



CUSPAP and the Common Law

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The following paragraphs consider the interaction between the 'Reasonable Appraiser' concept in the *Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP)* and the common law duty of care required of appraisers.

CUSPAP

CUSPAP section 3.58 defines 'Reasonable Appraiser':

3.58 Reasonable Appraiser: A Member providing Professional Services within an acceptable standard of skill and expertise, and based on rational assumptions. [see 4.2.5, 7.1.2, 9.8]

Having defined Reasonable Appraiser, *CUSPAP* then imposes the standard of Reasonable Appraiser as an ethics requirement (section 4.2) and as an appraisal preparation and content standard (e.g., sections 7.1.2, 9.6.2, 9.6.3, 9.7.1, 9.7.2, 9.8). In a technical review of an appraisal report, the reviewer must determine if the work product meets the Reasonable Appraiser test (section 11.5).

The Reasonable Appraiser test is the basis for review in disciplinary proceedings under the Appraisal Institute of Canada (AIC) *Consolidated Regulations* (e.g., regulations 5.11.1 and 5.20.1).

What use do Canadian courts make of the Reasonable Appraiser concept in lawsuits against appraisers?

Common Law

In *Royal Bank of Canada v. Westech Appraisal Services Ltd.* [*Westech*], the Supreme Court of British Columbia explained the appraiser's duty of care:

146 Decisions in this province ... have accepted the characterization of that duty as set out in *Avco Financial Services Canada Ltd. v. Holstein* ...:

The duty owed by an appraiser to his client is identical in principle to the duty owed by all professionals to people who employ them.

It is always implied that he/she will carry out the duty with a reasonable degree of care, knowledge and skill. An appraiser who fails to live up to that standard is negligent and is liable for his/her client's loss.

Depending upon the facts in a given case, the duty of care can extend to parties beyond an appraiser's client. Certain of my previous articles address this point.

The question arises, where do the courts look for guidance as to "reasonable degree of care, knowledge and skill" in appraisal. In *Westech*, the court relied upon previous case law for the following:

Property appraisal is not an exact science.

Failing to take sufficient steps to inform yourself about relevant properties or any of the circumstances which affect the subject property is negligent. However, an appraiser will not be found guilty of negligence merely because the valuation turns out to be wrong.

The question is whether the appraiser is guilty of professional negligence in arriving at the appraised value. The court must consider if the appraiser followed professional guidelines.

The standard of care is to be judged by the prevailing professional standards.

One might have thought from the foregoing that the courts have implicitly endorsed *CUSPAP*, since it provides the standards by which at least Members of the AIC are to perform appraisal services. But this is what the court in *Westech* said about *CUSPAP*:
165 In *VSH Management* at paras. 106-107, the court acknowledged that the *CUSPAP* "provides a set of rules that appraisers should follow when they are developing and communicating a formal opinion of value." However, it also recognized that the rules were general and did not "necessarily reflect how a typical and competent appraiser had to undertake his or her work . . . rather, they reflect the aspirations of the Appraisal Institute of Canada for the conduct of its members."



The court in *Westech* settled on a two-part inquiry: 1) were the appraisal services provided in accordance with *CUSPAP*, and 2) did the appraiser fail to meet the standard of care of a reasonable appraiser in arriving at and presenting the opinion of value. Without expressly stating so, the court’s formulation of the inquiry leaves open the possibility that a breach of *CUSPAP* will not necessarily lead to a finding that the standard of care was breached.

The court’s use of *CUSPAP* addresses one element of negligence law, i.e., the standard of care. The court considers other elements in a lawsuit alleging appraiser negligence. The test for negligent misrepresentation, presented in previous articles, is a useful illustration of the broader scope of inquiry the court engages in:

- there must be a duty of care based on a “special relationship” between the representor and the representee;
- the representation must be untrue, inaccurate, or misleading;
- the representor must have acted negligently in making the representation;
- the representee must have reasonably relied on the representation; and
- the reliance must have resulted in damage or loss to the representee.

Case Study; *Abt Estate v. Cold Lake Industrial Park GP Ltd.*

Canadian courts commonly refer to *CUSPAP* as the starting point for establishing the standard of care required of AIC Members. But, as noted above, the courts also look at additional criteria in a negligence lawsuit.

In previous articles, I reviewed the application of the duty of care and the standard of care in appraisal work. In the remaining paragraphs of this article, the Alberta Queen Bench and Alberta Court of Appeal decisions in *Abt Estate v. Cold Lake Industrial Park GP Ltd.* [*Abt*] are discussed to illustrate that, even when professional services are held by a court to fall short of the

standard of care as established, for example by *CUSPAP*, liability for negligence under the common law will not necessarily follow.

Abt overview

The *Abt* invested \$800,000 in a land development project in Cold Lake, Alberta. When the project failed, they sued various parties including the appraisers who had prepared an appraisal and an update.

At trial, the court held that the appraisers’ work product was negligently prepared and, since the appraisers should reasonably have known the *Abt*, as an investor, would rely on the work product, the appraisers and their firm were held liable to the *Abt*. The trial judge did not accede to the arguments that the reports were expressly stated to be only for mortgage purposes or that the value was based on four Extraordinary Assumptions.

The appraisers’ appeal to the Alberta Court of Appeal was allowed. The appellate court found that the appraisal work product was negligent, but that the *Abt* had not relied upon the appraisers’ statements. Instead, the appellate court found that the *Abt* had relied upon others who misrepresented what the appraisals said.

Trial decision

A full narrative land appraisal was provided by the appraisers presenting a value of \$10,115,000 for the subject land based on the Extraordinary Assumptions. On March 30, 2009, the appraisers provided an update letter with a revised value of \$8,595,000. The trial court accepted appraisal evidence adduced by the *Abt* that the property was only worth \$720,000. The trial judge concluded that the appraisal work product was “so flawed and grossly unrealistic that the reasonable conclusion is they were negligently, if not incompetently, prepared for a long-term client” and that the supervising appraiser knew the client was in the business of land development and would use the appraisals to raise money.

On the question of 'Reasonable Appraiser,' the trial court accepted the opinion of the appraiser called on behalf of the *Abt* that the original full narrative appraisal did not comply with *CUSPAP*, resulting in a gross overvaluation with no acceptable explanation in the evidence of the defendant appraisers or their experts.

The trial judge found that all the elements of negligent misrepresentation had been established. As to the first element, a "special relationship," the trial judge stated that an appraiser owes a duty of care, not only to the client, but to all other persons who might be expected to rely on an appraisal. The trial court held that, through their close relationship with the developer, the appraisers knew their appraisal would be used to raise money from investors, not just mortgage lenders.

The gross overvaluation established the second element of negligent misrepresentation, namely, that there was an untrue, inaccurate, or misleading representation.

As for the third element, the trial judge found that the appraisal work product "was so flawed that it does not meet the standard of a reasonably competent appraiser ..." and, therefore, the appraisers acted negligently.

The fourth element, i.e., reasonable reliance, was accepted by the trial court. The appraisal values were confirmed in the promotional material provided to the *Abt* and presented verbally by the developer and a financial advisor.

The *Abt* suffered a loss from the misrepresentation; therefore, the fifth element was made out.

Court of Appeal decision

The Alberta Court of Appeal did not overturn the trial court findings of negligence, but it disagreed with the trial judge's conclusion that the *Abt* relied upon a representation made by the appraisers. The Court of Appeal wrote the following:

- 96 [The appraisers] were professional appraisers. In 2008 one of the [developer companies] instructed [the appraisers] to prepare a valuation of the [subject lands] "to aid in obtaining mortgage financing." The instructions were not to prepare a "fair market value" appraisal, but rather to make four "Extraordinary Assumptions." The two most important of them were that the lands were zoned for industrial use, and that municipal servicing was available within one half mile of the lands. Such valuations are contemplated by the Standards of the Appraisal Institute of Canada, provided that the Extraordinary Assumptions are clearly disclosed in the report.
- 102 It is clear that misrepresentations were made about the present market value of the lands, and they were relied on by the *Abt*. Those misrepresentations, however, were never made by [the appraisers]. [The appraisers were]

never retained to prepare a present fair market valuation, and they never purported to do so. It was imprudent for [the appraisers] to accept the retainer as defined (based on the Extraordinary Assumptions); as can be seen, such valuations are open to abuse and misinterpretation. Further, it seems clear that the valuations were negligently made, even taking into account the four Extraordinary Assumptions. The trial judge described the appraisals as a "total sham" which is strong language, but justified on this record. However, *Abt* never read or relied on any valuation prepared by [the appraisers]. Instead, he relied on the misrepresentations by [financial advisor and developer] that the values (assuming the Extraordinary Assumptions) were fair market values.

104 The valuations are suspect, however, absent a finding by the trial judge that the appraisers knew or ought to have known that their valuations would be misrepresented by others as being fair market values, the appraisers could not be liable for the *Abt*' losses.

So, although the Court of Appeal did not upset the trial judge finding that the appraisal and update were negligently prepared, the appellate court concluded that *Abt* did not rely upon any representation from the appraisers but rather relied upon misrepresentation by others about the value conclusions.

Closing

In summary, *CUSPAP* will be a reference point for courts in determining the care, knowledge and skill required in rendering professional appraisal services. *CUSPAP* may set the standard of care, but the courts' inquiry will go further to determine if the other necessary elements of negligence have been proved.

End notes

- ¹ 2018 BCSC 473, para. 146
- ² *Westech*, paras. 163-164
- ³ *Westech*, para. 165
- ⁴ *Westech*, para. 171
- ⁵ *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at p. 110
- ⁶ 2018 ABQB 313, reversed in part 2019 ABCA 16
- ⁷ *Abt* [Trial Decision], para. 217
- ⁸ *Abt* [Trial Decision], para. 105
- ⁹ *Abt* [Appeal Decision], paras. 96, 102, 104

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners.