

## **Distinguishing Between Coverage Assessment and Loss Assessment in Insurance Disputes**

In first-party insurance disputes, particularly those involving significant damage amounts, it is crucial to differentiate between assessing coverage and assessing the amount of the loss. This distinction was at the heart of a case involving Aviva Insurance Company and the respondents' dentistry practice,<sup>1</sup> ultimately shaping the judicial outcome.

### **Coverage Assessment vs. Loss Assessment**

Coverage Assessment involves determining whether a particular loss or damage is covered under the terms of an insurance policy. This assessment addresses legal questions about the applicability and extent of a policy's coverage. For example, an assessment as to whether a policy covers smoke damage is a coverage assessment. Coverage determinations often involve interpreting the language of the insurance policy and assessing the insurer's obligations in accordance with that language against a particular fact scenario.

Loss Assessment, on the other hand, focuses only on quantifying the extent of the damage and determining the value of the damaged property, or the amount of the loss. This process involves factual determinations, such as the condition of the property before and after the damage, the cost of repair or replacement, and the actual cash value of the items in question. Loss assessment does not typically involve interpreting the policy, but rather applying its valuation terms to the facts at hand.

### ***Aviva Insurance Co. of Canada v Freedman, 2024***

In *Aviva Insurance Co. of Canada v Freedman*,<sup>2</sup> the respondents claimed their dental equipment was irredeemably contaminated by smoke and sought replacement under their "all risks" policy with Aviva. Aviva disagreed, arguing that the equipment could be cleaned rather than replaced. In the event of a disagreement as to the value of the property insured or the amount of the loss, the *Insurance Act* directs these questions, upon a specific written demand, shall be determined by appraisal.<sup>3</sup> The appraisal panel, consisting of appraisers from both sides and a jointly appointed umpire, was tasked with determining the value of the equipment.

Aviva's main contention was that the appraisal panel exceeded its jurisdiction by deciding to base the loss amount on replacement cost rather than cleaning cost. Aviva argued that this amounted to a coverage decision, which falls exclusively within the court's jurisdiction.<sup>4</sup>

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<sup>1</sup> *Aviva Insurance Co. of Canada v Freedman*, [2024 ONSC 2886](#) [*Aviva Insurance*].

<sup>2</sup> *Ibid*, *Aviva Insurance*.

<sup>3</sup> *Insurance Act*, [R.S.O 1990, c. I-8](#)

<sup>4</sup> *Ibid*, *Aviva Insurance*, at 23.

However, the Court clarified that the appraisal panel's role was to determine "the value of the property insured, the property saved or the amount of the loss", as stipulated by Statutory Condition 11 of the *Insurance Act*, [R.S.O 1990, c. I-8](#).<sup>5</sup>

The Court found the appraisal panel was within its jurisdiction to assess the extent of the damage and the corresponding loss amount.<sup>6</sup> Both parties provided evidence on whether the equipment needed to be replaced or could be cleaned. The Court therefore found that the appraisal panel's decision to base the award on the replacement cost rather than the cleaning cost was a factual determination about the amount of the loss, not a legal interpretation of the policy's coverage. Therefore, the appraisal panel's assessment did not usurp a court function by making a coverage determination.

### **Conclusion**

The court's decision to dismiss Aviva's application for judicial review underscores the importance of understanding the distinct roles of coverage assessment and loss assessment in insurance disputes. While coverage issues are legal questions for the court, factual determinations about the extent of the loss and the value of the property are within the scope of the appraisal panel's jurisdiction. This case reaffirms that appraisal panels have the authority to make determinations about the amount of loss without encroaching on the court's role in interpreting insurance policy coverage.

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<sup>5</sup> *Ibid*, *Aviva Insurance*, at 37.

<sup>6</sup> *Ibid*, *Aviva Insurance*, at 36.

## **CASE BRIEF**

### **Facts**

A fire caused damage to the respondents' dentistry practice. The respondents were insured by Aviva Insurance Company of Canada ("Aviva") under an "all risks" policy with a content loss limit of \$1,695,000. The respondents claimed their equipment was irredeemably contaminated by smoke and sought replacement. Aviva disagreed, asserting that the equipment could be cleaned for a cost of \$58,400.00.

The respondents, with the assistance of public adjustors, submitted a Proof of Loss (POL) for \$2,349,689.22 for replacement cost, which Aviva rejected. They subsequently initiated legal action against Aviva, and in March 2022, the respondents invoked an appraisal under Statutory Condition 11 of the *Insurance Act*.

Appraisal was conducted by appraisers appointed by each side with a jointly appointed umpire. The Appraisal Award determined the replacement cost of the equipment to be \$1,720,00 and its actual cash value to be \$900,000. The umpire and the respondents' appraiser signed the Appraisal Award; Aviva's appraiser did not.

Aviva sought judicial review of the Appraisal Award under section 128 of the *Insurance Act*, arguing that the appraisal panel exceeded its jurisdiction by basing the loss amount on replacement cost rather than cleaning cost. Aviva contended that by doing so, the panel usurped the court's function and acted unreasonably by making what amounts to a coverage decision. Aviva also claimed procedural unfairness in the appraisal process.

### **Issues**

1. Whether the appraisal panel exceeded its jurisdiction by determining the amount of the respondents' content loss based on cost to replace rather than clean the office equipment.
2. Whether Aviva was denied procedural fairness.

### **Analysis**

The Court affirmed that there is no appeal from an appraisal panel's decision under section 128(3) of the *Insurance Act*, and a court's jurisdiction is restricted to a judicial review of an appraisal panel's decision on the standard of reasonableness.<sup>7</sup>

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<sup>7</sup> *Aviva Insurance Co. of Canada v Freedman*, [2024 ONSC 2886](#), at 26-27 [*Aviva Insurance*].

### Jurisdiction

The umpire, together with the respondents' appraiser, acted within the authority provided by the insurance policy and the *Insurance Act* in making the Appraisal Award.<sup>8</sup> The appraisal panel was limited by Statutory Condition 11 to determining "the value of the property insured, the property saved or the amount of the loss".<sup>9</sup> Both parties provided the appraisal panel with extensive evidence about the extent to which the equipment was damaged, and the extent to which the equipment could be salvaged (or "saved"). These were questions of "the amount of the loss" and "the property saved", and they were questions that the appraisal panel was charged with determining.<sup>10</sup> These determinations did not involve disputed legal issues or questions of coverage or entitlement under the insurance policy, which would be within a court's purview, nor did the umpire inappropriately adopt a quasi-judicial role "with a view of making a final disposition of the controversy between the parties".<sup>11</sup>

### Was Aviva Denied Procedural Fairness?

Umpire's procedural choices are afforded considerable deference and will generally be respected unless there is proof of fraud, collusion, bias or the umpire's partiality, or if the appraisal panel has exceeded its jurisdiction.<sup>12</sup>

There was:

- a) No procedural unfairness or prejudice arising from the fact the respondents did not provide an updated sworn POL, after the appraiser provided updated unsworn schedules of loss – both amounts were higher than the amount the respondents were claiming under the policy;<sup>13</sup>
- b) No procedural unfairness or prejudice arising from the asserted absence of the respondents' experts when Aviva's experts provided oral evidence at the appraisal meeting;<sup>14</sup>
- c) No basis for challenging umpire's decision to proceed with making the Appraisal Award without obtaining the reconciliation of equipment lists he had requested at the conclusion of the appraisal meeting. The umpire explained that upon his own further

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<sup>8</sup> *Ibid*, *Aviva Insurance*, at 36.

<sup>9</sup> *Ibid*, *Aviva Insurance*, at 37.

<sup>10</sup> *Ibid*, *Aviva Insurance*, at 37.

<sup>11</sup> *Ibid*, *Aviva Insurance*, at 38.

<sup>12</sup> *Ibid*, *Aviva Insurance*, at 42.

<sup>13</sup> *Ibid*, *Aviva Insurance*, at 43.

<sup>14</sup> *Ibid*, *Aviva Insurance*, at 44.

examination of the equipment lists, he did not require the appraisers' reconciliation. It was within the umpire's purview to proceed on that basis;<sup>15</sup> and

- d) No merit in Aviva's challenge to the determination of the Actual Cash Value of \$900,000 for the equipment, since two members of the appraisal panel had the authority to make that value determination with or without the third member.<sup>16</sup>

### **Conclusion**

The application was dismissed. The Court found there was no procedural unfairness to Aviva that would justify setting aside the Appraisal Award.

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<sup>15</sup> *Ibid*, *Aviva Insurance*, at 46.

<sup>16</sup> *Ibid*, *Aviva Insurance*, at 46.