IAA
Kitchener-Waterloo

Team Canada Brings Home the GOLD!!

Team Canada celebrates after defeating Russia in the gold medal game at the World Junior Hockey Championships. (Ryan Remiorz/CP)

January 2020

PRESIDENT'S MESSAGE
JANUARY 2020

Ah January. The start of a new year, and a new decade! I hope everyone had a relaxing, fun filled holiday season! The New Year allows for some to start fresh and make some resolutions. About 4000 years ago, the ancient Babylonians are reported to be the first to make New Year's Resolutions and hold celebrations to honor the new year. Their New Year was held in March when they planted their crops for the year. They would make promises to their gods. If they kept their promises, they thought their gods would place favour on them for the upcoming year. Whether you are hoping to get more sleep, spend more time with family, eat healthier or travel more, hopefully you will be able to see your resolution come to fruition.

I love living in Canada, but winter is not my favorite season, with the cold, the shorter days, did I mention the cold?! Once winter arrives, I long for summer and start looking for the best beach vacation deals. Whether you crave the brisk winter air, or retreat into your house to binge watch Netflix, I hope you make time to join us at our upcoming KW-OIAA events!

On January 30, 2020 at Golf's Steak House please join us for our annual Chili Cookoff. Make your best chili and try and defeat our current champions! Then on February 27th, come out for dynamic speaker Kadey Schultz and her presentation on the Me Too Movement.

Thank you,
Jaime Renner
President of K-W OIAA


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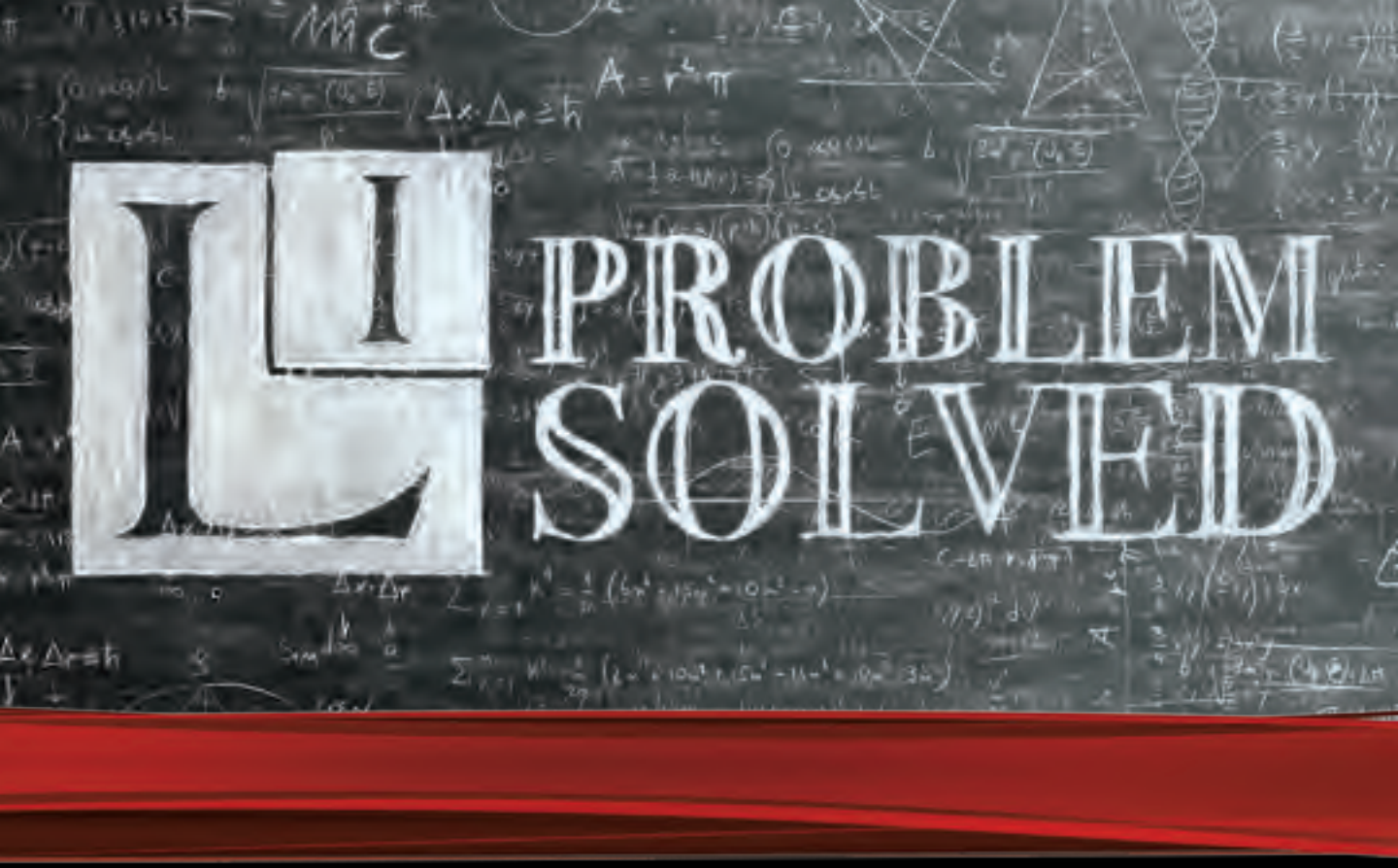

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EVENTS SCHEDULE 2019-2020

January 30, 2020	**Chili Cook-Off** **Manish Patel & Lisa Dobson** Challenge the winners from the 2019 Chili Cook-off by bringing your best chili, and your trivia knowledge.
February 27, 2020	**Educational Seminar - #METOO Discussion with Kadey Schultz** **Carrie Keogh, Matthew Bowker & Kayla Helmond**
March 26, 2020	**Educational Seminar – Environmental Remediation with Stantec** **David Bushell & Stephanie Klages**
April 30, 2020	**Election night & Battle of the Bands** **Jennifer Brown, Carrie Keogh & Matthew Bowker** Election for positions available on the board, Members wishing to join the board must be in good standing with the K-W OIAA. Any member of the OIAA with a Band is encouraged to sign up to play and see if you can beat the two-time defending champs the Haz-Mats
May 28, 2020	**Educational Seminar – Property Loss Prevention** **Jeff Cronk & Randy Henderson**
June 24, 2020	**John McHugh Memorial Golf Tournament** **Ariss Valley Golf & Country Club** **Jaime Renner & Ellie Celestine**

All events will be held at Golf's Steak House and Seafood unless otherwise noted.

OIAA
Kitchener-Waterloo

Thursday, January 30, 2020
5:30 p.m.

Chili Cook-Off

A flaming HOT time

Golf's Steakhouse Ballroom

598 Lancaster St W,
Kitchener,
ON N2K 1M3

RSVP by Friday, January 24, 2020 on the K-W OIAA web site https://www.kw-oiaa.ca/events or e-mail:
Lisa Dobson – lisa_dobson@cooperators.ca or
Manish Patel – mpatel@paladinrisksolutions.com

Join us for fun, food and prizes at our annual K-W OIAA Chili cook-off!

Will you be able to take home the People's Choice Award or Critic's Choice? Wishing all of our chili chefs the best of luck as you plan on how to bring home the hardware!

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SOCIAL CHIT CHAT

January 2020

Welcome everyone to 2020 and the next decade of your lives!

You'll see that the next few months are jam-packed with entertaining and educational events – put them in your calendar now so you don't miss them! This publication is also one of the incredible chapter initiatives that makes us different from virtually every other local OIAA chapter. It's a great opportunity for you to advertise but also to share your experiences and knowledge with everyone else by writing and submitting an article…or two ☺.

While I'm on my soap box, I'll also make a plea for you to continue the "Christmas or Holiday Spirit" throughout the coming year. Isn't it wonderful how relaxed, cheerful and friendly most people are around the holidays?…let's keep it going at least until Spring.

Matt shared an awesome recipe in last month's issue and while I can't think of anything to rival that, I would suggest that a large plate of homemade nachos or a home-styled charcuterie board along with a refreshment or two on a wintery weekend afternoon in front of a fire or good movie will go a long way to putting a smile on your face and contentment in your heart.

Hope to see you soon,

Randy

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PROVINCIAL DELEGATE REPORT

"The new year stands before us, like a chapter in a book waiting to be written."– Melody Beattie.

In the past I would always set a new year's resolution. This year, there will be no resolutions in my world, not because I don't have things I want to work on but because it just adds stress to my life. Most of you are familiar enough with me to know that I have very high expectations of myself, I can be rather hard on myself. So in 2020, there are no resolutions, just trying to be a better person then I was yesterday.

2020 events will kick off with the annual claims conference at the Metro Convention Center on January 22, 2019. We will welcome over 130 Industry Partners and host 9 different educational seminars covering all lines of business. This event is a FREE event for Insurance Professionals that meet the following criteria:

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- Sickness & Health care insurer adjudicators
- Risk managers
- Re-insurers
- Staff of the Financial Services Commission of Ontario
- Insurance Bureau of Canada
- Insurance Institute of Ontario/Canada

Please register here: https://www.microspec.com/reg/OIAA2020/

Regards,
Jennifer Brown
K-W OIAA Chapter, Provincial Delegate

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CLARITY IN CLAIMS AGAINST ADJUSTERS IN THEIR PERSONAL CAPACITY

Article by Helen D.K. Friedman

A recent decision of Justice Perell (*Burns v. RBC Life Insurance Co.*, 2019 ONSC 6977) provides some welcome clarity on the issues of whether insurance adjusters owe a duty of good faith to an insured independent of any duty owed by the insurer and the personal liability of insurance adjusters. Although claims of this nature have diminished markedly in recent times, they remain a concern and a vexing issue for claims adjusters (and the insurers who employ them).

In *Burns*, the plaintiff sued RBC Life ("RBC") and two of its employees (the "adjusters"), who administered the disability claim, for a declaration of entitlement under the policy, payment of long-term disability benefits, special damages of $100,000.00 and punitive damages of $1 million. The Statement of Claim pleaded RBC was vicariously liable for the acts or omissions of its employees. One adjuster advised Burns his benefits were terminated after five years of payment, the other denied his internal appeal of termination. The pleadings alleged all defendants (RBC and the adjusters) owed Burns a duty of utmost good faith. The collective conduct of the defendants was alleged to amount to bad faith, negligence and/or negligent misrepresentation.

The adjusters brought a motion to strike the claims against them under Rule 21. Justice Perell summarized the threshold for success of such a motion: On a pleadings motion, there is generally no evidence beyond the pleading and for the purpose of the motion, the court accepts the pleaded allegations of fact as proven, subject to some very limited exceptions. The moving party must show that it is plain, obvious and beyond doubt that the plaintiff cannot succeed with the claim. Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike should be exercised only in the clearest of cases.

The allegations in *Burns*' Statement of Claim are set out in great detail in the decision. With two limited exceptions, the allegations against the adjusters are grouped with those against RBC, collectively as the "defendants". There were some 38 allegations against the defendants collectively with additional allegations against RBC only. It cannot be said that the allegations were bald-faced or boilerplate pleadings as they contain a reasonable degree of particularity.

In addressing the law with regard to personal liability of employees, officers and directors of corporations, Justice Perell acknowledged that a corporation must act through human agency. The acts of those employed by a corporation or acting on behalf of an corporation are a manifestation of the acts of the corporation. A corporation acts, or omits to act, through its employees and its agents. That, however, is not sufficient to establish personal liability on these individuals. Rather, in order for employees to be liable in tort for conduct in the course of their employment, the Court of Appeal has found[1] their actions must be in and of themselves tortious or they must exhibit a separate identity or interest from those of the employer. In other words, the actions have to be the actions of the employee personally, separate and apart from those of their employer. An employee who carries on discussions and makes decisions related to the business carried on by the corporation, acting within the scope of their authority as an agent for the corporation, is simply causing the corporation itself to act and form legal relationships. Those actions are not actions by individuals in their personal capacity and on their own behalf. As a rule of pleading, in order to properly plead a case of personal liability against an employee, the plaintiff must plead a specific cause of action against that individual in their personal capacity.

In order to survive a motion to strike, there must be sufficient particulars pleaded to disclose a basis for attaching liability to the adjusters in their personal capacity. The material facts giving rise to personal liability must be

specifically pleaded because an employee is otherwise not personally liable for the acts of their employer unless their acts manifest a separate identity or interest from the employer and the actions of that employee are in and of themselves tortious conduct.

Justice Perell found there were no material facts pleaded which would support a claim against the employees personally and so struck those claims.

Justice Perell helpfully distinguished *Sataur v. Starbucks Coffee Canada Inc.*,[2] in which the Court of Appeal (in reversing the motion judge's decision to dismiss against two individually named employees) confirmed there is no general rule that an employee acting in the course of their employment cannot be sued personally for breaching a duty of care owed to a customer. In other words, an employer's vicarious liability does not shield employees from their own tortious conduct. Justice Perell found the adjusters were not relying on vicarious liability as a shield, rather they were relying on Court of Appeal authority which permitted the claims against them to be struck unless their acts manifested a separate identity or interest from the employer and their actions were of themselves tortious. The pleadings as against the adjusters, one in denying the disability claim and the other in dismissing an internal appeal, could attract vicarious liability on RBC, but those actions would not expose the adjusters to personal liability. According to Justice Perell, the allegations in the Statement of Claim simply did not manifest a separate identity or interest of the adjusters and the allegations were not of tortious acts of the adjusters in their personal capacity.

In perhaps the most helpful portion of the decision, Justice Perell addressed the proposition that individual adjusters owe a duty of good faith to the insured and can be found liable for such a breach. This proposition emanated from the contentious decision of Justice Cavarzan in *Spiers v. Zurich*.[3] Justice Perell noted *Spiers* was rejected in *Burke v. Buss*,[4] a decision of Justice Jennings who specifically found Justice Cavarzan provided no authority for finding an independent duty of good faith on adjusters. Justice Jennings agreed that an employee can be found liable in tort but opined the breach of duty of good faith arose from a contract between the insurer and the insured and was not one for which an employee of the insurer could be sued. To this, Justice Perell added *Spiers* did not reference the "strong line of authority" from the Court of Appeal which delineates how and when an employee can be individually liable for their tortious conduct when engaged in the activities of the employer. Justice Perell noted he was not bound by *Spiers* and further stated, in his opinion, *Spiers* was wrongly decided on the issue of liability of employees. This strong wording will no doubt bring comfort and hopefully closure to the issue despite the absence of appellate rulings. Notably, Justice Jennings had expressed hope the issue would be considered by the Divisional Court.

In sum, the decision in *Burns* is helpful in providing clarity on the issue of personal liability of employed adjusters, finding *Spiers* to be wrongly decided. The decision will hopefully put an end to claims against insurance adjusters in their personal capacity (which generally add nothing but time and cost and detract from the real issues). There still may be the odd exceptional case where pleadings will allege sufficient material facts to generate liability of an adjuster in their personal capacity, sufficient to show an adjuster was manifesting an identity separate to the insurer, but those should be extremely rare.

Furthermore, in the context of accident benefits disputes, the Court of Appeal's decision in *Stegenga v. Economical*[5] held claims against the insurer, including for bad faith/punitive damages, were subsumed in section 280 of the *Insurance Act*, which confers exclusive jurisdiction on the LAT to resolve disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of those benefits. Disputes concerning the amount of benefits, the timeliness of payment of benefits, and the conduct and process of the insurer in providing benefits (the handling or administration of the claim) are disputes in respect of a person's entitlement to benefits or the amount of benefits which have now been taken away from the courts. As such, claims for bad faith are claims which flow from the denial of benefits and are thus within the exclusive jurisdiction of the LAT, effectively barring further court actions for bad faith.

Although not dealt with by the Court of Appeal in *Stegenga*, any claims alleged against individual adjusters would also be subsumed in the dispute resolution sections and subject to the LAT, where the parties are the insured person and the insurer.

The combination of *Burns* and *Stegenga* significantly narrow the scope of individual adjuster liability and any perceived benefit in pursuing these type of claims.

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[1] *Lobo v. Carleton University*, 2012 ONCA 498; *Tran v. University of Western Ontario*, 2014 ONSC 617.

[2] *Sataur (Litigation Guardian of) v. Starbucks Coffee Canada Inc.*, 2017 ONCA 1017.

[3] *Spiers v. Zurich* (1999), 24 O.R. (3d) 726 (Gen. Div.), leave to appeal to Div. Ct. denied [1999], O.J. No. 4912 (Div. Ct.).

[4] *Burke v. Buss*, 2002 CarswellOnt 4381 (ONSC).

[5] *Stegenga v. Economical*, 2019 ONCA 615.

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Social Engineering: Things Aren't Always What They Seem

By: Stas Bodrov and Laura Emmett

In many respects, technological advances have eased our professional and personal lives. However, these advances come with a host of new risk exposures. Most recently, there has been an increase in social engineering attacks.

Although this sounds complex (and is usually very difficult to pull off), we likely encounter social engineering scams on a fairly regular basis. While the days of the "foreign prince" scams have passed, they have been replaced by more targeted campaigns resulting in large losses for businesses. These types of campaigns involve gathering specific information about a target who has access to funds or delicate information. Using that information, the nefarious actor can tailor emails, messages, and even phone calls to manipulate you into willingly making a transaction.

In November, Waterloo Brewing announced that they were the victim of a targeted social engineering fraud that resulted in a $2.1 million dollar loss. The company explained that the funds were lost when a malicious third party impersonated a creditor employee. This resulted in a wire transfer of company funds to a fraudulent account. Although the company was "actively taking measures to recover the funds", there were no assurances that such measures would result in the return of all or a portion of the misappropriated funds in a timely manner or at all.[1]

[1] Waterloo Brewing Press Release, November 21, 2019

The issue also affects government organizations. In May, the City of Burlington fell victim to a similar scam as Waterloo Brewing – a trusted City vendor engaged in an email manipulation tactic to convince city staff to change banking information for the vendor. On May 16, the City made a roughly $500,000.00 electronic transfer to the new account, which was fraudulent.

It is important to understand that social engineering scams can be used to target any type of organization, big and small. One way to control the risk associated with social engineering scams is to arrange adequate insurance coverage for such losses. However, in recent years, there have been two cases in Canada that addressed the scope of coverage for such policies. In the first case,[2] the Brick's account payable department was contacted by an individual who indicated that he was an employee at Toshiba. The individual advised that Toshiba had changed banks and that all future payments should be transferred to the new account. The Brick's records were updated without verifying the accuracy of the information provided. As a result, the Brick paid 10 invoices into the fraudulent account. These payments totaled in excess of $338,000.000. It was only when Toshiba contacted the Brick to follow up about missing payments that the scheme was uncovered.

While the Brick was able to recover some of the money, they presented the loss to its insurer. Chubb denied the claim because the only applicable coverage was a "crime policy" which dealt with "funds transfer fraud." The Court found that the provision did not apply because the Brick's employee had consented to the transfer of funds (although they had been a pawn in the fraudster's scheme).

In the second case[3], a Dentons lawyer transferred $2.5 million of his client's money to a Hong Kong bank account. In that case, after receiving email instructions to change the account details, the lawyer obtained written confirmation from his client by way of a letter of authorization. Taking this to be sufficient, the Dentons lawyer transferred the funds. Considering the context of this article, you are likely not surprised to find out that the instructions were sent by a nefarious third party actor, not the client, and the target account was not legitimate. Dentons was able to recover $800,000.00 but made a claim for the remaining amount to their insurer, Trisura. The Insurer denied the claim on the basis that Dentons did not purchase a Social Engineering Rider and was therefore not covered for the subject loss.

Social engineering and business email compromises are a significant risk to organizations. Warren Buffet once said: "It is good to learn from your mistakes, it is better to learn from other people's mistakes". There are several key take-aways from these stories. Businesses need to ensure that policies and procedures are in place when dealing with the transfer of money. Employees also need to be trained on spotting these scams. Most importantly, however, adequate insurance coverage is key.

[2] The Brick Warehouse LP v Chubb Insurance Company of Canada, 2017 ABQB 413.
[3] Dentons Canada LLP v Trisura Guarantee Insurance Company, 2018 ONSC 7311.

Caskanette Udall
CONSULTING ENGINEERS

Fentanyl and Narcotics Contamination Assessments in Buildings and Vehicles

By Bob Caskanette

There is an ever growing awareness and concern of Fentanyl use and the resultant contamination in buildings and vehicles from illicit drug use. Fentanyl is a highly potent synthetic opioid which rapidly acts to depress the central nervous system and respiratory function. Opioids interact with opioid receptors in the brain and elicit a range of responses within the body; from feelings of pain relief, to relaxation, pleasure and contentment.

Fentanyl and its analogues pose a potential hazard to persons who could come into contact with these drugs. Possible exposure routes to fentanyl and its analogues can vary based on the source and form of the drug. Persons are most likely to encounter illicitly manufactured fentanyl and its analogues in powder, tablet, and liquid form. Potential exposure routes of greatest concern include inhalation, mucous membrane contact, ingestion, and percutaneous exposure (e.g., needle puncture). Any of these exposure routes can potentially result in a variety of symptoms that can include the rapid onset of life-threatening respiratory depression.

Skin contact is also a potential exposure route, but is not likely to lead to overdose unless large volumes of highly concentrated powder are encountered over an extended period of time. Brief skin contact with fentanyl or its analogues is not expected to lead to toxic effects if any visible contamination is promptly removed.

Currently, there are no established federal or consensus occupational exposure limits for fentanyl or its analogues. However, the Canadian Centre for Occupational Health and Safety (CCOHS) states the lethal dose of fentanyl is approximately 2 milligrams (mg) of pure fentanyl, roughly equivalent to four grains of salt, which would kill the average adult. However, this varies and is subject to many other factors, such as the persons weight and opioid tolerance.

A building or vehicle can become easily contaminated with fentanyl and other illicit narcotics from drug users. This is a concern for all persons entering a building or vehicle where such drug use has taken place and those environments need to be assessed prior to entry to ensure the safety and wellbeing of those persons. A small accidental exposure can lead to significant adverse health effects which could be fatal in persons unaware there is a hazard or who are not properly safeguarded against the hazard.

We have recently begun a working relationship with a specialty narcotics restoration company and have access to real-time portable scanning equipment to test for a library of narcotics in a building or vehicle, including fentanyl. Swab samples can be collected on surfaces and analyzed within one minute in real time down to the nanogram in detection sensitivity. Additional narcotics that can be assessed and identified include but are not limited to; amphetamine, buprenorphine, cocaine, ephedrine/pseudoephedrine, heroin, ketamine, MDA, MDMA, methamphetamine, morphine, papaverine, pethidine, THC, tramadol, acetylfentanyl, butyrfentanyl, carfentanyl, furanylfentanyl, 3-methylfentanyl and W-18. There is also the capability to test for the qualitative presence or absence of fentanyl and other compounds in the air in addition to surface samples. This is key in identifying if contamination is present within a building or vehicle so proper safeguards can be put into place for persons that may be exposed.

We undertake assessments of buildings and vehicles for fentanyl and other narcotics contamination and can fully scan all areas of either to determine if concerns are present. We can also collect additional samples to be submitted to the laboratory if required for additional confirmation. We provide professional reports with detailed remediation and abatement protocols to be followed by certified contractors which are based on industry best practices currently available.

There are currently no established standards or guidelines in place for Fentanyl, although some are to be developed shortly. We have reviewed the drafts of some of these proposals, but cannot reference them at this time as more work is required to finalize this framework.

In general, there are three levels of required work procedures, depending on the level of fentanyl contamination present:

- Level I – Low Level of Contamination
- Level II – Moderate/Medium Level of Contamination
- Level III – High Level of Contamination

Following our report outlining the required remedial scope of work, we undertake any additional inspections required throughout the project until it is completed. We then re-attend at the site to reassess the building or vehicle involved and collect additional swab samples to analyze in real time to ensure no remaining contamination or hazards are present on any surface, including building HVAC systems. Additional clearance samples are also typically collected as an additional measure and are submitted to a laboratory for analysis to ensure the remediation was fully completed. A final clearance report is then authored outlining the results of our assessment and testing and the project is complete when the environment is deemed safe. This is critical to protect the future liability of homeowners, insurers and other stakeholders involved. We are always here to answer any questions you may have. Our team looks forward to assisting you on your next project.

Bob Caskanette is an Environmental Specialist with a Licensed Engineering Technologist (LET) with the Professional Engineers of Ontario (PEO) who has over 10 years of experience in the field of consulting and engineering.

Bob is a certified Environmental Professional (EP), with specializations in Site Assessment and Reclamation, Water Quality, Air Quality, Health and Safety, and Waste Management, by the Environmental Careers Organization (ECO) of Canada, Bob is also a certified Radon measurement professional and was trained in the Canadian National Radon Proficiency Program (C-NRPP).

Bob manages designated substance survey (DSS) projects and hazardous material project management and abatement (i.e. Asbestos, Lead, PCBs, Mercury and Mould), clandestine drug labs and marijuana grow ops, as well as other industrial/environmental hygiene related work.

Bob is very well trained and knowledgeable in health and safety requirements for projects, with over 200 hours of health and safety training between college and university courses, as well as industry training and is a certified HST.

In addition to environmental engineering duties, Bob is fully qualified to handle assignments in fire cause and origin investigation. He is a Certified Fire and Explosion Investigator (CFEI), Certified Vehicle Fire Investigator (CVFI), and a Canadian Certified Fire Investigator (CCFI-C). Bob is an active member of the National Association of Fire Investigators (NAFI), Canadian Association of Fire Investigators (CAFI), International Association of Arson Investigators (IAAI), and the National Fire Protection Agency (NFPA). Bob is currently on the CAFI executive board of directors, effective since April 2015 and currently holds the position of 1st Vice President.

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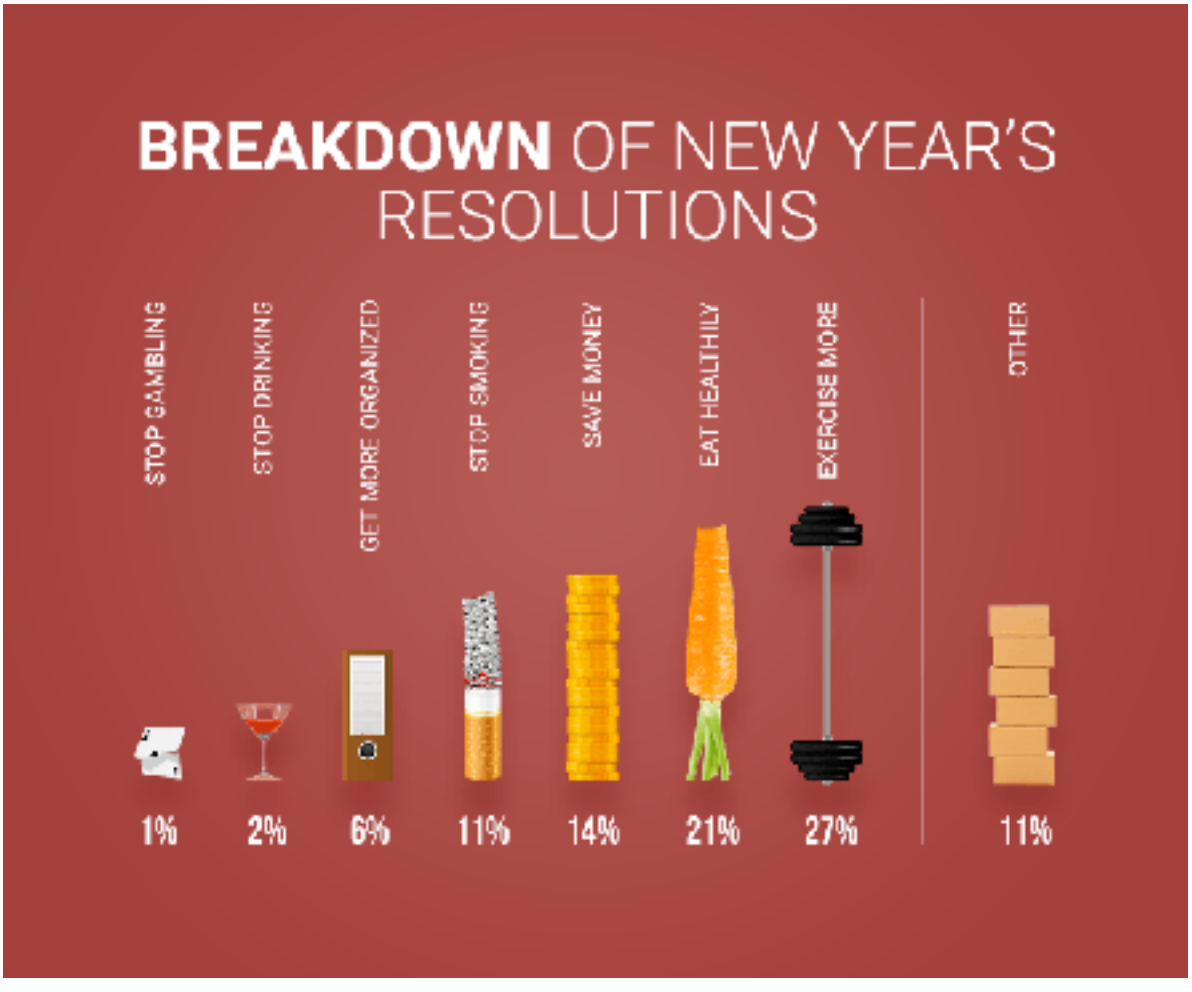

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