolate the value of the building." (p. 1)

[14] Escott began his valuation of the Convent by reviewing the area, neighbourhood and site data, including zoning and planning considerations. He then considered the property's "Highest and Best Use", which is "the use for the property which will produce the greatest net return for the foreseeable future" (p. 14). Noting (erroneously) that the Convent had remained vacant since it was purchased, Escott concluded:

> Based on our analysis, we are of the opinion that the Highest and Best Use of the subject property is for re-development with some potential for an adaptive re-use utilizing the existing convent building as a base. However the incremental value of the subject building over the land is likely marginal. (p. 14)

[15] Escott explained that there are three recognized approaches for measuring the value of a property under its Highest and Best Use, two of which he used in his report. Under the "Cost Approach", "value is measured by adding to the land value (found by Direct Comparison) the cost, in current prices, of reproducing the structure and site improvements, and then subtracting any loss in value due to physical depreciation, functional and external obsolescence". Under the "Direct Comparison Approach" (DCA), the market value of a property is derived "through the analysis of the sale prices of similar properties" (or "indices"). (all quotes p. 15)

[16] Starting with the Cost Approach, Escott determined the RCN of the Convent using the "Unit in Place Method", which he explained as follows:

> This consists of measuring the exterior and interior of the building in sufficient detail to allow a quantity take off of each component, e.g. the area of each interior partition is measured and its finish, construction and quality is noted. The area of the partition is then multiplied by its component cost/ft.^{2} to arrive at its replacement cost. The component cost is "built up" having regard to the finish, quality and construction of the partition.
>
> The remaining components of the building, i.e. excavation, foundations, frame, floor structure, interior construction, plumbing, heating and ventilation, electrical, exterior wall, roof structure, roof cover, architect's fees, etc. are costed in the same manner and aggregated to arrive at the total replacement cost. (p. 24)

[17] Escott chose the Unit in Place Method over the "Quantity Survey Method", which he defined as follows:

> This is the most detailed method and consists of measuring the interior and exterior of the building in sufficient detail to allow a quantity take off of all materials, labour, fees, profit and equipment required to reproduce the building. It requires the detailed costing of each item of material and wages on the basis of current local prices. It is similar to the cost estimate undertaken by a large construction firm in preparing a bid for tender.
>
> (p. 24)

[18] According to Escott, the Unit in Place Method is "less accurate than costing each item separately as is done with the Quantity Survey Method, but it is an acceptable approximation of replacement cost for fire insurance purposes" (p. 24). Using the Unit in Place Method, he concluded that the RCN for the Convent was $6,669,005. He then divided the effective age of the building (50 years) by its total physical life (70 years) to arrive at an estimate of physical depreciation (71%).

[19] Escott determined that it was not appropriate to calculate and deduct functional obsolescence for the following reasons:

> The building was originally designed and constructed for use as a convent. The building functioned well for that use for many years. However over time the building became outdated and its utility as a convent diminished as a result of changing standards and demands for this type of facility which are reflected in the external obsolescence for the structure. Accordingly we have not calculated specific functional obsolescence for the building in this instance.
>
> (p. 25)

[20] For external obsolescence, Escott wrote:

> The Indices used in the Direct Comparison Approach on the following page represents a variety of older, some historic buildings, where the original intended use of the building became obsolete given changes to modern day standards and market demands. All of the Indices exhibit external obsolescence when comparing the estimated physically depreciated value of the structures and the indicated building values based on our market analysis. The estimated external obsolescence for the Indices ranges from 76% to 98% with an average of 87%. We would expect the appropriate allowance for external obsolescence for the subject property would lie near the average of the Indices and we have finalised our estimate at 85% in this instance.
>
> (p. 25)

[21] Applying the Cost Approach, Escott deducted physical depreciation and external obsolescence from the RCN to arrive at an ACV of $290,000.

[22] Escott also calculated the ACV using the DCA. After researching sales, offers, and listings of comparable properties in the Maritimes, he compiled a list of seven properties, including the Convent, each of which he described as having been purchased "for an adaptive re-use". He added that each of the buildings "required extensive renovations and improvements to be re-utilised". Based on the data, Escott concluded that the ACV of the Convent was $200,000. (all quotes p. 29)

[23] Having found that the ACV indicated by the Cost Approach was $290,000, and by the DCA was $200,000, Escott reconciled the two approaches to arrive at a single, final estimate of value:

> We place the greater weight in the Direct Comparison Approach than the Cost Approach in this instance. The Cost Approach is more unreliable because of the age and physical characteristics of the building and the difficulty in accurately quantifying all forms of depreciation and obsolescence. The Direct Comparison Approach has the benefit of a good quantity of market data available for comparative purposes.
>
> We have rated the relative strength of each Approach to Value on a 5 point scale, i.e. Poor = 1, Fair = 2, Fairly Good = 3, Good = 4, Excellent = 5. The final estimate of value is computed as follows:
>
> $\frac{(2 \times \$\ 290{,}000) + (4 \times \$200{,}000)}{6} =$ $230,000
>
> **Final Estimate of Value** **$230,000**
>
> [Bolding in original]

[24] Subsequent to Escott delivering his report, Northbridge contacted him to advise that the Convent had been partially occupied prior to the building being vacated in the fall of 2016. Escott reviewed the data provided by New Dawn as to the uses made of the Convent prior to the loss and determined that the information had no effect on the Turner Drake valuation. In a letter to Sydney Leer, Senior Claims Adjuster at Northbridge, dated May 8, 2017, Escott stated:

> The partial use of the building prior to the date of loss represents an interim use at best. The building may have some potential for an adaptive re-use over the long term. However the costs of updating the structure to modern standards and building codes in order for the property to fully function as a multiple use community centre will be significant and the economics of such a re-development may not be justified without financial assistance from government agencies.

[25] New Dawn retained its own appraiser – Altus Group Limited – to calculate the Convent's RCN and ACV. The Altus appraisal report dated December 21, 2017, was prepared by James Hardy. The estimate of the RCN in the Altus appraisal was prepared by David Dooks, a Professional Quantity Surveyor from the Altus Cost Group, using the Quantity Survey Method. The RCN for the Holy Angels Convent as calculated by the Altus Cost Group was $14,582,210. This amount included a 10% design and pricing contingency, and a 10% construction contingency.

[26] Unlike Escott, Hardy did not define ACV as the market value of the property. Noting that the Northbridge insurance policy does not specifically define "Actual Cash Value", he set out definitions from various publications and court decisions and concluded:

> Based on the foregoing and my review there are varying interpretations of Actual Cash Value. That being said, the intrinsic value of the property to the insured provides a good basis for the determination [*sic*] ACV. This is [*sic*] can vary from the properties [*sic*] Market Value, as it reflects the value of the property to the owner/user in the properties [*sic*] state prior to the loss. Based on this merit, the determination of the ACV would reflect the replacement cost new of the property less physical and functional depreciation. External obsolescence would not be applicable to the utility of an owner/user of the property.
>
> [Emphasis added]

[27] Hardy defined physical depreciation as the "result of wear and tear, decay, dry rot, cracks, encrustation or structural defect in a building." He estimated the economic life of the Convent at 55 years, and the effective age of the building at 40 years. Like Escott, he divided the effective age by the economic life to calculate the physical depreciation (72.7%).

[28] Hardy defined functional obsolescence (or functional depreciation) as "a loss in value resulting from defects of design" or "caused by changes that, over time, have made some aspect of a structure, such as materials or design, obsolete by current standards". He noted the building was a "purpose built convent" and that "due to the specialized nature of the building some aspects of the building no longer had a functional use without reconfiguration at the time of the loss." He added that "some aspects of the building were no longer functional and would not be constructed the same in today [*sic*] standards." Hardy went on to estimate a total functional obsolescence of 60%. (all quotes p. 24)

[29] As to external depreciation (or external obsolescence), Hardy explained that it is "caused by negative influences outside the site and is usually incurable by the owner or tenant" (p. 25). He said external depreciation can be caused by factors like neighbourhood decline, the property's location within the community, or local market conditions. In Hardy's view, it was inappropriate to apply external depreciation in valuing the Convent:

> As previously discussed, the ACV is considered to be based on the intrinsic value to the insured. In the case of the subject building prior to loss, the building had a continued utility for community use irrelevant of any future redevelopment potential. As such External depreciation is not considered applicable.
>
> (p. 25)

[30] From the RCN of $14,582,410, Hardy deducted 72.73% for physical depreciation and 60% for functional obsolescence to arrive at an ACV for the Convent of $1,590,000.

[31] Hardy spent the remainder of the Altus report addressing the DCA. After reviewing the sales information for several other convents and religious buildings located throughout Atlantic Canada, he concluded that the data was insufficient to determine the Convent's ACV:

> Indices 1, 3, 4 and 6 are considered to be most comparable to the subject providing a reduced price range of $8.58 to $22.21 per square foot of gross building area excluding the land allocation. Index 1, 3, and 4 were all purchased for redevelopment while index 6 was purchased for continued community use at an understood discount for goodwill in association with maintaining the use.
>
> Although these indices provide price indicators for various former convents the data is not considered to be sufficient to determine the Actual Cash Value of the subject building for insurance purposes. In each case it is considered there was a level of external depreciation in the sales and does not represent the intrinsic utility to the owner. As such these indices provide a range of pricing below that of the Cost Approach due to external depreciation [and] are not considered comparable for the determination of Actual Cash Value.

[32] Hardy concluded the report by noting that Altus "relied solely on the Cost Approach" in arriving at the ACV of $1,590,000 (p. 31).

[33] After the Altus valuation report was provided to New Dawn, Northbridge retained Specialized Property Evaluation Control Services Limited (SPECS) to prepare a Cost Analysis of the Convent using the Quantity Survey Method. In his

report dated April 17, 2018, and addressed to Shane Walker at ClaimsPro, Nicholas Charlton, PQS, of SPECS concluded that the RCN of the Convent was $11,213,416.82. This amount included a 10% design contingency and a 10% construction contingency. However, just over one week later, on April 25, 2018, Charlton sent a second report to Ross E. Trueman, Director, Claims Atlantic Canada, at Northbridge, which stated that the RCN of the Convent was $8,914,262.71.

Appointment of the umpire

[34] With such a significant disparity between the two appraisals, the parties agreed to submit their differences to an umpire under s. 32 of the *Insurance Act*. That section provides:

> *Determination by appraisers or umpire*
>
> 32 (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 two disinterested appraisers, the insured and the insurer each selecting one and the two so chosen then selecting a competent and disinterested umpire.
>
> (3) The appraisers shall then determine the matters specified in the conditions 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.
>
> (4) Each party to the appraisal shall pay the appraiser selected by him and shall bear equally the expense of the appraisal and umpire.
>
> (5) Where
>
> > (a) a party fails to name an appraiser within seven clear days after being served with written notice so to do;
> >
> > (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 Supreme Court or the county court having jurisdiction in the county or 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.

[35] Both appraisers agreed that David Babineau of de Stecher Appraisals Ltd. would act as umpire. On December 3, 2018, Babineau, on behalf of de Stecher, wrote to counsel for New Dawn and Northbridge as follows:

> Pursuant to Section 32 of the **Insurance Act**, this letter confirms that the undersigned will act as the umpire in the disagreement related to the above referenced matter.
>
> In order to commence this task, the following information is requested:
>
> 1. A copy of the insurance policy in force at the time of the loss
> 2. Copies of the appraisal reports prepared for each party
> 3. Statement of the appraisers outlining the differences of the respective appraisals
> 4. Copies of the working files of the appraisers containing any information (supporting calculations, background information, photographs, etc.) that was relied on in the preparation of the appraisals
>
> Following receipt of the above documentation, the following steps will be taken:
>
> - Review of documents, e.g. insurance policy, appraisal reports, etc.
> - Interview of appraisers regarding any issues arising from the review of documents
> - Teleconference/meeting with appraisers – if deemed to have potential for successful resolution of outstanding differences
> - Preparation and submission of umpire's decision
>
> In accordance with Section 32 of the Insurance Act, it is understood the expense of the umpire will be borne equally by the parties to the appraisals. As such, an itemized invoice for the umpire's time and expenses will be submitted to the addresses [*sic*] on a monthly basis, at an hourly rate of **$225**, plus HST. Expenses will be charged as incurred.
>
> … [Bolding in original]

[36] Both Escott and Hardy provided Babineau with the materials he requested. On January 25, 2019, Babineau emailed the following to Colin Piercey, counsel for Northbridge, with a copy to David Green, counsel for New Dawn:

> At my request, Rick Escott of Turner Drake provided a number of documents related to the above referenced matter. One of the documents is a "Cost Analysis" prepared by SPECS, which is dated April 25, 2018, wherein they provide a Replacement Cost Conclusion of $8,914,262.71 (excluding HST). The

> report is addressed to Ross E. Trueman of Northbridge Financial Corporation. For your reference, a copy of this document is attached to this message as "Attachment 1".
>
> In the documents provided by James Hardy (formerly) of Altus related to the same matter, there is another report by SPECS, which was prepared on April 17, 2018, wherein they conclude that the total construction estimate (including contingencies) is $11,213,416.82. This report is addressed to Shane Walker of ClaimsPro, who I assume was working on behalf of the insurer. The majority of the difference (±81%) between these two estimates appears to be related to the inclusion of a 10% design contingency and 10% construction contingency. For your reference, a copy of this document is attached to this message as "Attachment 2".
>
> In order to better understand the reasons for the variance in the two estimates prepared by SPECS, I would like to ask the author of the two reports for an explanation. Would it be possible for you to ask your client to grant SPECS permission to answers [*sic*] my questions in this regard?

[37] On January 31, 2019, after obtaining instructions from his client, Colin Piercey replied to David Babineau (with a copy to David Green) that Northbridge consented to him contacting SPECS.

The decision

[38] On March 16, 2019, Umpire Babineau wrote to Richard Escott and James Hardy by email, stating:

> Gentlemen,
>
> As you aware [*sic*], in accordance with Section 32 of the **Insurance Act**, I was selected as the umpire in the dispute over the above referenced claim.
>
> Attached please find a draft version of my decision in this regard. Although I have proofread it, I have sent it to you in draft form because if I have misquoted you from the various documents you submitted I am willing to make any required edits. Therefore, please let me know if I have made any errors in this regard.
>
> Quoting from Section 32 of the **Insurance Act**, "*The appraisers shall then determine the matters specified in the conditions and, if they fail to agree, they shall submit their differences to the umpire,* ***and the finding of any two determines the matters.*** [emphasis added]" As you will note, I have determined that the Actual Cash Value is actually different than the Actual Cash Value concluded by either of you in your appraisals, and I believe there are valid reasons for this difference. Therefore, if this matter is to be settled, I require at least one of you to agree with my decision. If this is the case, I will send a copy of the final decision for your signature.

> I am quite certain you are both very busy, but I would appreciate it if you would consider this matter at your earliest convenience.
>
> [Bolding in original]

[39] On March 18, 2019, both Escott and Hardy acknowledged receipt of the draft. The following morning, Escott replied to Babineau, with a copy to Hardy:

> Good Morning David.
>
> I have reviewed the draft of your decision with regard to the comments and references you have made regarding the documents I have submitted in relation to this matter.
>
> I do not consider that there are any misquotes or errors in your decision that require corrections.
>
> Moreover, although you have not agreed with my final conclusion regarding ACV, I have reviewed your decision and the basis and rationale you have put forward in support of it.
>
> Based on the foregoing, I am prepared to agree and accept your conclusion of the appropriate ACV in this matter.

[40] Later that same day (March 19), without yet having heard back from Hardy, Babineau emailed the following to Escott:

> Rick,
>
> I wanted to let you know that a copy of the final decision is on its way to you via courier. Please sign and send it back to me by FedEx – there is a prepaid waybill with the envelope.

Babineau did not copy Hardy on the email.

[41] In the final decision, which did not change from the draft version, Babineau outlined his process at p. 2:

> In the process of preparing this decision the following steps were taken:
>
> - Reviewed all documentation received from James J.L. Hardy, AACI, (Hardy) formerly of Altus Group limited, who was the appraiser for the Insured. This documentation included an appraisal report, related correspondence, a copy of the insurance policy, photographs of the subject property, etc.

- Reviewed all documentation received from Richard J. Escott, AACI, (Escott) of Turner Drake & Partners, who was the appraiser for the Insurer. This documentation included an appraisal report, related correspondence, inspection notes, photographs of the subject property, etc.
- Conducted a literature search for articles and papers related to Actual Cash Value and reviewed a number of documents in this regard.
- Reviewed various judicial decisions related to insurance loss including as follows:
    - The Canadian National Fire Insurance Co. v. Colonsay Hotel Company, (1923) S.C.R. 688 3 D.L.R. 1001
    - McAnamey v. Newark Fire Ins. Co., 159 N.E. 902 (N.Y. 1928)
    - Leger v. Royal Ins. Co. Ltd.; Leger v. Home Ins. Ltd., N.B.R. (2d) 1, 70 D.L.R. (2d) 344, [1968] I.L.R. 1-207 (N.B. C.A.)
    - Ziola v. Co-operative Fire and Casualty Co., [1976] 6 W.W.R. 159
- Corresponded with the appraiser for the Insured and the appraiser for the Insurer to clarify certain issues identified in the document review.
- Prepared decision related to the appropriate compensation for the loss suffered by the Insured on March 7, 2017.

[42] Babineau went on to summarize the positions of each appraiser, noting that the major differences between them were in relation to the estimation of RCN, the calculation of functional and external obsolescence and the determination of ACV. Babineau also referred to the two SPECS reports, stating at p. 7:

> Referring again to the SPECS report that was prepared for the Insurer on April 25, 2018, it should be noted that in the documentation provided by Hardy there is another SPECS report. This report, which was prepared for Shane Walker of ClaimsPro on April 17, 2018, provides a total construction estimate (including contingencies) of $11,213,416.82.
>
> Nicholas Charlton, PQS, the author of both SPECS reports was contacted for clarification regarding the different estimates in the reports. A copy of this exchange of correspondence is attached to this letter as Appendix B.

I will come back to this correspondence later.

[43] Umpire Babineau proceeded to set out his findings on each of the main issues. On the issue of RCN, he concluded:

> The Replacement Cost New (RCN) estimate provided in the AGL appraisal, which is $14,582,410, was prepared by a Professional Quantity Surveyor (PQS)

> utilizing the *Quantity Survey Method*. As such, the cost estimate in the AGL appraisal is considered compelling at first. However, it is noted that the estimate includes the cost of a complete HVAC system, which the subject property did not feature at the time of the loss. Also, the RCN estimate provided in the AGL appraisal included a design contingency allowance of 10%. As it is understood that is not standard practice to include such contingencies in a cost estimate prepared for an insurance loss, the cost estimate provided in the AGL appraisal appears to be overstated.
>
> The RCN estimate provided in the TDP appraisal, which is $6,669,000, was prepared by Escott utilizing the *Unit in Place Method*. However, as Escott states in subsequent correspondence, "…the Quantity survey Method is considered a more detailed method to estimate the construction cost (RCN) of a specific building." Therefore, the cost estimate in the TDP appraisal appears to be less reliable and may be understated. Nevertheless, it is noted that the RCN estimate provided in the TDP appraisal appropriately did not include the cost of a complete HVAC system, or design and construction contingencies.
>
> As the report completed by SPECS on April 25, 2018, which provides a RCN estimate of $8,914,262.71, was prepared by a PQS utilizing the Quantity Survey Method, and this cost estimate did not include the cost of a complete HVAC system or design and construction contingencies, it is concluded that the RCN estimate provided by SPECS is more reliable than the RCN estimates provided in either the AGL or the TDP appraisals.
>
> [p. 8; Emphasis added]

[44] Babineau noted that both Hardy and Escott appeared to agree that depreciation must be deducted from the estimated RCN to reach an estimate of the ACV, but that they differed significantly as to which causes of depreciation should be deducted. Both agreed that there was significant depreciation of the building due to physical deterioration. Escott calculated physical depreciation at 71% and Hardy calculated it at 72.7%. Given the closeness of the two estimates, Babineau concluded that a rate of 72% (the rounded average of the two estimates) was reasonable (p. 8).

[45] Moving on to functional obsolescence, Babineau noted that while both Hardy and Escott concluded that the building suffered from depreciation due to functional obsolescence, they accounted for it in very different ways. Hardy took the more traditional view that various elements of the building were no longer functional, or not as functional, and estimated that a deduction of 60% for functional obsolescence should be made from the RCN (net of a deduction for physical depreciation). Escott chose not to make a distinct estimate for depreciation due to functional obsolescence, concluding instead that the

diminished utility of the convent was already reflected in the external obsolescence for the structure. On this point, Babineau concluded:

> While there may be valid arguments as to which method of estimating depreciation due to functional obsolescence is technically correct, I conclude the important point is that both appraisers recognized and attempted to measure this form of depreciation in some manner. In order to decide which method of estimating depreciation due to functional obsolescence is more reliable in this instance, it is necessary to consider how the appraisers dealt with the issue of external obsolescence.
> (p. 9)

[46] In setting out Hardy's position on external obsolescence, Babineau referred to a letter Hardy sent to David Green, dated December 17, 2018, in which Hardy noted that, absent a definition of ACV in the policy, it would be "punitive" to the insured to apply external obsolescence and to rely on a market value estimate. In Hardy's view, if the intent of the policy was for the ACV to be equal to the market value, the term should have been defined that way in the policy. Accordingly, he did not deduct for external obsolescence. Escott, on the other hand, concluded that external obsolescence should be deducted and, extrapolating from the indices used in the DCA, calculated it at 85%. Babineau described the issue of external obsolescence as "inextricably linked" to how the appraisers calculated ACV and he chose to discuss it further in the section on ACV that followed (p. 10).

[47] With respect to ACV, Babineau agreed with Hardy that the lack of a definition of ACV in the policy left the definition "somewhat open to interpretation" (p. 10). In Babineau's view, however, section 11(a)(v) of the policy – which refers to "actual cash value with proper deduction for depreciation, however caused" – "is quite clear that depreciation, 'however caused', must be deducted from the RCN to provide an accurate estimate of ACV by application of the Cost Approach" (p. 11). In other words, Babineau disagreed with Hardy that there should be no deduction for external obsolescence. Having so found, Babineau proceeded to determine the "depreciated RCN" using the Cost Approach. From the RCN of $8,914,262.71 estimated by SPECS in its report of April 25, 2018, Babineau deducted 72% for physical depreciation, and 85% for external obsolescence, which he noted included functional obsolescence, and arrived at an estimate of $374,399.

[48] Babineau noted that while both appraisers provided a Direct Comparison Approach in their appraisals, Hardy did not provide a conclusion for the DCA in

the Altus appraisal. Babineau referred back to page 30 of the Altus appraisal where Hardy found that there was a level of external depreciation in the sales of the other former convent buildings that did not reflect the intrinsic value utility to the owner. As such, Hardy concluded the indices "provide a range of pricing below that of the Cost Approach due to external depreciation" and "are not considered comparable for the determination of Actual Cash Value". Babineau disagreed:

> Again, while the policy does not include a definition of ACV, I conclude that Section 11 a (iv) is quite clear that depreciation, "however caused" must be deducted from the RCN to provide an accurate estimate of ACV by application of the Cost Approach, or the DCA. Therefore, I conclude that the fact that the indices (sales) exhibit depreciation caused by external obsolescence is not a reason to abandon the DCA in this instance.
> (p. 12)

[49] After reviewing the indices considered in the two appraisals, Babineau wrote:

> As it is generally recognized that depreciation is an expression of the discount that is applied by market participants, I conclude that it is appropriate to include a DCA in an assignment where the purpose is to estimate ACV. This is particularly relevant when the policy requires, "…proper deduction for depreciation, however caused…" (p. 12)

[50] He proceeded to apply the same rating process used in the Turner Drake appraisal to find that the ACV was $258,000:

> Apply the same rating (or ranking) to the amended Cost Approach, which is based on the SPECS costing of $8,914,262.71, and deduction of depreciation (however caused), and the Direct Comparison Approach from the TDP appraisal, results in an amended estimate of the Actual Cash Value of the subject building as follows:
>
> $$\frac{(\$374{,}399 \times 2) + (\$200{,}000 \times 4)}{6} = \$258{,}000 \text{ (rounded)}$$
>
> (p. 12)

[51] Babineau concluded his decision as follows:

> Based on a review of the documentation received from the appraisers and other material gathered in the process of preparing this decision, as umpire in this matter, I conclude that the Actual Cash Value of the subject building is **$258,000**.
>
> (p. 12)

[52] As noted earlier, on March 19, 2019, Richard Escott advised David Babineau by email that he was willing to agree with Babineau's findings, making the decision binding on the parties under s. 32 of the *Insurance Act*.

The correspondence with Nicholas Charlton at SPECS

[53] At page 7 of his decision, Umpire Babineau noted that he contacted Nicholas Charlton for clarification regarding the different estimates in the SPECS reports. That correspondence was attached to the decision at Appendix B. In his letter of February 1, 2019, Babineau asked Charlton a series of questions regarding design and construction contingencies, and, in particular, why Charlton removed those contingencies in his second SPECS report. Charlton replied by email on March 11 and included both Babineau's questions and his answers. The email is reproduced below:

> Good morning David,
>
> Please see my answers to your questions below, I have also attached two items in regards to "Contingencies" the first is from the Canadian Institute of Quantity Surveyors it deals with the percentage values that are applied to a contingency, as estimators, we base our contingency the [*sic*] number of unknowns and the level of risk involved. The second is from a book I use when working with Historic buildings it details why we use a contingency, and <u>with Historic buildings, there could be many unforeseen issues.</u>
>
> SPECS response to New Dawn Letter dated Feb 1, 2019
>
> Response prepared by Nicholas Charlton PQS
>
> Questions to be answered:
>
> Q1 The majority of the difference (±81%) between the cost estimate stated in the April 17th letter and the cost estimate stated in the April 25th report appears to be related to the inclusion of a 10% design contingency and a 10% construction contingency in the April 17th cost estimate. Would you confirm whether or not this is correct?
>
> A1 This is correct
>
> Q2 Would you please explain why these contingencies were removed in the cost estimate that was prepared on April 25th?
>
> A2 I removed the contingencies from my cost estimate at the request of the ClaimsPro adjuster Shane Walker
>
> Q3 Is it your standard practice to include or exclude a contingency allowance for design and construction when preparing a cost estimate for a building of the subject's design and construction?

A3 It is standard practice to include contingency amounts in a construction estimate, they typically allow for items, conditions, or events for which there could be an occurrence or an effect that are uncertain and that, in the contractor's experience, possibly could result in additional costs.

Q4 Is it your standard practice to include a contingency allowance for design and construction when preparing a cost estimate for an insurance loss?

A4 Contingency amounts would typically be excluded in the case of an insurance loss, as it is impossible to predict events or occurrences that could happen. Contractors will generally consider this when preparing their estimate and allow for such conditions, or additional costs.

Q5 Would you please confirm which of the two cost estimates provided in the April 25th report ($8,914,262.71 vs. $8,910,812.71) is correct?

A5 $8,914,262.71 is correct.

Please feel free to contact me if you have any further questions.

Regards,

Nicholas

[Emphasis added]

[54] One of the attachments to Nicholas Charlton's email is an excerpt from page 499 of a book titled *Historic Preservation Project Planning & Estimating* by Swanke Hayden Connell Architects, which states:

> Contingency: Contingencies, especially appropriate in the preliminary budgets, are intended to protect the contractor and give the owner a realistic estimate of potential project costs. A contingency percentage should be based on the number of "unknowns" in a project, or on the level of risk involved. This percentage is usually inversely proportional to the amount of planning that has been done for the project and to the detail of available information. In new construction, complete plans and a precise estimate reduce the need for a contingency. Historic building projects, on the other hand, are known for their inevitable unforeseen conditions despite a thorough site investigation, research, testing, and detailed specifications. Contingencies on historic preservation or rehabilitation projects can range widely for each unique building and are based on a whole host of other circumstances, such as availability of skilled labor, the project time frame, and the influence of funding agencies and preservation organizations.
>
> If each estimate is rounded up, or "padded", the estimator is, in essence, adding a contingency. This method may cause problems, however, because the estimator can never be quite sure what the actual cost is and what is the 'padding," or safety margin, for each item. In the summary, the estimator cannot determine exactly how much has been included as a contingency factor for the project as a whole. A

> more accurate and controllable approach is to price the estimate precisely and then add one contingency amount to the bottom line.
>
> [Emphasis added]

Correspondence with James Hardy

[55] On March 20, 2019, the day after the final decision was sent to Richard Escott for signature, James Hardy sent the following email to Umpire Babineau:

> Hi David,
>
> Upon review, I am comfortable with the references made to my report and subsequent letters however I am not in agreement with your conclusion.
>
> I realize you have not asked for further comment but one observation from your draft decision is the reference on page 8 (under the Replacement Cost New heading) that based on your understanding, design and construction contingencies are not standard practice. This appears to be obtained from your correspondence with Nicholas Charlton PQS with his answer to your question 4. I assumed you would have gave the same benefit to discuss the particulars of standard costing practice for insurance purposes with David Dooks, PQS, author of the Altus costing report prior to finalizing your opinion.
>
> Very Best Regards,
>
> James
>
> [Emphasis added]

[56] Babineau replied on March 21, 2019:

> Hi James,
>
> Thanks for your message. I apologize for not getting back to you sooner, but I had other matters to attend to over the last two days.
>
> While I understand and appreciate the reasons that you do not agree with my conclusion, I tried my best to weigh the evidence in a fair manner and then arrive at a well-founded decision. In order to reach my conclusion, I relied upon a review of the submitted material (included [*sic*] the report and correspondence prepared by David Dooks PQS), my own research and knowledge on the subject matter, and my subsequent correspondence with Nicholas Charlton PQS. In addition, I interviewed Shane Walker of ClaimsPro in this regard.
>
> All the best,
>
> David

[57] This email was the first notice to Hardy or New Dawn that Babineau had interviewed Shane Walker, the adjuster working for Northbridge.

Positions of the parties

[58] New Dawn challenges the decision by Umpire Babineau, concurred in by Richard Escott, on both procedural and substantive grounds. It says Babineau breached the duty of procedural fairness by corresponding with Nicholas Charlton and Shane Walker, both of whom were working for Northbridge, and relying upon the information he obtained without sharing it with New Dawn or its appointed appraiser, or giving them an opportunity to respond. New Dawn further submits that Babineau's conduct gives rise to a reasonable apprehension of bias.

[59] As to the substance of the decision, New Dawn says it was unreasonable for the umpire to rely on the replacement cost settlement provisions in Part I, section 11 of the policy to find that the ACV could only be determined once any depreciation, "however caused", was found and applied. New Dawn submits that the meaning of ACV for purposes of the policy was ambiguous, and the umpire should have interpreted that ambiguity against the insurer rather than as against the insured. In addition, New Dawn says it was unreasonable for the umpire to do his own independent investigation and draw his own conclusion regarding ACV. According to New Dawn, under the process followed by the umpire, Babineau effectively became an appraiser and Richard Escott, who agreed with Babineau's conclusion, an umpire, thereby turning the s. 32 appraisal and dispute resolution process on its head.

[60] Northbridge says the umpire's correspondence with Nicholas Charlton and Shane Walker, and his reliance on the information he obtained from them, did not breach procedural fairness. It points out that Umpire Babineau copied David Green, counsel for New Dawn, on the email seeking Northbridge's consent for Babineau to contact SPECS, and also copied him on the email to Nicholas Charlton setting out his questions. Northbridge submits that it was not until Babineau issued his decision that New Dawn suggested it should have been given an opportunity to review and respond to any answers provided by SPECS. According to Northbridge, New Dawn did not object to the umpire contacting SPECS when it was first proposed, and it should not be permitted to object now simply because it disagrees with the umpire's decision.

[61] As to the substance of the decision, Northbridge says it was reasonable for the umpire to consider the replacement cost settlement provisions in Part I, section

11 when interpreting ACV for the purposes of the policy. As to the umpire's process, Northbridge submits that s. 32 of the *Insurance Act* does not mandate a specific approach or prohibit an umpire from conducting their own research on valuation. The umpire is not required to adopt the conclusion of one of the appraisers. So long as the umpire and one appraiser agree in the result, the decision complies with s. 32.

[62] Richard Escott, through counsel, adopts the same positions as Northbridge. He submits that a low level of procedural fairness is required under s. 32 of the *Insurance Act*, and that that standard was met. He says the umpire's conclusion that the Convent's ACV was $258,000 is reasonable, particularly in view of the fact that New Dawn only paid $250,000 for the Convent, along with 13 other parcels of land, in 2013. Escott emphasizes that the purpose of insurance is to indemnify the insured, not to provide a windfall.

Was the duty of procedural fairness met?

[63] The parties agree that the umpire owed New Dawn a duty of fairness. As to the substance of that duty, they agree that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case": *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682. As D. Brown and J. Evans note in *Judicial Review of Administrative Action*, vol. 2, loose-leaf, at 7:1100:

> … because of the wide range of circumstances in which the duty of fairness applies, its content is not monolithic. In some situations it may call for a procedure that is barely distinguishable from that followed in the courts of law, including, for example, personal service of notice, full disclosure of relevant information, and an oral hearing before the decision-maker, with the right to be represented by counsel, to call witnesses, to produce evidence, and to cross-examine. In other settings, however, procedural fairness may be satisfied by an informal and simple procedure that could never be mistaken for a trial, such as an opportunity to make written submissions, or to have an interview with an official who will in turn report to the decision-maker.

[64] The parties further agree that the content of the duty of fairness is determined by considering the five factors set out in *Baker v. Canada*, [1999] 2 S.C.R. 817. Where they disagree is on whether the content of the umpire's duty, as determined by the *Baker* factors, required him to share the information obtained from Nicholas Charlton and Shane Walker with New Dawn and its appraiser, and give them the opportunity to respond to it.

[65] As L'Heureux-Dubé J. observed in *Baker*, although the duty of fairness is flexible and variable, the factors to be considered in determining the procedural rights required by the duty are all grounded in:

> …the notion that that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> (para. 22)

[66] The *Baker* factors were succinctly summarized by Bourgeois J.A. for the Nova Scotia Court of Appeal in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46:

> [27] Both parties agree that when asked to determine the content of a duty of fairness, a court is to be guided by the principles as articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé set out several non-exhaustive factors as being important to defining the extent and content of the duty of fairness:
>
> - The nature of the decision being made and the decision-making process;
> - The nature of the statutory scheme and terms of the statute pursuant to which the decision-maker acts;
> - The importance of the decision to the individual affected by it;
> - The legitimate expectations of the parties; and
> - The procedures chosen by the decision-maker, particularly if the statute has left the choice of such procedures to the decision-maker (*Baker*, at paras. 23 to 28).

[67] Justice L'Heureux-Dubé noted in *Baker* that this list of factors is not exhaustive, and reiterated that "the values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision": para. 28. She went on to add that when courts evaluate the requirements of the duty of fairness, they must recognize "the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured": para. 44.

[68] New Dawn cites *Judicial Review of Administrative Action in Canada* at 7:1320, where D. Brown & J. Evans write that "where there has been a past decision determining the content of the duty of fairness … it will be unnecessary to redo the [*Baker*] analysis". While there are no Nova Scotia decisions considering the content of the duty of fairness that applies to the appraisal and dispute resolution process under s. 32 of the *Insurance Act*, there is caselaw in other jurisdictions reviewing decisions under similar provisions for procedural defects. New Dawn relies on *Peace Hills General Insurance Company v. Doolaege*, 2005 ABQB 217, where the duty of fairness applicable in these circumstances was held to include the right of a party to know of, and to respond to, representations made to the umpire by the other party.

[69] The *Peace Hills* decision involved fire damage to a residence insured against fire with Peace Hills General Insurance Company. The adjustment process did not proceed smoothly and the homeowners requested that the matter be resolved by appraisal pursuant to s. 514 of the *Insurance Act*, R.S.A. 2000, Chapter I-2. The homeowners appointed Don Zavislake as their appraiser, while Peace Hills appointed David Johnston. The appraisers then selected James Christie to act as umpire. The appraisers had several meetings with the umpire and they corresponded with him to define and narrow the areas of disagreement and to make formal written submissions. The process, as between the two appraisers, was somewhat acrimonious. A hearing was held on September 28, 2004, and each appraiser made oral submissions.

[70] On November 1, 2004, Christie advised the appraisers that his report would be available for pick up on November 3. The appraisers each obtained a copy. The report had a few handwritten notes on it and it was unsigned. The final heading in the document was entitled "Reservation" and the paragraph under it stated, "(A)s Umpire, I reserve the right to adjudicate any additional or corrective matters which may arise from these proceedings". By fax dated November 4, the appraisers each received copies of three replacement pages incorporating corrections and the umpire's signature.

[71] On November 5, Zavislake sent a fax to the umpire requesting corrections and clarification of the report. He did not send a copy of this correspondence to either Peace Hills or its appraiser.

[72] On November 8, the appraisers received a fax from the umpire in which he advised that he was making adjustments to his report to correct previously agreed

depreciation allowances and other details. Later that day, a revised report dated November 8, 2004 was delivered to the appraisers. On November 9, Zavislake wrote to the umpire stating that he would accept the report subject to a condition relating to a review of "Item 1.3 Windows". Zavislake sent a copy of this communication to Peace Hills, but not to Johnston.

[73] On November 10, the umpire faxed a memorandum to both appraisers. The memorandum, dated November 10, 2004, stated that it was supplementary to, and formed part of, the report of the umpire dated November 8, 2004. That same day, Zavislake wrote to the umpire advising that he accepted the umpire's ruling as set out in the November 8 report and the subsequent memorandum. A copy of this correspondence was sent to Peace Hills. Again, no copy was sent to Johnston.

[74] On the impact of Zavislake's failure to provide a copy of the November 5 fax to at least Peace Hills, Lovecchio J. wrote:

> 67 In *Kane v. University of British Columbia* ([1980] 1 S.C.R. 1105), the Supreme Court listed a series of propositions for procedural fairness applicable to the decision of a tribunal or board conducting a hearing process. The propositions included the following:
>
> > 4. A tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views [cite omitted] ;
> >
> > 5. Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of another ... [cite omitted]; and
> >
> > 6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient that it might have done so [cite omitted].
>
> 68 The propositions enunciated by the Supreme Court of Canada were not followed in the case of the November 5, 2004 facsimile. I attach no blame to the Umpire for this omission. Quite to the contrary, Mr. Christie was clearly alive to the issue. In the aftermath of the November 10, 2004 Report, he wrote to Mr. Zavislake on November 18, 2004. He said in his letter: "... I note that you neglected to copy the opposing Appraiser with your letter addressed to me dated November 5th, 2004 ... Surely your background in Appraisal work would lead you to avoid contacting the Umpire without the involvement of your opposing Appraiser. ... While my judgement has remained totally objective nevertheless I am placed in a position where there may be a perception of conflict during the correction/adjustment phase of my Report".

> 69 The fact that Mr. Zavislake sent copies of his written communications with the Umpire to Peace Hills suggests that he also appreciated there might be a problem if communications were not shared by both sides. Sending such copies to Peace Hills is all that has saved those communications.

[75] The court concluded that "[t]he November 5, 2004 facsimile compromised the process" (para. 75), and set aside the report.

[76] Richard Escott submits that *Peace Hills* is distinguishable because the impugned communication in this case was made with New Dawn's knowledge. The record indicates that New Dawn was informed that the umpire intended to contact Nicholas Charlton for further information. Escott further says the procedural fairness analysis in *Peace Hills* is deficient because the court made no reference to *Baker*.

[77] Northbridge shares Escott's concerns about *Peace Hills* and relies instead on *Madhani v. Wawanesa*, 2018 ONSC 4282 (Div. Ct.), which it says prescribes a low level of procedural fairness for the appraisal and dispute resolution process under provisions like s. 32 of the *Insurance Act*. In *Madhani*, the applicant's home and its contents were destroyed by fire. The applicant and the respondent insurer were unable to agree upon the amounts owed pursuant to various provisions of the homeowner's insurance policy. The valuation disputes were referred to an appraisal process before an umpire as permitted under s. 128 of the *Insurance Act*, R.S.O. 1990, c. I.8. Each of the parties appointed an appraiser, and the appraisers appointed the umpire. The appraisers each submitted a pre-appraisal brief to the umpire. The appraisal process itself consisted of a discussion between the appraisers and the umpire. The umpire and the respondent's appraiser agreed that the depreciation applicable to the RCN of the building was 20 percent, but the Appraisal Findings document did not include any reasons or explanation for the percentage chosen. The evidence showed, however, that the umpire had given an oral explanation as to how he determined the ACV for the building. The applicant argued, among other things, that the umpire's failure to give written reasons for the depreciation figure was a breach of procedural fairness. The court, applying *Baker*, found that the process followed was satisfactory in the circumstances:

> 40 Applying those factors, we find that there was no denial of procedural fairness here. First, the applicable statutory scheme is a property valuation process. It is not an arbitration, and there is no requirement to hold a hearing and to hear evidence (*Krofchik*; *Shinkaruk*, above at para. 13). The appraisal process is designed to provide the parties to the dispute with a valuation of loss, and not the determination of legal rights. Moreover, it is meant "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" (*Shinkaruk* at para. 16).
>
> 41 Second, s. 128 of the Act requires that the findings be reduced to writing. It does not state that reasons must be given.
>
> 42 Third, the process is not adjudicative in nature. The appraisers for the parties are intended to agree, where they are able to do so, on valuation issues. According to Mr. Bussell's affidavit, which was not contradicted on the description of the process, the appraisers and the Umpire engaged in a discussion of the issues in an attempt to reach a consensus. Clearly, the process is based on discussion and the sharing of expertise in valuation.
>
> 43 It is true that the decision is important to the Applicant, and is binding with respect to a valuation of the loss. However, the Appraisal has not resulted in a determination of the Applicant's rights under the insurance policy--in particular, no determination was made as to specific items that were or were not lost.
>
> 44 While the affidavit in the Applicant's Record, submitted by a student-at-law, states that the Applicant had legitimate expectations that he would receive reasons, that statement is not evidence. Rather, it is a conclusion of law. In fact, applying the legal principles correctly, there is nothing in the record to suggest that there was anything said by the Umpire or any past practice that would give rise to an expectation that written reasons would be required.
>
> 45 With respect to depreciation, Mr. Bussell states that there was a discussion, following which the Umpire gave his view and oral reasons for that view. Mr. Bussell then changed his position and agreed with the Umpire, signing off on the ACV, which included a 20 per cent depreciation figure. No written reasons were requested by the appraiser for the Applicant.
>
> 46 In our view, the requirements of procedural fairness were met. The appraisal scheme is meant to be expeditious and cost-effective. Oral reasons were given, and no request for written reasons was made. The process followed was satisfactory in the circumstances.

[78] The first factor is the nature of the decision being made and the process followed in making it. The more closely the function of the tribunal and the decision being made “resemble[s] judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness”: *Baker*, para. 23.

[79] Section 32 of the *Insurance Act* provides the parties to an insurance dispute with an appraisal process for valuing an insured’s loss. This process does not determine the legal rights of either party. As noted in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.*, (1990), 71 D.L.R. (4th) 681, 1990 CarswellSask 369 (C.A.):

> 19 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. …

[80] Section 32 contemplates two potential routes to a final determination on valuation: agreement between the two appraisers, or agreement between one appraiser and the umpire. Where the appraisers do not agree, the statute leaves the particulars of the process to the umpire's discretion. While the umpire in *Madhani* requested written briefs from the appraisers, followed by a three-way in-person discussion, Umpire Babineau's approach was closer to an adjudicative process. He requested various written materials, including a statement from each appraiser as to the differences between their appraisal reports, and prepared a written decision. I find this factor attracts a moderate duty of fairness.

[81] The second factor is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates. L'Heureux-Dubé J. summarized this factor in *Baker* at para. 24:

> The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted … [citation omitted]

[82] A decision under s. 32 of the *Insurance Act* "is intended to be a final and binding determination of the loss": *Seed v. ING Halifax Insurance*, (2005), 78 O.R. (3d) 481, 2005 CarswellOnt 6554 (Sup. Ct. J. (Div. Ct.)), at para. 23. There is no appeal and further requests cannot be submitted to the umpire. The only option available to a party who is aggrieved by the decision is an application for judicial review. This factor also attracts a moderate duty of fairness.

[83] The third factor is the importance of the decision to the individual. "The more important the decision is to the lives affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated": *Baker*, at para. 25. While a decision under s. 32 does not determine either party's legal rights, the valuation of the loss is obviously important to the insured. In this case, the valuations of the two appraisers differed by more than $1.2 million. With no dispute as to the insured's right to recover under the policy, the outcome of the process under s. 32 could have significant implications for New

Dawn's plan to redevelop the Convent as the Cape Breton Centre for Arts, Culture and Innovation. That said, the decision does not demand the high level of procedural fairness applicable to decisions about an individual's right to continue in their profession, to receive long term disability benefits, or to file an immigration application from within Canada. This factor attracts a moderate duty of fairness.

[84] The fourth factor is the legitimate expectations of the person challenging the decision. "If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness … Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded": *Baker*, at para. 26. In *Hyson*, Bourgeois J.A. noted that "the application of the legitimate expectation doctrine is two-tiered; one must first consider whether legitimate expectations arise in the context before the court, and further, if there was a failure to comply with the expectations, whether it [was] substantial": para. 42.

[85] As previously noted, in his initial email to counsel dated December 3, 2018, David Babineau explained the process he intended to follow in discharging his role as umpire:

> Following receipt of the above documentation, the following steps will be taken:
>
> - Review of documents, e.g. insurance policy, appraisal reports, etc.
> - Interview of appraisers regarding any issues arising from the review of documents
> - Teleconference/meeting with appraisers – if deemed to have potential for successful resolution of outstanding differences
> - Preparation and submission of umpire's decision

[86] New Dawn submits that Umpire Babineau deviated from this process in a material way by contacting Nicholas Charlton of SPECS and Shane Walker of ClaimsPro and relying on the information he obtained without sharing it with New Dawn's appraiser and giving him a chance to respond.

[87] Northbridge says Babineau followed the procedure he set out. It says Babineau explicitly stated that he would complete an "interview of appraisers regarding any issues arising from the review of documents', and that the SPECS reports were integrated into Richard Escott's statement of differences. Northbridge

further submits that New Dawn was on notice of the precise differences related to contingency allowances as of January 25, 2019, when Babineau copied David Green on his email to Colin Piercey about contacting Nicholas Charlton. Finally, Northbridge says that even if Babineau is found to have departed from the procedure laid out in the December 3rd email, it was neither material nor substantial. Instead, the decision to gain clarification from Nicholas Charlton, and by extension Shane Walker, was a reasonable extension of the steps already provided for.

[88] Richard Escott adopts the same position as Northbridge. He says Umpire Babineau did not deviate in any material way from the steps set out in the email of December 3, 2018.

[89] Based on the process outlined in the email, I find that New Dawn would have the legitimate expectation that Umpire Babineau's contact with, or interviews of, any individual aligned with a party would be limited to the two appraisers. I do not agree that contacting Nicholas Charlton and Shane Walker, two individuals working for Northbridge, and not sharing the information obtained, was a reasonable extension of the steps already provided for. While it is true that the umpire put New Dawn on notice that he intended to contact Charlton, he did not disclose that he interviewed Shane Walker until after the final decision was reached. In my view, that was a substantial failure to comply with New Dawn's legitimate expectations.

[90] The final *Baker* factor is the procedures chosen by the decision-maker. As L'Heureux-Dubé J. stated at para. 27 in *Baker*:

> [T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure may by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[91] As noted earlier, s. 32 of the *Insurance Act* leaves it to the umpire to decide on the procedure for determining the matters upon which the appraisers disagree. This suggests deference to the umpire's choices. This factors attracts a low level of procedural fairness.

[92] The *Baker* factors, considered as a whole, support the conclusion that New Dawn was owed a moderate degree of fairness. The next question is whether the

umpire's failure to share the information obtained from Nicholas Charlton and Shane Walker with New Dawn and to allow it to respond to that information was inconsistent with the participatory rights required by the duty of fairness in these circumstances. "At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly": *Baker*, at para. 30.

[93] Northbridge and Richard Escott say there was no breach of the duty of procedural fairness because New Dawn knew that the umpire planned to contact Nicholas Charlton of SPECS and did not ask to be provided with a copy of his responses to the umpire's questions, nor for an opportunity to respond to them. In addition, they say that David Dooks of Altus Costing Group addressed contingency allowances in his report, which was before the umpire and considered by him.

[94] On December 14, 2018, David Dooks sent James Hardy a seven-page "[r]eview and preparation of comments in response to the correspondences from Turner Drake and Partners and a review of the provided SPECS report with prepared comments outlining the comparisons and differences relating to the Replacement Cost for Holy Angel Convent (Job No. 27030.100164) as prepared by Altus Group Limited (Cost & Project Management)". His reference to the SPECS report was to the report dated April 17, 2018, which included contingency allowances. There is no evidence that Dooks had seen or was otherwise aware of the second SPECS report that removed the contingency allowances. On the subject of contingency allowances, Dooks wrote at page 3:

> Contingency Allowances are included to cover construction cost for the unknowns relating to lack of design, undetermined or defined code requirement, unknown risk factors and the complexity of the project. A Replacement Cost Estimate is considered a Class 'D' Estimate, the general accuracy of this type of estimate is 20%. From my experience the final cost outcomes for construction cost are closest in cost to the original developed Class 'D' Estimate than higher developed cost estimates. The allowed contingencies may seem high at the initial review but as the design progresses and identified risk factors are minimized these contingencies are reduced or absorbed as there are more knowns than unknowns quantified in the construction cost model.

[95] There is nothing in the record from David Dooks on whether it is standard practice to include contingency allowances in a cost estimate prepared for an insurance loss.

[96] I find that when Umpire Babineau decided to consult Nicholas Charlton of SPECS, a party retained by Northbridge's insurance adjuster, on standard industry practice when preparing a cost estimate for an insurance loss, the duty of fairness required him to share Charlton's answers with New Dawn and to provide New Dawn's appraiser with an opportunity to respond. This was not a minor issue. When SPECS removed the contingency allowances from its report at Shane Walker's direction, its estimate of RCV dropped from $11,213,416.82 to $8,914,262.71. This change was of particular importance because Umpire Babineau went on to rely on the SPECS calculation, deeming it more accurate than both the Altus and the Turner Drake RCV calculation.

[97] Northbridge and Richard Escott say New Dawn should have asked to see, and respond to, Charlton's answers. Even if I accepted that New Dawn was responsible for ensuring that Umpire Babineau met the duty of fairness, which I do not, that argument fails to address the interview with Shane Walker at ClaimsPro, which New Dawn did not even know about until after Richard Escott had accepted the umpire's findings.

[98] Umpire Babineau's failure to share the information he obtained from Nicholas Charlton and Shane Walker is surprising in light of one of the articles he reviewed prior to his decision. Babineau's file contained an October 2017 article titled "The Appraisal Process, An Update", written by Glenn Gibson, President & CEO of the GTG Group. The article, which is apparently the ninth iteration of a 1996 research paper, references various legal decisions, including *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (cited in *Peace Hills*). The following statement at page 6, was highlighted in Babineau's copy:

> No one should communicate one-on-one with the umpire; to eliminate surprises, both appraisers and the umpire should be dealing with the same information flow.

[99] In my view, by failing to share the information he obtained (and subsequently relied on) with New Dawn, and to give New Dawn a chance to respond, Umpire Babineau infringed the principle of *audi alteram partem*. In *Hyson*, Bourgeois J.A. discussed this principle at length (see paras. 39, 45-57), adopting the following description from Guy Régimbald's *Canadian Administrative Law*, 2nd ed. (Toronto: Lexis Nexis, 2015):

> 3.2 RIGHT TO NOTICE OR "KNOWING THE CASE TO BE MET"
>
> The duty to act fairly is based on two fundamental principles, one of which is usually referred to in its Latin form as *audi alteram partem* – the right to hear the

> other side. As L'Heureux-Dubé J. noted, *audi alteram partem* is a rule "so fundamental in our legal system that I do not think there is any necessary to discuss it at length". The rule refers to the requirement that individuals must know the case being made against them and be given sufficient information to provide them with a reasonable and meaningful opportunity to answer the case before the decision maker renders its decision: "if the right to be heard is a real right which is worth anything, then it must carry with it a right in the accused man to know the case which is made against him". As held by the SCC in *Charkauoi*, the requirement of adequate notice is inherently linked to that of a fair hearing, in that a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case. [Footnotes omitted]

Justice Bourgeois also relied on the same principles from *Kane* cited in *Peace Hills*.

[100] Considering all of the circumstances, I find that New Dawn did not have a meaningful opportunity to present its case fully and fairly. The moderate duty of fairness that applied in this case would have been met by sharing the information obtained from Nicholas Charlton and Shane Walker with Altus, New Dawn's appraiser, and allowing it to respond briefly in writing. This would not have been an onerous or time-consuming exercise.

[101] Before moving on, I want to address New Dawn's argument that Umpire Babineau's conduct gave rise to a reasonable apprehension of bias. Whether that is indeed the case is relevant to my decision on the appropriate remedy. Justice L'Heureux-Dubé J. said the following about bias in *Baker*:

> 45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. …
>
> 46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> > . . . the 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. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, per Major J.; at para. 31, per L'Heureux-Dubé and McLachlin JJ.; and at para. 111, per Cory J.

> 47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; Old St. Boniface, supra, at p. 1192. …

[102] Section 32(2) of the *Insurance Act* states that the appraisers shall select a "competent and disinterested umpire". In other words, the umpire is expected to be impartial. In *State Farm Fire and Casualty Company v. 1432235 Alberta Ltd.*, 2018 ABCA 150, Wakelin J.A., for the Alberta Court of Appeal, stated:

> 4 The *Insurance Act* presumes that the Umpire is impartial. This is vital to the process. Public confidence in the adjudicative process depends on a belief that the decision is the product of an impartial decision-maker and a consideration of rational factors.
>
> 5 An Umpire must not only be impartial but be perceived by the public to be impartial.
>
> 6 The presumption of Umpire impartiality can only be set aside if there is clear evidence that would cause a reasonable, right-minded and properly informed person adopting a realistic and practical perspective to conclude on a balance of probabilities that the Umpire was not impartial.

[103] It is important to emphasize that there is no need for proof of actual bias on the part of the umpire.

[104] Procedural fairness required Umpire Babineau to employ a fair and open procedure that gave the appraisers for both the insurer and the insured an equal opportunity to put forward their views and evidence, and to consider them in valuing the loss. In other words, he was required to be impartial as between the parties. However, when Umpire Babineau considered whether contingency allowances should be included in calculating the Convent's RCV, he contacted individuals associated with the insurer and relied on their information to conclude that they should not -- to the benefit of the insurer. In the case of Shane Walker, that contact was made without the insured's knowledge, and was only disclosed when James Hardy raised the issue of the contingency allowances after the final decision had been reached.

[105] In my view, an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that Umpire Babineau, whether consciously or unconsciously, had shown a preference for the

insurer and did not decide fairly. To be clear, this is not a finding that Babineau was actually biased in favour of Northbridge.

[106] As a result, I find that the proper remedy is for the decision to be set aside, and for the matter to be remitted for consideration by another umpire. Although New Dawn requested that Richard Escott be disqualified from continuing to act as an appraiser for Northbridge in relation to the Convent, I am not satisfied that New Dawn will suffer any prejudice from Escott's continued participation in the appraisal process before a new umpire.

Was the decision reasonable?

[107] One week after this matter was heard, the Supreme Court of Canada released its decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66. In these decisions, the Supreme Court revised the framework for determining the standard of review where a court reviews the merits of an administrative decision.

[108] On December 20, 2019, I wrote to the parties to give them an opportunity to file further submissions addressing these decisions. They each filed supplementary submissions, which I have reviewed. However, having found a breach of the duty of procedural fairness requiring the decision to be set aside and the matter remitted for a decision before another umpire, I decline to consider whether the decision reached by Umpire Babineau, and concurred in by Richard Escott, was reasonable. As Régimbald writes at page 295 of *Canadian Administrative Law*, 2nd ed.:

> Moreover, courts usually quash administrative decisions on procedural grounds without any consideration of the merits of the case or as to whether the applicant would have had success on the substantive arguments. Speculation as to the possible outcome may only compound the denial of procedural fairness, and the courts are not in the most appropriate position as compared with that of the original decision maker to make such a determination.

[109] The ACV of the Convent should be considered by a new umpire without the potential influence of the court's assessment of a previous decision on the same issue that has been set aside on procedural grounds.

Conclusion

[110] The decision by Umpire Babineau, concurred in by Richard Escott, is set aside due to a breach of procedural fairness. The matter will be remitted for consideration by another umpire.

[111] If the parties are unable to agree on costs, I will accept brief written submissions within 30 days of release of this decision.

Arnold, J.