



President's Message – March 2014

OK, OK, I get it. It's Winter. It's Canada. But holy cow, can we PLEASE have Spring, now? Pretty Please? February brought us some wonderful GOLD moments (Yay, Canada – way to go at Sochi!), some COLD moments (minus 40C, anyone) and one weekend where we, as Canadians, realize how tough we are when the cold comes, because get the temperature up around zero, and we remember what warm weather feels like (yes, I did see people out in SHORTS that one weekend)

We have some amazing speakers coming up in the next few months as well as our Elections (April 24th), the joint Curling Bonspiel (April 4th) and our year end Golf Tournament (June 26th). The OIAA/IIC/IBAO Curling Bonspiel still requires sponsors, and the information for the event is contained in this bulletin. Please come out and join us! About Elections, we are looking for enthusiastic individuals who can bring something new to the table for our organization. Information on how to put your name into the race is also contained in this issue.

On a final note, I want to extend heartfelt Congratulations to our Secretary, Jennifer Brown, on the arrival of her lovely baby boy, Gideon Harley Brown, who arrived on Feb 27th – not like she planned this so she didn't have to take the minutes at the exec meeting! Hmmmm...

Go Spring!

Cyndy M. Craig, CIP CRM

KW-OIAA President

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



Schedule of K-W Chapter Monthly Meetings 2014

Date	Topic
March 27 th , 2014	Educational Meeting Extreme Weather Conditions
April 15 th , 2014	Deadline for Photo Contest
April 24 th , 2014	Elections and Fun Night
May 29 th , 2014	Educational Meeting
June 26 th , 2014	Annual Golf Tournament

Are you interested in joining the OIAA Board of Directors?

Now looking for new members for the 2014-2015 term!!

Positions open to Adjusters:

Director (two positions are available)
Secretary

Position open to Social Members:

Social Director

Position open to both Adjuster and Social Members:

Web Director

In order to put your name forward, you must be a member in good standing, dues must be paid up to date. If you are interested, please contact either Cyndy Craig or Laura Potts for more information.

ENTER TO WIN A LARGE BOTTLE OF GREY GOOSE!

WHAT!? BULLETIN NEWSLETTER PHOTO CONTEST

- **How?** Capture an icon of our Region's history on camera
- **Why?** The Bulletin cover is a traditionally historical monument or event
- **When?** Submissions **due April 15th 2014**; prize winner announced at the April Fun Night Meeting
- **Details:**
 1. Snap your photo
 2. Write a bio on its significance
 3. Submit both via email to stephanie.storer@ckrglobal.com or dstrigberger@millerthomson.com
- **What you win:**
 1. Large Bottle of Grey Goose
 2. Free year's Subscription to the **Bulletin**
 3. Your photo on the Cover for the 2014-2015 Bulletin year



Some examples to get you in the spirit:



In 2012 the Bulletin cover held an image of the West Montrose Covered Bridge (or “Kissing Bridge”) which, according to the Waterloo Region Official Tourism Website, is: “recognized as an historic site by Ontario's Archeological & Historic Sites Board” and is “Ontario's last remaining covered bridge” with a “198' span across the Grand River. Visitors come from all over the world to see and photograph this picturesque bridge.”



In 2013 the Bulletin will show Woodside House on its cover, the Birthplace of William Lyon MacKenzie King and, according to Parks Canada’s website (www.pc.gc.ca) was also “the boyhood home of William Lyon Mackenzie King, Canada's longest-serving Prime Minister. The house has been restored to the Victorian style of the 1890s. The importance of this residence is best reflected in King's own words: "The years that left the most abiding of all impressions and most in the way of family associations were those lived at Woodside."

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Complex Environmental Remediation Projects and Stakeholders

By Bob Caskanette, Caskanette Udall Consulting Engineers

Bob is an Environmental Scientist with over 8 years of experience in the field of environmental consulting and engineering.

These complex jobs come along from time to time. A fuel oil spill remediation has the potential to be a nightmare for insurance companies, homeowners, third parties and other stakeholders. We have run into several of these lemons over the years, and always find a way to make lemonade. Here is a brief overview of one such spill we recently handled.

An outside AST leaked at the side of a residential home in the suburbs. During our initial drilling and delineation work we quickly realized the soil in the area was coarse gravelly sand with lots of cobbles and boulders. Basically nothing to stop the fuel oil from vertically penetrating the soil until bedrock was encountered about 25-30 feet below ground surface. Fuel oil was able to penetrate to just above the bedrock layer. We knew right away, this would be a complex project. With property lines limiting access and excavation options and the general lack of room onsite to move equipment and supplies, options were limited. Rushing into projects without proper planning can result in a large pit with a machine stuck in the bottom and difficulty getting it out, or problems accessing all of the contaminated soil. A house may fall into the excavation if not structurally supported.

Our plan was to try to save the house and support it on temporary beams. We quickly realized based on the plume size and soil type, this was not an option. So the decision was made to disconnect all utility services and temporarily move the house. We got permission from a neighbour to use a portion of their unused driveway to sit a section of the house, freeing up additional room onsite. Soil excavation was then carefully completed in stages which stepped down the excavation to the bedrock layer. Multiple machines were required to excavate the soil up in lifts for eventual loading and disposal.

The coarse soil type made sloughing and cave in of the excavation sidewalls a major concern, so careful engineering had to be utilized to shore the excavation sidewalls and ensure onsite safety. Adhering to appropriate angles of repose, use of geotechnical fabric, and use of light weight concrete U-Fill during backfilling were some of the measures utilized to successfully complete the work. The excavation was quite large and the insured was concerned about some older trees on her property that she did not want to lose, so careful tactics had to be employed to meet her request. In the end, she was very satisfied with the extra care taken to address her needs and save her children's favourite play area.

The contaminated soil was removed to non-detect levels. The bedrock was exposed below the home and luckily the fuel oil never made it to the actual bedrock, but rather a compacted till layer just above which was acting as a vertical confining layer. We managed to keep all soil contamination onsite and get it removed prior to impacting a neighbouring third party.

Neighbours' third party concerns had to be handled professionally from the start. Keeping open dialogue and being courteous goes a long way. Working out appropriate start times each morning so there were no surprises, and keeping them in the loop as to schedules helped. The insured moved out for several months as work was completed but neighbours had to listen and see the excavators and dump trucks working on site. One neighbour had the insured house sitting in her driveway for several months, and was compensated for that allowance.

Most of you are aware of the TSSA and MOE, who of course were involved in this project like most other fuel oil spills in the province of Ontario. We kept them updated as to ongoing site progress along the way and provided them with professional reporting at the conclusion of the project for their review and eventual approval.

In this case we had other environmental stakeholders including The Grand River Conservation Authority (GRCA), who managed a creek in an adjacent park, and their management area extended into the insured lot. Regional and Municipal governments also had an interest. A Regional water well was located nearby and water production aquifers were below the site. This required additional work, included the drilling and installation of a groundwater monitoring well near the property in a municipal park, to satisfy all parties that no oil had contaminated the aquifer or the well.

Our structural engineers had to work through a series of permits from the municipality in order to satisfy those stakeholders.

Projects get very complex when a lot of stakeholders are involved. Hundreds of emails and phone calls take place in a relatively short period of time, which can be overwhelming for those lacking the necessary skill and experience. Project management takes a lot of time and patience on these projects.

If you want to sleep at night, take care in selecting your consultant and contractor so you can rely on them to handle the job and all the details properly. We are here to help and provide you with the professional and experienced consulting you require when faced with your next challenging project.

**Caskanette Udall
248-675 Queen St S
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800-92-5854**

3rd Annual Local Insurance Associations Charity Curling Bonspiel

Friday, April 4, 2014



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 come out and join us at Westmount Curling Club on Friday, April 4th. 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 4th.

Prize Sponsorships:

Donations of prizes to Melissa Snyder and Cyndy Craig
msnyder@lmicanada.com or ccraig@archinsurance.com

Location: Westmount Curling Club

Date: Friday April 4, 2014

Time: 9 am - Start. Select preferred draw time on form below.

Price: \$56 (includes hst). \$226 for a team of 4 (includes hst).

Note: Wear warm clothing and flat, indoor shoes

3rd Local Insurance Associations Charity Curling Bonspiel

First name		Last name	
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Team Member Names: _____ _____ _____ _____		Present Experience <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler <input type="checkbox"/> None <input type="checkbox"/> Curled 1-10 games <input type="checkbox"/> Curled 10-20 games <input type="checkbox"/> League Curler	



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3rd Annual Local Insurance Associations Charity Curling Bonspiel Celebration Event



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*Please send payment to the Insurance Institute – Conestoga Chapter Office (101-515 Riverbend Drive, Kitchener, ON N2K 3S3)

Sponsorship Opportunities

When: Friday, April 4th, 2014

Where: Westmount Curling Club

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

TITLE SPONSOR: \$1,250 – Covers ½ the cost of the combined lunch the day of the event.
(Morning Draw's Lunch or the Afternoon Draw's Lunch)

GOLD SPONSOR: \$500.00 – Covers the cost of complimentary drink ticket(s) for each attendee at lunch.

SILVER SPONSOR: \$350.00 – Covers the cost of the rink rental for the event and instruction

BRONZE SPONSOR: A cash donation of your choice that will be contributed to any miscellaneous expenses and/or the total proceeds from the event, to be donated to the United Way of Kitchener Waterloo & Area.

DOOR PRIZE: Door Prize of your choice.

THANK YOU FOR YOUR SUPPORT AND GENEROSITY!



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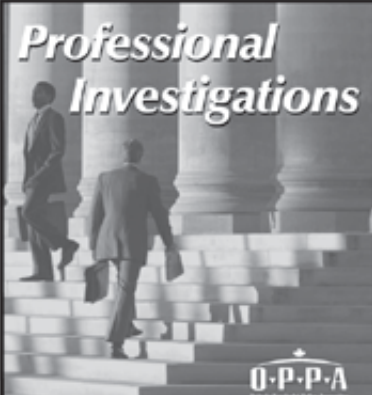
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Prevent Frost from Taking a Bite Out of Your Claim

Carl Lankin, B.A.Sc., M.A.Sc., P.Eng.

We are all familiar with the notion of frost as a delicate patterning of ice crystals on the inside of windows during winter months. Frost can have very serious and dramatic effects on structures. In this article, we give an introduction to the frost, its effects on the ground and surrounding structures.

So what is frost? Frost is simply the act or process of water freezing. When water reaches temperatures below 0°C ice crystals can begin to form as the liquid water undergoes a phase change and turns into ice (a solid). As we may remember from high school chemistry, freezing water is the exception to the rule that things contract or get smaller when cooled. Water tends to expand as it freezes and ice crystals propagate.



The ground around our homes, under our roads and around our offices contains water. The amount of water in the soil varies dramatically with the type of soil, location of the water table, ground water conditions, grading, drainage, surface conditions and the seasons as well as other factors. During freezing temperatures the water in these soils can freeze and expand. The expansion of the ice crystals forces apart the soil particles thereby causing the soil to expand as well. This expansion causes three main structural concerns:

1. Soils that were once compact have now been loosened/softened – During freezing temperatures the ground is quite solid as the ice serves to strengthen the affected soil; however, once the temperatures become milder the frost in the ground melts turning ice crystals into water. The gaps that were formed by the ice crystals are now filled with water and the soil

becomes soft and unable to withstand heavy loads. This is manifested each spring when new potholes appear on our roads. If a structure is constructed on frozen ground, the ground can settle during the milder temperatures and cause the structure to settle thereby damaging the foundation and upper structure.



2. Expansion of soils can create high vertical pressures and lift structures – If frost penetrates below an existing foundation, the expansion of the soil can cause the foundation to lift upwards. This uplift can severely damage the foundations and superstructure. Furthermore, the structure can sustain more damage once the frost thaws and the structure settles down below the original elevation of the footings due to the bearing material being softened by the frost penetration.

3. Expansion of soils can create high lateral pressures and push structures – Soils also expand laterally when the water in them freezes. These pressures can exceed 1500 psf. Foundations that do not have adequate drainage behind them can freeze and crack as a result of frost propagation. I've observed a foundation wall, with no basement, cracking due to poor drainage causing water to accumulate behind the wall and exerting excessive lateral pressures on the foundation wall when it froze.

A phenomenon resulting from frost that can also serve to lift structures is called adfreeze or frost jacking. Adfreeze is the phenomenon by which frost causes the surrounding soil to bond to a foundation and as the ice crystals propagate through the soils it expands vertically causing the affected foundation to raise or pull out of the ground. This is typically observed with fence posts or deck foundations that are either just posts embedded in the ground or concrete piers without footings. I've observed decks that have been placed on concrete piers against a home that rose due to adfreeze and lifted a portion of a home. This occurred since the deck was placed in contact with the underside of a door sill with no gap to permit some vertical movement. Better still, decks should be secured to the home along one side or have footings secured to the piers to minimise damage from adfreeze.

When you have a claim for a house fire during winter months, one of your concerns wouldn't typically be frost, but it should. Why? Well, as you are aware, after a significant house fire the heat to the house can be cut-off. As a result, the water is typically turned off and the lines drained to prevent the lines from bursting. One needs to also be mindful that if the water in the lines can freeze, then any water that happens to be behind the foundation walls or below the basement floor can also freeze. This freezing can cause serious damage to concrete floor slabs and foundation walls due to the expansive forces induced in the soil by frost. Temporary heat should be provided in the basement of a home to prevent the surrounding soils freezing and damaging the foundation and/or basement floor of the home.



It should also be noted that if you have a house fire that requires demolition of a home but not the foundations one also needs to be aware that the ground or main floor of the house also serves to laterally brace the foundation wall. So one should not only provide heat to prevent frost damage one also needs to leave the main floor in place (if feasible) or provide temporary lateral support; otherwise, the pressure from the surrounding soil could damage or cause the foundation walls to collapse.

With this introduction, you should be in a better position to prevent frost from taking a bite out of your claim.

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

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.

Mr. Carl 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.

For more information contact: Nancy Orr
insurance@rjburnside.com 519.271.5111 x655
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TORONTO DELEGATE REPORT

March 20, 2014 brings the annual **OIAA Curling Bonspiel** which will be held at the Richmond Hill Curling Club. April 9, 2014 at the Grand Hotel there will be a seminar and **Toronto OIAA Delegate Elections**. Two Toronto delegate positions are open for the term of August 2014 – 2016. If you are interested or know someone that is, please direct your inquiries to the nominating committee chair Steven Del Greco steven.delgreco@tdinsurance.com.

Without Prejudice Magazine is always looking for great articles so if you would like to become a published author please send me an article and I will submit it to the WP editorial team for consideration. We issue 2200 magazines 10 months of the year distributed throughout the province so the magazine is a great vehicle to share information and ideas. We are looking for articles approximately 2000-2500 words in length with content that is of interest to our readers and not self-promoting. A head shot and brief bio should also be provided prior to publishing.

Please take a moment to check out our **New Website** at www.oiaa.com and let us know what you think on Twitter @PresidentOIAA. You can also find the Ontario Insurance Adjusters Association on facebook and stay connected.

If you would like more information or have any questions or concerns please do not hesitate to contact me at Michael.mcleod@crawco.ca.

Regards,

Michael McLeod

Chapter Toronto Delegate

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SOCIAL CHIT CHAT

Unfortunately the extreme weather of this winter is being persistent but luckily the KW and surrounding insurance industry members have some upcoming events that are sure to help us forget about the cold (temporarily anyway).

On April 4th the joint association curling bonspiel is taking place at the Westmount Golf and Country Club. If you're looking for a fun-filled day don't wait to register your team to be sure to secure a spot! The KW-OIAA March dinner and networking meeting will be another one you won't want to miss. A speaker from IBC will be discussing (quite topically) severe weather and the insurance industry. For more information and to register visit our website www.kw-oiaa.ca.

Also don't forget to submit your photographs for our cover contest. If your photo is chosen it will be on the cover of our monthly bulletin for 2014-2015 and the winner will receive a bottle of grey goose and a free subscription!

Stay warm and I look forward to seeing you all at the March dinner and networking meeting.

Cheers,
Ashleigh Leon
Social Director

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Miller Thomson is proud to welcome Gabe Flatt to our Kitchener-Waterloo office, as an Associate in our Insurance group.

Gabe joins us from a prominent Bay Street insurance litigation firm in Toronto. He practices in the area of insurance litigation, including first and third party claims and disputes between insurers. Gabe has appeared as counsel at both private arbitration hearings and arbitration hearings at the Financial Services Commission of Ontario, as well as at private mediations. He has participated in numerous pre-hearings at FSCO and has appeared on motions at the Ontario Superior Court of Justice. He has experience in complicated matters including catastrophic impairment. In addition, he has significant experience in negotiating favourable settlements.

Gabriel J. Flatt

Associate

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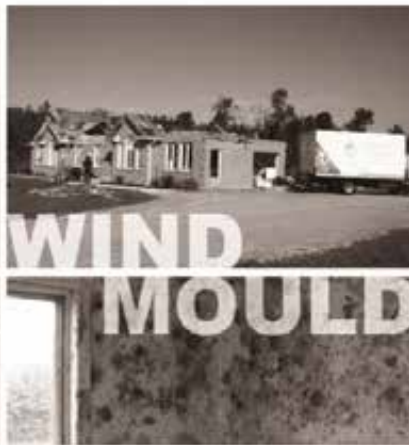
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Harassment or Känflikt

By [Chad Hanlon](#)

Whether it's he said, she said or any other combination thereof one of the major issues we face in today's workplace are personalities and the clashes they bring appearing at all levels of the hierarchy. When investigating these issues the determination that needs to be made is where this issue can be categorized. Is it a common conflict among workers, or could it be considered that all too commonly used category of harassment? The latter term will perk ears quicker and become a higher priority in the human resource triage much like claiming a head injury in the emergency room. Which may explain why it is so commonly misused and as a result the system so commonly abused.

Having that said, the question remains. How do we determine which way to lean when it comes to dealing with these complaints? Our answer will only become clear when we first have a clear understanding in the differences of the two.

A [conflict](#) can be defined in many ways depending on what we are discussing; however, the fundamental definition is as simple as, *a difference that prevents agreement*. If we put it in these terms we can almost see it as a competition or struggle for power, a tug of war of sorts. When we were kids we would often hear our mediators' attempt to resolve issues by a diagnosis as simple as "oh they're just jealous" or "you just both have strong personalities". As simple as that sounds, quite often it is accurate.

When we look to hire someone to better our team we quite often seek out the person that can make their own decisions and work independently, more importantly someone who is motivated to better the organization. Nothing motivates more than a little healthy competition, whether that represents two people in line for the same promotion or two people trying to better each other's piece count. Either way the organization will benefit from the competition. When the contest becomes unhealthy and there is a clear winner in sight is when the problems start to occur. Quite often the person in line for the silver will be the one to lodge the complaint and claim 'the head injury'.

The definition of harassment is much more aggressive in nature and very one sided. Aggressive pressure or intimidation, the act of systematic and/or continued unwanted and annoying actions of one party or a group, including threats and demands. The intent is to cause harm and force the victim into acting in ways against their choice. The purposes may vary, including racial prejudice, personal malice, or an attempt to force someone to quit a job. Quite often an alliance is formed and there is a reputation or past experience that will cause the victim to legitimately feel threatened by the bully.

We have been involved in numerous [workplace investigations](#) when it comes to these types of complaints, through numerous interviews and evidence gathering roughly 90% end up being determined as conflicts with chronic issues that surface exposing a pretty clear picture in the end. **The problem is we only hear about the 10% we let slip by and the catastrophic results that make the front pages.**

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Please join us on March 27, 2014 for the KW OIAA dinner meeting at Golf's Steakhouse with special guest speaker Doug DeRabbie of the IBC. As Director, Government Relations, Ontario, Doug provides strategic advice on government and political matters and liaises frequently with elected officials on provincial and municipal levels. Doug will be addressing the timely and relevant topic of Severe Weather.

With over eight years of experience working in both federal and provincial levels of government, Doug has held key positions with Infrastructure Ontario (IO) and Natural Resources Canada. He has worked for a member of Parliament as well as a number of industry associations including the Council of Ontario Construction Associations as Vice-President, Policy and Government Relations and the Retail Council of Canada as National Manager of Environment and Director of Government Relations, Ontario.

DATE: March 27, 2013 5:30pm

LOCATION: Golf's Steakhouse 598 Lancaster Street West Kitchener, ON

PRICE: \$35 (hst incl).

You can register online at www.kw-oiaa.ca. If you have any questions or concerns please contact Michael.mcleod@crawco.ca or Mark.hale@crawco.ca.

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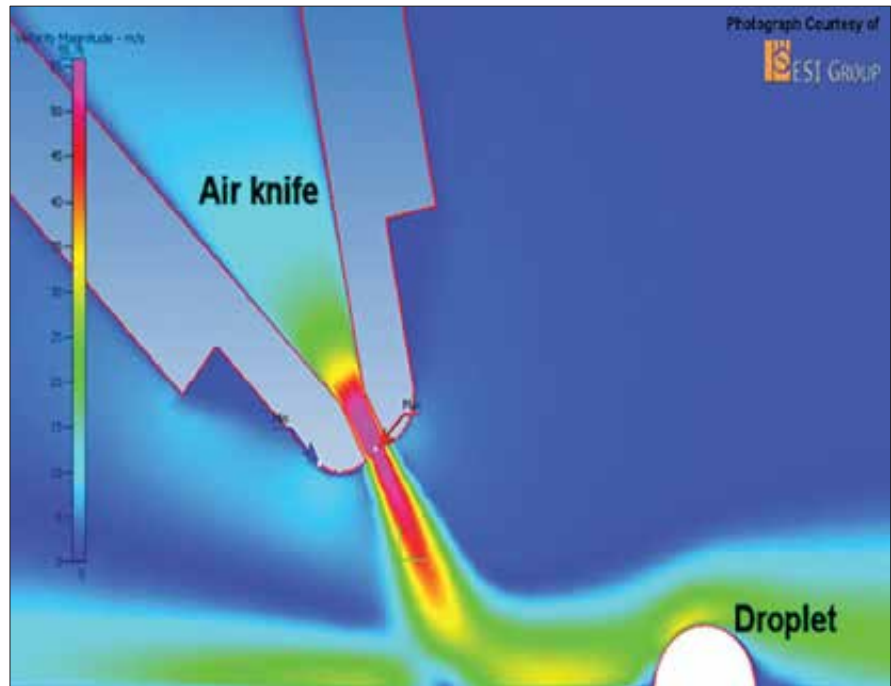
By Marshall Oliver

It's not that many years ago that restoration technology consisted of air movers and refrigerant dehumidifiers. If you lived in one of the Prairie provinces it was just air movers (we called them blowers back then). No matter what kind of disaster had just occurred, restorers would aim a blower in the appropriate general direction and recovery was at hand.

Today, amidst a sea of technology, our industry has changed vastly in the ways we respond to property damage. This change is due in part to the extremely wide range of materials being used in residential and commercial construction, and in part to countless advances in technology, providing previously unthought-of ways and means of collecting and removing moisture or contaminants.

If this article had been written five years ago, I would have expounded on the virtues of thermal vacuum freeze drying or molecular sieve technology and their applications to the restoration industry. However, in 60 short months we have been bombarded again and again with more than could have been imagined in the way of new technological advances. 'Composite' used to be a term used in mathematics. Now it's used to describe the makeup of most interior finishing materials.

Following the 9-11 disaster, the U.S. postal service utilized gamma radiation extensively to defeat anthrax; in the process it cooked a lot of paper due to the application of excessive heat. Today we know that dose mapping is a critical process in preventing heat buildup during radiation to kill bacteria in paper and that electron-beam radiation is even more successful, as it does not cause a change in temperature while effectively



Air knives are used in a cleaning process known as restorative ionised air wash.

sterilizing everything that moves.

Five years ago some of us were hesitant to eat microwave popcorn. These days the same technology is utilized around the globe in restorative drying applications. There was a time when we debated the number of days it would take to dry a building as we repositioned dehumidifiers to best advantage. Now we carry on the same debate while repositioning air knives and injection systems. From adsorption drying techniques used in electronics recovery to explosive carbon dioxide blasting techniques used in delicate abrasive cleaning, it's hard to believe how much new technology is at our disposal.

Of course, technology is not without its challenges. We used to fret over hidden cavities that might have filled with water from the sprinkler system following a fire. We now worry about microwaving a structure excessively, overheating the metal fasteners and setting the building on fire again.

Some would say all this technology is out

of control, manipulating our lives while we wait for systems to re-boot. Others would rise to the challenge with non-destructive moisture probe and wireless data logger in hand.

Where does it all lead? In my view, we are almost there. I believe the significant technological breakthroughs will be in the form of building materials that do not support mould growth and will not absorb moisture, which means they will not swell, change shape or discolour. Will we be out of a job? I don't think so. We'll be debating whether to utilize nuclear accelerators or passive protons to get our customers back in business.

Marshall Oliver, director of technical services for Belfor Canada, leads the firm's research and development programs and teaches technical seminars on such topics as disaster recovery planning, restorative cleaning procedures, paper restoration and forensic property damage analysis. He can be reached at marshall@belforcanada.ca. IW

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Authored by:
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The Supreme Court of Canada recently released the seminal decision interpreting the new summary judgment motion rules in Ontario. Following the release of the Osborne Report, Ontario amended the *Rules of Civil Procedure* in 2010 to increase access to justice. Importantly, the powers of a motion judge to determine whether there was a genuine issue requiring a trial were increased.

Prior to the amendments to the *Rules*, litigants faced an extremely high burden of proof to obtain summary judgment, particularly in matters involving credibility. Courts were often disinclined to make a ruling on matters involving credibility of witnesses and would refer the matter to the trial judge. This made summary judgment an ineffective tool in deciding a case when considering the principles of proportionality.

The New Summary Judgment Rule

Rule 20.04(2.1) provides the a judge hearing a summary judgment motion with the powers to weigh evidence, evaluate credibility of a deponent and draw any reasonable inference from the evidence. The scope of this new rule has been contentious since the changes to the *Rules*.

Previous direction was provided in the case of *Combined Air Mechanical Services v. Flesch* (2012), 108 O.R. (3d) 1. The Court of Appeal stated that summary judgment should only be granted if the “full appreciation” of the evidence and issues that in dispute can be achieved by way of summary judgment. Full appreciation would only be possible if the court could accurately assess the evidence and draw inferences from that evidence without actually hearing live witnesses.

The Supreme Court of Canada considered the Court of Appeal's decision, and determined that the threshold for granting summary judgment motions was too high when taking into account the principles of proportionality. It held that a motions judge should not be held to the same evidentiary standard as a trial judge, but should be able to grant summary judgment as long as a determination can be made fairly based on the available evidence.

Roadmap for a Summary Judgment Motion

The Supreme Court of Canada provided the general approach to be taken by courts when evaluating whether summary judgment should be granted. First, the court must determine whether there is a genuine issue requiring trial based only on the evidence before it, without using the new fact-finding powers. If there appears to be a genuine issue requiring a trial, the court should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Use of these powers will not be against the interest

of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality.

Further Cost Effectiveness

In cases that were not “guaranteed wins”, parties were often hesitant to bring a summary judgment motion, as a failed motion could be costly and time consuming. Rule 20.05 currently allows a judge to use the insight gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case and the effort expended on the failed motion.

Increased Court Participation

In the interest of avoiding lengthy and costly trials, the Supreme Court agreed with the Court of Appeal that judges can hear extensive oral evidence in matters that so require. Combined with the powers provided in Rule 20.04(2.1), the Supreme Court appears to be granting summary judgment motions judges with similar powers to that of a trial judge, thereby increasing accessibility to justice through summary judgment.

Increased Deference

The bar for appeal of a summary judgment decision was raised by the Supreme Court in this decision. Absent an error of law, the Supreme Court stated that an appellate court should defer to the motion judge’s decision and should not overturn it absent palpable and overriding error.

Why Does This Matter To Us?

The Supreme Court of Canada has greatly broadened the scope of a court’s power to grant summary judgment. Courts are now able to grant summary judgment with less evidence adduced and in a much more expeditious and cost effective manner than proceeding to trial. Summary judgment motions now appear to be an accessible judicial tool when dealing with your files. When the evidence is clearly in favour of the defendant, summary judgment motions should be considered as a useful tool to have a matter decided and disposed. Make sure to speak to your counsel about whether summary judgment is the best course of action in any of your matters.

Gabriel (Gabe) Flatt is an associate in the Waterloo office of Miller Thomson. He practices in the area of insurance litigation, including first and third party claims and disputes between insurers. He has experience in complicated matters including catastrophic impairment. In addition, he has significant experience in negotiating favourable settlements

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What is Appraisal?

Appraisal is a tool to resolve disputes over value in property insurance claims.

The courts have consistently identified two overriding purposes of the Appraisal process, (1) to encourage a quick settlement of the policyholder's claim; and (2) To expedite the trial process by providing the court with a valuation based on the expertise of an appraiser or umpire. It is typically quicker and less costly to determine value using the appraisal process than to litigate and have a court decide on value.

Where is the Right to Appraisal Found?

Property insurance policies in Ontario under the Insurance Act, Part IV, Fire Insurance, contain a Statutory condition which allows either the insured or insurer to elect Appraisal under the Insurance Act.

Appraisal

11. In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefore is made in writing and until after proof of loss has been delivered.

Is the Finding of the Appraisal Tribunal Final?

Courts have found that provided the tribunal has acted properly and within its authority, its findings as to value is final.

However, since there is no allegation of misconduct, the award is final and binding and the disagreement does not disclose a cause of action... The Court is not able, unless wrongdoing can be proven, to go behind the considerations of the appraisers. (*Falconer v. Sun Alliance Insurance Company* 1994)

The insured is still, of course, able to pursue other issues in the courts.

How does the Insurance Act govern the Process?

The Insurance Act provides minimal direction about the process.

Contracts providing for appraisals

[128. \(1\)](#) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer. R.S.O. 1990, c. I.8, s. 128 (1).

Appraisers, appointment

[\(2\)](#) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire. R.S.O. 1990, c. I.8, s. 128 (2).

Appraisers, duties

[\(3\)](#) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the findings in writing of any two determines the matters. R.S.O. 1990, c. I.8, s. 128 (3).

Costs

[\(4\)](#) Each party to the appraisal shall pay the appraiser appointed by the party and shall bear equally the expense of the appraisal and the umpire. R.S.O. 1990, c. I.8, s. 128 (4).

Appointment by judge

[\(5\)](#) Where,

- (a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;
- (b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or
- (c) an appraiser or umpire refuses to act or is incapable of acting or dies, a judge of the Superior Court of Justice may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer. R.S.O. 1990, c. I.8, s. 128 (5); 2006, c. 19, Sched. C, s. 1 (1).

Can other Matters be Decided at Appraisal?

The Insurance Act puts strict limits on the authority of the tribunal. It can only decide the value of

- The property insured
- The property saved
- The amount of loss

However it is up to the parties to agree that other matters can be decided by the tribunal. In *B.C Ins. Corp. v. Dawg Hldg. Ltd.* 1988 the court found that while the Appraisal provisions of the Insurance Act did not permit a business interruption loss to be determined at appraisal, this could be achieved by agreement between the parties.

.....there was no statutory authority for appraisal of the respondent's business interruption loss. In authorizing the umpire and appraisers to undertake this task, the insurer and the insured were making a private agreement or contract to confer arbitral power for the resolution of this aspect of the dispute, in addition to the statutory powers the appraisers had in respect of property losses.

How does the Process Work?

The advantage and disadvantage of Appraisal is the absence of any guidance or detailed process in the Insurance Act. Courts have held for instance that there is no requirement for the tribunal to hold a meeting or afford the parties a hearing (*Krofchick et al. v Provincial Insurance Co. Ltd.* 1978). However some generally accepted and appropriate procedures have been developed.

First Step: Notice

Either the insured or the policyholder may instigate Appraisal by serving, in writing, notice on the other party. It is however a condition precedent that a Proof of Loss has been filed and there is a disagreement between the parties over valuation. Typically the party serving the notice identifies who has been appointed to act as its appraiser.

Second Step: Response

The party served with notice of Appraisal must appoint its own appraiser within seven days. Should they fail to do so, the instigating party can ask that a court appoint an appraiser to act for them.

Third Step: The Umpire

Typically the appraisers appoint an umpire as their first act. Courts have said this is not absolutely required at the outset as the appraisers need only refer matters to the umpire that they cannot agree upon. Where appraisers agreed to a value without the need to appoint an umpire the court refused to declare the process invalid (*McDonald Metals (1983) Ltd. v. Saskatchewan Government Insurance* 2008). However it would be an unusual Appraisal where the appraisers were able to resolve all matters themselves so it makes sense to appoint the umpire right away. Where the appraisers are unable to agree on an umpire, application can be made to a judge to appoint one. Both sides would provide arguments in favour of their choices.

Fourth Step: The Appraisal Determination

No format or process is stipulated by the Insurance Act. As Lax J, observed in *Seed v. ING Halifax Insurance* 2005:

Courts have afforded substantial deference to an appraisal under the Insurance Act and the appraisal process, which is not subject to the provisions of the Statutory Powers Act. Unless there is proof of misconduct or that the appraisers or Umpire exceeded their jurisdiction, courts have been reluctant to interfere.

However to ensure that a finding by the tribunal is not challenged or set aside for misconduct, for exceeding its authority or lack of natural justice, certain commonly accepted practices have developed.

The umpire will typically agree with the appraisers on the nature of the process and timeline. This will include determining the matters that are in disagreement, submission of written briefs, the exchange of those briefs between appraisers and the date of a meeting to discuss and agree on the values they have been charged with determining.

As discussed more fully below the process can be both flexible and innovative within the bounds of natural justice.

Fifth Step: Documenting the Award

At the conclusion of the Appraisal hearing an Appraisal Award is set out in writing and signed by at least two of the participants. Assuming there is no allegation of misconduct by the tribunal or any of its members, no challenge that it exceeded its authority and no argument that it lacked natural justice that puts an end to the matter as far as value is concerned.

Challenging the Findings of the Appraisal Tribunal

Courts have held that the findings of the tribunal are only subject to challenge in very limited circumstances. Broadly these reasons have been found to be exceeding the authority of the tribunal, a breach of natural justice or conduct amounting to fraud, collusion or bias.

Some disqualifying actions may at first sight seem to be surprising such as including Overhead and Profit and GST in a building related ACV award (*Peace Hills General Insurance Company v. Doolaege* 2005), or deciding who should have the salvage. In both cases it was decided that this was beyond the limited mandate of the tribunal in fixing values and instead had decided how the policy should respond which was a legal matter reserved for the court to decide.

As the *Springer et al. v. American Home Assurance Company* November 28, 2006, case characterized it:

They can ask “how much?” in respect of a claim, but not “whether?”

The Ontario Court of Appeal however refused to invalidate an award when a tribunal decided that ACV could be determined on the basis of market value (*Re Barrett et al. and Elite Insurance Co.* 1987 et al).

In *O'Brien v. Non-Marine Underwriters, Lloyd's London*, 1991 CanLII 5980 (AB QB) approved the finding by Bayada C.J.S in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.*, 85 Sask. R. 54, 71 D.L.R (4th) 681, [1990] I.L.R 1-2648 (C.A) the court had this finding:

.....the validity of an appraisal is subject to challenge on the ground that the umpire (or appraisers, as the case may be) had no power (*i.e.*, jurisdiction) to do what he (or they) did. Fraud, collusion, bias or disqualification by reason of partiality will deprive him of that power. It is elementary that the same result will follow where the umpire does something which the empowering statute under which he is purporting to act does not empower him to do.

The court in *O'Brien* when considering the request by the policyholder to set aside the finding of the tribunal said:

In *Shinkaruk* the court held that going beyond the valuation of the loss to make a disposition of the entire controversy between the parties, goes beyond the jurisdiction of the umpire and removes the binding nature of the umpire's decision.

[14] The Saskatchewan Court of Appeal cases indicate that the state of the law in Saskatchewan is reasonably settled in reference to appraiser's authority. The decision resulting from the appraisal process is *prima facie* binding unless there is proof to indicate the appraisers or umpire exceeded their jurisdiction. An appraiser or umpire may exceed their jurisdiction through fraud, collusion, bias, partiality or defects in the appraisal process itself. What is not clear from the Saskatchewan cases is whether an unreasonable valuation robs the appraiser or umpire of jurisdiction.

Why should the courts be put to the effort of determining value, when there are no specific allegations why the appraisal procedure did not result in a proper valuation of the loss?

[17] The Saskatchewan authorities address many of the questions arising from *L. & A. Holdings*, supra. An appraisal, performed in accordance with the contractual provisions which incorporate s. 204 of the *Insurance Act*, is a final and binding determination of the value of the loss. The binding nature of the valuation may be successfully challenged by a party establishing fraud, collusion, bias or disqualification by way of interest or lack of impartiality.

[18] For the purposes of this application I need not decide whether an unreasonable valuation will result in a non-binding appraisal process. The O'Briens have not established that the present appraisal process was unreasonable.

[19] An examination of the purpose of the appraisal process supports the conclusion that appraisal is a final and binding valuation.

In a later case, *Peace Hills General Insurance Company v. Doolaege* 2005, an Alberta court decided it had powers to review by applying a pragmatic and functional approach of correctness this arising from a decision of the Supreme Court (*Pushpanathan v. Canada*). It then went on and noted another Supreme Court decision (*Kane v. University of British Columbia* 1980) dealing with procedural fairness applicable to a tribunal.

A tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views;

Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of another; and

The court will not enquire whether the evidence did work to the prejudice of one of the parties; it is sufficient that it might have done so. (*emphasis added*)

It decided there had not been procedural fairness and set aside the finding of the tribunal.

In *Dawg* the court held that when the umpire as part of the valuation determined who should receive the salvage he exceeded his powers. "*Since the statutory conditions do not include a power to determine the disposition of salvage, I conclude that the umpire exceeded his jurisdiction in purporting to do so*". The court did not set aside the whole appraisal finding but modified the award.

An insured argued that a tribunal had made a reviewable error in failing to give reasons for the award, which read as follows:

We, the undersigned members of the Appraisal Tribunal, concerning the insurance claim arising out of the above captioned matter, after careful consideration of the documentation and submissions presented on behalf of the Assureds and the Insurer conclude that with regard to the Temporary Repair Building claim, the Assured's loss amounts to \$58,142.76

In *Springer et al. v. American Home*, the court found that the Insurance Act imposed an obligation to reduce the "finding" to writing but did not create an obligation to give detailed reasons and concluded:

From a content point of view, the award satisfied the minimum requirements for appraisers and umpires under Section 128(3) of the *Insurance Act*.

In the same case it was also argued that the tribunal had acted in excess of its jurisdiction by adding in the final sentence of its award the following:

This figure does not include any amount for Additional Living Expenses as we have concluded that none are warranted to effect the temporary repairs to the ballroom.

The court concluded that the language used was not clear. It was concerned that had the tribunal determined that the residence was uninhabitable and that was the reason that no expenses were 'warranted' then the tribunal had exceeded its jurisdiction. Whether the house was uninhabitable would be a matter for the courts to decide. In the end result, the court was not satisfied the Umpire exceeded his authority.

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