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PRESIDENT'S MESSAGE

MAY 2019



All those April showers (and snow) have made for a beautiful start to Spring! I have started seeing flowers pushing through the earth and I am getting daily updates from my favorite asparagus farm that we are so close to fresh Ontario produce!

I had the pleasure of attending the 2019 OIAA Provincial Conference on May 2nd and 3rd in our nation's capital. It was great to see some of our chapter's amazing supporters as well as meet some new faces. A special shout out to the Ottawa team who worked hard to put on the conference. Our chapter knows well the amount of work and behind the scenes efforts it takes!

I also want to send a thank you to the **sponsors** because without you, these conferences cannot happen: **ServiceMASTER Restore, Davis Martindale, On Side Restoration, DFA Engineering Services, Larrek Investigations, Kelly Santini LLP, Access Restorations Services, Rebuild Response Group.**

Come join us this month on **May 23, 2019** (not our usual last Thursday of the month), for our **Catalyst Tech Night. Also, a location change:** Taste At The Tannery (121 Charles Street West, Kitchener). This event will bring together local tech talent and the insurance world, in an effort to innovate new solutions for the everyday problems we face in insurance.

As always, if your company or organization have a celebration coming up or a special event or maybe even a promotion or new hire you want to celebrate or have showcased, let us know! We want to help you get the word out in our bulletin.

Thank you,
Carrie Keogh
President of K-W OIAA

K-W OIAA EXECUTIVE COUNCIL 2018-2019

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If you have any questions,
concerns or comments, please do
not hesitate to contact any of the
above committee members.

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SOCIAL CHIT CHAT

May 2019



Well sometimes we just can't help patting ourselves on the back...



With the Battle of the Bands fresh in mind, I think we can all feel pretty good about the contribution of social members at that event. For example, almost \$2000 was raised, just at this event, for this year's chapter charity through the event sponsorships from Agro Zaffiro, Arcon, ARS, Centric, CEP, DirectIME, DKI, FirstOnSite, Ground Force, Larrek, RCT Bins, Paladin, Strigberger Brown Armstrong & ServiceMaster. Xpera hosted the very popular photo booth that was busy throughout the evening.

When it came to the bands, social member participation was front and centre once again with Winmar, DKI, Strigberger Brown Armstrong, Centric, Samis & Xpera leading the way through some pretty awesome and danceable music.

Let's continue this level of participation at the following two events of this year; the Tech Showcase on May 23rd and the ever-popular Golf Tourney on June 20th!

Kindest regards,
Your Social Director,
Randy Henderson

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BIG DEAL!



PROVINCIAL DELEGATE REPORT



In March, elections were held for the OIAA Senior Executive's Secretary position. Congratulations to Terry Doherty on your election to Secretary. We look forward to what he brings to the OIAA in the coming years.

The Kingston and Ottawa Chapters recently held provincial conference at the Shaw Centre on May 2 & 3, 2019. Attendees had the opportunity to learn about distracted driving from Parker Thomson, the resiliency and determination of paraplegic Bruce Cook in addition to the following seminars: Sports injury Panel, Medical and recreational Marijuana, Head Injury Panel, Prepping experts for trial, AB-BI CAT Injuries and Investigator vs Engineer. We were entertained by music from the Dueling Pianos and the Hornette's and the food was delicious

Upcoming 2019 Provincial OIAA Events:

June 7, 2019- OIAA Golf Tournament at Cardinal Golf Club. Sponsorship Opportunities and foursomes are still available. Please register here: <https://www.oiaa.com/events/2019-golf-tournament/>

Sponsorship Opportunities:

\$500 per Hole Sponsorship (36 available)

\$1500 Luncheon Sponsorships (4 available)

\$2000 Cart GPS Sponsor (1 available)

Lunch sponsors logos will be printed on the lunch cooler bags received by each golfer. Cart GPS sponsor has their Corporate logo displayed on each golf cart GPS for the entire round.

Provincial event details and sign up are available at oiaa.com .

Regards,

Jennifer Brown

K-W OIAA Chapter, Provincial Delegate

EVENTS SCHEDULE 2018-2019

May 23, 2019 -

Catalyst Tech Night:

Kristin McCutcheon and Jeff Cronk

Taste at The Tannery - 121 Charles Street West, Kitchener

5:30 pm – 9:00 pm

Buy your tickets online: <https://www.kw-oiaa.ca/events>

****NEW DATE & LOCATION**

June 20, 2019 -

John McHugh Memorial Golf Tournament:

Carrie Keogh & Jaime Renner

Ariss Valley Golf & Country Club

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The K-W OIAA is pleased to be hosting the John McHugh Memorial Golf Classic at Ariss Valley Golf and Country Club. Please join us for a day of golf and fun among your industry friends. Every year the K-W OIAA president chooses a charity to be the beneficiary of a generous donation that will greatly assist that organization. This year the chosen charity is **Nutrition for Learning**.

PLEASE REGISTER ONLINE: <http://www.kw-oiaa.ca/>. REGISTRATION DEADLINE IS WEDNESDAY JUNE 12, 2019.

Itinerary for Thursday June 20, 2019:

8:30am	Registration Opens - Breakfast
10:00am	Shot Gun Start
12:00pm	Lunch on the turn
4:00pm	Approximate time for dinner

Players Golf Package

\$155 HST inclusive per person, Fees include one round of 18 holes of golf, use of a cart, breakfast, lunch and dinner. A team of 4 will be \$620.00

Other Options:

All Day Food Tickets: \$50 (Breakfast, lunch and dinner)

Dinner Only Tickets: \$35

Sponsorship

A generous donation will be made to **Nutrition for Learning** from all hole sponsorships.

Hole Sponsorship (2 types) is available for \$225. A prize hole (longest drive/ closest to the pin) requires sponsors to bring both a male and female prize in addition to sponsoring the hole. A non-prize hole has no additional requirements. ****Please note:** You are responsible for providing your own tent, table and chairs.

Title Sponsorship is also available should you be interested:

You may display your banner at this portion of the event should you sponsor these.

Breakfast Sponsor- \$500

Lunch Sponsor- \$1000

Door Prizes are also a welcomed and are drawn for at the dinner. If you are donating a door prize, please advise Carrie Keogh (ckeogh@goremutual.ca) or simply bring it with you with a business card attached to it.

Questions? Please contact:

Carrie Keogh (ckeogh@goremutual.ca) or by phone 800-265-8600 Ext 2545

Jaime Renner (jaime.renner@economical.com) or by phone 519-570-8500 Ext 43031



REGISTRATION DEADLINE IS WEDNESDAY JUNE 12, 2019.

*****Please note that soft spikes and dress code will be strictly enforced*****

Directions

Ariss Valley Golf and Country Club is located just outside of Guelph on Road #86 (Elmira Road). They are #5700 on Road #86 North of Guelph between Marden Road and Country Road 51. Phone- 519-824-1551

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Prize hole Sponsor (\$225) _____
 I would like to sponsor a hole (\$225) _____
 I would like to sponsor breakfast (\$500) _____
 I would like to sponsor lunch (\$1000) _____
 I would like to donate a door prize _____

Other Ticket Options

Extra Breakfast, Lunch and Dinner tickets at \$50 per person. _____
 Extra Dinner Ticket at \$35 per person. _____

Payment Information

Golf Total (\$620 per team) \$ _____
 Extra Tickets Total \$ _____
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 Total Amount Encl. \$ _____

Contact Us

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Marshalling the Policy Limits - the equitable principle of marshalling will not defeat the common law



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In *House v Baird*, 2019 ONSC 1712 the bankruptcy doctrine of marshalling was argued in an injured party's attempt to avoid the common law. As the law currently stands, where personal injury judgments exceed insurance policy limits, multiple plaintiffs recover on a *pro rata* basis. Marshalling was debated as a unique, but ultimately unsuccessful, argument to skirt this principle and allow all of the plaintiffs to recoup their full amount of damages.

Marshalling is an equitable remedy used in mortgage, security, and bankruptcy actions. Its function is to prevent the creditors of a single debtor from defeating one another. Funds can be marshalled to Creditor A where its only claim is against a single fund or security – Fund X, if Creditor B has claims against multiple funds, including Fund X. Counsel in this case were unable to identify any previous uses of marshalling in the context of section 277 of the *Insurance Act*.

On February 25, 2009 Tyler House was driving a vehicle owned by Donald Baird; Adam Samms was a passenger in this vehicle. The Baird/House vehicle lost control and was struck by a vehicle driven by Murray. Samms died in the accident. House and Baird were both injured.

The Samms family and Baird both sued House, Murray, and the Township of Wilmont. Their actions settled before trial for \$200,000 and \$500,000 respectively. In the settlement, these plaintiffs agreed that if there was a shortfall in the available insurance,

their settlements would be pro-rated with the other plaintiffs. They also agreed to be bound by liability findings of any trial the ensued.

House sued Baird, Murray, and the Township. House's claim against Murray settled for \$675,000 and Justice Kent approved this settlement at the trial. House ultimately obtained judgment against Baird at trial for \$1,405,439.10, which amount accounts for liability apportionment and the Murray settlement. The action against the Township was dismissed.

Baird was insured by State Farm and House was insured by Nordique Insurance. Both had third party liability limits of \$1 million. Under the *Insurance Act* the policy belonging to the owner of the vehicle – in this case State Farm – responds first to claims of automobile liability (s. 277(1)); any other policies are excess insurance only. The first loss policy insures both the owner and the driver of that vehicle. Accordingly, Baird's State Farm policy responded for House's negligence as well. House's Nordique policy was excess insurance only.

The total settlement and judgment amounts against Baird and House exceeded State Farm's third party policy limits by over \$1.1 million. State Farm was responsible to pay for the negligence of both Baird and House as follows:

- i. Damages owed by Baird to the Samms family (collectively with iii, totaling \$200,000);
- ii. Damages owed by Baird to House (\$1,405,439.10);
- iii. Damages owed by House to the Samms family (collectively with i, totaling \$200,000); and
- iv. Damages owed by House to Baird (\$500,000).

The general principle in insurance law is that the limits of a policy should be pro-rated unless there are special circumstances (*Scale Estate v The Cooperators Insurance*, 2018 ONSC 363). Following a similar case from the British Columbia Court of Appeal Braid J declined to find special circumstances in this case, and required the State Farm policy limits to be distributed *pro rata*.

All three parties suffered a shortfall under the policy limits of the State Farm policy. As the excess insurer, Nordique was responsible to pay damages on behalf of House to both Baird and the Samms family. However, Justice Braid held that since the policy limits were identical, House could not recover the shortfall in his own damages from his own insurance policy.

House was put into a predicament where, as the driver but not the owner of the car, he was the only injured party who would not fully recover his damages. His inability to access Nordique's policy, and the dismissal against the Township, resulted in his only route of recovery being through the State Farm policy, which was distributed to all three plaintiffs on a *pro rata* basis. House made a number of arguments to allow him access to more funds.

House argued that State Farm should not pay Baird for his claim against House, as this was Baird's own insurer. However, Braid J rejected this argument, stating that both Baird and House were insured by the State Farm policy for liability purposes. State Farm was not indemnifying Baird for his own negligence; rather it was indemnifying Baird for House's negligence as an insured driver under the policy.

Perhaps most interestingly, House argued that the judge should employ the equitable remedy of marshalling. If accepted, the full limits of the State Farm policy would be marshalled to House's benefit. Baird and the Samms family could then recover from the Nordique policy.

Braid J dismissed the argument of marshalling on three grounds: there was not a common debtor and two creditors; marshalling cannot defeat clear statute; and a claimant's access to other insurance funds is irrelevant.

The Ontario Court of Appeal has identified five preconditions for marshalling (*Green v Bank of Montreal* (1999), 128 OAC 324 (ON CA)):

1. two creditors;

2. one common debtor;
3. two funds of the debtor with the superior creditor having access to both and the inferior creditor to but one;
4. no interference with the choice of remedy of the superior creditor; and
5. no prejudice to third parties.

The judge in this case could not identify who the debtors were purported to be in the circumstances. Further, she explained that the purpose of marshalling is to benefit the creditor, not the debtor. Therefore, House could not be considered a debtor in the circumstances. Without being able to identify the creditors and debtor House failed to satisfy a precondition of marshalling and could not succeed in his argument.

Equitable principles cannot be enforced to avoid statutory principles. Conflicts between equity and common law must be resolved in favour of the common law. In this case, her Honour found the principle of marshalling to be in clear conflict with the *Insurance Act* and case law. Accordingly, she refused to use her discretion to make use of the equitable concept of marshalling.

In *Insurance Corp of British Columbia v Kushneriuk*, 2004 BCCA 440 ("**Kushneriuk**") the BC Court of Appeal overturned a decision that effectively employed marshalling – allowing the most seriously injured of the parties to recover 100% of the first loss policy limits rather than sharing that policy on a *pro rata* basis. The Court of Appeal held it was an error to consider other available insurance coverage and prioritize the claim of a single plaintiff who was unable to recover against other funds. Braid J followed this line of reasoning in rejecting the application of marshalling in accessing insurance policy limits.

Interestingly, if the marshalling argument had been accepted neither Baird nor the Samms family would have recovered any less – their collective settlement of \$700,000 would have been fully paid within the Nordique policy. However, the quantum of recovery by each of the parties was not a consideration in this case. If the marshalling principle had been accepted, perhaps the recovery of other parties would have factored into the prejudice element of marshalling. Nevertheless, there would be a risk that use of this principle could ultimately result in limiting the

recovery of other plaintiffs – effectively favoring one party's recovery over another.

In this decision the court has refused to broaden use of the equitable principle of marshalling beyond its existing uses. Being a recent decision, there remains the possibility of appeal. However, given the reasoning of this decision and the decision of British Columbia's Court of Appeal in *Kushneriuk* insurers can be moderately comforted that marshalling is unlikely to be extended into their realm of the law.

Lyndsay Reuvers-Hone is an associate in the London office of Miller Thomson LLP. Her practice services a broad range of litigation needs including commercial, insurance and estate litigation.

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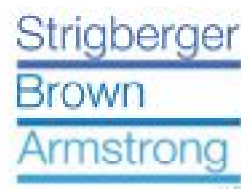
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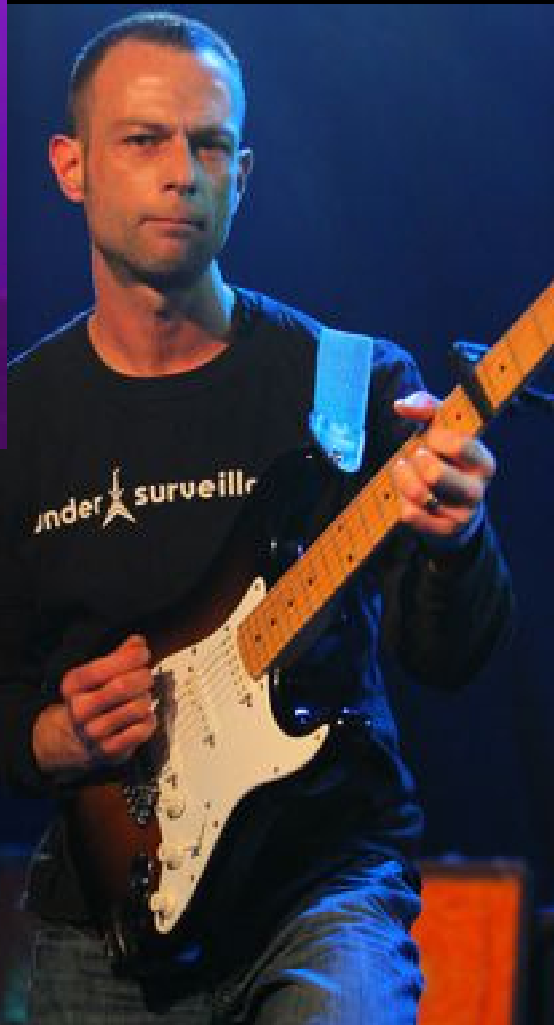
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STORAGE TANKS AND **PHASED ENVIRONMENTAL** **SITE ASSESSMENTS**



By Oliver U. Gonzalez, P.Eng., QP, CESA



Phase I Environmental Site Assessments (ESAs) in accordance with CSA Z768-01 are typically requested during land transactions to gain insight into the environmental condition, including potential impairments, of a property. This is not to be confused with Phase One ESAs for the purpose of Records of Site Condition (RSC), as those ESAs are created for slightly different purposes. A Phase I ESA aims to identify existing and/or potential sources of on-site or off-site contamination, as related to a property of concern. This process can produce valuable information when choosing to buy, sell or insure a property. Historically, one of the biggest culprits of environmental contamination and property impairment has been the release of contaminants from storage tanks.

A Phase I ESA is mainly a document review. The assessor goes back as far as possible, preferably to first property use, to assess the environmental condition of a property via available documentation, including (but not limited to) fire insurance plans, historic photographs, maintenance records, underwriters' reports, freedom of information requests, interviews, or information found through environmental databases. This means taking snapshots of the property through time, including any potentially contaminating activities (PCAs) that may be in the area of the property being assessed. But the search does not end at the boundaries of a property, since an assessor will examine any available environmental information within a radius of 250 metres from the property being assessed. So, while the Phase I property may have never been a drycleaner or a mechanic shop, the neighbouring properties may have been, which may lead to potential contamination within the property being assessed.



At times, the document review will produce no significant results (i.e. no environmental concerns); however, the paper review must be substantiated by conducting a site reconnaissance, to corroborate the information. It is often, however, that while completing the reconnaissance something of environmental concern will be identified. Evidence of a potential storage tank is one thing that can often be identified on-site but may not be identified by the document review.

Storage tanks can be installed aboveground (AST) or underground (UST), and can hold a variety of different potential contaminants; however, the most common use is fuel storage. While the Technical Standards and Safety Authority (TSSA) holds a record of registered ASTs and USTs, the database is not complete, as some installations have been historically completed by homeowners or others, without much registration or any at all. The biggest threat to the environmental condition of a property when it comes to storage tanks comes from USTs, since they are installed below ground. While cathodic protection is typically present in USTs during their active lifetime, it does not prevent them from degradation through time after their use and maintenance has stopped. Therefore, the TSSA's Fuels Safety Program (FSP) adopted the Liquid Fuels Handling Code (LFHC) and Fuel Oil Code (FOC), which require that any UST must be removed from the ground if unused for more than two years. In addition, whenever a UST is removed, a Qualified Person (QP), as identified by Ontario Regulation 153/04, must certify that the soil and/or ground water condition around the tank bed have not been impaired by the typical contaminants of concern (COC) associated with fuels such as benzene, toluene, ethylbenzene, xylenes and petroleum hydrocarbons (BTEX/PHC) fractions F1 through F4.

But historically the decommissioning of USTs has not been adequate, leaving USTs in the ground with fuels still present and potential for underground contamination. The repercussions of contamination by fuels can be in the hundreds of thousands, if not millions of dollars in remediation costs, depending on the amount of contamination released, transport pathways, access to the shallow localized ground water table, vicinity to areas of natural and scientific interest (ANSI), or impacts to neighbouring properties,



among other reasons. A well completed Phase I ESA aims to identify these potential environmental liabilities, so that an informed decision can be made regarding the environmental condition of a property.

So, what should one look for when trying to identify if a UST is present? As USTs become unused, and time passes, certain signs begin to show. One of the ways a UST can show its presence is by depressions in the soils or asphalt located above the UST bed. If cracks have developed in a pattern indicating settlement, or if asphalt sections appear to be cut up and replaced, these can be signs of a UST being present or having been present. Other more obvious signs can be the presence of steel pipes emerging from the ground. These can be fill and/or vent lines for USTs and are typically found closer to the foundation walls of buildings; however, it is not uncommon that they may be found elsewhere on a property. Any unknown pipe emerging from the ground warrants attention and additional checks. One such check may be completing a ground penetrating radar (GPR) scan of the areas of concern, to check for any metal structures located below grade. In any case, spending some money up front to understand

the environmental condition of a property can save hundreds of thousands of dollars in potential environmental liability.



Contamination from buried or aboveground storage tanks has the potential for migration. While there are many contaminant transport pathways, the shallow localized ground water table in the area may be the most important pathway to be assessed, since it could allow contamination to migrate to neighbouring properties or properties of greater environmental sensitivity (for example, from a commercial to a residential property, or from a residential land to a conservation area). A Phase I ESA that is well completed aims to minimize the risk of exposure to environmental liability that USTs, ASTs, or any other potentially contaminating activity may have on a property.

A Phase I ESA may conclude that a Phase II ESA is required. A Phase II ESA is an intrusive examination of the environmental concerns identified by the Phase I ESA. While the Phase I can take a few weeks to complete, a Phase II ESA may take months depending on the amount of data that needs to be assessed and the contaminants of concern that need delineation. Note that this Phase II ESA is an

intrusive study of areas of potential environmental concern (APECs) on the property, identified through completion of a Phase I ESA. This is not to be confused with remediation efforts that take place when a fuel/oil spill occurs, as that reaction is required under the Environmental Protection Act, R.S.O. 1990, c.E.19's Part X – Spills. While this reactive approach is based on a Phase II ESA process, it does not address all contaminants possibly present on a property and has in many cases been identified as a limited Phase II ESA due to its reactive nature, and particular focus on a specific contaminant spilled. The actions taken in those cases need to ensure that the contaminants are properly dealt with. A Phase II ESA, however, is an attempt to delineate potential contamination on a property based on historic information.



Phased environmental site assessments help understand the environmental condition of a property. Understanding the environmental risks associated with buying, selling, or insuring a property is something that can be done proactively, and that has the potential to not only save hundreds of thousands of dollars, but also better and protect the condition of our environment.

Mr. Oliver U. Gonzalez is President of OGEE Solutions Inc., an engineering firm specializing in environmental engineering and services. He is a professional engineer (P.Eng.) with a Civil and Environmental engineering background, and a Qualified Person (QP), as outlined by O.Reg.153/04. He holds the title of Certified Environmental Site Assessor (CESA) through Associated Environmental Site Assessors of Canada (AESAC) and has completed designations as a Certified Mould Investigator (CMI) and Certified Mould Remediator (CMR) through the National Association of Mold Professionals (NAMP). Mr. Gonzalez has completed hundreds of environmental assessments and remediations, specializing in the release of fuel-related contaminants onto the environment, assessment and remediation. For more information visit www.ogeesolutions.com



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