

# PRESIDENT'S MESSAGE



**December 2012**

The KW OIAA is a member of the Tri-Association – the other members are the local Brokers Association and the Insurance Institute. We are working to promote attendance at events put on by any of the associations. All of the associations are planning educational meetings as well as fun events – we hope that you can attend, and can find information on upcoming events on any of the websites. We are promoting the 2<sup>nd</sup> Annual Charity Curling Bonspiel in March – information on this event can be located within the bulletin. If you didn't attend last year, you missed out on a very fun event!

As we wrap up 2012, there are parties to attend! We hope to see you at the Toronto OIAA Party on December 12 at the Westin Hotel. Don't forget that your KW OIAA Party is December 13 at Golf's Steakhouse.

On behalf of the KW OIAA – we hope that you and your family have a safe and happy holidays.

Regards,

Charlene Ferris, FCIP CRM

President – KW Chapter



December 2012

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# 2nd Annual Local Insurance Associations Charity Curling Bonspiel Friday, March 22, 2013

## SPONSORSHIP FORM

**When:** Thursday, March 22nd, 2013

**Where:** Westmount Curling Club

**Time:** 9 am - Start. Select preferred draw time on the registration form

### SPONSORSHIP OPPORTUNITIES:

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**Insurance Institute**



# 2nd Annual Local Insurance Associations Charity Curling Bonspiel

## Friday, March 22, 2013

Time is more valuable than ever with busy schedules it is often difficult to support the many insurance events. Leaders within your local Broker, Adjuster, and Insurance Institute associations have been working to organize a winter event that will bring our memberships together providing an opportunity to net work with like minded individuals within our community.

Based on your feedback, we recognized that building and creating connections within our industry is important to you and key to career development and success. Our tripartite associations are please to extend an invitation to join our second annual Local Insurance Associations Charity Curling Bonspiel.

We hope you can join us at Westmount Curling Club on Friday, March 22. We are offering a morning and afternoon draw so you can still get a half-day in at the office. A buffet style lunch will be catered to both the morning and afternoon curlers, with four (4) end draws providing lots of opportunity to connect with colleagues throughout the local industry.

This is a fun event so experience is not required but we will try to match up experienced groups in the draws along with offering some instructions at the rink. A registration is provided below. It will

be first come first serve for your choice of a morning or afternoon draw. If you care to sponsor part of the event please indicate so on the registration form. We will present proceeds to the United Way of Kitchener Waterloo.

Curling is a really fun social sport that most of us do not get to try or do very often, we really hope you can join us on the 22nd.

### Prize Sponsorships

Donations of prizes to Melissa Snyder and Charlene Ferris  
msnyder@lmicanada.com or Charlene\_Ferris@cooperators.ca

### Location

Westmount Curling Club

### Date

Friday March 22, 2013

### Time

9 am - Start. Select preferred draw time on the registration form.

### Price

\$50 plus hst per person. \$200 plus hst for a team of 4.

### Note

Wear warm clothing and flat, indoor shoes

## 1st Local Insurance Associations Charity Curling Bonspiel

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Present experience <input type="checkbox"/> Never curled <input type="checkbox"/> Curled 1-10 games		Preferred position <input type="checkbox"/> Skip <input type="checkbox"/> Vice <input type="checkbox"/> Second <input type="checkbox"/> Lead	
<input type="checkbox"/> Curled 10 - 20 games <input type="checkbox"/> Present league curler		Preferred draw time <input type="checkbox"/> a.m. <input type="checkbox"/> p.m.	

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## Schedule of K-W Chapter Monthly Meetings 2012-2013

<b>Date</b>	<b>Topic</b>	<b>Contact</b>
2012		
SEPTEMBER 27	TRADE SHOW	Charlene Ferris Cyndy Craig
OCTOBER 25	BAD FAITH	Stephanie Jermyn Laura Potts
NOVEMBER 29	CHILI COOK-OFF	Dale Stuart Mark Hale
DECEMBER 9	KIDS CHRISTMAS PARTY	Randy Higgins Dale Stuart
DECEMBER 13	CHRISTMAS PARTY <b>**NEW THIS YEAR**</b>	Stephen Tucker Charlene Ferris
2013		
JANUARY 31	CARGO THEFT	Lisa Dobson Dan Strigberger
FEBRUARY 28	PANEL DISCUSSION	Stephen Tucker Mike McLeod
MARCH 28	PROVINCIAL SEMINAR	Mike McLeod
APRIL 25	FUN NIGHT & ELECTIONS	Stephen Tucker Laura Potts
MAY	<b>**NO MEETING AS PROVINCIAL CONFERENCE**</b>	
JUNE 27	GOLF TOURNAMENT	Charlene Ferris Cyndy Craig

**\*\* All meeting dates, topics and contacts are subject to change**

**\*\*Cost for meeting is \$35 per person**



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Chapter of Ontario Insurance Adjusters Association



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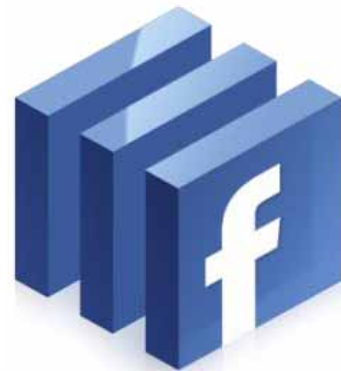
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# TORONTO DELEGATE REPORT

On November 14, 2012 a legal panel of plaintiff and defense lawyers teamed up for an educational seminar for OIAA members at the Sheraton Centre. The panel offered some great insight and discussion on current industry affairs.

The 2012 OIAA Christmas Party “Jingle all Evening” was December 12, 2012 at the Westin Harbour Castle in Toronto. The sold out event was a great start to the holiday season.

We look forward to the new year which brings us the OIAA Claims Conference 2013 at the Metro Toronto Convention Center on February 6, 2013. The event is a full day of seminars, networking, luncheon with keynote speaker and over 150 trade show exhibitors profiling the latest products and services for the claims industry.

In March we will be getting out the brooms and ask you to stay tuned for details and registration information for the annual Curling Bonspiel.

You can always stay up to date on upcoming events and register online at [www.oiaa.com](http://www.oiaa.com).

If you would like more information or have any questions or concerns please do not hesitate to contact me at [Michael.mcleod@crowco.ca](mailto:Michael.mcleod@crowco.ca).

Regards,  
Michael McLeod  
Chapter Toronto Delegate

## **ASSOCIATION CONTACTS AND INDUSTRY EVENT SCHEDULE**

**January 31st, 2013.....Educational Meeting**

**February 28th, 2012 .....Educational Meeting**

**March 28th, 2013 .....Provincial Seminar**

Insurance Brokers Association of Waterloo

Contact – Dianne Monteiro

[dmonteiro@donovaninsurance.com](mailto:dmonteiro@donovaninsurance.com)

K-W Ontario Insurance Adjusters Association

Contact – Randy Higgins

[randy@pdkw.ca](mailto:randy@pdkw.ca)

Insurance Institute-Conestoga Chapter

Contact – Heather Graham

[hgraham@insuranceinstitute.ca](mailto:hgraham@insuranceinstitute.ca)





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# SOCIAL CHIT-CHAT

December 2012

## PUT ON YOUR WINTER TIRES

If there's one thing we've learned, it's that Ontario winters require snow tires and this year will not be like last year, with *the Almanac* predicting a slightly colder-than-normal winter this season with slightly more snow. Despite the fact that most Canadians (75%) recognize the need for snow tires, more than half don't use them (58%) according to an article in the *Canadian Underwriter*, Daily News (2012-11-22) "Most drivers in cold-weather markets don't use winter tires: survey".

In addition to these details, the survey also revealed that "nearly a fifth [of Canadians surveyed] (19%) said they don't drive any slower during the winter, and 73% said they drive just as often in the winter as in other seasons".

As we gear up for the Christmas season, let's take a slice of the risk out of driving to and from those family and festive events this year. Buckle up; Arrive Alive (no drinking and driving); and please: PUT ON YOUR WINTER TIRES.

Cheers,

Stephanie Jermyn, CKR Global  
SOCIAL DIRECTOR

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## Structural Failure or Damage Investigation – What is an expert?



**An expert opinion is of critical value** when investigating a structural failure or damage to a structure. The insured and the insurer need timely, objective, accurate and professional advice that only an expert can provide. It is important to be familiar with what the insured needs to supply to the professional engineer and what the engineer needs to provide to the insurer. It is also critical to be confident in your technical expert and to be aware of the responsibilities of an engineer, and what qualifies an engineer as an expert. So, what makes an expert...

Unfortunately no university offers a degree in “expert engineering”. The definition of expert given by the Merriam Webster dictionary is *“having, involving, or displaying special skill or knowledge derived from training or experience”*. While this definition makes sense, it is somewhat simplistic and open to interpretation. In fact, the definition of an expert recognized and used by courts of law is much more descriptive and has five key traits as follows:

- 1. Education** – An expert must have relevant undergraduate and graduate degrees from an accredited institution. The Canadian Engineering Accreditation Board (CEAB) is a working Board of Engineers Canada that has been accrediting undergraduate university programs in Canada since 1965. A list of accredited universities can be found on their website at [www.engineerscanada.ca](http://www.engineerscanada.ca)
- 2. Skill** – An expert must have a developed ability in their field of expertise. Skill is the ability to take one’s knowledge, training, education, and experience and apply it to solve a problem, complete a task and convey information. While an engineer may have a good deal of knowledge about a topic, they need the skill to apply it to the situation at hand.
- 3. Training** – An expert must have been trained through interaction with a mentor or formal classes. Training supplements and builds on the education of the expert by providing practical application to real world issues.
- 4. Experience** – An expert needs to have worked within a specialty for long enough to attain the capability to do their job competently. During this time, the expert needs to have overcome a problem or completed a particular design enough times that they complete all aspects of the task efficiently and effectively. One needs to keep in mind that having 30 years or more of experience does not necessarily make one an expert.
- 5. Knowledge** – What an expert knows is dependent on the education, skill, training and experience of the expert. An expert is constantly building their knowledge through continuing education and participation in professional associations.

**To qualify as an expert in a court of law**, one would need to demonstrate each of the five traits listed above. Other attributes that contribute to expert status include professional licensure, authoring of papers/books, awards, good character, and having been recognized as an expert by courts/tribunals previously.

**When retaining an expert**, the scope of work needs to be clearly outlined, including a description of the issue that you need the expert to opine and any pertinent background information. This information may include related details such as as-built drawings, pre-condition surveys, or photos prior to the occurrence of the event, as well as whether or not the insured has “Building Code Coverage”. Knowing if the insured has “Building Code Coverage” will allow the expert to take note of revealed conditions related to the impact that do not meet current codes, such as non-code compliant wall or floor framing. The expert will then attend the site to make observations and measurements needed to prepare a report. In the report, the expert will clearly describe: the scope of the review, the structure under review, the location of the damage, the nature and extent of the damage, the logic behind the cause of the damage, the recommended remedy, any immediate or long-term precautions that need to be taken and, if applicable, the associated costs for the remedy. The expert needs to convey this information in a concise and easy to read report complete with photographs and/or drawings. The report needs to be direct and written for the intended audience, avoiding the use of technical jargon and embellished descriptions. The report will not go beyond the expert’s range of expertise, meaning that a structural expert will not comment on electrical issues. Above all else the expert must remain objective and not become an advocate for either side in a dispute. The report does not need a lot of quantity just quality.

One needs to keep in mind that above all else a professional engineer’s duty is to public safety. In turn, they have a duty to report issues that are identified during the site assessment that may impact public safety, whether they are covered by the insured’s policy coverage or not.

**Hiring a consultant** does not implicate that you have transferred your liability or information collection to an expert. As outlined above, it takes investigation to ensure you are obtaining the level of expertise required in the case of insurance claims.

**Carl Lankinen**, B.A.Sc., M.A.Sc., P.Eng.  
Senior Manager, Facilities Design  
R.J. Burnside & Associates Limited

*Mr. Lankinen has acted as a structural expert on a number of expert reports for insurance companies and law firms. He has opined on a variety of issues including house fires, structural collapses, tornado damage, foundation underpinning for environment repairs and wind damage. He has also completed a number of peer reviews of drawings, calculations, reports, buildings and components. To this end, he has qualified as an expert witness while testifying at a Professional Engineers of Ontario tribunal.*

*Carl is the Facilities Group Senior Manager at Burnside. The Facilities Design Group is a multidisciplinary team consisting of the Mechanical Engineering Group, the Electrical Engineering Group, the Structural Engineering Group and the Integrated Design Group.*

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## Insurance Bad Faith Claims



Authored by:

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Insurance contracts have long been regarded as contracts of 'utmost good faith'. Initially, the obligation was imposed at contract formation as a requirement that the parties disclose everything in their knowledge to allow for a proper appreciation of risk involved. Ostensibly a reciprocal obligation, this good faith requirement was borne largely by the insured as the party most often with knowledge of the risks and interests to be insured. The result was effectively a defence for insurers who could rely on a failure to disclose as a means of avoiding the contract.

More recently, good faith obligations have been extended to the claims and settlement context. These developments greatly increase the exposure of insurers to bad faith claims. Developed in the United States, this type of good faith obligation has not attracted much attention in the Commonwealth; perhaps because the law of contracts in the United States departs in several ways from that of Canada. First, and foremost, the United States recognizes a general duty of good faith and fair dealing in the performance and enforcement of contracts. Secondly, most States have enacted legislation expressly regulating the insurance claims and settlement process, prescribing certain types of unfair or deceptive conduct.

Until recently, Canadian courts were unwilling to extend the good faith obligation beyond the disclosure stage to the claims and settlement process. However, in *Fidler v. Sun Life*,<sup>1</sup> the Supreme Court of Canada, relying upon the Ontario Court of Appeal's decision in *702525 Ontario Inc. v. Lloyds of London*,<sup>2</sup> simply assumed the application of the good faith obligation to the claims and settlement context. Similarly, in *Whiten v. Pilot Insurance Company*,<sup>3</sup> the defendant insurer itself accepted that an insurer was under a contractual duty of good faith and fair dealing with regard to claims handling.

### First Party Context

Taken together, *702525 Ontario Inc.*, *Whiten*, and *Fidler* provide a sense of what constitutes bad faith in the insurance context. Specifically, in *Fidler*, a denial of disability benefits case, the Supreme Court noted that its finding of bad faith was "the result of the overwhelmingly inadequate handling of the claim or the introduction of improper considerations into the claims process".

More broadly (i) the insurer must undertake an unbiased and thorough investigation of the claim, considering all reasonably available information, without pre-determining the outcome, (ii) the insurer must be reasonably prompt in both its investigation of the claim and its communication with the insured, (iii) the insurer must not subject the insured to undue or unfair pressure or tactics to extract a low settlement and must not impose improper conditions on payment, and (iv) the insurer may be wrong in its assessment without attracting damages, provided its position was reasonable.

### Third Party Context

Bad faith claims in the third party context generally occur where the insurer fails or neglects to settle within the policy limits, proceeds to trial, and loses. In doing so, the insurer exposes the insured to paying the amount of the claim in excess of the policy limits. Insureds advancing this sort of bad faith claim have seen some success, but not universally. In both *Pelky v. Hudson Bay Insurance*<sup>4</sup> and *Dillon v. Guardian Insurance Company*<sup>5</sup> the plaintiff offered to settle within policy limits, but the insurer proceeded to trial and lost. In both cases, the insured was successful against the insurer. However, in *Fredrickson v. I.C.B.C.*<sup>6</sup> the insured's claim was dismissed on the basis that the Canadian law did not recognize an independent duty of good faith settlement. While the insurer owes the insured some obligation, given its complete control over the course of the action, it is not clear that duty amounts to one of good faith.

*Shea v. M.P.I.C.*<sup>7</sup> is the most recent case in this area. In a detailed analysis, the court determined what while an insurer's obligations do not rise to the level of a fiduciary, the control they exercise over the conduct of the litigation create duties above the universal duty of honesty. These duties include (i) good faith and fair dealing, (ii) at least as much consideration of the insured's interests as the insurer's, and (iii) to disclose with "reasonable promptitude" to the insured all material information touching on the litigation of the insured's matter and in the settlement negotiations. Furthermore, the duty to defend includes the duty to defend on damages and to take all legal measures to reduce them as against the insured. Where it becomes impossible for one counsel to fully represent the conflicting interests of both the insured and the insurer, the insurer may be responsible to appoint separate counsel for the insured.

<sup>1</sup> 2006 SCC 30.

<sup>2</sup> (2000) 184 D.L.R. (4th) 687.

<sup>3</sup> 2002 SCC 18.

<sup>4</sup> [1982] I.L.R. 1-1493 (Ont. H.C.).

<sup>5</sup> (1983), 2 C.C.L.I. 227 (Ont. H.C.).

<sup>6</sup> (1990), 42 C.C.L.I. 250 (B.C.S.C.).

<sup>7</sup> (1991), 1 C.C.L.I. (2d) 61 (B.C.S.C.).



## Punitive Damages

A discussion of bad faith claims against insurance companies would not be complete without mention of punitive damages. One of the most significant aspects of a bad faith claim is that it can serve as the independent actionable wrong required to make punitive damages available to the plaintiff. While it is a pre-condition, it does not necessarily follow that punitive damages will be awarded in every case of bad faith. To get to punitive damages, the insurer's conduct must be exceptional insofar as its conduct was, to quote *Whiten*, "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from the ordinary standards of decent behaviour."

A second issue of note is whether the employer (the insurer) can be vicariously liable, in the form of punitive damages, for the bad faith conduct of its employees. The majority of the British Columbia Court of Appeal recently held that an employer may be vicariously liable for its employee's bad faith conduct where it puts the employee in a position to commit the conduct and then avails itself of the proceeds thereof.<sup>8</sup>

## Recent Developments

In *McDonald v. Insurance Corporation of British Columbia*,<sup>9</sup> the British Columbia Supreme Court held that a breach of the duty of good faith does not require malicious intent, that failure to conduct an adequate investigation, provide an objective assessment of coverage and clearly communicate that decision and its effect to the insured each constitute such a breach.

Eleanor McDonald struck a van while driving the wrong way on a one way street. She was charged with failing to provide a breath sample, impaired driving and dangerous driving. The owner of the van then commenced an action against McDonald, but her insurer, the Insurance Corporation of British Columbia, neither appointed counsel nor filed a statutory third party notice. Instead, the claim's handler, after a cursory investigation, denied McDonald coverage on the basis that she was incapacitated by alcohol at the time of the accident, largely on the basis of the criminal charges. The Crown stayed the criminal charges and McDonald pleaded guilty to the provincial offence of driving without reasonable consideration. In the civil action, I.C.B.C. settled without her knowledge for a sum of \$182,085.36 and subsequently sought indemnification from her. In response, McDonald commenced an action against I.C.B.C. for indemnification and punitive damages on the basis of I.C.B.C.'s breach of its duty of good faith in handling her third party liability claim.

The duty of good faith required that the insurer bring reasonable diligence and fairness as well as an appropriate level of skill, thoroughness and objectivity to the investigation. This I.C.B.C. failed to do when it neglected to obtain witness statements soon after the incident. It also failed to conduct a more thorough investigation once it learned the criminal charges had been stayed, which would have disclosed that McDonald had been stopped by a police officer an hour prior to the accident, who had determined she was not intoxicated. I.C.B.C. was further obligated to assess fairly the results of the investigation with respect to its decision on coverage.

That is not all, the court also found I.C.B.C.'s letter to McDonald warning her that she may be found in breach of the terms of her policy was inadequate given that she had already been deemed to be in breach and therefore liable for any judgment or settlement

secured by the plaintiff. This failure to communicate was exacerbated by then settling without advising McDonald or taking her reasonable interests into account.

The failure to adequately investigate, assess coverage, and give clear notice, along with settling without notice to, or consideration of the interests of, McDonald each constituted a breach of the duty of good faith. Punitive damages then were awarded as the handling of the claim was so inadequate that it amounted to harsh, high-handed conduct representing a significant departure from the court's sense of decency and fair play. The court determined that the insurer would not otherwise be held accountable for its bad faith and that punitive damages would also serve as an example to other insurance companies in similar circumstances. The punitive damages amounted to \$75,000.

Having only been rendered in February of this year, *McDonald* has yet to receive subsequent judicial treatment. It remains to be seen how its particular gloss on the duty of good faith will be received. If accepted, insurance companies will face a number of new considerations in administering their claims processes:

1. the need to conduct their own thorough investigation of any basis on which they may seek to deny an insured's coverage;
2. the need to communicate clearly with the insured regarding coverage determinations and their potential consequences for the insured;
3. that the failure to conduct a proper investigation or to communicate with the insured regarding coverage and settlement matters can constitute bad faith dealing; and
4. the fact that malicious intent is not a prerequisite for an award of punitive damages following a finding of bad faith dealing.

*Theodore J. Madison is an associate counsel in the Insurance Litigation Group at the London office of Miller Thomson. Ted's legal practice focuses on the area of insurance defence, including the defence of personal injury claims and accident benefits.*



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<sup>8</sup> 2008 BCCA 484. For a discussion of an "entirely blameless" employer, see *Asselstine v. Manufacturers Life Insurance Co.*, 2005 BCCA 292, Lowry J.A. dissenting.

<sup>9</sup> 2012 BCSC 283.



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Thank you everyone that came out to November's Chili Cook Off. A special thanks to the individual teams who entered a Chili. We had 16 pots to sample and a special thanks to the attendees who came from as far away as London & Niagara to participate. There could only be two winners though and we have new Champions in both categories.

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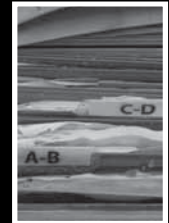
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