features

Appraisal Standards and Professional Negligence Claims

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abstract

Successful negligence claims typically result from a failure to employ appropriate valuation methods, follow recognized appraisal procedures, or disclose hypothetical conditions. Advancements in appraisal education and improved appraisal practices, coupled with mandatory continuing educational requirements, have raised consumer expectations regarding the level of competency of appraisers. In assessing claims of negligence, the courts are increasingly taking into consideration the prevailing standards of the appraisal profession. This article examines a number of negligence cases in the context of the professional appraisal standards of the Appraisal Institute of Canada.

This article explores appraisal standards and claims of professional negligence. Court cases involving negligence claims against appraisers are examined in the context of the current appraisal standards of the Appraisal Institute of Canada (AIC).[1] The comparisons of the negligence claims to the current appraisal standards are confined to the courts' decisions rather than the actual appraisals involved in the disputes. It also must be recognized that appraisal standards have evolved, and under the current appraisal standards of the AIC, the courts would likely hold an appraiser's work product to a higher standard than that used in past cases. When reviewing an appraisal report in contemplation of litigation, the applicable standards are those that existed when the appraisal under review was prepared.

Terminology and Concepts

Any discussion of professional appraisal practice and lawsuits related to professional negligence must begin with an examination of the terminology and concepts that the courts consider when reviewing a negligence claim.

Appraisal Practice and Market Value

Appraisal practice is described in the Canadian edition of *The Appraisal of Real Estate* as follows:

> Appraisers perform analyses and render opinions or conclusions relating to the nature, quality, value, or utility of specified interests in, or aspects of, identified real estate. *Appraisal is defined as the act or process of estimating value. An appraisal is an estimate of value.* Real estate appraisal involves selective research into appropriate market areas; the assemblage of pertinent data; the use of appropriate analytical techniques; and the application of knowledge, experience, and professional judgment to develop an appropriate solution to an appraisal problem.[2]

1. The 2004 edition of the *Canadian Uniform Standards of Professional Appraisal Practice* can be viewed and downloaded on the Appraisal Institute of Canada Web site at www.aicanada.org. The *Standards* meet the sponsor criteria of The Appraisal Foundation in their international membership category, and are similar in substance to the *Uniform Standards of Professional Appraisal Practice* (USPAP), which can be viewed at www.appraisalfoundation.org.
2. Appraisal Institute of Canada, *The Appraisal of Real Estate,* Canadian Edition (Chicago: Appraisal Institute, 1992), 9.

Appraisal practice covers a broad spectrum of problem-solving tasks that involve real property and are undertaken for a variety of functions. The professional standards and negligence claims examined here, however, relate primarily to market value appraisals intended for financing. Market value is defined as follows:

> The most probable price which a specified interest in real property is likely to bring under all the following conditions:
>
> 1. Consummation of a sale occurs as of a specified date.
> 2. An open and competitive market exists for the property interest appraised.
> 3. The buyer and seller are each acting prudently and knowledgeably.
> 4. The price is not affected by undue stimulus.
> 5. The buyer and seller are typically motivated.
> 6. Both parties are acting in what they consider their best interest.
> 7. Marketing efforts were adequate and a reasonable time was allowed for exposure in the open market.
> 8. Payment was made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
> 9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.[3]

Market value is not founded on an "as if" or "assumptive" premise. An "as if" or "assumptive" premise implies a contingent and prospective value, which is inconsistent with establishing market value "as is" at the effective date of appraisal. In *Jabbour v. Bassatne*,[4] a dispute arose as to the as-is market value of raw land. The appeals court observed that

> [a] reasonable person would assume land to be equivalent to specified cash only in its current ["as is"] condition on the competitive market, not after costly alterations as yet unmade had turned it from raw land into a "developable" condition….[as the trial court stated] "the prudent, well informed buyer would know the current condition of the land and pay a reasonable price for the land, not a price that assumed the land to be in a 'different' or 'more developed' condition."

Appraisers retained to estimate market value (i.e., value in exchange) have at their disposal the three traditional approaches to value:[5] the sales comparison approach, the income capitalization approach, and the cost approach. Of the three approaches, either the sales comparison approach or income capitalization approach is likely to be the most applicable in estimating the market value of property. Typically, these two approaches are the most relevant from a lender's perspective in establishing the appropriate loan amount and confirming that the property provides adequate security in the case of mortgage default.

Reasonable Appraiser Standard

The 2004 edition of the *Canadian Uniform Standards of Professional Appraisal Practice (Standards)* issued by the Appraisal Institute of Canada provides guidance as to the level of performance the public should expect from its members. Contained in the Foreword of the *Standards* is a statement of competency:

> A member must not render Appraisal, Review or Consulting services in a careless or negligent manner. This requires a member to use due diligence and due care. The fact that the carelessness or negligence of a member has not caused an error that significantly affects his or her opinions or conclusions and thereby seriously harms an intended user does not excuse such carelessness or negligence.[6]

As to how members are judged in discharging their professional obligations, the Appraisal Institute of Canada applies the "Reasonable Appraiser" standard,[7] which measures the performance of appraisers against the performance of their peers within the organization and within the profession. The *Standards* state that a Reasonable Appraiser is "one who maintains a level of performance that would be acceptable to the Professional Practice Peer Group [of the Appraisal Institute of Canada]." The *Standards* further state that "if reasonable appraisers conclude that there is no rational foundation for an analysis or opinion, then such analysis or opinion would not be justified."[8]

3. Appraisal Institute, *The Appraisal of Real Estate,* 12th ed. (Chicago: Appraisal Institute, 2001), 24.
4. *Jabbour v. Bassatne,* 673 A.2d 201 (D.C. App. 1996).
5. Appraisal Institute, *The Appraisal of Real Estate,* 63–64.
6. Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice* (Ottawa, ON: Appraisal Institute of Canada, 2004), 2.
7. In *Kokanee Mortgage MIC Ltd. v. Concord Appraisals Ltd.,* [2000] B.C.J. No. 1629 (BCSC), the court in finding the appraiser negligent, in part, in respect of the direct comparison approach concluded that "a reasonable appraiser should do two things:…obtain as much information as possible to adequately inform himself about the comparables available….[and] alert his reader to the possibility that his appraisal was less reliable because of the absence of appropriate comparables."
8. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 481–485.

When an appraiser's performance falls below the standard of the Reasonable Appraiser, and an economic loss is sustained by a party entitled to rely upon the appraiser's work product, the damaged party may bring an action against the appraiser for negligent misrepresentation.[9] In cases where there is a claim of negligence against an appraiser, the courts have looked to the prevailing standards of the profession and the Appraisal Institute of Canada.

> The question of negligence must be determined in the context of the professional activity of the defendant. Was their course of conduct a breach of the professional standards applicable to real estate appraisers in general, and in particular was it in accordance with the principles established by the Canadian Institute of Appraisers?[10]

When appraisers promote a particular expertise or specialty within the profession, they are held to an even higher standard by the courts:

> …if a person engaged in the real estate appraisal business holds himself out as possessing a particular expertise, not normally found in the average real estate appraiser, in the appraisal and valuation of certain types of property (e.g. agricultural, commercial, industrial, etc.) then a higher degree of care and skill is expected of him than of one who does not profess to be so qualified.[11]

In addition, there is the possibility that a court could find that certain circumstances call for a standard of care that is higher than the usual professional standard. In this type of circumstance, standard appraisal practice is in itself negligent, as suggested by the court in *Kripps v. Touche Ross & Co.*, where the court held that "while professional standards would normally be a persuasive guide as to what constitutes reasonable care, those standards cannot be taken to supplant or to replace the degree of care called for by law."[12]

Negligence

The term "negligence" is defined in *Black's Law Dictionary* as follows:

> The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.
>
> The term refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while "wantonness" or "recklessness" is characterized by willfulness. The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of particular case. Doctrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result.[13]

The term "actionable negligence" is defined in *Black's Law Dictionary* as

> The breach or nonperformance of a legal duty, through neglect or carelessness, resulting in a damage or injury to another. It is failure of duty, omission of something which ought to have been done, or doing of something which ought not to have been done, or which reasonable man, guided by considerations which ordinarily regulate conduct of human affairs, would or would not do. Essential elements are failure to exercise due care, injury, or damage, and proximate cause.[14]

In *VSH Management Inc. v. Neufeld,* the court stated that the determination of whether an appraiser has acted negligently

> will be based on whether or not the appraiser acted reasonably having regard to the standards prevailing in the profession [*Canadian Uniform Standards of Professional Appraisal Practice*] and the imprecision inherent in the methods [Approaches to Value] by which the value of the property is determined. This is the minimum standard that an appraiser must meet in order to not be found negligent.[15]

Negligent Misrepresentation

When an appraiser is retained to prepare an appraisal, that individual is expected to develop and express an opinion. If that appraisal is negligently prepared and causes an economic loss, the appraiser may face

9. See *Queen v. Cognos,* [1993] 1 S.C.R. 87.
10. *Friedland v. Derochie, Hoffman Ltd.,* [1992] O.J. No. 1179 DRS 93-02410; see also *Indian Head Credit Union Ltd.,* [1992] S.J. No. 342 DRS 95-05060 Q.B. No. 1725 of A.D. 1991 J.C.R [1994] S.J. No. 126 (Sask. C.A.).
11. William F. Foster, "Accidental Misrepresentations: The Problems of Liability and its Avoidance," *Appraisal Institute Magazine* (November 1981): 17.
12. *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968 (BCCA).
13. Joseph R. Nolan et al, *Black's Law Dictionary,* 6th ed. (St. Paul, MN: West Publishing Co., 1990), 1032.
14. Ibid., 29.
15. *VSH Management Inc. v. Neufeld,* [2002] B.C.J. No. 1673 BCSC 755. The appraiser did not take the necessary steps to properly inform himself of the reliability of the property's rental income and was found negligent for overstating the rent that the prospective purchaser of the hotel could expect to obtain.

a claim for negligent misrepresentation. The negligence claim can arise both from what the appraiser did and did not do.

> A finding of negligence will most often flow from sloppy compilation of objective [and factual] data, the use of inappropriate valuation methods, and the failure to carry out relevant analysis, as compared to errors in judgment in dealing with the applicable data, valuation method(s) and analyses… [I]n supplying information and advice, negligent misrepresentation can occur not only in what is actually said, or written, or considered, but also by what should have been said, written, or considered.[16]

The elements necessary to sustain a claim for negligent misrepresentation were set out by the Supreme Court of Canada in *Queen v. Cognos*:

1. There must be a duty of care based on a 'special relationship' between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making said representation;
4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.[17]

The existence of a "special relationship" between the representor and the representee is a threshold requirement of a claim for negligent misrepresentation. The court in *Cognos* noted that circumstances other than contractual relationships might give rise to a special relationship and duty of care:

> There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a 'special relationship' exists between the representor and the representee which will give rise to a duty of care. Some have suggested that 'foreseeable and reasonable reliance' on the representations is the key element to the analysis, while others speak of 'voluntary assumption of responsibility' on the part of the representor. Recently, in *Caparo Industries plc v. Dickman,* [1990] 1 All E.R. 568 (H.L.),… the House of Lords suggested that three criteria determine the imposition of a duty of care: foreseeability of damage; proximity of relationship; and the reasonableness or otherwise of imposing a duty.[18]

Valuation Opinions

Variability. Appraisers may differ in their opinions of market value, resulting in entirely different value conclusions for the same property as of the same date. The courts recognize, however, that this does not necessarily mean that any of the opinions are negligent.[19] The courts have also ruled that overvaluation does not in itself show negligence.[20]

The variability in opinions of value is to some extent a function of property type. Single-family tract housing in an urban setting is the least likely to be in dispute, while unique properties—such as churches, bowling alleys, movie theaters, hospitals, and speculative land with an uncertain end use—are likely to show the greatest divergence. During periods of market inactivity or instability, opinions of value are also likely to show more variability. As an opinion of value is only valid at a point in time, many appraisal reports contain an exculpatory clause such as the following:

> Because market conditions, including economic, social and political factors, change rapidly and, on occasion, without notice or warning, the estimate of market value expressed herein, as of the effective date of this appraisal, cannot necessarily be relied upon as of any other date without subsequent advice of the author of this report.[21]

In the future, there may be less variability in valuation opinions due to standardized appraisal approaches and practices, enhanced practical and educational requirements, use of computers and program software, increased availability of macroeconomic and microeconomic information, and access to real estate databases through the internet.

Scope of Work. In assessing the reliability of an opinion of value, careful attention must be paid to

16. Cameron Harvey, "Liability of Appraisers for Negligence," *The Canadian Appraiser* (Winter 1988): 25.
17. *Queen v. Cognos.*
18. Ibid.
19. See *Royal Bank of Canada v. Burgoyne,* [1995] N.S.J. No. 538, DRS 96-09243 (NSSC).
20. *Baxter v. Gapp & Co. Ltd.,* [1939] 2 K.B. 271, [1939] 2 All E.R. 752, at p. 758 (C.A.); see also *Friedland v. Derochie, Hoffman Ltd.; Cari-Van Hotel v. Globe Estates Ltd.,* [1974] 6 W.W.R. 707 B.C.S.C.
21. *Austin v. Knowles, Lambert, Canning & Associates Ltd.,* [2002] O.J. No. 1380. A similar clause was relied upon in *Grey Mortgage Investment Corp. v. Campbell & Pound Ltd.,* [2002] B.C.J. No. 964. If an appraisal is prepared for the function of mortgage financing, this type of exculpatory clause may prove beneficial against a claim for negligence where the existing loan is subsequently renewed without the benefit of an updated appraisal or the advice of the appraiser of the original appraisal and the renewed loan goes into default.

the scope of work section of the appraisal report, which outlines the amount and type of information researched and analysis applied. Scope of work includes, but is not limited to, the extent of the

- inspection;
- research into physical and economic factors that could affect the property;
- data research, verification, and inspection of comparables; and
- analysis applied.[22]

The scope of work applied must be sufficient to result in opinions/conclusions that are credible in the context of the intended use of the appraisal. The appraiser has the burden of proof to support the scope of work decision and the level of information included in a report. Statements forming the scope of work must be factual and tailored to the specific appraisal assignment. In *VSH Management,* the appraiser's report contained a statement indicating that the report was based on investigations that included "discussions with owners, managers and agents and others knowledgeable with this type of property or this sector of the market as well as municipal officials."[23] In finding this statement false and misleading, the court noted that

> [the appraiser] was unable to provide any name of any person with whom he may have discussed the information provided in the appraisal. In fact, what… [the appraiser] did was to refer to a collection of other appraisals of like properties. As that was the source of his information,… [the appraiser] should have said so in the appraisal report and not led Mr. Binkley [the client and prospective purchaser] to believe that he had actually made the effort to have discussions with owners, managers, agents and others knowledgeable with this type of property.[24]

An appraiser must not acquiesce to a client's demands to undertake appraisal work that would circumvent the *Standards* and lead to an inaccurate, meaningless, misleading and/or fraudulent appraisal. A client's request must be reasonable and serve a legitimate purpose. The *Standards* require an appraiser to disclose the intended use and purpose of an appraisal in the report. The *Standards* define "intended use" as "the use or uses of an appraiser's reported appraisal, consulting, or review assignment opinions and conclusions, as identified by the appraiser based on communications with the client at the time of the assignment." A statement of intended use is "necessary for the appraiser and the client to determine the appropriate scope of work to be undertaken, and the level of information to be included in the report." A statement of purpose is necessary because "liability to the client depends on the appraiser's understanding of the client's purpose in ordering the appraisal."[25]

Use. An appraisal report should also include a clause that controls the distribution of the report and the extent to which the report can be relied upon. The content of the clause could be similar to the following:

> Written consent from the author and supervisory appraiser must be obtained before all (or any part) of the content of the appraisal report can be used for any purpose by anyone except: the client specified in the report and, where the client is a mortgagee, its insurers and the borrower, if he/she paid the appraisal fee. The author's written consent and approval must also be obtained before the appraisal (or any part of it) can be conveyed by anyone to any other parties, including mortgagees other than the client and the public through prospectus, offering memo[randum], advertising, public relations, news, sales and other media.[26]

An appraisal that fails to impose any restrictions on the use of the report and fails to identify the intended user(s) could result in exposure to liability from anyone that has relied upon the appraisal report and sustained a financial loss due to the appraiser's negligence. A poorly drafted clause may allow an unintended third party to successfully sustain a claim for negligence against the appraiser. In *Royal Bank of Canada v. Burgoyne*, on the questions of the use of a report and who might be expected to rely on it, the court commented as follows:

> Clearly, the report, on its face, contains no limitation on its use by the client, other than it must be in respect to "deliberations affecting the subject property" and must be "used in its entirety"…. [T]he fact [the appraiser] may not have been aware of the particular financial institution that would be presented with the report is irrelevant. A finding that the Bank is one of a limited group he could reasonably foresee as using

22. "Definitions," *Canadian Uniform Standards of Professional Appraisal Practice.*

23. *VSH Management Inc. V. Neufeld.*

24. Ibid.

25. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1334–1345.

26. This clause, as part of the Certification and Statement of Limiting Conditions of an appraisal report addressed to a specific "banking/mortgage lender client," would not entitle a third party to rely upon the report in *Grey Mortgage Investment Corp. v. Campbell & Pound Ltd.,* [2002] B.C.J. No. 964 BCSC 685.

> and relying on the statements contained in his report means the [Bank] is one of a "limited class" to whom it was reasonably foreseeable the report might be given. If, as author of the report, [the appraiser] wished or intended to limit or exclude persons, who would otherwise be reasonably foreseeable as being in a limited group that might use and rely on the report, then the responsibility is on him, as the author, to set out any such limitation or exclusion.[27]

Assumptions and Limiting Conditions. Typically, the appraiser does not forewarn the client of the underlying Assumptions and Limiting Conditions that are likely to be attached to an appraisal report; it is only upon receipt of a completed appraisal report that a client becomes aware of any exclusionary clauses. While imposing underlying Assumptions and Limiting Conditions after the fact without a client's prior consent or knowledge has not been an issue raised in any known negligence claim against an appraiser, it might be more prudent to submit the underlying Assumptions and Limiting Conditions with the Letter of Engagement[28] and specifically reference them.[29]

Appraisals in Anticipation of Litigation. Appraisers do a disservice to the public and the profession if they blindly accept appraisal instructions from their clients without regard to the *Standards* and their ethical and moral obligations to produce credible work product.

> For professionalism to be effective and of social relevance in this day and age, a meaningful ethical consciousness which transcends personal financial enrichment must prevail. Third parties and the general public have a vested interest in the activities of all professionals and must not be financially damaged by the misguided loyalties of professionals to their clients and their inappropriate relationships.[30]

Appraisals prepared in contemplation of litigation or quasi-judicial proceedings are of particular concern, as an appraiser qualified by the court or an administrative board to give testimony as an expert witness is afforded significant latitude in submitting opinion evidence while enjoying immunity from prosecution for acts of negligence.[31]

When preparing reports in contemplation of litigation or quasi-judicial proceedings such as expropriation, appraisers sometimes rely on the *Standards'* Jurisdictional Exception, defined as an assignment condition that voids the force of a part or parts of the *Standards*. The Jurisdictional Exception provides that it is misleading to fail to disclose in the report the part or parts of the *Standards* disregarded and the legal authority justifying this action. Under the Reasonable Appraiser test, it is the appraiser's responsibility to determine whether the use of the Jurisdictional Exception is appropriate.[32]

An emerging body of case law suggests that a "friendly" expert witness hired to perform litigation support services who performs those services in a negligent manner cannot use the shield of witness immunity to hide from civil liability.[33] In *Marrogi v. Howard,*[34] the Supreme Court of Louisiana ruled that a client could sue a "friendly" expert witness for negligence in the performance of the expert's duties before and during trial. In adopting this rule, the court commented as follows:

> The benefit to the judicial system in the rule we announce today is a practical one: ridding the system of incompetent experts and ensuring that reliable opinion testimony is presented to the fact-finder. … Without some overarching purpose, it would be illogical, if not unconscionable, to shield a professional, who is otherwise held to the standards and duties of his or

27. *Royal Bank of Canada v. Burgoyne.*

28. For further discussion of engagement letters, see also Guide Note 9, "Use and Applicability of Engagement Letters," *Guide Notes to the Standards of Professional Appraisal Practice of the Appraisal Institute* (Appraisal Institute, 2003).

29. The Practice Notes of the *Standards* refer to Extraordinary Assumptions and Limiting Conditions as one of the items that could be included in a "Letter of Engagement."

30. Tony Sevelka, "Appraisal Review: An Emerging Discipline," *The Canadian Appraiser,* Part I of II, 1996, Vol. 40, Bk. 4, 38; Part II of II, 1997, Vol. 41, Bk. I, 42.

31. In *Jinda Singh et al v. Bank of B.C. et al,* [1990] B.C.D. Civ. 3711-07 (BCCA), the appeals court overruled the lower court's ruling calling an action for negligence against an appraiser involved in a foreclosure proceeding an "abuse of process." The appeals court held that "a claim in negligence brought against an expert witness for a mortgagee in foreclosure proceedings (an appraiser) wherein the mortgagor alleges that a negligent appraisal of the mortgaged premises resulted in a sale of such at a loss to the mortgagor cannot be considered to be an abuse of process or res judicata by reason of the court's acceptance of the valuation in approving a sale of the lands." In reference to "witness immunity," the appeals court noted the "rapidly expanding basis for liability" imposed in accord with the Hedley Byrne principle establishing in law a "duty of care."

32. *Canadian Uniform Standards of Professional Appraisal Practice,* 3.

33. See *Levine v. Wiss & Co.,* 97 N.J. 242, 478 A.2d 397(1984), holding that immunity would not protect an expert witness–accountant from a negligence claim even though the accountant was appointed by the parties pursuant to court order; *Mattco Forge, Inc. v. Arthur Young & Co.,* 5 Cal. App. 4th 392, 6 Cal. Rptr. 2d 781 (Ct. App. 1992), holding that witness immunity would not shield an expert witness–accounting firm from otherwise actionable professional malpractice. In *LLMD of Michigan, Inc. v. Jackson-Cross Company,* 740 A.2d 186 (Pa. 1999), the Pennsylvania Supreme Court noted that "[t]he goal of ensuring that the path to truth is unobstructed… is not advanced by immunizing an expert witness from his or her negligence in formulating that Opinion. [Witness immunity should not protect expert witnesses who do not] render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession."

34. *Marrogi v. Howard,* 805 So.2d 1118 (La. 2002).

her profession, from liability for his or her malpractice simply because a party to a judicial proceeding has engaged that professional to provide services in relation to the judicial proceeding and that professional testifies by affidavit or deposition.

Appraisers involved in litigation or quasi-judicial proceedings as expert witnesses ought to carefully consider their role, their duties, and their obligations. Certainly, it is not the function of an appraiser to act as the client's advocate to either enhance or diminish the value of a property in dispute. Some lawyers align themselves with appraisers whom they can control, but the conduct of the directed appraiser is the antithesis of the ethical requirements of the appraisal profession.[35] Beyond questions of law, it is the appraiser's responsibility to analyze and determine highest and best use, select the appropriate valuation approaches, and develop unbiased opinions of value.

Inappropriate Assignment Parameters

Appraisers also must be careful to avoid inappropriate assignment parameters. Some examples of inappropriate assignment parameters include:

- adoption of a foundation of property rights and a value definition inconsistent with the appraisal problem, including purpose and function. The *Standards* require disclosure of the property rights appraised, the purpose of the assignment, including a relevant and sourced definition of value, the identity of the client and intended users, and the intended use of the appraiser's opinions and conclusions.
- adoption of assumptions and limiting conditions that are unwarranted or unreasonable, without which the value of the property in its "as is" condition would be significantly less or more valuable and inconsistent with the Reasonable Appraiser test.
- acceptance of legal instructions that go beyond questions of law and impinge on the appraiser's expertise and independence to determine highest and best use, select the appraisal approaches, and formulate opinions of value, all of which must be consistent with the Reasonable Appraiser test.
- reliance on an inappropriate valuation approach like the cost approach rather than the income capitalization approach to estimate the market value of an income-producing property such as a shopping centre under lease to a number of tenants. The *Standards* require that the appraiser disclose and support the reason for the exclusion of any of the usual valuation procedures.
- adopting a highest and best which does not meet the four-pronged test of being physically possible, legally permissible, financially feasible, and maximally productive. The *Standards* require disclosure in the report of the existing use and the use reflected in the appraisal, and the appraiser must define and resolve the highest and best use.
- valuing raw land without any planning and subdivision approvals (executed subdivision agreement) as if it were an actual subdivision and applying the subdivision development method.[36] (There is no reference to the subdivision development method as one of the three traditional valuation approaches in the AIC *Standards*.)

Appraisals prepared on an "as if" or "assumptive" basis have the potential to be misleading and possibly fraudulent. The "as if" or "assumptive" appraisal is a hypothetical appraisal as it assumes facts or conditions not in existence at the time the appraisal is prepared, and the opinion of value emanating from such a premise is both contingent and prospective. The "as if" or "assumptive" premise should not be adopted by the appraiser unless it is reasonable and within the realm of probability (not distant or speculative), complies with the *Standards*, and can be justified in the context of the intended use of the appraisal as a valid objective.

Responsibility rests with the appraiser, not the client, to determine whether an "as if" or "assumptive" appraisal is an appropriate exercise of the appraiser's professional expertise and is consis-

35. J. D. Eaton, *Real Estate Valuation In Litigation,* 2nd ed. (Chicago: Appraisal Institute, 1995), 541.

36. AIC Claim Prevention Bulletin CP-7 (Revised Oct. 1994), 3, states "[T]he Residual Approach should only be used when development of the site is not too distant, there is obvious demand for the resultant product, and there is at least some documentary evidence that such a development will be approved. Ideally, the development or subdivision plans should be available, all municipal consents obtained, and necessary services available. It is certainly not desirable to take a piece of raw land, assume a potential development, and proceed to the Residual Approach [Subdivision Development Method]. In addition, the Residual Approach should never be used without the Comparison Approach in at least a 'back-up' role." Also see Bulletin CP-7 (August 1993), "Application of the Residual Approach to Value". The *AIC Handbook of Disclosure Guidelines for the Valuation of Real Estate Assets* (1996),12, cites *Clarkson Co. v. Penny and Keenleyside Appraisal Ltd..,* (1985), 64 BCLR 343, [1985] 5WWR 538 (S.C.), in reference to a negligence claim involving the appraisal of raw land the court found that the appraiser knew or ought to have known that the report would be examined by a potential lender. The court, however, held that there was no negligent misrepresentation by the appraiser because the value of $68,750 was for development purposes, and no reasonable lender would rely on an appraisal of raw land for development purposes.

tent with sound appraisal practice. If an "as if" or "assumptive" appraisal is prepared, the appraiser must disclose that the appraisal is hypothetical and that the value estimate is both contingent and prospective, and not an indication of the market value of the property in its "as is" condition.

An "as if" or "assumptive" value estimate conveniently bypasses the cost associated with the time, carrying charges, and financial outlays required to achieve the value estimate, and makes no provision for risk and entrepreneurial profit associated with achieving the "assumptive" premise because the future events, occurrences, decisions, approvals or rulings vital to the value estimate are treated as if they had already taken place. It may be appropriate to go one step further and provide an indication of the market value of the property in its "as is" condition so as to measure the impact on value of the "as if" or "assumptive" premise.

In *Transamerica Life Insurance Co. of Canada v. Hutton*,[37] an appraiser avoided a finding of negligence where the court found that the appraiser had been instructed to appraise the property not on an "as is" basis, but on the assumption of the proposed improvements, and the covering letter and appraisal report specifically stated that the valuation was for "the market value of the subject property, when renovated, assuming the information received is correct and subject to the attached contingent and limiting conditions."

In *Transamerica Life Insurance*, the "Highest and Best Use" section of the appraiser's report stated the building's current condition and indicated that the building was to be renovated. The report also detailed the proposed renovations and improvements and stated that when the renovations were completed, assuming that the quality of the materials and workmanship was good, the building should be in excellent condition. Other references to the improvements included a statement that taxes would increase, that financial statements indicating income and expenses would not be available until the renovations were completed and that, in consequence, costs would have to be estimated for the purposes of the appraisal. The court ruled in favor of the appraiser, noting in disbelief that no one from Transamerica claimed to have read the appraisal report in detail and found that

> the Appraisal Report was prepared… on an assumptive, or completion, basis and that this was in accordance with instructions [provided to the appraiser and if] anyone… on behalf of Transamerica had read the report, this should have been obvious.[38]

Reporting Format. According to the *Standards,* a Full Narrative appraisal report is comprehensive and detailed, and prepared without invoking an Extraordinary Limiting Condition.[39] A Narrative appraisal report is one where an Extraordinary Limiting Condition has been invoked.[40] An Extraordinary Limiting Condition refers to a necessary modification or exclusion of a Standard Rule.[41] Here again, the *Standards* provide that the burden is on the appraiser in the report to explain and justify the necessity for any Extraordinary Limiting Conditions and "to conclude before accepting an assignment and invoking an Extraordinary Limiting Condition that the scope of work applied will result in opinions/conclusions that are credible."[42]

Hypothetical Conditions. The *Standards* allow an appraisal to be based on hypothetical conditions only "when they are required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison. Common hypothetical conditions include proposed improvements and prospective appraisals."[43]

For every Hypothetical Condition, an Extraordinary Assumption is required in the report.[44] An Extraordinary Assumption refers to "a hypothesis—either supposed or unconfirmed—which, if not true, could alter the appraiser's opinions and conclusions." Full disclosure of any Extraordinary Assumption must accompany statements of each opinion/conclusion so affected.[45]

The *Standards* provide that when an appraiser imposes a Hypothetical Condition, it must be clear to the reader of the report that

37. *Transamerica Life Insurance Co. of Canada v. Hutton,* [2000] O.J. No. 2240.

38. Ibid.

39. The corresponding appraisal report under the U.S. *Uniform Standards of Professional Appraisal Practice* (USPAP) is a "self-contained" report.

40. USPAP does not recognize the "Narrative" reporting format, but invoking an Extraordinary Limiting Condition would result in a "Limited Appraisal". See the DEPARTURE RULE under USPAP.

41. "The Rules are based upon accepted appraisal teaching that incorporates the minimum compulsory content of principles for appraising, reviewing or consulting assignments necessary to provide a credible result." *Canadian Uniform Standards of Professional Appraisal Practice,* 2.

42. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1499–1502.

43. Ibid, lines 1509–1511.

44. USPAP also requires disclosure of any hypothetical condition and extraordinary assumption, but distinguishes between the two to the extent that one does not have to accompany the other.

45. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1494–1497.

1. the property condition does not in fact exist as at the date of appraisal;
2. the analysis performed to develop the opinion of value is based on a hypothesis, specifically that the property condition is assumed to exist when, in fact, it does not;
3. certain events need to occur, as disclosed in the report, before the property condition will, in fact, exist;
4. the appraisal does not consider unforeseeable events that could alter the value conclusion; and
5. a different value conclusion would likely result but for the hypothesis.[46]

Appraisers have a professional obligation and duty to disclose within their reports that any variance from a Hypothetical Condition and Extraordinary Assumption will render the conclusion invalid. Inserting a companion statement disclosing that the indicated value premised on the Hypothetical Condition(s) is not an indication of the market value of the property in its "as is" condition would help to ensure that any reader of the report is not misled or misinformed. The *Standards* state that

> The hypothetical condition must be clearly disclosed in the report, with a description of the hypothesis, the rationale for its use and its effect on the result of the assignment. An analysis based on a hypothetical condition must not result in an appraisal report that is misleading.[47]

Case Studies

The following cases brought against appraisers have been selected to illustrate the factors considered by the courts in finding an appraiser negligent and to explore how the AIC *Standards* might be applied to the facts of each case. Without having the benefit of reviewing the actual appraisals involved in the court cases, the applicability of the *Standards* is confined to the appraisal information contained in the court rulings.

Octagon Mortgage Corp. v. Senger

In the case *Octagon Mortgage Corp. v. Senger*,[48] Octagon Mortgage had received an application for a mortgage loan from a mortgage broker acting on behalf of a client seeking "bridge financing." As security for the loan, the client offered a third mortgage on a residential property he owned. An appraisal of the residential property indicating a value of $710,000 supported the client's mortgage request. The mortgage company retained its own appraiser, Stacey, who purportedly was instructed "to review and substantiate the accuracy of the appraisal and to visit and view the subject property." After having visited the residential property, Stacey wrote to the mortgage company that he had reviewed an appraisal on the property; he also certified he had personally inspected the property, that he had no interest in the property, and that his employment was not contingent upon the amount of his valuation estimate. His report stated

> I have considered the comparables used and the comparables of other recent sales and agree that a value range of the subject property is $675,000.00 to $725,000.00 and a single estimate of value, as of October 25th, 1990 of $700,000.00.
> Apportioned as follows:

LAND:	$400,000.00
IMPROVEMENTS:	$300,000.00

The mortgage company advanced $164,000 on the strength of a third mortgage against the residential property. The borrower defaulted and the mortgagee took foreclosure proceedings. Pursuant to a court-ordered sale, the residential property realized $549,000. The first and second mortgagees were paid out and the third mortgagee sustained $81,955.76 in lost principal, interest, and costs.

It turned out that the property's lot area was less than half an acre, not 43,560 sf (one acre) as stated in the original appraisal accompanying the mortgage application. In his review of the appraisal, Stacey had failed to uncover the error in the lot size. The mortgage company sued Stacey for the losses it had sustained.

At trial, Stacey admitted that his opinion of value would have been affected to an extent of $100,000 or $150,000 if he had known the lot's actual size. He unsuccessfully argued that he had conducted an appraisal review and that the "review letter is not a full appraisal." The court noted that Stacey's letter contained no qualifying statements,[49] and it concluded that Stacy "failed in his obligations to his client [the mortgage company]." Based on this find-

46. Ibid, lines 1527-1536.
47. Ibid, lines 1541-1544.
48. *Octagon Mortgage Corp. v. Senger,* [1994] B.C.J. No. 225 DRS 95-03191
49. The judge alluded approvingly to a qualifying statement contained in another appraisal prepared and submitted in defense of Stacey's report which cautioned that "…Typical of professional appraisal review standards, we have relied without verification on the description contained in the appraisal. We summarize below the property description on which the appraisal was based. Should the property vary materially from this description, our analysis may no longer be valid." However, the appraisal assumed a one-acre lot, which the judge criticized as a "touch of make-believe in the face of the known facts."

ing, the court awarded the mortgage company damages of $81,955.76.

Application of the Standards. At the time Stacey prepared his report, the Appraisal Institute of Canada did not have any appraisal review standards such as the ones that currently exist. The current Review Standard Comments provide guidance for situations similar to *Octagon Mortgage*:

Review Standard - Purpose

- a review appraiser must ascertain whether the purpose of the assignment includes the development of an opinion of value of the subject property of the appraisal under review.
- if the purpose of the assignment includes the review appraiser developing an opinion of value of the subject property in the appraisal under review, that opinion is an appraisal whether:
  a) it concurs with the opinion of value in the appraisal under review;
     1) at the same date of the value in that appraisal or;
     2) as of a different date; or
  b) it differs from the opinion of value in the appraisal under review;
     1) at the same date of the value in that appraisal or;
     2) as of a different date.
- pursuant to either a) or b) above, the review appraiser must identify and state any new information relied upon, the reasoning and basis for the opinion of value and all assumptions and limiting conditions (if different from or in addition to those in the appraisal report under review) connected with the opinion of value.
- those items in the report under review that the review appraiser concludes are in compliance with the Appraisal Standard can be used in the review appraiser's development process. Those items not deemed to be in compliance must be replaced with information or analysis developed in accordance with the Appraisal Standard in order to produce a credible value opinion.[50]

The appraiser in *Octagon Mortgage* failed to qualify his report to caution his client that reliance was being placed on some or all of the data contained in the appraisal report under review, including the incorrect lot area.

Also, because Stacey had conducted research into comparable sales in addition to those listed in the appraisal that he reviewed and had concluded with his own value estimate, he had, in effect, prepared an appraisal. Stacey's certification attesting that his employment was "in no way contingent on the amount of my estimate" was consistent with having prepared an appraisal. A review appraiser that presents his own opinion of value as part of a review report must comply with all of the Appraisal Standard Rules relating to developing an appraisal.

Barry J. Black Investments, Inc. v. Walker, Ellis & Pezzack

In the case *Barry J. Black Investments, Inc. v. Walker, Ellis & Pezzack*,[51] Mega Corporation proposed acquiring property owned by Standard Commercial Tobacco Company of Canada Ltd. for $1.7 million. The property consisted of three parcels: Parcel 1 was 9.02 acres and improved with warehouse buildings; Parcel 2 was vacant land of 2.01 acres; and Parcel 3 was vacant land of 0.16 acres. Acting on behalf of Mega Corporation in the capacity of mortgage broker, CBN Financial Group Limited retained an appraiser to value all three parcels, with specific instruction that Parcel 1, the improved property, be appraised based on the "income approach."[52]

The appraiser prepared his appraisal as of March 24, 1987, indicating a combined value of $2,356,000: $1,931,000 was attributed to Parcel 1 improved with the warehouse buildings; $400,000 to Parcel 2; and $25,000 to Parcel 3. On the strength of the appraisal at $2,356,000, the mortgage broker was able to obtain a mortgage commitment on May 5, 1987 for $400,000 in private funds (handled through the investor's law firm) toward a $550,000 second mortgage behind a first mortgage of $700,000 confined to Parcel 1. The value reported to obtain the $400,000, however, was incorrectly conveyed as $2,536,000, and the mortgage broker failed to disclose that the appraised value applied to all three parcels, and that there was a pending transaction for Parcel 1 at $1,275,000.

Sometime after the closing, the second mortgage went into default and the investor's law firm settled the investor's (plaintiff's) claim by paying $326,757.47

50. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 2343–2365.

51. *Barry J. Black Investments, Inc. v. Walker, Ellis & Pezzack,* [1995] O.J. No. 1633

52. Parcel 1 consisted of storage rental warehouses and, as an income-producing property, the income capitalization approach would generally be the most appropriate valuation method. From a lender's perspective, knowledge of the actual and anticipated net income from the warehouses would assist in establishing the loan amount, calculating the debt coverage ratio, and determining the amount of rent that the facility could be expected to generate in the event of mortgage default.

plus legal costs. The law firm tried to recover against the appraiser, but despite the court's finding of negligence against the appraiser, the law firm was held solely responsible for the investor's losses. In finding the appraiser negligent, the court relied upon the AIC Standards of Professional Practice, Regulation No. 7.[53] The court attacked the appraisal on many fronts taking exception to numerous violations of the AIC's Standards of Professional Practice.

In *Black Investments*, the appraiser's actions were contrary to the requirement that if an appraiser is not providing a market value estimate, the appraiser "must include a definition of the value being reported, along with a statement to the effect that the reported value is not market value, as well as provide an explanation of how it differs from market value." The appraiser made no such disclosures in his definition of value. The court observed:

> …[A]n appraiser cannot arrive at market value by the utilization of one approach to value in isolation to other relevant information which may impact on market value. For example, if there is relevant direct sales information, an appraiser has an obligation to disclose that information in his report and comment on its applicability or non-applicability to the market value estimate…. an appraiser has an obligation to disclose any relevant information of which he or she has knowledge which may have an impact on the estimated value. If the relevant information is not disclosed there is a contravention of the Standards of Professional Practice, S.R. 1.4 which states that it is a contravention, "to fail to consider all physical, functional, locational, and economic factors as to their effect on the estimate of value".

The court criticized the appraiser's report because it omitted specific information on the property's tenancies and income. The court found that the comments relied upon by the appraiser to negate the legitimacy of his appraisal did not detract from his obligation to provide reasoning to support a valuation. As to the absence of any reasoning in support of the valuation, the court came to the inescapable conclusion that

> [t]he reason that [the appraiser] provided no reasoning for his valuation is: there was no reasoning which could support a value of $1,931,000 on parcel 1 using the income approach only when he knew that parcel 1 was being purchased for $1,275,000, a difference of almost $700,000 for which he had no explanation….[The appraiser] overvalued parcel 1 by utilizing the income approach to value only and ignoring other relevant information and in the result did not provide a proper estimate based on market value.

The appraiser's certification that "[n]o important facts have been withheld or overlooked" did not square with the finding of the court that the appraiser "withheld or overlooked important facts." In summary, the court found that the appraiser was negligent in the preparation of his appraisal report and the valuation was not based on market value.

Application of the Standards. In the *Black Investments* case, the *Standards* would have required the appraiser's report to

1. describe and apply the appraisal procedures relevant to the assignment;
2. support the reason for the exclusion of any of the usual valuation procedures;
3. detail the reasoning supporting the analyses, opinions and conclusions of each valuation approach; and
4. analyze and disclose any current Agreement for Sale, option or listing of the property (if such information is available in the normal course of business).[54]

The *Standards* also provide that "excluding any of the three traditional approaches to value that would be considered pertinent under the Reasonable Appraiser standard, constitutes an Extraordinary Limiting Condition that requires disclosure with reasoning.[55] The exclusion of a relevant approach must not result in a report that is misleading.[56] The *Standard*s further provide that the reasoning in an appraiser's report "requires the logical review, analyses and interpretation of the data in a manner that would support the conclusion, not mislead the reader and be to a level consistent with the 'Reasonable Appraiser' standard."[57]

In *Black Industries*, the intended function of the appraisal was for mortgage financing, and the appraiser knew that the lender would be relying on his

53. Now replaced by the provisions of the *Canadian Uniform Standards of Professional Appraisal Practice.*

54. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1035, 1043–1059.

55. Standard 1 of the American USPAP does not permit the exclusion of a pertinent valuation approach required to produce a credible opinion of value.

56. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1644–1648.

57. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1654–1657.

appraisal report. When the property to be mortgaged is income producing, a lender's primary concerns are the market value of the property and the debt coverage ratio. In this lawsuit, the appraiser's definition of market value deviated from any authoritative definition of market value, and made no reference to the existing rental income (being significantly lower than what was projected), so that both the opinion of value and the income stream on which the lender relied were misleading.

As noted previously, the *Standards* require disclosure and analysis of any current Agreement for Sale, option, or listing of the property if such information is available to the appraiser in the normal course of business. Any prior sales of the property within three years[58] also have to be disclosed and analyzed, and any impact on the price paid under known undue stimulus noted. Any pending or prior sale involving atypical financing would require that the purchase price be adjusted to its cash equivalent, consistent with the concept of market value. When an income capitalization approach is applicable, an appraiser must base projections of future rent and expenses on reasonably clear and appropriate evidence. In *Black Investments*, the lender was induced to make a second mortgage loan to its detriment based on the strength of the misleading appraisal that did not disclose the pending sale of Parcel 1 at $1,275,000.[59]

A member of the Appraisal Institute of Canada must perform assignments ethically, objectively and competently in a meaningful manner in accordance with the *Standards*. Further, it is unethical for a member to develop, use or permit others to use, for any purpose any report which the member knows, or ought to know, is misleading.

Esselmont v. Harker Appraisals Ltd.

In the case of *Esselmont v. Harker Appraisals Ltd.*,[60] Harker prepared an appraisal report for the owners of a 127-acre undeveloped tract as of September 23, 1975, indicating a value of $1,440,000 by the subdivision development approach and $953,400 by the market data approach, now known as the direct comparison approach. Subsequently, in July 1976, the owners placed the appraisal before Esselmont in support of a request for a third mortgage loan of $200,000. There was an existing first mortgage of $200,000 and a second mortgage of $150,000. On the strength of the Harker appraisal report, Esselmont and five other investors placed a $200,000 third mortgage for a term of six months against the property.

Eventually there was default on all three mortgages and the first mortgagee foreclosed on the mortgage. Esselmont, as third mortgagee, claiming to have relied on the September 23, 1975 appraisal, launched an action against Harker for sustained losses of $303,546.36.

At trial, the appraisal report was impugned for its many major defects. Evidence was presented indicating that the owners had "shopped for value" within the appraisal community. Two other commissioned appraisals prepared as of the same effective date (September 23, 1975) indicated values of $170,000 and $318,000, neither of which were brought to the attention of Esselmont.

In the Harker appraisal, under "Summary of Salient Facts and Important Conclusions," the zoning was incorrectly reported, both as to zoning category and minimum size requirement; the property was within the 5-acre minimum "Agricultural Land Reserve [ALR]"classification. Because the appraiser's conclusion that the highest and best use for the property was "development by subdivision," the zoning was a critical factor. The court commented as follows:

> To sub-divide [sic] the subject property thus would require first a successful application to the Land Commission to release the property from the A.L.R., popularly known as the "Land Freeze". The latter took precedence over any local zoning, such as the SH1A zoning (by the City of Kamloops) over the subject property. Once a successful application to release this land had been carried out, the local zoning would be in effect. Then the developer would have had to go through the City of Kamloops authorities. In this instance that would have presented some very sizable difficulties, because as the appraisal is based on 2 acre plots…, the City zoning (SH1A) was a minimum of 5 acre plots.[61]

Harker admitted he knew that the land was under the ALR, which did not permit subdivision,

58. An appraisal of a one-to-four-family residential property requires the appraiser to analyze and report any prior sales of the subject property that had occurred within one year. USPAP makes no distinction among property types, and requires disclosure of all sales of the subject property (whether nonresidential or residential) that occurred within three years of the effective date of appraisal.

59. An appraiser appearing on behalf of the negligent appraiser testified "that there was no obligation on [the appraiser] to disclose the actual rental income for the past year of operation or to disclose the selling price of $1,700,000 for the combined three parcels." It is difficult to conceive of any circumstance that would justify withholding such critical information and not disclosing it in the appraisal report.

60. *Esselmont v. Harker Appraisals Ltd.,* [1979] B.C.J. No. 275 (BCSC).

61. Ibid.

and that he should have mentioned this fact. To the contrary, his report indicated that water and sewage disposal services were to be extended to the subject area, although Harker admitted that he had not made any inquires in this regard. The court concluded "there was not the slightest justification for Harker to put any such thing in his appraisal."

As to the market data (direct comparison) approach, the court stated that the comparables should be "as close to the subject as possible geographically and in size, and where the value is established by a sale, that sale [be] as close in time as possible to the effective date of the appraisal." The court noted that the subject property was approximately 127 acres of undeveloped land, about 15 miles from the center of the city, while the appraisal listed eight comparables, varying in size from 2 acres to 11.79 acres; five of the eight comparables were 5 acres or less. With the exception of Harker, the appraisers who gave evidence were unanimous in condemning the use of these comparables to estimate the value of the subject property. When questioned on the use of these comparables, Harker claimed that he could not find any true comparables.

In reference to Harker's appraisal section "Development Approach to Value," the court's reaction was less than complimentary:

> There is no proper comparison at all between the two properties, but of course the use of [the selected comparable] gives an end result valuation [of $1,440,000] to the subject property grossly and mendaciously [lyingly] inflated.

When Harker prepared his appraisal in September 1975, he had in his possession two purported bona fide offers for the subject property—June 17, 1975 for $850,000 and July 23, 1975 for $750,000—which were refused by the property owners. Harker did not take these offers into account in estimating the value of the property. He claimed that since the purpose of his appraisal was to advise the property owners of the market value, i.e., what they might reasonably accept, he did not need to include the two offers.

The court noted that had the two offers been used in Harker's calculation, the final estimate of value would have been lower than it was. In finding the appraiser negligent, the court concluded that his appraisal was "reckless, mendacious and irresponsible" and constituted "a gross overvaluation," and the appraiser had fallen "far short of the standard of care which the law imposes on a professional appraiser."

Application of the Standards. In the *Harker* case, the *Standards* would have required the appraiser's report to

1. disclose the scope of work necessary to complete the assignment;
2. disclose all assumptions and limiting conditions;
3. disclose any hypothetical conditions;
4. disclose land use controls;
5. state the existing use and the use reflected in the appraisal;
6. describe and analyze all data relevant to the assignment;
7. describe and apply the appraisal procedures relevant to the assignment;
8. detail the reasoning supporting the analyses, opinions and conclusions of each valuation approach;
9. analyze the effect on value of anticipated public or private improvements; and
10. analyze and disclose any current Agreement for Sale, option, or listing of the property (if such information is available to the appraiser in the normal course of business).[62]

In *Harker*, the scope of work undertaken by the appraiser was insufficient to result in opinions/conclusions credible in the context of the intended use of the appraisal, which was to ensure adequate security for mortgage financing. There were numerous unidentified Extraordinary Assumptions, and the use of the "development approach to value" [subdivision development method] was not warranted, as subdivision was not the highest and best use of the property.[63] Physically, the undeveloped tract did not have access to services, subdivision was not legally permissible, and there was no evidence of demand for residential housing in the area where the tract was located. No inquiries of any municipal departments and governmental agencies were ever undertaken by the appraiser to ascertain the viability of subdivision or the steps and timing involved in the subdivision approvals process.

Impressing upon the undeveloped tract an imaginary subdivision was a hypothetical exercise

62. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1009, 1017, 1029–1037, 1041–1043, 1047, 1055, 1059.

63. The AIC *Standards* make no reference to the subdivision development method as one of the three traditional valuation approaches.

and resulted in a value on an "as if" or "assumptive" premise, rather than a value of the tract in its "as is" condition. In addition, a "land freeze" eliminated any possibility of development, so that characterization of the subject property as a speculative land holding with an uncertain end use would have been a more appropriate conclusion. The reported zoning and comparable sales did not fit the actual characteristics of the subject property. Under the *Standards*, an appraiser must collect and verify relevant information in a manner consistent with Reasonable Appraiser standards. There was a failure to perform ethically, objectively and competently. A member of the AIC must develop and communicate his/her analysis, opinions and advice in a manner that will be meaningful to the client, that will not be misleading in the marketplace, and that will be in compliance with the *Standards*.

Finance America Realty Ltd. v. Block, Prossin & Schelew

In the case of *Finance America Realty Ltd v. Block, Prossin & Schelew*,[64] Conrod owned a seven-acre parcel, which he wanted to subdivide into eight lots. The parcel was encumbered by a first mortgage of $31,000 when Conrod applied to Finance America Realty (Finance America) for a second mortgage. On February 6, 1976, Finance America arranged for the appraisal of the property. Conrod told the appraiser retained by Finance America that the subdivision was not approved but approval was imminent.

The appraiser prepared his appraisal report as if approval had been received for an eight-lot residential subdivision, despite the appraiser's knowledge to the contrary. He valued the property at $97,200. Without subdivision approval, the land was worth only $65,000. Based on the reported value of $97,200, Finance America approved a second mortgage of $25,000. But for the higher value, Finance America would not have advanced the second mortgage as it was not a loan conditional on subdivision approval. Conrod defaulted, and Finance America subsequently sold the property for $45,000, sustaining a loss of $20,898. Finance America then launched an action against the appraiser to recover the financial losses it had sustained as a result of the appraisal.

At trial, evidence was presented as to the status of the Conrod property with regard to the proposed subdivision. An application for a development permit had been submitted to the County of Halifax and the cities of Dartmouth and Halifax in October 1975 with respect to the Conrod lands. The application was forwarded to the Department of Highways, and the department reported that the proposed road layout, as shown on the plan, met with the requirements of the department subject to the provisions of department specifications for subdivision roads. On January 30, 1976, however, the Director of Development and Planning for the County of Halifax wrote to Conrod advising him that the property was not eligible for a regional development permit, and that if he wished to discuss the matter further to contact his office. In the meantime, Conrod's application would be held in abeyance awaiting Conrod's written response. Conrod never responded.

The economic impact of subdivision approval or nonapproval on the value of a property was significant. On the assumption of a subdivision of eight lots—one of which included a half-built house—the property was appraised at $97,244, consisting of $41,244 for the house and its lot and well, and $8,000 each for the other seven lots. Without subdivision approval, all that Conrod had in legal fact was a large seven-acre lot with a half-built house and driveway worth a total of about $65,000.

When the appraiser had met with Conrod to inspect the property, Conrod showed the appraiser a (conceptual) subdivision plan of eight lots and a road, where the lots had been laid out on the ground and marked by surveyor's stakes, and a 66-foot-wide, well-built road, which Conrod claimed had passed Department of Highways standards. He also showed the appraiser the half-built house, serviced by a well and septic tank, located on one of the back lots. The appraiser did verify that there was a file relating to the property in the county office, but he did not carry his investigation any further as to the status of the subdivision application. The appraisal report contained no reference to subdivision approval or lack thereof. The district was described in the appraisal report as a "developing residential area," and the lots were described as "all having road frontage." The appraiser in his certificate stated that to the best of his knowledge and belief, the statements contained in the report, and upon which his estimate of value was based, were correct.

The Supreme Court of Nova Scotia found that the appraiser breached his duty to Finance America by failing to inform his client of a vital fact that the appraiser knew, namely, that the subdivision plan had not yet been approved.

64. *Finance America Realty Ltd. v. Block, Prossin & Schelew,* [1979] N.S.J. No. 61 (S.C.A.).

> …[T]he appraiser knew that the subdivision had not been approved and thus did not legally exist…[H]e was obligated to emphasize that fact in his report and to make clear that his appraisal applied only if and when approval had been obtained, no matter how sure he might have been that approval was 'imminent.' That is the fault for which the [appraiser] must be liable….[The appraiser] did not exercise reasonable care in preparing the appraisal report. I prefer to describe [the appraiser's] breach of duty as being his failure to report the non-approval, a material fact actually known to him rather than the failure to verify the legal status of the subdivision.[65]

Application of the Standards. In the *Finance America Realty* case, the *Standards* would have required the appraiser's report to

1. disclose the scope of work necessary to complete the assignment;
2. disclose all assumptions and limiting conditions;
3. disclose any hypothetical conditions (including proposed improvements);
4. disclose land use controls; and
5. state the existing use and the use reflected in the appraisal.[66]

An appraiser's failure to disclose an assumptive premise on which a value estimate rests is a contravention of the Ethics Standard, which provides that it is unethical for a member to develop, use or permit others to use, for any purpose any report which the member knows, or ought to know, is misleading. The appraiser in *Finance America Realty* should have made inquiries to the appropriate agencies and governmental bodies regarding the status of the subdivision application and the steps necessary in achieving subdivision. The fact that the property owner had commenced infrastructure improvements in anticipation of subdivision approval did not justify the valuation of the property as if it had already been legally subdivided. Accordingly, the appraiser erred in his opinion of highest and best use of the property as an eight-lot residential subdivision, which led to a gross overvaluation of the property in its existing use as a large single lot with partially completed improvements.

Conclusion

A difference of opinion as to the value of a property is not, in and of itself, proof of negligence. The courts recognize that appraisal is not an exact science, and divergences in opinions of value are not uncommon. However, a failure to follow generally accepted appraisal procedures and practices, and errors of omission and commission are factors that the court considers when assessing a claim of negligence against an appraiser. The acceptability or unacceptability of an appraiser's actions (or inactions) are judged in the context of the standards of the appraisal profession and of the Appraisal Institute of Canada at the time the disputed appraisal was prepared, applying the Reasonable Appraiser test.

A disturbing pattern noted in the cases reviewed here is the failure to disclose important property-specific information such as a pending Agreement for Sale or an existing lease pertaining to the property being appraised; this constitutes a form of concealment. It is difficult to imagine any circumstance in which an appraiser could be justified in withholding critical information such as a pending Agreement for Sale, when the very purpose of the appraisal is to estimate the market value of the property. What better indication of market value could there be than a pending sale of the property to be appraised, provided that the transaction meets the definition of market value. The same holds true for a recently executed arm's-length lease, without tenant inducements, as an example of market rent for use in the income capitalization approach of the property being appraised. Of course, other independent market data would still need to be researched to test the reliability of subject-specific valuation benchmarks.

A hypothetical "as if" or "assumptive" appraisal has been shown to be another source of potential negligence claims against appraisers. This type of appraisal is contingent and prospective, and because the value presupposes assumptions or conditions that have not yet occurred, the indication of value is not the market value of the property in its "as is" condition. Failure to reference the "as if" or "assumptive" value estimate in some meaningful way to the market value of the same property in its "as is" condition can be misleading and result in financial losses. All assumptions must be within the realm of probability and be achievable within a reasonable period of the date of appraisal, and the steps, time and costs involved in achieving the value of the "as if" or "assumptive" premise must be disclosed. Allowances for risk and entrepreneurial profit associated with the prospect of achieving the "as if" or "assumptive" premise must also be taken into account.

65. Ibid.
66. *Canadian Uniform Standards of Professional Appraisal Practice,* lines 1017, 1029–1033, 1037.

An appraiser acting in the capacity of a reviewer must make clear the scope of the review and be careful not to cross the line that distinguishes the review function from the appraisal function, and to make clear the scope of the review and the extent to which the data in the appraisal is being relied upon and not independently verified. Review appraisers who present estimates of value and fail to follow appraisal standards or provide a disclaimer for reliance on information in the appraisal under review could find themselves answering to a claim of negligence if the failure to comply with the appraisal standards or data contained in the reviewed appraisal causes a financial loss to someone entitled to rely on the review appraiser's work product.

Appraisers who have historically enjoyed immunity from claims of professional negligence while acting as expert witnesses in contemplation of litigation and quasi-judicial proceedings may no longer enjoy such a privilege. A number of courts have ruled that a "friendly" expert witness, hired to perform litigation support services but who performs those services in a negligent manner, cannot hide from civil liability behind the shield of witness immunity. The "friendly" expert will be held to the same professional standards and duties as other appraisers practicing outside of the courtroom in a business environment.

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