

HOW TO SLEEP COMFORTABLY WITH DATA BREACH RISK

The top court has upheld waivers, now here's how to write them

OPPORTUNITY IN TOTAL LOSS

HOW TO DETECT AUTO WRITE-OFFS ONE **WEEK EARLIER**

TOTAL LOSS SERIES

> WHAT INSURERS NEED TO KNOW **ABOUT CANADA'S NEW TOP-TIER CAT THREAT**

PERILS OF **BRINGING** YOUR OWN **DEVICES** TO WORK

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Canadian lerwriter

CONTENTS

Volume 86, No. 3 | April 2019

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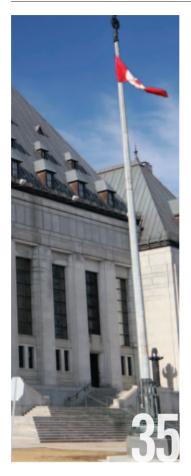
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FROM THE EDITOR

Why brokers should care about IFRS 17

PERSPECTIVES

Our readers respond to our recent stories on brokercarrier connectivity, BrokerLink acquisitions, the definition of a "household" in an insurance policy, and more....

DECLARATIONS

11 Bring your own device

You let your employees bring their own latops, mobiles and phones to work and plug them into the business network. What could go wrong?

15 Defending "deep pockets"

Ontario is reviewing its ioint-and-several liability law, which puts institutional coffers at risk

INTERVIEW

20 Steve Pottle

How does a self-described "radio guy" become a senior risk manager? It all started with Y2K...

HANDBOOK

35 Follow the settlement

How a seemingly minor clerical error wound up shaping the face of Canadian reinsurance law

39 Controlled burn

What insurers need to know about wildfires, Canada's newest top-tier peril

PEER TO PEER

50 What will set you apart

Richard Grant of Trisura Guarantee gives his best advice on how to stay ahead of your competition

IN EVERY ISSUE

- 12 SURVEY SAYS
- NEW OFFERS
- **BIG MOVES**
- SUMMARY 17
- BY THE NUMBERS
- 37 TRUSTED ADVISOR
- 40 CROWDSOURCED

CORRECTION

In the article "Marketers Rising," published in our March 2019 edition, the brokerage Lawrie Insurance Group was misidentified as "Dan Lawrie." Dennis Harrington's correct title when he joined the Lawrie Insurance Group was director of marketing and communications. Also, the author's name was spelled incorrectly: the correct spelling is Robyn Croll. Canadian Underwriter apologizes to the author and the people identified in the article for the errors.

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Subscription Rates: 2018 Canada
1 Year \$51.95 plus applicable taxes ● 2 Years \$75.95 plus applicable taxes Single copies \$10 plus applicable taxes, except \$49 plus applicable taxes for July issue featuring annual Statistical Guide

Subscription Inquiries/Customer Service Mary Garufi (416) 614-5831

GST Registration number 890939689RT0001 econd Class Mail Registration Number: 088 Publications Mail Agreement #40063170

Return undeliverable Canadian addresses to: Circulation Dept. Canadian Underwriter

5353 Dundas Street West, Suite 400, Toronto, Ontario M9B 6H8 Tel: (416) 614-2200

ISSN Print: 0008-525 ISSN Digital: 1923-34

Funded by the Government of Canada Canada









FROM THE EDITOR



Numbers game

Why brokers should care about IFRS 17

any brokers I know pride themselves on being plain-spoken, straight-shooters who can cut through financial bafflegab in a heartbeat. This is why IFRS 17 is going to drive them crazy in 2022, which is the latest date set for implementation.

For now, IFRS seems to be more of a headache for actuaries and accountants, who are currently going through the hair-pulling exercise of figuring out how to report P&C insurance company financial results using the proposed new global accounting standards.

SAS Canada, an analytics software provider, recently held a dinner event for its insurance company clients to discuss their challenges related to IFRS 17 conversion. One CFO expressed concern that P&C insurers would be making business decisions about product offerings based on the new accounting standard.

One thing is for sure: P&C financial results will never look the same. Assuming IFRS 17 is implemented as planned, many of the financial metrics that brokers use to compare their markets will be gone. Say good-bye, for example, to combined ratios or direct premiums written.

Combined ratios, derived by dividing insurance premiums from claims payments and operating expenses, are to the P&C insurance industry what batting averages are to baseball. Baseball fans know a good hitter has a batting average of more than .300. Similarly, brokers know a profitable insurer has a combined ratio under 100%. As one former company executive put it to me recently: if brokers see a combined ratio of 102% three years in a row, they know executive heads will roll and company underwriters will be encouraged to seek other career opportunities.

As for direct premiums written (amount of premium collected before reinsurance is considered), could it be any more straightforward? And yet, it appears this common marker would also disappear under IFRS 17.

Why? Ironically, it's so that brokers and investors will receive clearer and better financial data about their carriers under the IFRS 17 standard. Information that brokers will need a doctorate in actuarial science to understand. Information that will make P&C insurers - especially the smaller ones - seem like they are tanking one year and wildly profitable the next.

One good thing about IFRS 17: It will open up new opportunities for brokers to sell D&O and E&O insurance. That's because company board members, like brokers, won't be able to read the highly-technical financial data either. cu

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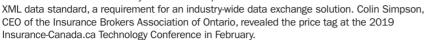
perspectives

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What real-time, broker-carrier connectivity might cost

February 27

The story: For 90 Ontario insurers working through the broker channel, it would cost a total of \$4 billion to conform to the Centre for Study of Insurance Operations'





It is unbelievable that we keep talking about BrokerFlow. No one wanted to build this thing, because vendors that know about these types of projects know it is a project doomed to fail and makes no sense. This project checks every box of a mega-technology project that will have millions thrown at it and produce no tangible results. We have seen this before.

Das says:

Spoken like a true vendor or integrator in this space getting worried about the mega \$\$ you are getting today for really poor connectivity. I see you there. Sorry, we are done paying for this old model. Together as a group we can do better.

JHC says:

I think we can agree that none of the existing vendors in this space wanted this built because it erodes their pretty lucrative [albeit not broker- or carrier-enabling] point-to-point connectivity work. Whereas DX gives them money for life. We went down the path so that nobody could feel that they weren't given their fair shake at the build. We can now actually move on to making this a true reality. Pretty exciting stuff in my lifetime.

Great recap of the session I attended. The cost to insurance companies is already crippling for very little in terms of integration. We know we aren't giving brokers what they need to succeed and we aren't going to be able to if something doesn't change in terms of the industry. D/X is great for vendors (who are already cashing in). Not great for insurance companies. We need to get a dynamic start-up on the case of building this hub and get this moving in 2019!

Why likeability is not the most important selling point

March 25

The story: A stellar salesperson does not need to feel liked to succeed, according to a recent survey of 450,000 salespeople. Eighty-nine percent of respondents indicated that elite salespeople don't feel the need to be liked; in fact, those who focus on being liked are doomed to fail.

Ex broker says:

I have decades of experience in insurance. What made me successful was my knowledge of the policies I was selling. I never stopped learning.



BrokerLink adds three Alberta locations

February 4

The story: Edmonton-based brokerage Bridge Financial Insurance Ltd. joins Intact Financial Corporation's BrokerLink unit. The announcement came less than a month after another Edmonton brokerage, Challenge Insurance, joined BrokerLink.

Signature Risk says

What happens once Intact owns a piece of every broker in Canada? Asking for a friend.

This new statistic could prompt brokers to ask clients about housemates



February 20



The story: The term "household" appears in insurance policies, but judges and insurers are divided about what the term means. In a January ruling, the Court of Appeal for Ontario found that co-residence does not necessarily mean that two people live in the same household.

Marc Dubois says

Would it not be entirely simpler to define the term "household" in the policy?

One-million litres of crude oil released in Manitoba train derailment: TSB

April 1



The story: Transportation Safety Board of Canada investigators say at least 1 million litres of petroleum crude oil was released when a freight train derailed in February on a ranch in western Manitoba.

Tony Thibaudeau says

Ignorance is bliss. Why put petroleum products in a pipeline (a new pipeline no less), when you can cut the pipe into 55-foot sections, put 114,000 litres of crude in it, and then put it on rails at 28 kilometres an hour through urban centres and environmentally sensitive areas? This is much better...

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declarations

HIGHLIGHTS Survey Says... p.12 | Liability Reform p.15 | New Offers p.16 | Big Moves p.17



CYBER SECURITY

Bring your own vulnerability

How bringing your own mobile devices to work can increase the risk to your organization – and how to manage that risk

BY GREG MECKBACH, Associate Editor

he bring your own device (BYOD) trend, spawned by the popularity of smart phones and tablets, has created a new cyber risk for some organizations.

Many organizations are allowing their employees to bring their own mobiles, tablets or laptops to work and connect them to the network, says Dave Millar, business executive, security for IBM Canada.

"If a user is bringing their own de-

vice from home, the same types of corporate security controls should apply," says Millar. "You should essentially extend those controls to that person's BYOD device."

For example, the worker's smart phone might be set up so that the screen locks after a certain period of inactivity, requiring a password or biometric login to start using the device again.

Regulated industries such as banking have a good understanding of the risks

of BYOD, but other sectors may not understand the risk very well, says Millar. "While I believe there is a general awareness that cyber security is an issue, I think that in mid-sized enterprises, they may not be explicitly aware of the types of risks that are introduced with BYOD."

If you own or manage an organization that has a BYOD policy, you should be asking several questions, Millar says. "As a corporation, what are you allowing people to access? In particular, what kind of

BUDGET MONEY FOR CYBER | MARCH 21

The federal government proposed to spend \$144.9 million over five years to support critical cyber systems, including those in the finance, telecommunications, energy and transport sectors.



CLOSER TO DEMUTUALIZATION | MARCH 20 An overwhelming majority (99%) of Economical Insurance's mutual policyholders voted in favour a demutualization conversion proposal, moving the company closer to becom-

ing publicly traded on the stock exchange.



DECLARATIONS

data? Is it personally identifiable data? Is it health data? Is it financial reporting information? Is it credit card information?"

Letting workers bring their own devices and connect to your IT systems can pose a risk. "For example, if the device is compromised and has some malware on it, it could transfer the malware on to the network," Millar warns.

This is true even if the users have their own anti-virus software installed on their devices, says Millar. "Maybe they don't have the anti-virus up to date or maybe because it's such an advanced piece of malware, there is no virus signature."

It could be dangerous to allow anyone to connect their BYOD device to the network without any kind of security checks. Once malware is present on the corporate network, unscrupulous individuals could then communicate to that malware over the Internet to search for information on the network.

Another risk of BYOD is that a user's personal electronic device could be used to store your organization's intellectual property, says Steve Pottle, who is vice president of Risk and Insurance Management Society (RIMS) Inc. and director of risk management services for Thompson Rivers University in B.C.

Your organization is especially vulnerable if the user is taking his or her device from Canada to a foreign country. It is possible that a foreign country's customs officer could seize or peruse that device, Pottle says. "They have the right to do so and they'll either copy it or basically take the stuff that they feel is inappropriate or of a politically sensitive nature and go from there."

One way to avoid this is to send emplovees overseas with a "naked" device. "It has the basic applications on it," as Pottle explains. "I can dial into my email, and that sort of thing. Otherwise, there is nothing really important on that device if it were to be stolen or taken away **SURVEY SAYS...**

MARKET BLOCKING

More than 200 commercial brokers told us what they think about market blocking, in which brokers submit quotes to multiple carriers to "lock" an account. Are your carriers engaging in the practice? Does that matter to you? Here's what you told us...

> How many of your carriers engage in market blocking?



If a carrier engages in market blocking, is that a factor you might consider when placing business for a client?



would that have on your decision? 9% 32% Neutral 4% Verv Positive **16%** Verv Negative **39%** Negative

If ves. what influence

by certain government authorities for their own investigations."

If your workers are hooking up their own devices to the organization's network, you may have to amend your information security policy to apply to BYOD devices, even when employees are using them for their own personal use, Millar advises. "Just because you are at home and not connected to the network, you could have corporate data sitting on that device, or you could still have access to the corporate network remotely from that device."

To reduce exposure, risk managers should establish policies on the acceptable use of BYOD devices. A policy will spell out the steps that users should take to keep their devices properly secure.

"If as a risk manager you are taking those steps to have policies, educate the users on what those policies are, and what the risks are," says Millar. "And if you are deploying the same types of security controls onto those devices, then you are going to be able to reduce your risk significantly of being harmed by the BYOD program." cu

SEVERE FLOODING PREDICTED | MARCH 19

Due to heavy snowfall in the United States, the Manitoba government warned that the Red River Valley could see flooding higher than in 2009, when several communities had to close some or all of their road access to the outside world.



DAWN OF FRAUD COLLABORATION | MARCH 19

Aviva Canada and Desiardins Insurance. two of Canada's three largest insurers, announced a joint fraud investigation that led to charges against a so-called "ghost broker" who sold false insurance documents.



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LIABILITY REFORM

Defending the 'deep pockets'

Seeking fairness for all parties in a liability dispute, Ontario is reviewing its joint-and-several rule, long the bane of risk managers at large, affluent institutions

BY GREG MECKBACH, Associate Editor

aving the means to pay a plaintiff may not necessarily be a good thing, especially in a jurisdiction with joint and several liability.

That's why, in the spirit of fairness to all parties involved in a liability dispute, Ontario's provincial government is reviewing a controversial law that increases the liability risk of large, "deep-pocketed" organizations.

For years, Ontario's *Negligence Act* has been a thorn in the side of many insurers and risk managers. The law allows multiple defendants in the same lawsuit to be found "jointly-and-severally" liable to the plaintiff.

In other words, if the defendant who

is mostly responsible for the injury or damage can't pay his or her share of a court-ordered damage award, then another defendant in the case — even though they are only marginally responsible for the accident — could be on the hook to pay for the entire damage claim.

An extreme, hypothetical example is the drunk driver who hits a bump in the road and injures a pedestrian. The driver is found to be 99% responsible for the pedestrian's injuries, but he has no money to pay the \$3-million court award against him. In that case, the municipality, which is only 1% responsible because of the bump in the road, might have to cough up the entire \$3 million.

The law particularly affects municipalities and larger organizations. Plaintiff's lawyers, knowing that these entities have the means to pay for larger damage awards, will look for ways to find them liable for damage, thus drawing them into a case. They might accuse a municipality of failing to properly maintain roads, for example, or sue bar owners for allegedly over-serving alcohol to a patron who later drove and injured someone.

The Association of Municipalities of Ontario (AMO) has long advocated for reform of the joint and several liability law. "The courts will just look at a municipal government and say, 'You can pay. Figure it out, but you can do it,"



WHAT RISK MANAGERS WANT | MARCH 15

Cyber is the Number 1 hot topic for members of Risk and Insurance Management Society (RIMS) Inc., a survey revealed, with risk managers looking for more consistency across the industry in cyber policy wording.



REPLACING HIGH-TECH WINDSHIELDS | MARCH 15

Camera calibration is just as efficient with aftermarket replacement windshields as with OEM parts, a Belron Canada study reports. Calibration is required after replacing windshields on cars that offer advanced driving assistance systems (ADAS).

DECLARATIONS

AMO executive director Pat Vanini said in an interview.

While he did not specifically promise to change the law, Ontario Premier Doug Ford recently said his government will consult with stakeholders about it. "What we are looking for is consultation with the lawyers, the insurance industry, etc. as to how we can make the system fairer," Randy Pettapiece, a backbench Progressive Conservative government MPP, told Canadian Underwriter recently. "Those consultations will be starting soon in the future."

Pettapiece noted that municipalities in his riding have a small tax base. "If they were ever involved in one of these judgements, it would be devastating for them," he said.

When municipal governments are named in lawsuits, the joint-and-several rule can be an incentive for those municipal governments to settle out of court "to avoid long drawn-out litigation for amounts that may be excessive," said Vanini. That could mean reduced spending on municipal infrastructure or prohibiting certain activities such as tobogganing. She added that joint and several liability is one reason (in addition to flood risk) that municipal liability insurance rates have increased.

AMO is not advocating one specific model but says the current system is unfair. This is because it is possible, in theory, for a client who is 1% liable to pay 100% of a judgement.

Not everyone is convinced this actually happens in practice.

"Unless someone can show me a case, this 1% paying for 100% is a bit of an urban legend to me, because I haven't seen it," said David Williams, a veteran London Ont. lawyer with Harrison Pensa. He cautions that if the joint and several liability rule is changed, and if accident victims go uncompensated as a result, those losses could be borne by the plaintiff or the taxpayer. cu

NEW OFFERS

PLAYER'S HEALTH PROTECT



Vendor: Player's Health

Target audience: Coaches, administrators and athletes

What it does: The Player's Health Protect app allows athletes to report abuse and misconduct privately and anonymously

Used to report abuse and misconduct such as threats, hazing and abuse, the software is free to sports organizations, schools and athletes. It is part of a suite of risk management software created to support the holistic health of athletes in amateur sports. Athletes and sports associations can use the entire suite or just one app. The Player's Health app is new in Canada, but has been adopted in the United States. Since its launch several months ago, the app has grown to 70,000 users and has documented 40 abuse incidents (35 of them actionable). The product suite includes an injury management platform. This ensures athlete safety by creating injury reports, managing an athlete's return to play after a concussion, communicating updates and reducing liability to the sports organizations and teams.

ECLIPSE



Target audience: Businesses, landowners and real estate investors

What it does: Provides environmental liability and pollution clean-up insurance, along with risk management services

Beazley has broadened its coverage to include blanket pollution liability protection for non-owned locations, warehouses and distribution chains. Eclipse provides environmental liability and pollution clean-up insurance. It is offered alongside risk management services that help to control pollution risks associated with transactional and operational hazards, transportation, waste disposal and other associated exposures. Coverage for costs associated with business interruption and crisis response is now included as standard in Eclipse. They include fees for public relations support; medical/funeral expenses; psychological counselling; travel or temporary living expenses; and security expenses.

HUMAN RESOURCES, LEGAL AND EMOTIONAL SUPPORT ASSISTANCE



Vendor: Travelers Canada

Target audience: Specialty insurance customers

What it does: Offers support to help professionals manage day-to-day activities fundamental to their roles at private, public and non-profit organizations

Travelers Canada has launched a new suite of services for specialty insurance customers. Their insurance policies will now come packaged with human resources, legal and emotional support assistance available at no extra cost. The new services offer assistance in the following areas: 1) Legal, including in-house attorney phone support on issues such as rental agreements, contracts, real estate law and consumer law; 2) Human resources suppoort on issues such as hiring, absences/leaves, safety, discrimination, immigration, labour matters, benefits and temporary employees; 3) Emotional support provided by professional counsellors for personal and work issues.



REINSURER EYES CANADA | MARCH 13 Validus Reinsurance Ltd., a Bermuda-based

reinsurer acquired by AIG last year for \$5.5 billion, is looking to establish a Canadian branch office to provide treaty and facultative reinsurance of commercial property and casualty and specialty risks.



BROKERLINK'S M&A STRATEGY | MARCH 12

Intact Financial Corp.'s BrokerLink unit seeks to expand in provinces where it already has brokerages, including Ontario, Alberta or Atlantic Canada. Brokerlink's head of acquisitions told Canadian Underwriter.

BIG MOVES

Claims veteran Seyler moves to ClaimsPro

John Seyler, past president of the Canadian Independent Adjusters' Association (CIAA), is now director of ClaimsPro's specialty risk division.



CURRENT ROLE: Director, Specialty Risk Division for ClaimsPro. P&C EXPERIENCE: 31 years PROFILE: Served in a variety of roles with the Canadian Independent Adjusters' Association (CIAA). including national president and Ontario chapter president.

John Seyler, a past president of the Canadian Independent Adjusters' Association (CIAA), is now director of ClaimsPro's specialty risk division.

Seyler previously served as president of ProFormance Specialty Claims Inc. and president of Integrated Insurance Resources Inc.

At ClaimsPro, Seyler will work in Toronto providing technical oversight and overall support for two teams in the special risk division: the complex, commercial and industrial (CCI) team, and the transportation, equipment and cargo (TEC) team.

Seyler served as president of CIAA from September 2012 to 2013. He was previously president of CIAA's Ontario chapter.

He has also been director of specialty services for Cunningham Lindsey.

Stephen C. Ruschak is the new CFO of The Guarantee Company of North America, succeeding Jules Quenneville. Ruschak joined The Guarantee in

2009 as president of The Guarantee Company of North America U.S.A.



Graham Haigh is the new vice president of broker distribution at Wawanesa Mutual Insurance Company, working out of Winnipeg. He was previously

Wawanesa's vice president in charge of business development.



Chris Sekine is the new president and CEO of Trisura Guarantee Insurance Company, succeeding Mike George, who will continue to work with the insurer on a consulting

basis. Sekine has led Trisura Guarantee's surety group since its inception.

SUMMARY

RISK MANAGEMENT

Preparing for active shooters

RISK & INSURANCE MANAGEMENT SOCIETY (RIMS)

Protecting a workplace begins well before a shooter enters the premises, says a new **RIMS Professional** Report authored by RIMS business content writer Justin Smulison.



By customizing an active shooter plan that focuses on prevention, training, feedback and post-incident protocols, employees will be mentally and physically prepared to react to violent threats, says the report, Active Shooter Preparedness for Your Organization.

The report features insights from workplace violence and business continuity experts on the following topics:

Warning signs of potential attacks: Poor work performance, unkempt appearance, frequent outbursts, unexplained absences and tardiness, and volatile and defamatory social media activity.

Best practices in communication: Establishing a reporting policy can be the early warning system an organization needs to prevent a tragedy.

Strategies to minimize injuries, property damage and uncertainties: Key elements of the most popular plans include evacuation (leaving belongings; warning others if possible); hiding (locking and blocking doors and trying to hide separately from the shooter's view); and self-defence (as a last resort, act aggressively against the shooter and try to pick up items that can be used as weapons, such as fire extinguishers and scissors).

Once the plan is developed, test and practice it throughout the organization by using walkthroughs, tabletops (presentations, even audio and footage from active shooting incidents in certain circumstances) and live events. After training, perform a "hot" debrief immediately afterwards, followed by a "cold" debrief one or two weeks later.

"Since there is no one-size-fits-all description of an active shooter, organizational preparedness and training is critical," the report said. Practice the plan and encourage employees to report suspicious behaviour.

MGA MERGER ANNOUNCED | MARCH 7 H.W. Kaufman Group and Burns & Wilcox Canada acquired Torontobased TRU Transportation Risk Underwriters Ltd., a managing general agency with unique transportation expertise.



COST OF ATLANTIC **STORM** | MARCH 6 A winter storm in late January that brought snowfall, freezing rain, rain and strong winds to eastern Canada caused more than \$39 million in insured damage, according to Catastrophe Indices and Quantification Inc. (CatlO).



Cyber Risk Management Benchmarking— Are Your Clients Doing Enough?

Eric Hodge, Director of Solutions, CyberScout Nate Spurrier, Senior Director of Business Development, CyberScout

TABLE 1

Top cyber crime risk reduction measures

- 1. Vulnerability management
- 2. Education and awareness
- 3. Anti-virus protection
- 4. Online backups
- 5. Business risk assessment
- 6. Breach response planning
- 7. User re-certification
- 8. Phishing testing
- 9. Data mapping
- 10. User account validation
- 11. Vendor account validation

Since 2003, CyberScout has provided comprehensive data breach and identity management services to help protect identities and enhance reputations.

7580 N Dobson Rd, Suite 201 Scottsdale, AZ 85256 Phone (480) 355 8500 www.CyberScout.com The cyber insurance take-up rate spiked in 2018, up 10 percent from 2017, according to the eighth annual Information Security and Cyber Risk Management survey released by Zurich North America and Advisen Ltd.* Although you may be selling more cyber insurance, clients do not seem to be gaining a better grasp of these risks. This is because companies are not taking simple measures to protect their assets with noninsurance methods that can significantly reduce cyber risks. Because these risks are not as well understood as other physical safety risks, people are unsure about what steps they should be taking to protect their digital assets.

This lack of knowledge can be combatted with tactics such as user education, phishing testing, and online backups. Many of these involve company policy and education initiatives businesses can undertake themselves or with outside help.

More than with auto insurance or general liability insurance, brokers have a greater opportunity to reduce a cyber attack on clients and stem losses for their carrier partners with education and guidance.

Cyber criminals continuously update their methods of attack. In addition to learning about cyber insurance coverage, it pays to keep abreast of the latest data breaches, ransomware types, and extortion plots. The more prepared a business is, the less likely they'll be surprised by a devastating attack. Here are some of the top cyber crimes a business may encounter in the upcoming year and corresponding solutions to put in place.

Ransomware and cyber extortion

When you turn on your computer, you see a pop-up box instructing you to pay to have your data returned. Hackers have encrypted your data using ransomware and now demand a large payment to release it. This likely happened because the business had open connections and it was identified when the hacker broadly searched for vulnerable companies. These events rarely target a specific business but identify companies that are easily hacked.



Table 1 Risk Reduction Measures: 1, 2, 4, 8

Email redirect

Maybe you receive a spam email that prominently displays an unsubscribe button. Clicking on that link actually gives the attacker access to your computer and other personal information.



Table 1 Risk Reduction Measures: 2, 3

^{* &}quot;Information Security and Cyber Risk Management," Zurich North America and Advisen Ltd., 2018.



User credential theft

The endgame of a credential-based attack is the use of compromised passwords to authenticate applications and steal data from a business. Once an attacker gets ahold of user credentials and passwords, they can sell the credentials in the cyber crime underground or use them to compromise an organization's network. Hackers often trick individuals or businesses into giving away credentials using email or phone calls.



Table 1 Risk Reduction Measures: 1, 7, 10

Third-party attacks and non-compliance

Several thousands of business customers' credit cards are stolen, causing the business to have to report this to customers as well as privacy authorities. A cyber criminal infiltrated the system through an outside service provider with access to the systems and data, such as a retail point of sale terminal.

Shortly after this breach, a national governing body contacts an executive at the business and informs them they have incurred a heavy fine for failing to report the data breach in a timely manner. The business now must pay a noncompliance fine.



Table 1 Risk Reduction Measures: 1, 3, 5, 9, 10, 11

Denial-of-service

Suddenly the company's servers receive so many requests they can no longer function, halting all business. This is comparable to a group of people crowding the entry door of a shop, making it hard for legitimate customers to enter, disrupting business. In a distributed denial-of-service attack, the incoming traffic originates from many different sources, making it impossible to stop the attack simply by blocking a single source.



Table 1 Risk Reduction Measures: 1, 3, 5, 6

One thing is certain, data breaches will continue to happen more frequently with increasing damage to businesses. Prepare yourself to discuss the risks as well as risk reduction strategies with clients. No amount of insurance coverage will prevent an event from happening, so educate your clients with options that can help with cyber risk reduction.







cu | Your education is in radiotelevision arts. What did you do before you became a risk manager?

I was a radio guy after I graduated in the late 80s. I worked at Newstalk 1010. I enjoyed my time there. I was doing the morning show radio, which is fun, but when you are in your late 20s and getting up at four o'clock in the morning, it kind of kills your social life at night. So, I took a risk and went into a corporate communications opportunity for a year.

cu | York University in Toronto hired you in 1998 to work on Y2K (Year 2000). You were making sure that their computer systems could handle four-digit years after Dec. 31, 1999. What happened there?

My background was not in IT. My role was to manage the communications aspect of why we needed to become Y2K compliant. We were constantly sending information to the board about the risk of non-compliance. That's when the board questioned the administration and said, 'Do you have a risk management person?' My new role sort of grew out of what was once somebody's side gig of buying insurance. They formed the risk management unit at York. It was a second career for me, coming into the insurance and risk management field from my communications and radio background.

cu | How was the learning process?

I did not have an insurance or broker background that a lot of people in risk management have, so I took my Canadian Risk Management designation and my Charted Insurance Professional certification while I was working at York. In the fall of 2000, the university created a risk management and insurance unit in finance. I joined as their insurance administrator; later, I managed the department. Having that communications perspective has served me well. I can listen to what people have to say and understand their different perspectives on issues.

"My role was to manage the communications aspect of why we needed to become Y2K compliant. We were constantly sending information to the board about the risk of noncompliance."

cu | You moved from Toronto to Kamloops, B.C. last year to become director of risk management services for Thompson Rivers University. Is managing risk for a university out west different from managing risk for York University in Toronto?

In B.C., I find the risks are a lot more climate-based compared to what I dealt with in Ontario. I am in the interior of British Columbia. For the past two years, we have had interface fire threat. After we had those large forest fires in northern B.C. last year, the smoke filtered down into the Kamloops area, where I am based. When we talk about interface fires in B.C., we are talking about large-scale fires that can literally jump rivers and roads. That is a big concern here. From a ground management perspective, we have to make sure that we are keeping the grounds relatively free of potential combustibles – trees, grass and that kind of thing.

cu | Are the risks at Thompson Rivers different in other ways?

This is a smaller university than York University; in my portfolio, I manage different types of risks. At York, I didn't have security, I didn't have health and



safety, and I didn't have enterprise risk. Those are now in my areas as well. That's a welcome opportunity. At Thompson Rivers University, security, health and safety, and enterprise risk are all under one risk management cluster, whereas at some of the bigger universities in Ontario, they have sort of dispersed them into various sub-units.

cu | How has your personal experience with insurance evolved?

Over time, I have evolved from buying insurance and issuing certificates of insurance to where I am now. Right now, I'm not as heavily involved in managing insurance procurement because at this particular university we have insurance through the B.C. government. So I spend more time sitting down with students, faculty and staff to work through more strategic risk management issues such as risk governance, compliance and bridging the downside of risk with the opportunities associated with taking risks.

cu | You have volunteered with RIMS for more than 15 years in various capacities. Why?

If you put the time into it and volunteer, RIMS is great for meeting people on a more personal level. So, if you have business questions, you don't feel that awkwardness of having to ask someone who you don't really know for answers. My first RIMS Canada conference was in Ottawa in 2001 and I did not know many people around the room. I remember saying after that conference, "Wow, this is a very good sharing community." One thing I find with risk managers, regardless of where you work or what kind of role you have, they are always willing to share best practices with other people. Back when I first started, someone said to me, "You don't necessarily need to know everything. But it really helps when you know who you can call to ask that question." cu



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PROFILE

STFVF POTTLF

Title: Vice President, Risk and Insurance Management Society Inc. (RIMS)

Director of Risk Management Services. Thompson Rivers University in Kamloops, B.C.

Education: Radio and Television Arts. Ryerson University; Canadian Risk Management (CRM) designation; Chartered Insurance Professional (CIP) designation

Experience: Morning show producer. CFRB Toronto, Newstalk 1010; Director of Risk Management Services at York

Association experience: Local organizing committee chair, 2008 RIMS Canada Conference; President of RIMS Ontario Chapter (2008-10); Chair of the Communications and External Affairs Sub Committee of the RIMS Canada Council (2011-13)

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ON THE SCENE

2019 Insurance-Canada.ca Technology Conference

February 26-27, 2019 Toronto, Ontario

Drawing the industry's technology leaders from across the country, ICTC featured sessions for brokers and claims professionals on the topics of new risks, customer engagement, and digital technologies. Many speakers shared concrete examples of how market disruption has affected their business, and how they initiated and executed their own programs in response to the upheaval.

















Greg Meckbach, Associate Editor



s a Canadian risk manager, your worst nightmare could be employees who fail to delete certain computer files. Or perhaps your employees are browsing through company records for nefarious reasons, or maybe just out of idle curiosity.

All of these situations, common enough occurrences in any workplace, could lead to a lengthy and expensive data breach lawsuit against your company.

The risk has become bigger in recent months, especially because of a key change to the federal *Personal Information and Protection of Electronic Documents Act* (PIPEDA) that took effect last November.

"Ever since the mandatory breach notification kicked in, two pieces have been challenging for organizations," says cybersecurity lawyer Imran Ahmad, a Toronto-based partner with Blake, Cassels & Graydon LLP.

The first piece is record keeping.

It is now mandatory for organizations to log every data breach, regardless of whether or not it might cause harm. If such a breach could cause a "real risk of significant harm" (the RROSH test), then the potentially harmed parties must be notified.

"The log is only as good as the information you receive from your front-line employees," Ahmad observes. "And that's where it has been a big challenge in terms of educating and informing employees. Often, organizations will assume that if it does not meet what we call the real risk of significant harm or the RROSH test under PIPEDA, then it may not be something they need to log. But the fact is, there is no threshold. So, you need to keep a log."

A second challenge is complying with different laws across multiple jurisdictions. Violating privacy laws can result in heavy fines and penalties, warns Steve Pottle, the Kamloops, B.C.-based vice president of Risk and Insurance Management Society Inc. (RIMS).

Canada-wide breach notification

Mandatory breach notification can increase your employer's liability risk, warns David Fraser, a Halifax-based privacy lawyer for McInnes Cooper, who represented Google Inc. in matters before the Privacy Commissioner of Canada.

"I think this is an issue that should be keeping [risk managers] up at night," Fraser says. "If it's not high on their radar, it should be. We have seen a significant shift in this area in Canada over the last couple of years, culminating with the coming into force of the amendments made by the *Digital Privacy Act* that require breach notification and record keeping of all trivial breaches."

Originally passed into law in 2015, the *Digital Privacy Act* made some changes to PIPEDA, including mandatory breach notification. In the past, there was no Canada-wide law requiring organizations who were targets of a data breach — involving credit card information, for example — to notify affected individuals.



Right to be forgotten

Another recently-enacted privacy law that might affect your organization is the European General Data Protection Regulation (GDPR), which took effect in May 2018. GDPR gives citizens in all 28 EU countries the right to have their personally identifiable information deleted when it is "no longer necessary in relation to the purposes" for which it was collected.

This "right to be forgotten" will probably become a "new normal across the globe," as more jurisdictions follow the EU's lead and create their own versions of GDPR, suggests Pottle, the director of risk management services for Thompson Rivers University.

It may be wise for risk managers to follow the GDPR rules even if they do not think they keep data on EU citizens, Pottle suggests. "Eventually all the jurisdictions are going to catch up to this," he says. "You have a right, as a member of the EU under this privacy regime, to basically have yourself and your data erased. Companies would then have the responsibility to basically wipe you clean from their database and that alone can be quite onerous."

When deleting is not deleting

Deleting data on a company system is easier said than done. "Hitting the delete button doesn't mean it's off your server," says Sylvia Kingsmill, partner and national leader, digital privacy and compliance, forensic services at KPMG Canada. "Just look at your iPhone. If you delete a photo, it is still saved and stored for an additional 30 days until it is permanently deleted."

That said, you have a major liability

risk on your hands if you keep computer data longer than necessary — especially if that data is being used for purposes other than for which it was originally collected.

Data destruction policy

This is why many organizations need a data destruction policy, Kingsmill says. "If you are selling widgets and if you are a (business-to-business) company, the risk exposure is very minimal. But if you are business-to-consumer, and if you are collecting individually identifying personal data, sensitive or not, as a best practice you should have a data retention and destruction policy."

What that policy should say depends on the size and scope of your activities.

The federal Office of the Privacy Commissioner recommends that organizations keep an inventory of the personal information they are retaining. Managers need to ask whether personal information exists in multiple copies and if so where backups and copies are stored.

If information is stored in removable media such as CDs, there is a variety of ways of destroying it - such as incineration, pulverizing, shredding and melting.

A data destruction policy could be as simple as two or three pages, says Kingsmill. "A lot of privacy regulators have templates that can be leveraged if you are a small to mid-sized business and you don't have the budget to hire someone externally to do that for you."

Reporting guidelines

As a start, risk managers should have a policy in place spelling out the incidents that must be reported. Employees need

to know what's in the policy. "There is no point in drafting a super-lengthy policy that nobody reads," says Ahmad. "It could be a couple of pages."

There is no hard-and-fast rule about how long your policy should be, but it should be customized to your organization to some extent, Ahmad recommends. He also suggests that risk managers prepare a one-page summary of the breach policy for front-line workers.

Second, Blake, Cassels & Graydon recommends that risk managers create an incident intake form, which employees can fill out to report a breach.

Third, risk managers need to ensure employees know that every breach needs to be logged, even if it does not have to be reported. "If you lose a laptop, and all the data was encrypted, and you find the laptop afterwards, that is still an incident that needs to be kept in a log that should hopefully be in the legal department's purview," says Ahmad.

Most organizations walk a fine line between data retention and data destruction, Kingmill observes. Companies sometimes need to retain data in case they are sued and need to produce documents for discovery. So being too quick to delete data could turn out to be a bad idea.

Your data destruction policy needs to stipulate how to destroy data so it is not easily reconstructed, and should include the media you can use to store data, said Kingsmill.

Some organizations, for example, do not allow certain sensitive data to be stored on servers, but only on removable media (such as USB sticks) that can be locked in a filing cabinet or safe.

Data destruction policies should be easy to understand without a lot of legalese. "No one is going to read a data destruction policy that is 50 pages long and full of technical IT jargon," said Kingsmill.

Reputational harm

The new requirement to report certain breaches has created new liability risk, warns Fraser. Reputational harm caused by reporting a data breach seems more likely because of the speed and extent of modern-day communications. "If

"There is no point in drafting a super-lengthy [data destruction] policy that mobody reads."

you have to send a message to 10,000 customers that something has happened with their information, almost certainly one of those 10,000 is going to be a reporter and you are not going to stay under the radar," says Fraser. "There is a very strong likelihood that one of those people is, works for, or knows a class action lawyer. We have seen an explosion in privacy class actions over the last number of years."

This explosion was triggered in part by Jones v. Tsige, a Court of Appeal for Ontario ruling that recognized intrusion upon seclusion as a tort. The case arose when Winnie Tsige, a Bank of Montreal worker, accessed the bank records of co-worker Sandra Jones. Jones sued Tsige and was awarded \$10,000 by the Court of Appeal for Ontario.

Curiosity killed the bottom line

The Bank of Montreal was not a party in Jones v. Tsige, but the significance for risk managers is that a plaintiff can be awarded thousands of dollars if their privacy is breached, even if they suffered no economic loss.

"Intrusion upon seclusion put privacy torts squarely on the radar for class-action lawyers, so most notifications of any significance will likely result in class-action lawsuits," Fraser says. "There have been a number of insider-snooping cases, in which curious employees have gone poking through the records of others; that often results in damages of \$1,000 bucks per person snooped upon."

In the event of a privacy breach, an

organization could be sued for negligence, breach of confidence, breach of fiduciary duty or breach of contract, said Fraser. And it's not just an individcompromised in a breach. "You could have confidential information belonging to another party," says Ahmad. "It could be intellectual property, it could be the design of a product, it could be a joint venture, it could be client lists - it could be a variety of things....

"So, do you as an organization have ual's personal information that can be an obligation to give a heads-up to that vendor who may be the target? We have seen a lot of that these days. The number of inbox or email compromises has increased significantly.". cu

























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f one of your clients has ever visited a ski resort, trampoline park or even the gym, they've likely signed a waiver of liability.

David Schnarr was one of those people. About nine years ago, he went online to purchase a 2010-11 season ski pass from Blue Mountain ski resort near Collingwood, Ont. He signed a waiver form as part of the deal, agreeing to waive any and all legal claims he might make against the ski operators and others in the future. He also agreed to release them from liability for any damages he may suffer.

About a year after he signed the form, on Mar. 26, 2011, Schnarr was descending the ski trail known as "Smart Alec" when he collided with a piece of debris from a broken ski pole. He lost control, struck a tree and injured himself.

Notwithstanding the waiver he signed, Schnarr sued Blue Mountain. The Court of Appeal for Ontario ruled in March 2018 that Schnarr was bound by the waiver that he signed. Schnarr took his appeal to the Supreme Court of Canada, but the top court would not hear the appeal.

The insurance industry breathed a sigh of relief. Waivers, which protect insurers' commercial clients from liability, still had legal status.

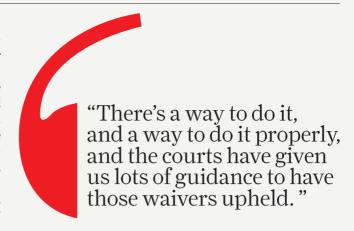
In effect, the Supreme Court ruling means that recreational businesses and municipalities in Ontario can continue to use waivers to protect themselves from liabilities in activities that have inherent risk, so long as they are properly worded and there are proper procedures in place for signing the waivers, says Toronto-based law firm Thomas Gold Pettingill LLP.

"There are policies and procedures and ways to draft agreements where I promise you the waivers will be upheld," says Ian Gold, a founding partner of Thomas Gold Pettingill, which focuses on complex insurance and commercial disputes. "There's a way to do it, and a way to do it properly, and the courts have given us lots of guidance to have those waivers upheld. Currently under the case law, waivers are alive and well and I would recommend continuing to use them."

In *Schnarr v. Blue Mountain Resorts Limited*, the Court of Appeal for Ontario found that the ski resort's waiver contained an obvious heading that was set out in bold type, in a bright yellow box, and outlined with a red border. The waiver specifically instructed the customer to "PLEASE READ CAREFULLY!"

The Schnarr case was twinned with a similar fact situation in *Woodhouse v. Snow Valley*. In both cases, the plaintiffs were patrons of the defendant ski resorts. The skiers purchased their tickets and executed the waivers of liability as a condition of the sale. Schnarr was allegedly injured and so was Elizabeth Woodhouse, who said she was injured while using a tow rope at Snow Valley Ski Resort in the township of Springwater.

In both these cases, none of the underlying facts have yet been proven in court. The waiver case that went to the Ontario Court for Appeal (and subsequently appealed to the Supreme Court) dealt with a novel point of law.



The issue in the lower court rulings turned on two conflicting statutes, the *Occupier's Liability Act* (OLA) and the *Consumer Protection Act* (CPA).

The appeal court addressed the question of whether the CPA or OLA governs the relationship between the consumer and ski resort; in particular, whether Sections 7 and 9 of the CPA spoil or void an otherwise valid waiver of liability under Section 3 of the OLA.

Section 7 of the CPA says the CPA, which protects the rights of consumers, applies "despite any agreement or waiver to the contrary." Section 9 says "the supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality." Section 3 of OLA says an occupier of a premises owes a duty of care to ensure the people entering the premises and the property itself are reasonably safe.

In *Schnarr*, the parties agreed there was a "consumer agreement" between Schnarr and Blue Mountain. Ontario Superior Court Justice E. Ria Tzimas originally held that Blue Mountain's waiver under the OLA partially offended sections of the CPA. She ruled the waiver was void and severed from the consumer agreement.

Similarly, in *Woodhouse*, Ontario Superior Court Justice John McCarthy ruled that Snow Valley's waiver was void in respect of both tort and contract claims. But he held that a court nevertheless has the equitable power to enforce a void waiver in a consumer agreement pursuant to a section of the CPA.

The Court of Appeal for Ontario overturned the lower court decisions. "In my view, when applied to the instant context, ss. 7 and 9 of the CPA fundamentally undermine the purpose of s. 3 of the OLA," wrote Court of Appeal for Ontario Justice Ian Nordheimer. "The statutes are irreconcilable and conflict. As such... the more specific provision in the OLA prevails over the general provisions in the CPA."

Gold said the courts had to look at the legislative intent. The appeal court ultimately found the CPA was put in place to deal with commercial transactions, Gold said, while the OLA was more designed for a case like this.

Before the announcement of leave to appeal to the Supreme Court, Gold told an insurance claims conference that he was not convinced the top court would weigh in on the issue. "Personally, I think it's the right decision," he said of the appeal court ruling. "If the Supreme Court of Canada makes what I think to be the wrong decision and says the [CPA] applies and you can't rely on waivers, I'm not sure what will happen in the world of recreational sports and activities."

Robert Betts, the Beard Winter LLP lawyer who defended Blue Mountain, called the appeal court ruling "great news for liability insurers, particularly any liability insurer who deals with the recreational industry." He said the lower court decisions had "really upset decades of case law and waivers, where insurance companies and resort operators could use these waivers as full-stop defences."

The appeal court decision, on the other hand, "really waters down the scope of

consumer protection in favour of these waivers," says Shantona Chaudhury, partner at Pape Chaudhury LLP and one of the lawyers representing Schnarr and Woodhouse.

So where do waivers stand now, in light of the court rulings on the matter? What is the key to ensuring waivers are upheld in court?

"There has to be a process," Gold says. "The wording has to be correct. You can't have them signing when they are hooked into the bungee cord about to step off and, 'OK, sign this before you go."

Gold points to a ruling from the Ontario Superior Court of Justice on Jan. 3, 2019. In Hosseinkhani v. OK Fitness Inc., the waiver Fatemeh Hosseinkhani signed when she joined the gym was not upheld. The decision clarified the ability

"There has to be a process. The wording has to be correct. You can't have them signing when they are hooked into the bungee cord about to step off and, 'OK, sign this before you go."

of occupiers to obtain waivers under the OLA as long as reasonable steps are taken to ensure they are brought to the attention of the person signing the waiver.

The judge in Hosseinkhani referenced the Schnarr appeal court decision, among others. For example, the waiver in Schnarr's case was in the bright vellow box with red border and specifically instructed the customer to read carefully. "The reasonableness of the steps taken to bring the release to the attention of the person signing the agreement may be apparent from the document itself," the court noted in Hosseinkhani v. QK Fitness Inc.

For Hosseinkhani, the waiver was on the back page of the application form. Also, it was in the same font as all the other fonts on the membership form. The front page contained no warning saying, "Please turn over," nor was there a highlighted area or spot for someone to initial beside the waiver paragraph.

"The form was signed, but at the end of the day, the court did not uphold the waiver," Gold remarks. "It's just that the way this waiver was done, the court didn't think it should be held against her."

Despite this ruling on the books, Gold strongly promotes the use of waivers. "I beg you, or your clients or insured, not to give up on the concept of waivers and signage. Lots of times people say, 'Who cares? They are never going to uphold it. We don't need to bother getting a waiver.' We are big fans. I promote the use of waivers." cu

The Legal Odyssey of Waivers

Schnarr v. Blue Mountain Resorts Limited in a nutshell

The Conflicting Laws

Occupier's Liability Act

Section 3 (1) of the Occupier's Liability Act (OLA) states: "An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises." It further goes on to say: "The duty of care provided for in [Section 3 (1)] applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty." (And does this by means of a waiver, for example.)

Consumer Protection Act

Section 9(1) of the Consumer Protection Act (CPA) provides that a supplier of a service, such as a ski resort or some other recreational facility, for example, is deemed to warrant that the services it is providing are of a reasonably acceptable quality. Section 7(1) of the CPA prohibits the waiver of a consumer's substantive and procedural rights.

The Legal Issue

Blue Mountain Resorts is both an occupier of land and the supplier of a service. So, can the resort use waivers (under the OLA) or can't they (under the CPA)?

The Verdicts

Ontario Superior Court

The Consumer Protection Act trumps the Occupiers' Liability Act. Therefore, no waivers under s. 7(1) of the CPA.

Ontario Court of Appeal

The Occupiers' Liability Act trumps the Consumer Protection Act. Therefore, waivers allowed under s. 3 of the OLA.

Supreme Court of Canada

Refuses to hear appeal of the Court of Appeal for Ontario decision. Therefore, waivers are allowed under s. 3 of the OLA.



Curtain call for entries.

Submit your nominations for the 11th Annual CIP Society National Leadership Awards. Recognized leaders join the prestigious Leadership Circle.

Established Leaders

Ginny Bannerman, CIP (2013) Carla Blackmore, FCIP (2009) Ron Bouwmeister, FCIP (2010) Diane Brickner, CIP (2012) James Cameron, FCIP (2013) Paul Féron, FCIP (2018) Glenn Gibson, CIP (2011) Andrew Janzen, FCIP (2009) Johanne Lépine, FPAA (2014) Barry F. Lorenzetti, CIP (2012) Paul Martin, CIP (2016) Patrick McNally, FCIP (2009) Lynn Oldfield, FCIP (2014) Robert Pearson, FCIP (2016) Greg Thierman, CIP (2010) H. Ross Totten, FCIP (2009) Raymond White, FCIP (2010)

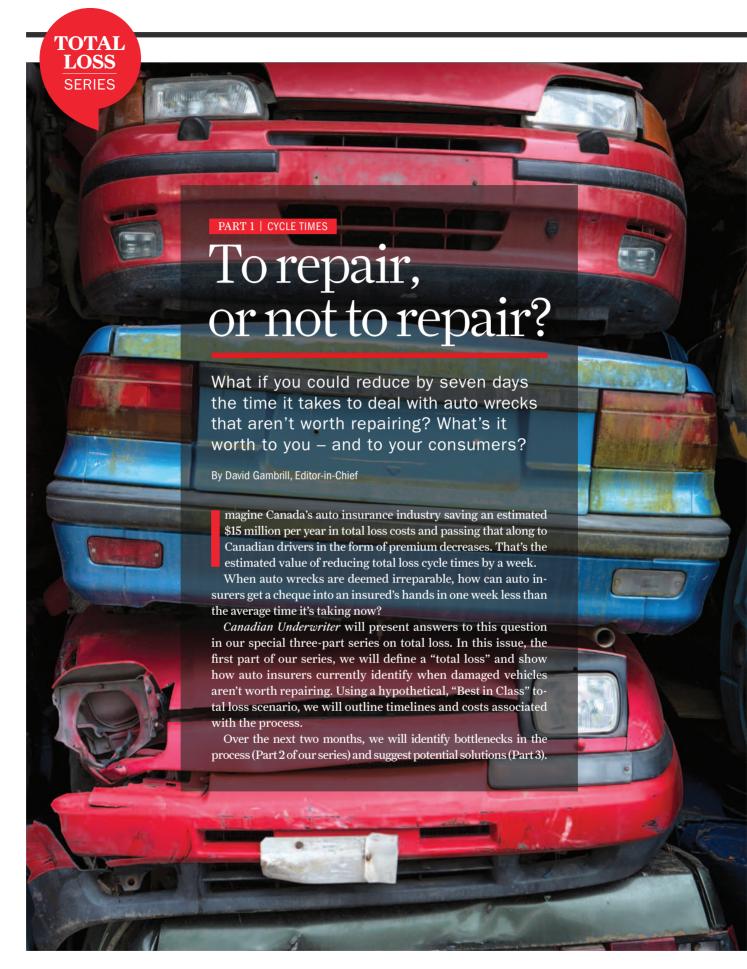
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Nominations will be accepted until June 30.

For more information about the leadership awards and the nomination process, please visit the CIP Society website. www.insuranceinstitute.ca/cipsociety





Days 1 to 3

Jane Doe drives her car along a rainy Ontario street late at night when an oncoming vehicle strays into her lane and hits her 2016 Grand Jeep Cherokee head on.

A tow truck driver takes her vehicle to the nearby collision reporting centre, where she first reports the loss to her insurer and the police. Based on her report of the damage, the insurer figures this is a total loss; with Jane's consent, the insurer has the Jeep towed directly to a salvage yard. Two days later, an appraiser quickly identifies that Jane's vehicle is beyond repair.

"Obvious indicators that the vehicle is probably not repairable or is not worth repairing is that it is a non-drive; all the air bags have been deployed; there is structural damage; the vehicle is over eight years old; it's leaked fluid; there is a burn; or the doors don't open," says Ewan Cameron, assistant vice president of claims at RSA Canada. "You should be able to make an estimation rapidly."

Days 4 and 5

The appraiser values the Jeep at \$36,000. She is then informed that repairs would cost more than \$30,000. That's well beyond the insurer's limit of 75% in repair costs. (Each insurer has its own threshold limit, typically between 70% and 80% of the depreciated value of the vehicle.) Jane's Jeep is a total loss.

Days 6-10

The appraiser contacts Jane and offers a \$36,000 settlement. "Negotiations tend to drag the [total loss] process on," ob-

serves Kelly Merchant, senior regional service manager in the field at Audatex (a Solera company). "If you call an insured and tell them that their car is worth \$12,000, and they were expecting \$16,000, chances are you are not settling that day."

After a few days of negotiations, Jane signs over the ownership of her car to the insurer and walks away with a cheque to buy a new car.

Days 11-31

The insurer now owns a hunk of junk. The next step is to auction off the vehicle, which can take another two to three weeks. Through auction, the insurer can recover an average of about \$2,000 and \$2,600 for a salvaged vehicle.

Total Loss Costs

Our example above is extremely basic. There were no injuries. The vehicle was driven to an accident reporting centre, as opposed to a towing yard unknown to the insurer. The total loss was immediately obvious. It took less than a week for the insured to settle with the insurer. And yet, this scenario cost the insurer about \$1,050 in car rental and storage fees alone.

In reality, a 10-day turnaround time from collision to cheque in the hand of the insured would be considered "best in class." The actual industry average for resolving a total loss is in the range of 19-25 days. That's from the time of the crash until the time the consumer walks away with a cheque from the insurer.

The process is more like 40 to 50 days if you include the time it takes to auction

off a vehicle. (An auction will typically fetch an average of about \$2,000 to \$2,600 for the insurer.)

Total losses amount to roughly 20% of an insurer's physical damage claims. "Of the vehicles where a claim is truly made, we see about 4,000 repairs a year and then maybe somewhere between 2,600 and 2,800 total losses, so it's about a 60/40 split between how many we do repair and how many are totaled," says Lorna Richards, program manager of auto physical damage at Gore Mutual Insurance Company.

Based on reported company averages, the entire P&C industry might process approximately 20,000 total losses across the country in any given year. Assume it takes an average of 22 days to resolve each of them; assume also that insurers pay an average of \$105 per day in car rental and storage yard fees. That's \$2,300 per total loss.

Multiply that by the number of the industry's total losses and you get a \$46-million price tag for car rental and storage fees alone. Shave that process down by a week and insurers might save \$15 million. How can the P&C industry get there? Look for Part 2 of our series in May to show where fat can be trimmed from the system. Cu



PART 2
MAY | BOTTLENECKS

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Once again this year, The Quarter Century Club plans to continue to make a donations to Children's Charities & the Insurance Institute Scholarship Fund.



handbook

HIGHLIGHTS

Newfoundland's deductible p. 37 | Burnout victim p.37 | New wildfire data p.39



REINSURANCE LAW

Follow the settlements.

The Supreme Court ends the winding legal journey of a reinsurance contract that did not contain a "follow-the-settlements" clause

BY HARMON C. HAYDEN, Founder, Harmon Hayden Law

n Canadian reinsurance law, when a "follow-the-settlements" clause is absent from a reinsurance contract, must the reinsured prove its loss — both on liability and quantum — against the reinsurer in the same manner as the original insured?

The answer is yes.

A follow-the-settlements clause limits the ability of a reinsurance company to challenge how the ceding insurer allocates the settlement. The clause is particularly relevant in complex cases, in which the ceding insurer allocates losses across several different reinsurers. The purpose of the clause is to reduce the likelihood that the ceding insurer will resort to lawsuits in order to determine allocation, which can hurt claimants by delaying settlement payments.

But what happens when the reinsur-

ance contract does not have such a clause?

This is the subject of one of the longest-running reinsurance cases in Canada, which is coming to an end after litigation spanning decades throughout the United States and Canada. There have been numerous judgments in Swiss Reinsurance Company v. Camarin throughout the years, but perhaps the most important came both in the trial decision in the British Columbia Supreme Court and the subsequent appeal in the British Columbia Court of Appeal decision.

The underlying facts in Swiss Reinsurance Company are fascinating and literally span the globe — from product liability actions in California, Colorado, New Mexico, Oregon, Texas and Washington, to insurers and brokers from London, Switzerland, Barbados

and British Columbia. But our interest here is in what the B.C. Court of Appeal states clearly and unequivocally: a reinsured must prove its loss in the same manner as the original insured.

In the absence of a "follow-the-settlements" clause, there must be a judicial determination on liability under the policy. The burden of proof is on the reinsured to prove on a balance of probabilities that the underlying plaintiff's loss fell within the risks covered under the original and reinsurance policies, and that it was in matter of fact liable to the plaintiffs in respect of that loss.

Background

Vancouver-based MacMillan Bloedel Ltd. purchased commercial general liability policies from American International Group Inc. (AIG) during the 1990s, be-



Jean-Pierre Gagnon

Farm Mutual Re Announces New President

Farm Mutual Re announces that Jean-Pierre Gagnon joined the company on April 1, 2019 as President. Jean-Pierre (JP) will work alongside Steve Smith (Chief Executive Officer) until Steve's retirement in August 2019. JP will then assume the roles of President and Chief Executive Officer.

JP has worked in the property and casualty insurance industry since 1991. He has held senior leadership roles in actuarial, risk management and underwriting, in Canada and abroad. Most recently, JP was Vice President Personal Insurance for Travelers Canada where he worked since 2010. Prior to that role he held Chief Actuary and Chief Risk Officer positions with Travelers. JP also held leadership, underwriting and actuarial roles at CAA Insurance Company, Eckler Partners, and TD-Meloche Monnex.

JP has a Bachelor's degree in Actuarial Sciences from Laval University and is a Fellow of both the Casualty Actuarial Society and the Canadian Institute of Actuaries.

"I am truly honoured to succeed Steve who has done a phenomenal job of leading the organization," said JP. "I am excited about joining the team and working closely with our members."



fore MacMillan Bloedel was acquired by Weyerhaeuser Company Ltd. MacMillan Bloedel acquired roofing tile manufacturer American Cemwood Inc. in 1993.

MacMillan Bloedel was served with several lawsuits alleging that defects in Cemwood tiles were causing damage in felt layers underneath those tiles on roofs.

In the underlying American Cemwood actions between 1994 and 1997, 22 lawsuits alleged damages. AIG agreed to settle the claims for \$70 million, seeking more than \$25 million from Swiss Re under reinsurance provisions.

Court records indicate that AIG was 50% reinsured first by Camarin Limited (a captive reinsurance company, and an indirect subsidiary of MacMillan Bloedel), and then by Swiss Re. Aon Reed Stenhouse Inc. placed the reinsurance policies.

AIG insured MacMillan Bloedel and its subsidiaries under a primary layer of insurance, which was not at issue in the litigation. AIG also insured MacMillan Bloedel under an umbrella layer of insurance, the subject of this appeal. Five such policies were issued between 1993 and 1998, excluding 1994.

Camarin reinsured AIG for 50% of its limits under five of the six original policies (1994 excluded). Swiss Re reinsured Camarin for 100% of its liabilities to AIG.

Swiss Re sought to rescind its reinsurance policies in a B.C. court, claiming material misrepresentation.

At trial level, the court held that the omission of the "follow the settlements" clause by Aon, albeit a clerical error, was negligent. Therefore, any alleged misrepresentation by Camarin was not material.

More importantly, the trial judge held that the reinsurer was required to "follow the settlements," even absent an express clause to that effect. Conditional judgment was given to Camarin against Aon on account of their failure to include a "follow-the-settlement" clause.

The Appeal Court unanimously upheld the appeal and ordered a new trial. This was appealed to the Supreme Court of Canada which refused leave to appeal. Thus, this remains the leading case and the present law of Canada on this particular issue.

The Outcome

The retrial of this matter was scheduled for a 145-day trial commencing in October 2018. I was advised by counsel on Nov. 19 that this trial did not proceed. They advised as follows: "You are at liberty to say the trial was adjourned and the court was informed there was an agreement that required certain steps to be taken."

Thus, this long and winding litigation has come to an end and the law is presently settled in Canada, in accordance with English precedent.

To recap, a reinsured must prove its loss in the same manner as the original insured; in the absence of a follow-the-settlements clause, there must be a judicial determination on liability under the policy. How does this apply to the facts established in *Swiss Reinsurance Company v. Camarin*?

For the reinsurer Camarin to prove its loss in the same manner as the original insured (MacMillan Bloedel), Camarin would need to demonstrate that MacMillan Bloedel/Cemwood was subject to a "liability imposed by law" that fell legally within the coverage of the policy. Camarin would need to show that MacMillan Bloedel/Cemwood was liable in the Richison class action lawsuit for damages insured under its policy.

"These principles are sensible," the British Columbia Court of Appeal concluded. "The fact that a settlement may be reasonable to a primary insurer cannot be determinative because the primary insurer may well settle for reasons that are extraneous to the merits of claim — for instance (as was the case here) to avoid exposure to a bad faith claim."

Based on this case, underwriters and brokers should carefully consider whether they intend to include a "follow-the-settlements" clause and determine the law of the jurisdiction that will apply to the interpretation of reinsurance contracts. Cu

Harmon C. Hayden is the founder of Harmon Hayden Law (www.haydenlaw.ca), with offices in Vancouver and Kamloops, B.C., focussing on insurance, reinsurance, product liability, and complex commercial litigation.

BY THE NUMBERS

Newfoundland & Labrador's Deductible

Newfoundland's Consumer Advocate wants to continue with the province's auto insurance deductible regime, in which the driver deducts an amount from his or her final claim settlement.

Proposed New Potential Effect of Deductible \$10,000 deductible Current Premium New (\$10,00 Deductible) Premium Consumer Advocate's (\$10.00 Deductible) \$1.132 proposed amount: \$1,067 \$10.000 Province's current deductible amount: 2.500\$65 Premium savings **Ontario Experience** (1996-2002)Claims Cost Increase Deductible \$15,000

TRUSTED ADVISOR

I am a sad, lonely and depressed adjuster. I am working on too many claims files at once. I don't have any friends anymore and my family members complain that I am always working. What do I do?

- Tired of it All



Dear Tired,

It sounds like you are well on the way to burning out, if you aren't there already. This is something more than just feeling stressed and anxious occasionally. Burnout happens when stress is chronic and prolonged. Common signs include: disengagement and blunted emotions (sometimes to the point of detachment and depression); poor health and more sick days; feelings of hopelessness; a loss of motivation or ideals; or a sense of being overwhelmed by small tasks. Try to communicate your feelings in a constructive way with your office colleagues, friends and family. Also, if you are working so hard that you are neglecting your own needs, you will need to make sure you are eating healthy foods, drinking water throughout the day, and getting plenty of sleep and exercise. Sometimes, change is as good as a rest. Find ways to change or shift your responsibilities at work. This may involve handling different sales accounts, claims files or projects. Learn to avoid taking on more work than you can handle. This may involve saying 'no' to a task, but 'yes' to the person making the request. In other words, negotiate a way that your colleagues get what they want without you having to do it. Lastly, take a vacation – a real one. No checking your phone for work-related voicemail messages or emails while you are away from the office. Reconnect with an activity that you enjoy, be it meditation, martial arts, sports, going to a movie, pottery, or sipping drinks at the beach. Sure, work will miss you while you are gone: But better they miss you for only two weeks than for the rest of Eternity, after you quit the job. And, as always, if you need help, seek professional help, which is typically available through employment benefit programs.

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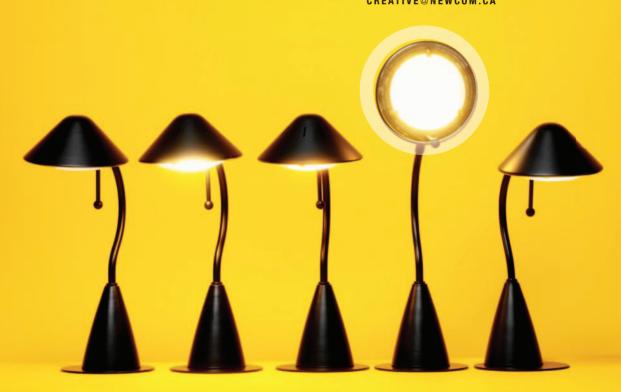
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WILDFIRES

Controlled Burn

What kind of data can help insurers snuff out Canada's newest top-tier peril?

BY CHRIS FOLKMAN, Senior Director, RMS

ildfire dominated news headlines again last year, with the damage in California taking centre stage in November. Insured losses for the Northern California Camp and Southern California Woolsey fires are estimated at between US\$9 billion and US\$13 billion. For the Camp Fire, 86 people were killed as entire towns such as Paradise, with close to 27,000 residents — were largely destroyed.

Canadians can relate. The 2016 wild-fire in Fort McMurray, Alta. remains the costliest property and casualty insurance claims event in the country's history, with insured damage of nearly Cdn\$4 billion. Last year, forest fires in Ontario and B.C. broke records for acreage burned. Fortunately, the location of these 2018 wildfires resulted in no catastrophic claims events.

It seems we are on an escalating trend. As such, insurers in both Canada and the U.S. are left wondering what is in store for the next wildfire season and beyond.

Tier 1 peril

Wildfire has become a Tier 1 peril for insurers and reinsurers in wild-fire-prone areas, and events can test insurer solvency. In one U.S. example, Merced Property and Casualty was liquidated in December by the State Insurance Commissioner for California after showing outstanding liabilities in the town of Paradise that were nearly three times the level of its assets. In California, more than 354,000 hectares burned in 2018 (an area nearly six times the area of Toronto), about 70% more than what burned in 2017, according to CAL FIRE.

How bad was the 2018 wildfire season in Canada? Wildfires never left the news. At the end of the season, on Sept. 27, the Canadian Interagency Forest Fire Centre reported that 6,845 fires had burned 2.2 million hectares (5.6 million acres). There were more fires last year than during the very active season in 2017 (5,305); however, even though the frequency of last year's fires doubled the 25-year average, around 35% fewer hectares burnt in 2018 than during the year before.

After a record-breaking wildfire season in 2017, British Columbia was again hardest hit in 2018, accounting for nearly 60% of the country's total burnt area. The province set a new record in 2018, with 1.35 million hectares burned – 13 times its 20-year average. Five hundred fires burned in B.C. last year, forcing tens of thousands of residents to evacuate. Because of where the fires happened, only 155 structures were lost in 2018, compared to 310 in 2017. Tens of thousands of residents were evacuated, and 155 structures were lost in 2018, compared to 310 in 2017.

Tools to Take Control

Alarm bells are ringing in the insurance industry. Wildfire clearly requires catastrophe modeling just like any other major peril. To understand both exposure accumulations and return period loss metrics, the market needs better tools for managing this risk.

The industry needs answers to questions like:

- · What is the 100-year wildfire loss for the U.S. or Canada?
- · Given increasing exposure, will we ever see a Cdn\$10-billion wildfire event loss?
- · What role do mitigation measures play in reducing the risk?

The market has long struggled with tools that take too simplistic a view of wildfire, based on fuel load/fire spread models. Published industry fire data can also be inconsistent, incomplete, and outdated.

To help quantify a wildfire risk accurately, high-resolution simulation models can account for the conditions that turn a small wildfire into a catastrophe. They also provide insights on event probability, the effects of increased development in suburban areas, fire suppression, and mitigation measures.

New high-definition models incorporate the latest events and use probabilistic techniques that not only accommodate fire spread, climate, fuel type and wind speed, but also consider location-level characteristics such as roof covering, defensible space, and construction materials. Major wildfires cause damage to structures not only with radiant heat, but also with smoke and wind-driven embers, highlighting the modeling challenges and the need for ever-greater model resolution and computational capacity.

What's going on?

Aggressive fire suppression and infrequent controlled burns causing fuel build-ups are cited as some of the reasons for the widespread fires.

Continuing warm, dry conditions exacerbated by climate change are making matters worse. As fire ecologist Robert Gray told CBC: "What we thought was going to be an average condition in 2050, we're starting to see those conditions coming a lot sooner."

Also, building in the wildland-urban interface has resulted in wildfires moving closer to communities. Canadian Forest Service fire scientist Lynn Johnston estimates that roughly 60% of municipalities and First Nations reserves in Canada have been built within five kilometers of large, fire-prone areas.

Insurers cannot afford to look at wildfires as a peril that can be managed easily through claims payouts and loss reserves. Wildfire has the potential to be an earnings event, and in some cases a solvency event. Fire is standard in every homeowner's policy; without effective modeling, pricing and risk selection, wildfire will continue to affect underwriting profitability.

For provinces such as British Columbia, where half of the worst 10 fire seasons since 1950 have occurred in the last nine years, time - and luck - is surely running out. Wildfire-exposed insurers need to treat this pervasive (and escalating) peril as a major cat concern. cu

Chris Folkman, senior director of product management at RMS, is responsible for specialty lines including terrorism, casualty, wildfire, marine cargo, industrial facilities, and builders' risk. He is a leading commentator on California's wildfires.

CROWDSOURCED

ARE YOU NOTICING A HARD MARKET IN COMMERCIAL INSURANCE? IF SO. HOW IS THIS AFFECTING RISK **MANAGERS?**



Iennifer Goodwin

Chair, RIMS Maritime Chapter Risk and Information Systems Manager, Scotia Investments Limited

We are all hearing about the tighter market.

We are all being hit with rate increases. As for coverage, terms and capacity, it still seems to be pretty generous. Nobody is being hit with anything unusual there. As for rates going up, they are going up across all lines.



Peter Kennedy

Senior Vice President, National Director, Real Estate Practice. Aon Canada

The current commercial insurance market in Canada is in a correction mode for some risks. Aon is seeing increased underwriting discipline, but not a hard market. For proper-

ty insurance, insurers are quoting premiums to attain desired profitability targets based on an account's loss history. If the loss history is poor, deductible changes are likely, in addition to premium increases. But, with the odd exception, we are generally not seeing coverage changes. Capacity is being cut back in some cases, usually resulting from natural catastrophe modeling exercises. For casualty insurance, insurers are undertaking loss trending analyses on accounts with a frequency of losses. Those results will factor heavily into renewal pricing. To date, there has been little in the way of cutbacks in coverage and capacity. The environmental insurance market is tightening for select risks only, such as those with losses and claims-servicing challenges (e.g. remote risks, costly to access). The construction insurance market is firming, with both higher premiums and restrictions in coverage on some lines (such as project hot work). This is attributed to construction industry-wide loss trends. Specialty lines of coverage, such as executive risk, are seeing higher premiums, but only on a case-by-case basis depending on industry sector and loss history. Notwithstanding, accounts with a good loss history and risk profile continue to be favoured by insurers.



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MEDIA INC

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Produced by the publishers of Canadian Underwriter magazine

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Claims Canada is the country's only national publication serving the insurance claims community. Published six times a year, it delivers practical insight that drives the success of claims decision-makers and influencers. Claims Canada is distributed in print and digital editions to a wide range of more than 15,000 industry stakeholders, including claims managers, adjusters, insurance executives, brokers, restoration professionals, forensic engineers and lawyers, among others.

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www.claimscanada.ca April - May 2019 | Claims Canada 43

BEST PRACTICES, BUILDING CODES AND RISK

Building resiliency in Canada

By Emily Atkins

2018 was a big year for catastrophes in Canada.

According to CatIQ's Laura Twidle, speaking at the CatIQ conference in Toronto this February, there were 12 Cats and nine notable events in Canada last year. These Cats accounted for \$1.9 billion in insurable losses in 2018, and with notable losses added as well, that number could mount to over \$2 billion. Ontario was hardest hit, with losses of \$1.2 billion, the largest chunk of which was caused by the May windstorm.

There's no doubt that these are large losses, and climate change predictions indicate that the frequency and severity of such events is going to continue to increase. Insurance Bureau of Canada (IBC) data show that P&C insurance payouts due to extreme weather events have more than doubled every five to 10 years since the 1980s, and 30 years ago average insured losses of Cat claims were \$400 million; now they average \$1 billion.

Perspectives on resiliency

In the face of these losses, the push to build resiliency in Canadian communities and individual dwellings is urgent. Insurers, homeowners, municipalities and higher levels of government alike share the risk of climate change related losses due to overland flooding, fire, wind and hail events.

Against this backdrop we decided to talk to people who are working behind the scenes and from different angles on creating the ability to withstand the onslaught of natural disasters. We asked about current resilient design initiatives, public education and the political will needed to move preparedness initiatives forward. What we learned is that while we know lots about how to build to avoid risks, there is still a long way to go before resiliency is truly built into our communities.

Burning misconceptions

2018 was particularly bad for wildfires. California, British Columbia, Greece, Portugal and the Arctic (on the Russia-Finland border) all experienced unprecedented burns. But wildfires have only recently become a serious threat to insured property. Since the 1990s the cost of fighting these conflagrations has grown as more people move into the wildland-urban interface area.

We asked Eric Kennedy, assistant professor in Disaster and Emergency Management, with a specialty in wildfire management at York University in Toronto what it takes to build a fire-resilient community.

Best practices now are based on an understanding that wildfire is not the wall of flame that many of us have seen in videos from events like Fort McMurray, Alberta. Rather, it spreads by dropping what Kennedy calls "conniving little embers" into fuel sources, and when it comes to homes that means shingles, eavestroughs, wooden siding and decks. With that knowledge the approach to wildfire resilence becomes eliminating the possible sources of fuel that the embers can ignite.

These include keeping trees away from the house, avoiding sources of tinder for the embers like woodpiles, full eavestroughs, and brush piles, and building with fire-resistent materials. "All of that stuff is going to do a huge amount in terms of ensuring home survival and building survival during a wildfire situation," Kennedy asserts.

Behaviour is key

But that's just the basic, commonsense approach. Creating building codes will protect structures, Kennedy says, but building resiliency takes more than changing codes. Doing it properly requires a lot of buy-in from residents. "There are so many behavioral changes that have to get made, and they each have their own different flavour

and different challenges," he said.

Kennedy notes that the issue of wildfire revolves around the fact that people really want to live in the interface zone. Which means that certain activities required to protect their property fly in the face of the reason they want to live there in the first place. "You want to be in the forested land-scape. You want to be in the secluded area. You want to have that line of trees between your house and the road, so that you get some privacy," he says. "I think we're all too quick to say the solution is really easy, just cut down a few trees around your home, when that's actually a really powerful reason for why people want to be there."

It comes down to education and a "negotiation within the person themselves, coming to terms with how they want to live, what risks they're willing to take and the tradeoff between some aesthetics and these wild-fire protection kinds of things," Kennedy says. People have to be brought on board with taking responsibility to reduce the risk of wildfire consuming the community.

Sustainable resilience

But even if they are on board in principle, there are other challenges to public engagement. Kennedy asks: "If we want people to use the right roof building materials, how do we make sure that those are available at a similar kind of cost, so that people are at least not paying a huge amount more to be responsible?"

Maintenance is another issue. FireSmart programs are great because they educate people about how to reduce the risk to their homes, he notes, but "you've got to do a lot of stuff on a regular, on a weekly, a monthly, an annual basis to maintain that around your property. You have to actually get up there and clean out the eavestroughs a couple of times a year, or even more regularly."

And, what about those who are mobility impaired, seniors, people with disabilities? If they cannot do the work themselves, can they afford to hire someone to do it for them? Then there is the liability question of a municipality telling its citizens they have to go up on their roof to clean up. Kennedy says these questions cannot be overlooked.

In the aftermath of a large wildfire it might seem expedient to prevent rebuilding on a risky site. But Kennedy believes that notion raises many complexities: "Do you have a different standard for people who are just moving to these areas?" Should people be allowed to stay if they lived there for generations? He also points out the financial inequities raised – wealthy people can perhaps afford to take more risk, and buy insurance that others cannot.

require keeping the water out. It's simply a matter of making the structure flexible and resistant to the elements.

Tamsin Lyle, principal at Ebbwater Consulting, a Vancouver, B.C.-based firm that provides flood management solutions, is a firm believer in building to allow the water to get in, rather than attempting to interdict it. "You're going to get wet," she says, but the idea is that you can evacuate and the building envelope will not be damaged by the water. That means no drywall, no carpets and simple preparations like having lightweight, easily moved furniture and appliances up on plinths.

Flood resiliency, as with fire, is a necessity because people like to live in disaster-prone areas.

1% preparedness

Kennedy believes that no matter what the disaster, it's easier for governments to get money for response than prevention. "It's a hugely expensive operation on the fire-fighting side, but it's very hard to get the kind of focus and investment that we need on the preparedness side. If you look at the amount of money that's spent on fire fighting annually in Canada versus the amount that's spent on doing FireSmart [for example] – a huge amount is spent on response. When you have helicopters and planes and people out there, it's very easy to spend an incredible amount."

He asserts that it would only take a tiny fraction of the spending on the preparedness side to build resilience. "If we could take 1% of the fire budget and move it over to additional preparedness stuff, that would make a huge difference."

Flood

Flood resiliency, as with fire, is a necessity because people like to live in disaster-prone areas. But unlike fire, building a structure that is flood resilient may not

Since there is typically plenty of warning before floods are on the doorstep, "even if it's only four or six hours, there is a warning time, so if you have a plan in place, you can move your furniture. A lot of the flooding we deal with in Canada, the trivial stuff, is rapid onset and rapid rise and then it goes away really quickly too. If you can manage to be away from your home for a couple of days over five or ten years, but you don't have any of the stress of the recovery part that's pretty cool," she says.

There are plenty of examples of this type of construction already built in flood-prone areas. Its advantage over the perhaps more obvious solution of raised construction – houses on stilts or screw-pilings – is that it creates a more pleasant urban environment with streetscapes that are human scale and useable. Raised buildings just shed the water onto someone else, Lyle says, and may also create exposure to seismic risk. In B.C. she notes the codes requiring stilt buildings cause so many accessibility issue with the necessary stairs for access that planners are spending

inordinate time dealing with variances.

Lyle points out that there are exquisite examples of flood-proof construction in existence all around the world. But, she says, because of the cost of building they are typically the preserve of the wealthy.

Imagination vs. the building code

Lyle is involved in national standards

development and believes that generally the codes are not quite up to speed with current thinking and construction techniques for flood risk prevention. But forward-thinking entities are pushing the bar higher. Vancouver, for example, because it operates under a charter, has been coming up with new building design standards that will allow people to implement best practices,

rather than limiting them to the current guideline that they put buildings on stilts.

"The challenge is that if we are now being told to build out for the end of the design life of a building – that's the year 2100 in some places and along the coast – buildings are going to have to be three or four metres higher, especially on the east coast, than they are now, and it's kind of impractical," she says.

This kind of design effectively 'sterilizes' the streetscape, inspiring designers to instead come up with building designs that incorporate useable street-level space that is inundation-friendly. Lyle says designers envision spaces that can be used as retail—cafes and the like—and cleared out when the water is coming.

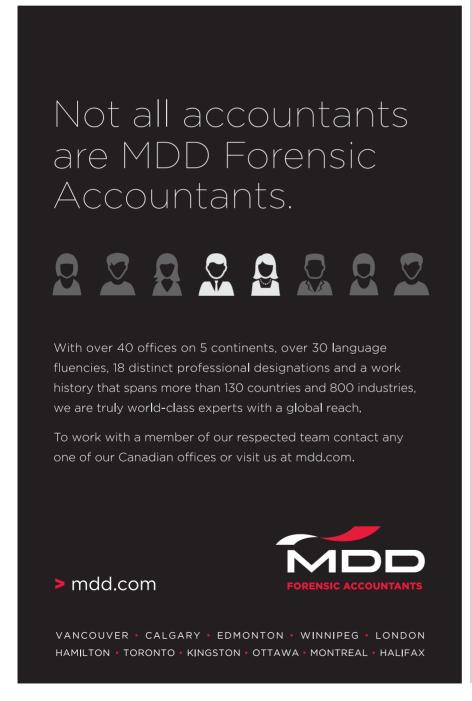
She cites European examples where they build civic spaces on the flood plain that are seasonally floodable. "But the challenge we have here is that for the most part we're still looking at archaic building codes and standards that define what we're doing and not really allowing people to have imagination."

Political will

Like Kennedy, Lyle also sees a lack of commitment from politicians as a significant barrier. She cites the most recent provincial budget in British Columbia, where she saw a brief, tantalizing window of opportunity. "Because we had two years in a row where we had a flood-fire, flood-fire season there was senior direction towards 'let's do something about this'. And, that's when they made all of these recommendations and these broad sweeping statements about how they were going to start looking on disaster risk reduction. And then six months later there's nothing in the budget."

A role for insurers

The P&C insurance industry has for years recognized the value of funding and undertaking research into resiliency. The Institute for Catastrophic Loss Reduction (ICLR), which was founded in 1998 as an initiative of the P&C insurance industry to deliver research into disaster prevention, is a prime example of the industry's commitment. IBC likewise, takes an active role in



guiding resiliency development.

Kennedy would like to see insurers continuing to play a significant role in tackling wildfire hazards. Not only do they have a role in investing in the research needed to improve codes and resiliency, they are also uniquely positioned to "provide carrots and sticks for getting people engaged in the problem," he notes.

"There's lots that the insurance industry can do to figure out how to make building codes more progressive, in figuring out how to deal with existing housing stock and in figuring out ways to help make responsible decisions affordable for homeowners; make it worthwhile doing the right thing, giving people who might be financially tight, the capacity to do the right thing."

Chris Rol, a senior policy advisor with Insurance Bureau of Canada, says the industry is doing just that in engaging both homeowners and governments. "We've been calling for a number of years for community to take steps to become more resilient. And we've been trying along the way to provide them with tools and aid, to assist them in this. We talked about the importance of land planning as that sort of first step of resiliency. As well, there are things that homeowners can do to reduce their risk and so we wanted to have those conversations," she said.

Equally the industry needs to talk with governments about adaptation. "The way things have been done in the past, [are] not necessarily how things should be done in the future," Rol said. "Sometimes past governments and past councils made choices that have resulted in people living in risky areas and so land use planning does matter."

Rol notes that the industry is also engaging with government about the financial management of flood risk. "Even with insurance being made more widely available for overland flooding, we recognize that there are people at that highest risk area where insurance would be – either practically or effectively – unaffordable and unavailable."

"We can see it's a very challenging thing because there's not a lot of dollars to go around. But mitigating flood risk is one of those things that they need to do and they need to deal with the infrastructure that's not meeting the needs of their community."

A risky trade-off

It's clear that the body of knowledge about how to reduce risk and prepare for natural disasters has come far in recent years. But the fact remains that resiliency against wildfire and flood is still an aspiration, a goal that many are working towards.

"I would say, as a scholar in disaster and emergency management, there are very few places that we can choose to live that don't have any risk," Kennedy says. "We could say, 'Okay, you shouldn't live in Jasper. You should live out in Edmonton.' You run into tornadoes and hail and thunderstorms and all these other things, and hail as an insurable loss and an uninsurable loss is an absolutely huge threat. In many cases you'd be trading off one risk for another."

Rather, he says, we need to ask how we live in risky places. We need to look at individual and collective responsibility and learn to live with the risk rather than in denial.

RECENT INVESTMENTS IN RESILIENCE

Canada's federal government has recently made a series of funding announcements in support of building resilience. Here are some highlights:

- \$205,000 to the Government of the Northwest Territories for an adaptation project to assess the cost of climate change impacts.
- \$50,000 to strengthen the Toronto Port Authority's infrastructure.
- More than \$1.3 million to support six climate change projects in Southern Ontario focused on water management and infrastructure.
- More than \$1 million in support of six climate change projects in British Columbia, including strategies for managing wildfires, coastal and shoreline resilience, and critical infrastructure.





47

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KLEPTOCURRENCY

Crime insurers face new challenges with cryptocurrency

By Chris McKibbin and Maria Christodoulou

very day seems to bring a new headline announcing another massive cryptocurrency loss. In February, QuadrigaCX, Canada's largest cryptocurrency exchange, allegedly lost access to some \$190 million worth of clients' cryptocurrency. According to QuadrigaCX, its CEO was the only person able to access the cryptocurrency. The CEO was reported to have died suddenly in India at the age of 30 – a report that was greeted with skepticism in some quarters.

Insurance for financial loss resulting from the use of technology to commit fraud has existed in various forms for decades. However, cryptocurrency represents a new asset class, and thus a new challenge for fidelity/crime insurers. An understanding of cryptocurrency and blockchain technology is essential.

What is Cryptocurrency?

A cryptocurrency is a digital asset that serves as a medium of exchange and relies on cryptography to control the creation of units and to secure and verify financial transactions. Over 1,000 cryptocurrencies have been in use. Cryptocurrencies differ from traditional currency in that they: (1) are decentralized; (2) are generated in a limited supply; (3) have no physical form; (4) accommodate pseudonymous – and often anonymous – transactions; and (5) are not legal tender. Cryptocurrency transactions are generally non-reversible.

Decentralization is a critical feature of cryptocurrency. In a "traditional" online transaction between two people, a third party intermediary (such as PayPal) is necessary to complete the transaction. In a decentralized model, transactions are not processed through a third party; they move directly from person to person. One

issue that a cryptocurrency system must address is how to confirm – without a third party intermediary – that A owns the cryptocurrency A proposes to transfer to B, and has not already spent it in a prior transaction. This is known as the "double-spend" problem.

A cryptocurrency system solves the double-spend problem by use of a block-chain, which is a decentralized public ledger distributed through a peer-to-peer network among all the users of that cryptocurrency. Each user maintains a "wallet" (software which stores the user's private keys). A private key is a string of alphanumeric characters, the possession of which enables the user to transact cryptocurrency. If a private key is lost (as is alleged with QuadrigaCX), the cryptocurrency cannot be accessed and is effectively gone forever.

The wallet applications carry out the transaction by "announcing" the proposed transaction (which includes the private key) to the network of participating servers. These servers ("cryptominers") collect proposed transactions and verify that the cryptocurrency exists. Cryptominers then collect transactions and aggregate them in blocks. When a transaction appears in a valid block, it is considered confirmed.

Crime Insurers Respond

Several American insurers have made forays into the cryptocurrency sphere. A fundamental threshold issue in extending crime coverage to cryptocurrency is that crime policies only cover "money" (coins and currency), "securities" and certain other classes of tangible property. Cryptocurrency is an intangible asset, so specific endorsement language is necessary to extend coverage to it.

In the United States, Insurance Services

Office, Inc. introduced an "Include Virtual Currency as Money" endorsement, while Great American Insurance Group introduced an endorsement that adds cryptocurrency to the definition of "Securities". To date, no Canadian crime insurer has offered a general coverage extension in respect of cryptocurrency, although several are exploring the idea.

Considerations for Crime Insurers

While cryptocurrencies offer protections against double spending, such protocols cannot prevent wrongful single spending. The blockchain is indifferent as to whether the user of a private key is the "legitimate" owner, or a fraudster.

Assuming that cryptocurrency is recognized as covered property by endorsement, some of the "traditional" crime insuring agreements could apply. Examples include employee dishonesty, social engineering fraud (SEF) and (with important qualifications) computer fraud. Other insuring agreements, such as loss inside the premises and loss outside the premises, do not "fit" conceptually with cryptocurrency loss scenarios.

Employee Theft: Cryptocurrency can be lost through employee dishonesty. In April 2018, an Indian cryptocurrency trading platform alleged that a rogue employee sent 438 bitcoins to an unauthorized recipient. As with any loss alleged to have been caused by an employee, there will be evidentiary issues surrounding the proof that it was an employee that caused the loss, rather than a third party.

One challenge in the investigation of cryptocurrency losses is that the transfer mechanism is nearly anonymous. In order to prove employee involvement, it would be necessary to demonstrate that the employee had access to the private key, and to negate the possibility that the private key fell into the hands of a third-party fraudster. As infinite copies of a private key can exist, this could pose a practical challenge to demonstrating employee involvement.

SEF: SEF occurs when an insured voluntarily transfers property based on a fraudulently induced mistaken belief as to the ownership of that property. An insured may be duped into transferring cryptocurrency to a public key that is mistakenly believed to represent a legitimate recipient, but is in fact controlled by a fraudster. As with existing SEF coverage endorsements, underwriters will need to consider appropriate limits and whether verification/callback requirements might be appropriate conditions to coverage.

Computer Fraud: The intent of computer fraud coverage is to indemnify the insured with respect to hacking incidents, i.e., where a hacker directly causes the insured's computer to make an unauthorized transfer of money,

without any involvement on the part of the insured or its employees. Some U.S. insurers have made it clear their policies do not provide indemnity for cryptocurrency hacking losses, but a form of specialized computer fraud coverage could be developed for hacking incidents involving cryptocurrency.

Loss Inside/Outside the Premises: These coverages do not readily apply in the case of cryptocurrency, because they are tied to the existence of physical property and physical premises. But what happens if the private key is given physical manifestation, such as a wallet stored on a USB drive, or a piece of paper with the private key written on it? At first blush, it would seem that coverage could arise, as there is now something that can be physically transported. However, the issue is not that clear. A piece of paper containing a written private key is simply a piece of paper containing data; it is not the cryptocurrency itself. It can be copied ad infinitum, and has no more intrinsic value than a monthly bank statement with an account balance written on it.

Underwriters will also need to analyze new types of losses as the cryptocurrency ecosystem continues to evolve. For example, if an employee uses workplace computing resources for cryptomining (a costly, energy-intensive process), is that an employee theft loss? Policy conditions, such as those relating to valuation, will also need to be considered. Cryptocurrencies are notorious for significant price volatility, so valuation provisions will need to be drafted with this in mind.

Despite the scary headlines, cryptocurrency is beginning to form part of the legitimate commercial ecosystem – a part that displays significant growth potential. The question for crime insurers is not whether there should be coverage for cryptocurrency, but what form(s) such coverage will take. •

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49



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peer to peer



Mike George, Bob Taylor and John Gar**ner** were the three founders of Trisura. followed by an initial group of about a dozen employees. "When I started, I was employee number seven," says Grant, senior vice president of specialty insurance solutions. "Now, with retirement and people leaving, I am the second-longest serving Trisura employee."

(Chris Sekine, recently appointed president and CEO, is the longest-serving. He succeeds George, who will continue working with Trisura on a consulting basis as of Apr. 15).

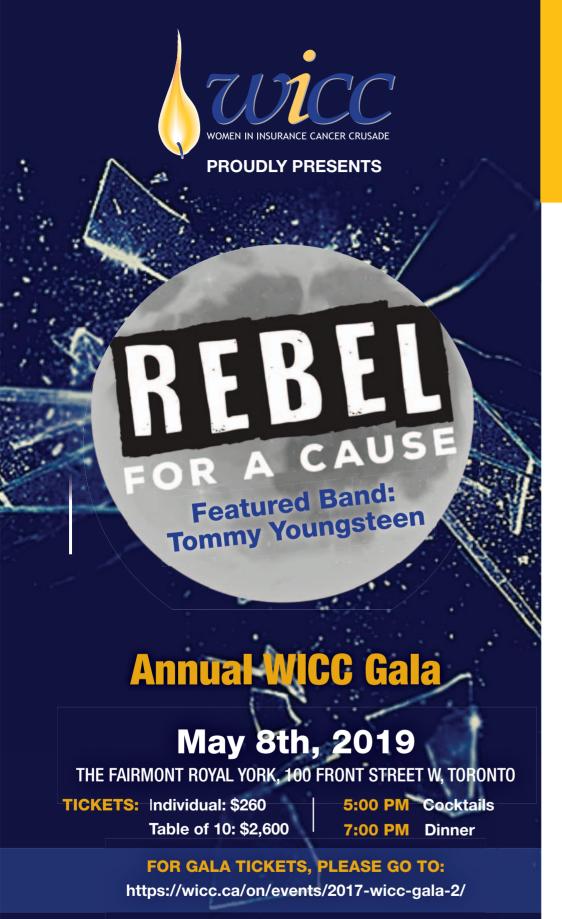
"When we started, we had nothing," Grant recalls. "It was borrowed furniture from Brookfield and we started from scratch - no wordings, no underwriting manuals, no systems, no processes. It was a lot of late nights drafting and establishing all of the systems and processes needed to run a company."

Grant credits his background in underwriting, reinsurance, new product development and program business as invaluable. After 23 years in the industry, he is still learning.

"Be a student and learn everything

you can about insurance," Grant says of the best advice that he's ever received. "Risks are constantly evolving. You can grow as an underwriter and as a valued member of your team with the power of knowledge. If you think you 'already know it all,' you will be passed by those who continue to learn."

Another tidbit of advice Grant received: Love what you do. And if you don't, find what you do love. "There's a job for anyone and everyone in the insurance industry. You just have to find what makes you tick and go after it." cu



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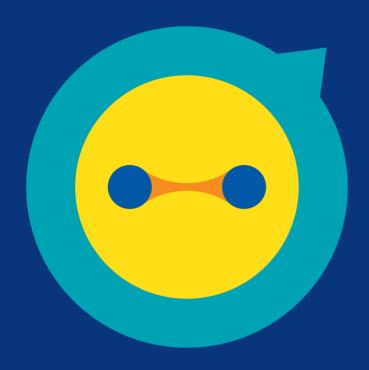


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