Court Case Summaries

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# Appraisal vs Consulting

BACKGROUND:

* 11.36 acres homestead land zoned Agricultural but Neighorhood Plan indicated probable zoning to be single-family
* Plan of subdivision resulted in remnant parcels that were not specifically mentioned in the transmittal letter, the appraisal, diagrams or plans
* Appraiser owed a duty of care to identify if City would approve subdivision
* 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 as the Appraiser did not breach the contract and was not negligent for failing to conduct a feasibility analysis

TAKEAWAYS: Ensure the scope of work and intended use are appropriate for the assignment – make sure the client knows the limits of your report and communicate alternatives under the Consulting Standard. Limitations should be noted in the letter of transmittal.

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>>,

# Approaches – DCA & 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 that ¾ of the property had a “no build” covenant and how much of the land was useful due to a presence of a creek
* Damages $66,210

TAKEAWAYS:

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>>

# Approaches – DCA

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 for attributing too much weight on the quantity and quality of renovations
* Valued $100-300K higher than other appraisers
* Appraised at $985,000  Other comps are less than $700,000
* Damages $170,800

TAKEAWAYS:

Detail your DCA and depreciation.

Consider comparable "ceiling" prices and the contributory value of renovations.

Use bracketing.

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

# Approaches - Income

BACKGROUND:

* 8 story hotel in Vancouver, 39 residential units
* Appraisers are arm’s length, never linked to investor’s money
* Appraisers are 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

TAKEAWAYS:

Detail your rationale for rent income.

Discuss with your client and decline the assignment if the report may be considered unreliable.

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

# Extraordinary Assumptions and Reliance

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 sought $800,000
  + Appraisals based on extraordinary assumptions were open to misuse and misunderstanding
  + Court of appeal overturned the decision finding the appraisers did not owe a duty of care to the plaintiff since it was another party who mispresented the appraisals as fair market value
  + for a third were not fair market value and the appraisers did not have a duty of care to the plaintiff

TAKEAWAYS:

* Know and limit who can rely on your report.
* Research your comparables.
* Exercise caution and clearly disclose when using extraordinary assumptions that may not result in market value. If a report is based on assumptions, state the assumption next to the value (see CUSPAP 7.9)

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

Abt Estate v Cold Lake Industrial Park GP Ltd, 2019 ABCA 145 (CanLII), <<http://canlii.ca/t/hzw9l>>

Abt Estate v Ryan, 2020 ABCA 133 (CanLII), <<http://canlii.ca/t/j69s9>>

# Intended Use

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.  A 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:

* Do not assume, ask questions make notes in your work file.
* If you do not know, include limits and assumptions in your report and your letter of transmittal.
* Check the marketing history including contacting the listing agent if the subject was listed for sale within three years of the effective date.
* Follow both the lender’s policy AND comply with CUSPAP.  If a client asks that you make an exception, get it in writing. If you take on an assignment, you must complete the assignment to the Reasonable Appraiser test and in compliance with CUSPAP regardless of the fee charged.

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

# 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

TAKEAWAYS:

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>>

# 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

TAKEAWAYS: Careful with contracts – do not 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 within your report.

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

# 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

TAKEAWAYS:

* 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.
* Limit the use of your report.

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

# Intended User

BACKGROUND:

* + Residential property on Vancouver Island
  + Appraised in $2,210,000 (2006) and $2,550,000 (2007)
  + Appraised $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

TAKEAWAYS:

* 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>>

# Intended User – Unauthorized Use of Reports

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 on a First Nation’s burial site
  + Client discussed the appraisal with the developer without knowledge or permission
  + Damages of specific performance

TAKEAWAYS:

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

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>>

# Intended User – Unauthorized use of Reports

The follow are excerpts from cases that went to trial where appraisals were used without appraisers’ knowledge or permission. In some cases, the insurance program and the appraisers incurred costs for defending the misuse of the reports:

[13] …It was a 25-acre tree farm near Chilliwack, BC. It included a large newly constructed house, a 5-car garage and two other houses, one of which had a pool (the “Property”). … An appraisal of the Property dated addressed to a Joe…was provided to Jane by a Mr. D, the mortgage broker. S, in turn, provided it to the plaintiff.

[22] S provided the plaintiff with a more recent appraisal of the Property for an individual named JM….. S had obtained the Appraisal…from Mr. D.

[29] The plaintiff testified that, on May 18, 2012, in reliance on the Appraisal as well as his own judgment based upon the success of the Second Mortgage Investment so far, the plaintiff funded the Third Mortgage Investment.

[30] The plaintiff testified that he would not have advanced the funds in respect of the Third Mortgage Investment but for his reliance on the appraised value….

[Bryce v Rala Investments Ltd., 2020 BCSC 90 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc90/2020bcsc90.html)

[3]           The appraisal … was not for the plaintiff but rather for an entity called Verico Select Mortgages … A copy of the appraisal was obtained by the defendants (I believe from an independent mortgage brokerage firm … and was provided by the defendants to the plaintiff …prior to him advancing the third mortgage financing in question.

[4]           The parties are in agreement that the appraisal valued the property significantly higher than its actual market value at the time and that, for the purpose of trial, was prepared negligently.  The plaintiff originally named Appraiser and the author of the appraisal…as defendants.  However, the action was discontinued against them because it was determined by plaintiff’s counsel that the limit of liability and waiver language contained in the appraisal precluded an action against them.

[5]           Fundamental to the plaintiff’s case against the remaining defendants, namely the mortgage brokerage firm and its principal, is the assertion that they breached the standard of care expected of them in the circumstances.  In particular, the plaintiff alleges that the defendants had a duty to and failed:

a)   to recommend that the plaintiff obtain his own appraisal of the property before providing mortgage financing; and/or

b)   failed to advise the plaintiff to obtain what is called a Letter of Transmittal from the author of the appraisal before using and relying upon it.

Bryce v Rala Investments Ltd., 2020 BCSC 51 (CanLII), <<http://canlii.ca/t/j4jxx>>

[3] … He further provided his client… an appraisal report…to proceed with the proposed mortgage loan in the principal amount of $430,000 on a one year term at an annual interest rate of 11%.

[4] The pleading alleges that in reliance on the documents and F’s advice, 368 advised F that it would advance the second mortgage loan. F represented to 368 that an independent appraisal was not necessary given the November 2014 appraisal provided to 368 by F.

[5] After the transaction closed, the second mortgage was registered on title by F on January 29, 2015, along with a Notice of Assignment of Rents-General. The second mortgage went into default on September 1, 2015…. As a result, he discovered an alleged fraud committed by A. On September 25, 2015, the TD Bank, the first mortgagee on the property, delivered a Notice of Sale for the property to 368, which indicated that the outstanding balance on the first mortgage was $845,930.55.

[368230 Ontario Limited v. F Law, 2018 ONSC 3254](https://www.canlii.org/en/on/onsc/doc/2018/2018onsc3254/2018onsc3254.html)

[2] Ryan is a mortgage investment company that purchases mortgages from Alpine and other companies. Alpine is a licensed mortgage broker in British Columbia, Alberta and Ontario. Unlike conventional lenders, Alpine is an equity lender — in deciding whether to lend, it places more weight on the value of the land used to secure the loan and less weight on a borrower’s income and capacity to keep up with mortgage payments. Alpine sells the mortgages it underwrites to Ryan or to other third party investors. It does not retain a portfolio of mortgages for its own investment purposes.

[Ryan Mortgage Income Fund Inc. v. Alpine Credits Limited, 2017 BCCA 206](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca206/2017bcca206.html)

[9] Kokanee came into possession of the appraisal without [Appraiser’s] knowledge or authorization. They did not grant Kokanee authorization to use the appraisal for the purposes of obtaining or providing mortgage financing…. [Appraiser] says they did not know that Kokanee had the appraisal until several years after it was completed.

[Kokanee Mortgage M.I.C. Ltd. v. Burrell, 2018 BCCA 151](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca151/2018bcca151.html)

[21] In the first action, filed July 4, 2014, Alpine and Ryan, as the two plaintiffs, sued the two present third parties….Appraisals.

[22] By contrast, in the current action, as noted earlier, Ryan sues Alpine and Alpine in turn has third partied the Appraiser.

[Ryan Mortgage Income Fund Inc. v. Alpine Credits Limited, 2016 BCSC 1582](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1582/2016bcsc1582.html)

[18]           Ms. C does not address the fact that she failed to disclose to the CPL judge that she purchased the property for $3,100,000 two years earlier.  She also does not address the fact that she used the A appraisal without the author’s permission.

[19]           The issue with the A appraisal came to Mr. B’s attention when his counsel tried to examine Ms. A.  She refused to attend an examination and stated that the appraisal had been performed for a different party for a different purpose.  She did not consent to Ms. C use of it.  Ms. C had no other evidence with respect to the property’s value aside from her own belief that another property down the road had sold for much more.  She did not know any of the particulars of this property.

2469908 Ontario Ltd. v. Axton, 2018 ONSC 7452 (CanLII), <<http://canlii.ca/t/hwjsr>>

# Expert Witness Immunity

BACKGROUND:

* Claim alleged appraiser negligent in providing expert evidence at Trial.
* Courts typically hold that witnesses have immunity for their testimony so that witnesses do not have to fear retaliation in lawsuits
* Dismissed with court extending witness immunity to a party’s own expert witness, not just to adverse witnesses.

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

# Expert Witness Immunity

BACKGROUND:

* Appraiser’s role was an expert witness in preparing a report for foreclosure
* Claim dismissed with absolute witness immunity granted to expert witness for similar reasons to the above Paul v Sasso case that an expert witness preparing an expert report is protected under Canada law from retaliation

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

# Expert Witness Immunity/Property/Subpoena

Privilege/Conflict

[22] In relation to a witness of fact, the law is plain. There is no property in a witness. As Lord Denning said in Harmony Shipping Co. S.A. v. Saudi Europe Line, [1979] 3 All E.R. 177 (CA):

the reason is because the court has a right to every man’s evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can bar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing the witness of fact, from getting the fact from him and from calling him to give evidence or from issuing him with a subpoena.

[23] Similarly, “there is no property in an expert witness as to the facts he has observed and his own independent opinion on them.” There being no such property in a witness, it is the duty of a witness to come to court and give his evidence insofar as he is directed by the judge to do so. An important qualification on this principle, however, is that the expert cannot be compelled to answer any questions which infringe the rule of litigation privilege.

[24] There are three main guidelines which govern when an expert may be disqualified when called by the opposing party:

(1) there is no property in a witness;

(2) even though a party has retained an expert and communicated privileged information to the expert, the expert can still provide an opinion for an opposing party and may be called as a witness at trial; but

(3) the expert may not be questioned concerning any privileged material he or she received from the opposing solicitor or disclose any opinion given in confidence to the opposing solicitor.

[36….  In my view, paras. 1 and 11 of the limiting conditions of the Report are for the protection of the appraiser, not the client.  The purpose of these limiting conditions, and the similarly worded Rule, is to protect the appraiser from damage claims by strangers to the client relationship who may have seen or been given the appraisal information.  It is simply a means of dealing with the “indeterminate liability to an indeterminate class for an indeterminate amount” problem frequently encountered in tort law.

[37]           In my view, therefore, neither the limiting conditions in the Report nor the applicable professional Rules prohibit APPRAISER from testifying at the behest of the respondent when he is, at law, otherwise capable of doing so.

Bortnikov v. Rakitova, 2015 ONSC 1163 (CanLII), <<http://canlii.ca/t/ggfl5>>

# Fraud Alleged – Collateral Attack

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 collateral attack  (using different forums other than the normal proceedings to attempt to undo a previous court order)
* Damages sought $400,000
* Claim dismissed as Plaintiff failed to show any breach of professional standards, despite value appearing to be high in retrospect.

TAKEAWAYS:

* DO NOT take on assignments that have red flags for fraud – you may be 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>>

Royal Bank of Canada v Benchmark Real Estate Appraisals Ltd, 2015 ABQB 288 (CanLII), <<http://canlii.ca/t/ghgnm>>

# Fraud Alleged – Straw Buyers

[9] In support of the straw buyers' mortgage applications, P retained appraisers who based their appraisals of properties on renovations that were either incomplete or never started. The appraisers were often pressured by Pervez to increase the value of their appraisals. E had no direct contact with any of the property appraisers.

[14] …Other indicted and unindicted co‑conspirators came in and out of this operation during that time. Straw buyers were recruited by persons who formed their own cells with their straw buyers as part of this operation…P was in charge of dealing with mortgage brokers and bankers, appraisers, realtors, and lawyers. … recruited straw buyers, paid straw buyers, participated in the creation of forged documents, directly uttered false statements in order to secure mortgage loans, and secured renters and collected rents in order to cover mortgage payments for straw buyers. ..P would deal with securing the mortgages, which included dealing with mortgage brokers, appraisers and lawyers.

R. v. Ellis, 2007 ABQB 722 (CanLII), <<http://canlii.ca/t/1v09r>>

# Fraud Alleged –Shadow flipping

[16]        In this case, the "optics" arguably engender skepticism, if not suspicion.  Shortly after the Contract in this case was executed, significant changes were made in the real estate industry to address the controversial practice of "shadow flipping" and alleged misconduct on the part of real estate agents, including misleading advertising and predatory sales strategies designed to take advantage of consumers.  If the flipping transactions in this case had occurred two years later, Mr. T would have benefitted to the tune of some $1.2 million over and above the purchase price set out in the May 16, 2015 Agreement.  The Limited Dual Agency Agreement would not have been signed and Mr. Z would not have been able to represent both vendor and purchaser.

[8] In 2016, in support of their summary trial application, the defendants provided Mr. T with an appraisal report indicating that the sale price was at fair market value. The report was not challenged at the summary trial or the trial in front of me. This essentially cut the legs out from the claim, which was already devoid of evidence. It is no doubt this which led to an amendment (made shorty before the full trial) changing the conspiracy claim from one to convince Mr. T to sell at an under-market price to selling at a “reduced price”. At the trial, Mr. T said he had been told that the sale price was a “heavenly price”; something he had not alluded to in his discovery evidence.

Tsai v Li, 2018 BCSC 582 (CanLII), <<http://canlii.ca/t/hrft3>>,

Tsai v Li, 2020 BCSC 60 (CanLII), <<http://canlii.ca/t/j4r49>>

# Fraud Alleged – Lender Due Diligence

[124]      The Law Society publication on “Due Diligence on Mortgage or Loan Transactions” indicates that it is the Lender’s responsibility to satisfy itself as to the value of the property.  Depending on the circumstances, these steps could include reviewing the Agreement of Purchase and Sale for discrepancies, reviewing the MLS listing for the property, attending at the property or **conducting an on-site appraisal.**Certainly a requirement that the banks return to their previous practice of conducting appraisals to verify value in high ratio mortgages would go a long way to help prevent mortgage fraud.  The cost of the appraisal could be added to the mortgage insurance fees or be paid by the borrower, as was the past practice.  The Lenders, however, have made a business decision that the risk of loss is not sufficient to justify the necessity and cost of an appraisal.  Unfortunately, to the extent that the risk of loss has been downloaded to the legal profession, the legal profession becomes the insurer for the banks’ calculated business risk.

Law Society of Upper Canada v. Wayne Fitzroy Leacock, 2012 ONLSHP 170 (CanLII), <<http://canlii.ca/t/fttfx>>

# Fraud Alleged – Purchase Price – Transaction History

[23]           There was also one other area where Ms. Wilson felt there was a duty of disclosure on the member.  He was, after all, retained by and working for the Bank.  When a search of title reveals a reasonably recent significant difference between a prior purchase price and the new purchase price, it requires explanation.  …, the amount of difference between the purchase price and the mortgage ought to have set off red flares that something extremely unusual was happening. .

[24]           … confirmed that in her view there was a scheme in place to defraud the Bank.  That the Bank suffered no losses, either because the mortgages were CMHC insured; or the value of the property had increased, was simply fortuitous and did not detract from the fraudulent nature of the scheme.  Royal Bank does not mortgage properties in excess of the purchase price and ought not to have had in its possession Agreements of Purchase and Sale that differed from that same document in the hands of their lawyers.

[25]           She confirmed that according to the Bank's records there was an appraisal that justified every loan.  She also agreed that when the Bank retained a separate appraiser by the name of R to review E appraisals, every one of his appraisals came back at $200,000.00, which probably rendered them equally unreliable.

Law Society of Upper Canada v. John Sergio Tucciarone, 2005 ONLSHP 20 (CanLII), <<http://canlii.ca/t/1lwl1>>

# Fraud Alleged – X – Transaction History

BACKGROUND:

* Evidence led the police to suspect that a real estate agent had conspired to defraud a lender in a real estate transaction.
* Real estate agent had purchased the property September 2006, and was also listing agent, and agent for buyer
* Real estate agent, was the vendor and listing agent, and selling agent, and hid these from the purchasers and the lender in June 2007
* Real estate agent also provided the property appraisal to the lender.

TAKEAWAYS:

* An analysis of the Agreement for Purchase and Sale and an analysis of prior sales in any valuation are important mandatory requirements under CUSPAP and to a lender. Comment on the prior sale price in relation to the current sale price and provide an explanation of any dramatic change in value.
* Ensure the lender has a true copy of the appraisal, not provided by a third party agent
* When not provided with the Offer for Purchase and Sale, add a limiting condition to highlight any risk to the lender.

Westra Law Office (Re), 2009 ABQB 391 (CanLII), <<http://canlii.ca/t/245m4>>

# Fraud Alleged – Purchase of “Big Deal” Condo-hotel

[3]           Broadly speaking, the plaintiff alleges that it was induced into selling a unit in the Shangri-la Hotel in Toronto….at significantly below market value by reason of the fraudulent representations …. concocted a false story concerning his intention to purchase the top four floors of the Shangri-la for a significant purchase price (referred to in various documents and communications as the “Big Deal”) …

180 University Residential Limited Partnership v. Yours Asia Corporation, 2015 BCSC 289 (CanLII), <<http://canlii.ca/t/ggh3g>>,

# Fraud Alleged – Purchase Price – Research Zoning

Incorrect Purchase Price Information Used to Mislead Appraisers

[376]     The Vendors contend that Appraiser, who prepared …Appraisal, was provided with an incorrect $38.8 million purchase price…

[381]     Appraiser relied, at least in part, on incorrect information provided to him regarding a $38.8 million purchase price …Accordingly, the basis for his profitability assessment and appraisal was incorrect. Appraiser was also not provided with a copy of the Zoning Warranty, which may also have influenced his estimate of the market value….

Documents Used to Mislead Potential Partners and Assignees

[387]     I have already found that A provided the False Purchase and Sale Agreement to Y to mislead them with respect to the true purchase price of and deposit made for,…also find that the Purchasers provided false or misleading information to their agents – who in turn passed this information on to potential partners or assignees.

# Intended Use and Land Use Controls (floodplain)

BACKGROUND:

* 11 lots on floodplain in Mission
* No letter of transmittal
* 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

TAKEAWAYS: 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 read the appraisal, but credit loan committee did not read appraisal and relied only on the appraisal value
* 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

TAKEAWAYS:

* 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

TAKEAWAYS: 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 fail to live up to a reasonable degree of care, knowledge and skill are 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.

TAKEAWAYS:

* 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 vs Full Appraisal

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

TAKEAWAYS: 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>>

[14]    In addition, case law exists as to when a drive-by appraisal, a realtor’s opinion, and a full appraisal should be filed. See: Royal Bank of Canada v Gaudet, [2019 SKQB 87](https://www.canlii.org/en/sk/skqb/doc/2019/2019skqb87/2019skqb87.html); Royal Bank of Canada v Hanterman, [2013 SKQB 158](https://www.canlii.org/en/sk/skqb/doc/2013/2013skqb158/2013skqb158.html), 419 Sask R 253. In situations such as this, where the court is being asked to reduce the floor price for a second time, clear and cogent evidence as to value is required. At para. 8 of Hanterman, Justice Gabrielson stated:

**8**  I am not satisfied that I have sufficient information as to the true value of the mortgaged property in order to grant a renewed order nisi for judicial sale. It is inconceivable to me how, in the current real estate market, the value of the property would drop by almost 50 percent from June 13, 2012, to March 22, 2013, regardless of the "rough condition" (as it was described in Mr. Payne's letter) of the interior. **When the Court is requested to make an order for judicial sale, it must rely upon accurate information as to the value of the property in order to set the upset price necessary for the judicial listing. In my opinion, the order nisi for judicial sale cannot be renewed without the benefit of an appraisal from an accredited appraiser so that an informed upset price can be set.**

Bank of Nova Scotia v Nieswandt, 2020 SKQB 53 (CanLII), <<http://canlii.ca/t/j5wml>>

[27]         I echo the comments of Justice Gabrielson and would add that the best practice would likely be to obtain proper appraisal evidence before seeking a sale order. I understand that appraisals are relatively expensive and that costs are passed on to the mortgagor. This is why this court generally accepts drive-by appraisals or realtors’ opinions at the leave stage. But where an actual sale order is sought, it makes abundant sense to get the proper evidence at the initial application for such an order rather than trying to patch up a botched order later.

Royal Bank of Canada v Gaudet, 2019 SKQB 87 (CanLII), <<http://canlii.ca/t/hzn21>>

TBD

West Fort William Credit Union v. McKillop, 2006 CanLII 34457 (ON SC), <<http://canlii.ca/t/1prwn>>

# 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

TAKEAWAYS: 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>>

# Procedural Fairness/Apprehension of Bias

[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 CanLII 10 (SCC)](https://www.canlii.org/en/ca/scc/doc/1980/1980canlii10/1980canlii10.html), [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.

New Dawn Enterprises Limited v. Northbridge General Insurance Corporation, 2020 NSSC 150 (CanLII), <<http://canlii.ca/t/j6x45>>

# 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

TAKEAWAYS: 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 – Report Format

[155]      First, Mr. Appraiser is reproached for using a “narrative appraisal report”, which in Mr. W’s opinion, is a format that is outdated and contravenes the Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP). Mr. W states that the terminology was changed with the 2005 CUSPAP and that the only report options available now are full narrative, short narrative, and form. Although Mr. Walker testified that Appraiser did not use the correct title for the report, he advised that his critique merely speaks to the form and not substance of Mr. Appraisers report. Mr. Appraiser, in reply, testified that he sat on the CUSPAP standard committee and that they moved away from the American standard USPAP, which was adopted by the Canadian National Association of Real Estate Appraisers (CNAREA), the association Mr. W belonged to. He states that Mr. W is not a member of the CUSPAP and that he did not properly interpret the rules. He explained that narrative reports continue to be used on a daily basis. I find Mr. W’s critique of Mr. Appraisers report format unnecessary and a distraction to the real issues in dispute.

Friesen v Friesen, 2020 ABQB 103 <http://canlii.ca/t/j54v3>>

# Stale-dated Reports

BACKGROUND

* Appraisals must be read in entirety to understand the methods and assumptions
* A creditor filed only portions of the report
* Failing to file an entire report undermines their evidentiary 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>>

# 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

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

# Appraisal vs CMA (realtor opinion, broker report)

* Drivebys less reliable than full appraisals

[29]      Having considered the evidence of the parties with respect to the property and having heard the evidence of both Mr. N, a certified appraiser, and Mr. H, a realtor who had some experience as a property assessor, I prefer the evidence of Mr. N.  He is a qualified appraiser and in my view acted totally independently, having been engaged by both parties and in fact having been effectively retained by the petitioner and her current husband.  He conducted a thorough inspection of the property and had observed the property in 2004 and again in 2014.  On the other hand Mr. H did a very cursory inspection of the property, does not have the qualifications of Mr. N, and was inconsistent with his approach on his market analysis, not only with this property but with the vacant property as well.

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

[20]        Appraisals are opinions – and only opinions.  Even more so, an estate agent’s market analysis (which is not an appraisal); and especially so where, as here, the agent includes the statement in the 2018, three-paragraph analysis that “\*\*\*Prices are subject to change with market conditions.  This is my opinion only!”

McInnis (Re), 2020 NSSC 64 (CanLII), <<http://canlii.ca/t/j58p9>>

[4]           There is no dispute as to the principles to be applied on an application for approval of sale in a foreclosure proceeding. The court must be satisfied that the property has been marketed in a “businesslike manner” and that the proposed sale is provident in all the circumstances”: Mission Creek Mortgage Ltd. v. Angleland Holdings Inc., [2013 BCCA 281](https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca281/2013bcca281.html), at para. [40](https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca281/2013bcca281.html#par40); Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd., [2014 BCSC 458](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc458/2014bcsc458.html). …

7]           The petitioners obtained an appraisal in February 2018 valuing the property at $2.758 million. They concede that the appraisal is inaccurate, in part because the appraiser did not have the correct facts about the property, and that the appraisal is as a result “far too conservative”. The respondent mortgagor relies on an appraisal dated June 20, 2016 at $10 million. The submission of the petitioners is that the 2016 appraisal is dated and unreliable as a result.

[8]           Rather than obtaining an updated appraisal of the property, the petitioners rely on a realtor’s letter to establish that the marketing was businesslike and the sale provident.  ….

[10]        In my view, there are significant gaps in the realtor’s letter. First, there is no explanation as to why the listing price was dropped from $10 million to $5.9 million at the end of the 60-day listing period set out in the January 2018 order. While the original listing at $10 million reflected the value in the 2016 appraisal, there was no appraisal supporting a listing at $5.9 million. The petitioners submit that they relied on the opinion of the realtor in this regard. The realtor’s letter simply sets out the new listing price effective June 16, 2018, with no rationale offered for the almost 50% reduction in the listing price.

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

[16]      The petitioner engaged H to prepare a comparative market analysis for this property.  H was called to give evidence.  Although the report that he prepared identifies that it was prepared exclusively for the respondent, in fact it is confirmed that this was prepared exclusively for the petitioner.  Mr. H is a realtor ….Mr. Hawrysh is not a certified appraiser.  Based on his comparative market analysis, Mr. Hawrysh concludes that the property had a value of $20,000.00 as of 2006.

[22]      The recent trend of offering copies of advertisements from the internet sales website Kijiji as evidence to the court of the value of an asset is of absolutely no assistance to the court.   The practice of lawyers encouraging their clients to obtain this material and expecting it to be considered as evidence should be strongly discouraged.  Parties need to obtain proper evidence as to values as soon as possible after the separation of the parties in cases where property issues are going to be raised.  This needs to be emphasized early on by the lawyers and also in the course of case management. The failure to do so leads to a very unsatisfactory and unnecessary and costly proceeding.  This in no way promotes access to justice or the concept of proportionality.  A minimal investment in obtaining proper appraisals contemporaneously with the separation date would in most cases save literally thousands of dollars of legal fees that most parties can ill afford to pay.

[29]      Having considered the evidence of the parties with respect to the property and having heard the evidence of both N, a certified appraiser, and H, a realtor who had some experience as a property assessor, I prefer the evidence of N.  He is a qualified appraiser and in my view acted totally independently, having been engaged by both parties and in fact having been effectively retained by the petitioner and her current husband.  He conducted a thorough inspection of the property and had observed the property in 2004 and again in 2014.  On the other hand Mr. H did a very cursory inspection of the property, does not have the qualifications of Mr. N, and was inconsistent with his approach on his market analysis, not only with this property but with the vacant property as well.

Monastyrski v. Okapiec, 2014 MBQB 244 (CanLII), <<http://canlii.ca/t/hrl8t>>

I am not persuaded that Mr. Jones' purpose in doing his comparative market analysis at the end of July, 1988, was to give Mr. Butler and Mrs. Habgood "meaningful advice" as to the value of the property.  Mr. Jones was in the business of selling real estate for a commission.  His chief reason prior to the signing of the listing agreement on August 5, 1988 for identifying the prices at which other properties were listed or for which they had been sold was, I find, to determine for his own benefit a realistic selling price for the property in a quiet market.  Moreover, his inquiries at the municipal office regarding subdivision were quite clearly directed at obtaining information for the purpose of promoting the property to prospective purchasers as land with subdivision potential, and not, I conclude, for use as part of an in-depth analysis of the value of the property.

 My reasons for discounting Mr. Jones' testimony that he undertook his inquiries concerning the value of the property in order to give the plaintiff meaningful advice are essentially two-fold.

 First, the work was done in the context of a "possibility of (him) getting a listing", and in a situation in which there is no suggestion he had been asked to advise on the value.  In fact, at his meeting with Mr. Butler and Mrs. Habgood on August 5, 1988, at which time he obtained the listing agreement, Mr. Jones' recommended selling price of $350,000., which he wrote into the listing agreement, was crossed out at the behest of Mrs. Habgood and replaced by the figure of $425,000.  His advice, although proffered, had not been sought by the plaintiff.  Nor was it accepted.  Mrs. Habgood testified she did not accept Mr. Jones' advice about the listing price on August 5, 1988,

...because I had previous information as to what somebody else had said it was worth.

West Coast Engineering Ltd. v. Homelife Benchmark Realty Corp., 1994 CanLII 1130 (BC SC)

[7]              Ms. H used a similar approach but is not truly independent, being a long time friend of the R. family.  I am also persuaded that she does not have the same qualifications that Mr. F had.  As for the opinion provided by Mr. S, there is no indication as to how the appraised value was determined, there are no comparisons, and Mr. S was not called to give evidence or to subject himself to cross-examination on his opinion of value.  I note that Mr. F appraisals are fairly consistent.

K.A.T. v. K.D.T., 2002 MBQB 276 (CanLII), <<http://canlii.ca/t/1r8mz>>,

[26]            … I prefer these appraisals to the real estate evaluation completed by A Realty, for several reasons. Firstly, Ms. M is a certified residential appraiser, certified by the Appraisal Institute of Canada, as is clear from the initials CRA which appear following her name on the appraisal. Mr. A is a realtor but not a certified appraiser. No evidence was provided of what his experience and expertise were in valuation of homes. Secondly, the appraisals completed by Ms. M are stated to be as of October 6, 2006 while the evaluation by Mr. Adams was completed on August 22, 2006 but is stated to be “as of July 1, 2006". I am entitled to take judicial notice of the fact that the current real estate market in Alberta is extremely volatile and that prices are increasing rapidly. Thus, I am of the view that the more recent valuation more closely approximates current value in a rising market such as the one now being experienced in Alberta.

[27]            I place the value of the Innisfail home at $325,000, based upon the appraisal completed by Appraisal Associates. I prefer this appraisal to that of the real estate evaluation completed by realtor …It was impossible to determine whether Mr. Vs evaluation was valid.  Mr. V is not a registered appraiser. He is a licensed realtor and a real estate broker but no evidence was offered as to what his experience was in valuation of homes. Further, it is apparent on the face of his evaluation that he attached information about two properties that he considered comparable. However, this information was removed from Mr. V evaluation before it was made an exhibit. Lastly, the value he places on the house is unclear. He indicates that the Innisfail house requires repairs but then says “as is” he feels it would sell for “in the area of” $270,000. However, immediately after making this statement, he says “this price reflects approximately $40,000 in repairs.”  It is difficult to know from his comments, therefore, whether his view is that the house is worth $270,000 “as is” or $270,000 less $40,000 or $230,000.

[28]            On the other hand, the appraisal completed by Appraisal Associates was completed on September 25, 2006, almost three months after the Realty evaluation which is stated to be as of July 1, 2006. For the same reason I gave earlier, it is my view that the more recent valuation more closely approximates current value in a rising market such as the one now being experienced in Alberta. Further, the Appraisals’ appraisal was completed by Jim Brown, a certified appraiser with the designations AACI and P.App. The AACI designation means that Mr. Brown is an appraiser accredited by the Appraisal Institute of Canada and therefore that Mr. Brown has taken a recognized course of study. The comparables used are also clear on the face of the document. For all of these reasons, it is my view that the appraisal completed by Appraisal Associates is more reliable than is the one completed by Realty.

Thompson v. Thompson, 2006 ABQB 796 (CanLII), <<http://canlii.ca/t/1q604>>

[18]      The plaintiffs provided two types of valuation of the property.  They contacted a family acquaintance, Mr. T, who had been in the house a few times and had never seen the basement.  He was a realtor, not an appraiser.  He did a drive-by opinion of value.  He testified that his estimate of value was $135,000 to $145,000.  He acknowledged that valuating was not an exact science and there could be a fluctuation of value.  He acknowledged that it is better to have a house occupied to sell it.  He also agreed that an unconditional cash offer without an inspection is a more attractive offer and that it is reasonable to rely upon a real estate opinion.

[19]      The second person the plaintiffs called in terms of valuing the property was a qualified appraiser, …  His appraisal was filed as an exhibit on the trial and he was cross-examined as well.  …

[28]      …  He may have been wiser to obtain two written appraisals to confirm his decision to sell and the price at which to sell…

Ducharme v. Goulden, 2010 ONSC 4021 (CanLII), <<http://canlii.ca/t/2bml8>>

[63]        … The only evidence she has presented is hearsay evidence (that is, what has been told to her by unidentified realtors) and an email from a named realtor.  In that email the realtor noted that he would like to help her.  However, he recommended she get a professional appraiser to give her a valuation.  He noted that a valuation was going to be more persuasive with a judge.

Su v. Empire Developments Ltd., 2017 BCPC 141 (CanLII), <<http://canlii.ca/t/h3x6t>>,