Court Case Summaries:

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# Collusion

BACKGROUND:

* Allegation of collusion and negligence against appraiser. *"It is a scenario with which this Court is all too familiar.“*
* RBC gave $780,000 loan for a condo in Calgary, unable to sue mortgagor
* RBC claims a proper appraisal would result in a refusal for loan
* Alleges several parties involved to inflate the price
* Appraiser was unsuccessful arguing the action is a collateral attack
* Damages sought $400,000
* Claim dismissed as Plaintiff failed to show any breach of professional standards, despite value appearing to be high in retrospect.

TAKE AWAY: DO NOT take on assignments that have red flags for fraud – you are liable for mistakes even in fraud or foreclosure cases.

Royal Bank of Canada v Benchmark Real Estate Appraisals Ltd, 2014 ABQB 297 (CanLII), <<http://canlii.ca/t/g6vqh>>

# Duty of Care - Comparables

BACKGROUND:

* 4 plex near Nelson BC encroached on Crown land
* Appraiser’s judgement must be exercised within acceptable standards and based on rational assumptions
* Appraiser was unable to support or explain a number by anything more than “my experience” or “in my head” - unable to support calculation on square footage basis
* Did not adequately look into comparables or alert readers that the appraisal was less reliable because of lack of comparables
* Failed to identify ¾ of the property had a “no build” convenant and how much of the land was useful due to a presence of a creek
* Damages $66,210

TAKEAWAY: Detail your DCA and reasoning. Discuss with your client and decline the assignment if the report will be unreliable.

Kokanee Mortgage MIC Ltd. v. Concord Appraisals Ltd., 2000 BCSC 1197 (CanLII), <<http://canlii.ca/t/1fmvv>>

# Duty of Care – Income

BACKGROUND:

* 8 story hotel in Vancouver, 39 residential units
* Appraiser are arm’s length, never linked to investor’s money
* Appraiser is in breach of contract or negligent (not fiduciary duty) if a report is found misleading or incorrect
* Appraisers were negligent in determining that there were licensed rooms for rent
* Damages $238,800

TAKEAWAY: Detail your rationale for rent income. Discuss with your client and decline the assignment if the report will be reliable.

VSH Management Inc. v. Neufeld, 2002 BCSC 755 (CanLII), <<http://canlii.ca/t/5kt3>>

# Duty of Care – Overvaluation

BACKGROUND:

* + Judge indicated appraisals were pure fantasy, a gross overvaluation, total sham
  + Judge rejected lot absorption rates
  + Judge questioned appraiser impartiality and commitment to the duty as an expert to the Court
  + Candidate appraisers first appraisal in the area, based opinions of strong demand on hearsay rather than sales
  + Damages $800,000

TAKEAWAY: Know and limit who relies on your report, research your comparables.

Abt Estate (Re) v Cold Lake Industrial Park GP Ltd, 2018 ABQB 313 (CanLII), <<http://canlii.ca/t/hrp97>>

# Duty of Care – Appraisal vs Consulting

BACKGROUND:

* 11.36 acres zoned Agricultural
* Appraiser owed a duty of care to identify if City would approve subdivision
* Existence of remnant lots should have been flagged in the letter of transmittal, appraisal report, diagrams or plans
* Appraiser had a duty to determine whether the costs, effort and risk of the purchase and development are viable
* Appraiser’s report fell between an appraisal and a feasibility analysis
* Overturned by Court of Appeal

TAKEAWAY: Ensure you ensure the scope of work and intended use is appropriate for the assignment – make sure the client knows.

541788 Alberta Ltd v Bourgeois & Company Ltd, 2017 ABQB 363 (CanLII), <<http://canlii.ca/t/h441d>>,

541788 Alberta Ltd v Bourgeois & Company Ltd, 2018 ABCA 310 (CanLII), <<http://canlii.ca/t/hv83g>>,

# Duty of Care and Intended User

BACKGROUND:

* The bank requested a residential appraisal and indicated a potential value of $3,000,000 for the subject property
* Candidate member viewed the subject property and completed an appraisal that indicated a value range of $2,500,000 to $3,000,000
* The appraisal was completed for first mortgage purposes; however, the loan was actually completed for second mortgage purposes.
* Loan was to be temporary only and be replaced with a business loan later.  Credit union held the first mortgage in the amount of $1,450,000
* The bank issued a second mortgage in the amount of $700,000
* Owner defaulted 2 years later
* The subject was a rural property located in a good location.
* There was an elementary school situated across the street from the subject.
* The subject was situated on an 8.44 acre parcel of land that was extensively landscaped.
* 2 story dwelling with 4,300 square feet over two levels and 2,500 square feet in the basement.
* The Home was described as “Estate” quality, and alternatively “architecturally designed” with high quality finish.
* Outbuildings included: triple detached garage, 1,500 sq. ft. shop and 2,000 sq. ft. barn.
* The dwelling was built in 2005
* It had been listed for sale within one year of the effective date with a list price of $2,760,000
* No interest was received
* The Realtor recommended a reduction to the list price.
* The property owner would not reduce the list price and after 138 days on the market the listing was canceled.

TAKEAWAYS:

The appraiser assumed the appraisal was being completed for first mortgage purposes as indicated in his appraisal report. The client was the appraisal firm’s largest client and they had completed many appraisals for them over the years that were usually completed for first mortgage purposes. The appraiser indicated in court they would not have completed the appraisal if they knew it was being completed for second mortgage purposes. **Never assume anything, always ask questions and make notes in your work file.**

The subject was listed for sale for $2,760,000 within one year of the effective date, yet the appraiser indicated a value range of $2,500,000 to $3,000,000. The Realtor indicated in court they received no offers and he had recommended to the owner that they reduce the list price from $2,760,000; however, the owner did not agree to a reduction and the listing was canceled after 138 days on the market. ***Always check the marketing history and if possible speak with the listing agent if the subject was listed for sale within three years of the effective date.***

The bank’s policy was that out buildings were not to be included in the value, yet the appraiser included the value of the outbuildings in his valuation.  The appraiser indicated to the court the value of the outbuildings was $250,000.   If a bank has a policy that outbuildings are not to be included**.  *Make sure you abide by a lender’s policy AND comply with CUSPAP.  If a lender asks that you make an exception, which was not the case in this situation, make sure you have it in writing to protect yourself.***

The appraiser indicated in court the assignment was very complicated and the fee charged was not enough for the assignment. The fee charged is irrelevant. ***If you take on an assignment, you must complete the assignment to the Reasonable Appraiser test and in compliance with CUSPAP.***

Royal Bank of Canada v Westech Appraisal Services Ltd., 2018 BCSC 473 (CanLII), <<http://canlii.ca/t/hr677>>, retrieved on 2019-11-15

# Duty of Care and Intended User

BACKGROUND:

* Appraisal of an equestrian facility in Belmont, ON after constructions and renovations were complete
* 2010 “prospective” value of $950,000
* 2013 appraisal at $650,000 referred to water flooding in the basement
* 2013 listing at $534,900
* Damages sought $700,000
* Appraiser Lansink expert opinion that it is common practice for any appraiser giving an opinion of value on property for mortgage financing purposes to allow anyone, who is lending money to the owner, to rely on the opinion
* Another appraiser expert opinion that appraisers are concerned about liability and regularly limit their liability to third parties through conditions and require third parties to seek permission especially in second mortgages

TAKE AWAY: Careful with contracts – don't allow your reports to be reassigned to third parties without your knowledge and authorization by informing your client in your letter of engagement, transmittal letter and in your report.

Devincenzo v. Moir, 2017 ONSC 5122 (CanLII), <<http://canlii.ca/t/h5tm1>>

# Duty of Care and Intended User

BACKGROUND:

* + Fourplex in Alberta village assumed renovations 100% due to flooding
  + Appraisals at $430,000 and $250,000 and forced sale value $187,500
  + AMC website included a "non-standard appraisal requirement" in the lenders order noting that Capital Direct assigns the mortgage security to new mortgagees after lending
  + Capital Direct sold the loan to an Income Trust
  + Argued that appraiser owes a duty of care to second lender, the appraisers accepted the contract and the appraiser's limiting conditions are only a proposal to amend the contract
  + Damages sought $136,200

TAKE AWAY: Careful with contracts – don't allow your reports to be reassigned to third parties without your knowledge and authorization by informing your client in your letter of engagement, transmittal letter and in your report.

Capital Direct Lending Corp v Howard & Company Real Estate Appraisers and Consultants Inc, 2016 ABQB 545 (CanLII), <<http://canlii.ca/t/gtxwh>>

# Duty of Care and Intended User

BACKGROUND

* Certification of a class action lawsuit against the appraiser
* 52 acres of land for townhouse development in Alberta
* First appraisal ~$14M, second appraisals as complete ~$13M, as is ~$11M
* Land transferred for less than $250,000
* At least 96 investors relied on the appraised value - investors received the cover letter and later a copy of the report by another investor
* Argued that appraisers knew the reports were to be used for soliciting and were negligent
* It is unreasonable to rely on a value opinion without knowing the assumptions
* Damages $170,800

TAKEAWAY: An opinion of value is intertwined with assumptions and limitations, so use the 3 times test by communicating in your letter of engagement, your cover/transmittal letter and in your report.

Da Silva v River Run Vistas Corporation, 2018 ABQB 869 (CanLII), <<http://canlii.ca/t/hvnbg>>

# Duty of Care and Intended User

BACKGROUND:

* + Residential property on Vancouver Island
  + Appraised in $2,210,000 (2006) and $2,550,000 (2007)
  + $1,400,000-$1,500,000 (2010) and $1,345,000 (2011)
  + Sold in 2014 for $925,000
  + Intended User was left blank
  + Intended use was 1st or 2nd mortgage
  + 1st mortgage by Credit Union, 2nd by Kokanee
  + Kokanee's reliance on the appraisal is reasonable without a disclaimer
  + Argued that limiting conditions is ambiguous, unclear, inconsistent

TAKE AWAY: Always name the Intended User and a specific intended use.  Use clear, consistent, specific disclaimers.

Kokanee Mortgage M.I.C. Ltd. v. Vogelsang, 2017 BCSC 768 (CanLII), <<http://canlii.ca/t/h3p55>>

Kokanee Mortgage M.I.C. Ltd. v. Burrell, 2018 BCCA 151 (CanLII), <<http://canlii.ca/t/hrlk9>>

# Duty of Care and Intended User

BACKGROUND:

* + City, YMCA and developer entered into an agreement for the sale and redevelopment of old train station land
  + Disagreement on the land value due to environmental contamination and alleged aboriginal artifacts
  + Client discussed the appraisal with the developer without knowledge or permission
  + Damages of specific performance

TAKEAWAY: Make clear assumptions and limiting conditions about environmental issues and archeological surveys. Discuss with your client and decline the assignment if a report may

Correct Building v Jeffrey Lehman, 2016 ONSC 6183 (CanLII), <<http://canlii.ca/t/gtxmx>>,

Correct Building Corporation v. Lehman, 2018 ONCA 462 (CanLII), <<http://canlii.ca/t/hs2l9>>

# Expert Witness Immunity

BACKGROUND:

* Claim alleged appraiser negligent in providing expert evidence at Trial.
* Dismissed with court extending witness immunity to a party’s own expert witness.

Paul v Sasso, 2016 ONSC 7488 (CanLII), <<http://canlii.ca/t/gvvg3>>

# Expert Witness Immunity

BACKGROUND:

* Appraisers role was an expert witness in preparing a report for foreclosure
* Claim dismissed with absolute witness immunity granted to expert witness

0742848 B.C. Ltd. v 426008 B.C. Ltd., 2019 BCSC 1869 (CanLII), <<http://canlii.ca/t/j354f>>

# Intended Use and Land Use Controls

BACKGROUND:

* 11 lots on floodplain in Mission
* No transmittal letter
* 91% loan to value ratios
* Argued appraiser overvalued land, negligently failed to consider flood plain bylaw and its effect on H&BU
* Judge comments on CUSPAP requires the impact of floodplain bylaws

TAKE AWAY: Limit LTV in your intended use and review land controls over zoning.

Ryan Mortgage Income Fund Inc. v. Alpine Credits Limited, 2016 BCSC 1582 (CanLII), <<http://canlii.ca/t/gt7z6>>

Ryan Mortgage Income Fund Inc. v. Alpine Credits Limited, 2017 BCCA 206 (CanLII), <<http://canlii.ca/t/h41bx>>

# Inspection

BACKGROUND:

* Appraised at $65,000
* Credit Union manager knew about the limiting conditions and damage
* Credit Committee did not read appraisal and relied only on the appraisal
* Purchaser abandoned repairs
* Building was not economical, or feasible to repair, at the time of appraisal
* Condition was apparent on a proper visual inspection
* Conscientious appraiser would have paid attention to obvious bulges in the walls, sloping roof life, slanted floor and serious problems with the roof, drainage, walls and foundations
* Damages $65,000 plus expenses, less land value

TAKE AWAY:

* Be diligent, document everything, take lots of pictures and disclose limiting conditions up front.

Indian Head Credit Union Ltd. v. A. Hosie and Co. Ltd., 1994 CanLII 4583 (SK CA), <<http://canlii.ca/t/1nqm9>>

# Inspection

BACKGROUND:

* Appraised the wrong house as complete
* No house numbers, no house, only foundations and footings
* Difference between “common” and “reasonable” practices of inspection
* Damages $140,006 plus interest and costs

TAKE AWAY: Verify your subject (read the PEB on verifying the subject.)

Royal Bank v. Richardson Appraisals Inc., 2003 BCSC 718 (CanLII), <<http://canlii.ca/t/5bb0>>,

# Inspection

BACKGROUND:

* Letter of engagement stipulated the appraiser must inspect
* Appraiser employed staff for inspections, used $50 per front foot based on assessed value provided by town clerk
* Appraisers owe a duty of care to lenders, same as a duty of all professionals
* Appraisers who fails to live up to a reasonable degree of care, knowledge and skill is negligent and liable for loss
* Appraiser failed to note no floor, few new homes built, old and unattractive, opposite a railway, did not consult local realtors, what the owner paid.

TAKE AWAY:  Inspect the property yourself and complete your own land analysis. Make sure you take all the steps necessary to produce a credible appraisal report

Avco Financial Services v. Holstein, 1980 CanLII 2200 (SK QB), <<http://canlii.ca/t/g7jsv>>

# Inspection - Driveby

BACKGROUND:

* Full appraisal $1,100,000 in 2011
* Appraiser could not obtain access for an inspection
* Driveby appraisal $670,000-$710,000 in 2015
* Drivebys must be viewed with skepticism when compared to full appraisals
* Comparative market analysis (CMAs) by a realtor falls short of being an appraisal

TAKE AWAY: Complete a full inspection for the best report and disclose the limits of a driveby.

Tri City Capital Corp. v. 0847925 B.C. Ltd., 2016 BCSC 369 (CanLII), <<http://canlii.ca/t/gnl4n>>

# Inspection - Defects

BACKGROUND:

* 4th mortgage on a property in Langley
* No building, or occupancy permit
* Appraisal showed a beautiful country estate photograph that grossly misrepresented quality
* Inspection shows an inexperienced builder with inadequate materials
* Damages $25,000 plus 5% interest

TAKE AWAY: Place reasonable financing limits on your reports. Take photos and report any defects.

Seeway Mortgage Investment Corporation v. First Citizens Financial Corporation, 1983 CanLII 429 (BC SC), <<http://canlii.ca/t/23qwl>>

# Scope – No Insurance

BACKGROUND

* Duplex with basement suite, 5 kitchens located in Montreal
* Evaluation Technician inspected the property
* 5% depreciation on a renovated 1946 home
* Tribunal indicates professional misconduct
* Valued $100-300K higher than other appraisers
* Appraised at $985,000  Other comps are less than $700,000
* Damages $170,800

TAKEAWAY: Detail your DCA and depreciation.    Pay attention to comparable "ceiling" prices.

Compagnie d'assurances d'hypothèques Genworth Financial Canada c. Picard, 2017 QCCS 3267 (CanLII), <<http://canlii.ca/t/h4x2d>>

# Scope – No Insurance

BACKGROUND

* 2018 decision on 2008 appraisal
* CRA appraised 4 lots + 145 acres for financing
* Assuming a single residence, but Highest and Best Use required an AACI co-signature
* Appraiser did not read the insurance policy
* Insurance company refused coverage
* Member sold the appraisal business prior to the claim, but was still liable
* Damages sought $485,000

TAKEAWAY: Read your insurance policy, decline assignments beyond your scope or competency.

Frontenac Mortgage Investment Corporation c. Pigeon-Roy Évaluation (Gatineau) ltée, 2018 QCCS 146 (CanLII), <<http://canlii.ca/t/hpz0p>>

# Scope of an Appraiser

BACKGROUND

* House and workshop in Fort Nelson, BC
* Appraiser is not an architect, engineer, quantity surveyor or building inspector
* Appraisers’ reports are opinion evidence on market value
* “Differences of opinions among appraisers are, of course, notorious.”

TAKEAWAY: Use good quality photos and reports and note limits on your expertise as an appraiser.

Haven Invt. Ltd. v. Harper, 1986 CanLII 728 (BC CA), <<http://canlii.ca/t/210lg>>

Cari-Van Hotel Ltd. v. Globe Estates Ltd., 1974 CanLII 1686 (BC SC), <http://canlii.ca/t/gbl3c>

# Stale-dated Reports

BACKGROUND

* Appraisals must be read in entirety
* Failing to file an entire report undermines their value
* Outdated, stale (2-5 years old) reports are of little assistance
* When a receiver markets a property, a sale is a better indicator than an valuation

Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531 (CanLII), <<http://canlii.ca/t/g63g6>>

TO DO

426008 B.C. Ltd. v 0742848 B.C. Ltd., 2018 BCSC 1475 (CanLII), <<http://canlii.ca/t/htr7c>>

# Syndicated Mortgage Investments

<https://www.aicanada.ca/wp-content/uploads/Tier-1-case-commentary.docx>

[Barkley v. Tier 1 Capital Management Inc., 2018 ONSC 3224](https://www.canlii.org/en/on/onsc/doc/2018/2018onsc3224/2018onsc3224.html?resourcelibrary)

[Barkley v. Tier 1 Capital Management Inc., 2018 ONSC 1956](https://www.canlii.org/en/on/onsc/doc/2018/2018onsc1956/2018onsc1956.html?resourcelibrary)

[Barkley v. Tier 1 Capital Management Inc., 2019](https://www.canlii.org/en/on/onca/doc/2019/2019onca54/2019onca54.html?resourcelibrary)

[Madryga v. Fortress Real Capital Inc., 2017](https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4792/2017onsc4792.html?resourcelibrary)

[McDowell and Aversa v. Fortress Real Capital Inc., 2017](https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4791/2017onsc4791.html?resourcelibrary)

# Zoning

BACKGROUND

* Lack of comparables - “Why didn't you say so in your report?“
* Zoning was wrong, 10 minute visit to city hall to ascertain correct zoning was an inexcusable mistake
* Appraiser made no inquiries about potable, domestic water
* Appraisal is reckless, mendacious and irresponsible. It constitutes a gross overvaluation and its author fell far short of the standard of care which the law imposes on a professional appraiser.
* Damages $303,546 plus 8.75% interest

TAKEAWAY: Check zoning and utilities.

Esselmont v. Harker Appraisals Ltd., 1979 CanLII 355 (BC SC), <<http://canlii.ca/t/23ckc>>

*TO CONSIDER*

[Tri City Capital Corp. v. 0847925 B.C. Ltd., 2016 BCSC 369 (CanLII)](http://canlii.ca/t/gnl4n)

* + Drive-bys less reliable than full appraisals

<https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc739/2019bcsc739.html>

# ADD Aussie Cyberliability?

* June 2019 – LandMark White – a publicly-traded valuation firm in Australia - announced a data breach, its second in 2019
* The 1st cyber attack saw customer information published on the “dark web”
* The 2nd saw company documents posted to the US file-sharing platform SCRIBD.
* After the first, the Australian Stock Exchange suspended trading of its shares. (The firm said the cost of the first incident would hit its revenue by AUD $7 million).