



THE HEARTBEAT OF RISK MANAGEMENT, December 2013

# *A Risk Manager's* **Holiday Carol**

■ **By: Mark Morency**, Enterprise Insurance Risk Management, Royal Bank of Canada

**A**s Managing Editor of the Pulse, I always look forward to the December edition, where we hope to inject some holiday merriment into everyone's day. Instead of the President's Message this quarter, we wish everybody a happy holiday season and all the best for 2014. Whether you celebrate Christmas or any other holiday traditions over this season, I hope that you enjoy my risk manager's twist on a holiday classic. – Mark Morency

**W**hile miserly old Ebenezer Scrooge sits in his counting-house contemplating how to reduce commission costs on a frigid Renewals Eve, his risk manager, Bob Cratchit, shivers in the anteroom. Scrooge had refused to spend money on a boiler and machinery policy and thus cannot fix the generator. Bob Cratchit secretly wonders why all their policies expire on December 25th. Scrooge confronts Bob Cratchit, complaining about Bob's wish to take a day off for the holiday. "What good is Christmas," Scrooge snipes, "that it should interfere with our insurance renewals?" He begrudgingly agrees to give Bob a day off but insists that he arrive at the office all the earlier the next day. As Bob leaves, Scrooge spits out an angry "Bah! Humbug!".

Later that evening, after returning to his dark, cold apartment, Scrooge receives a chilling visitation from the ghost of his previous risk manager, Jacob Marley. Marley, looking haggard and pallid, relays

his unfortunate story. As punishment for his greedy and self-serving attempts to renew his policies without a broker, his spirit has been condemned to wait for endless policies that never get issued. Marley hopes to save Scrooge from sharing the same fate. Marley informs Scrooge that three spirits will visit him during the night. After the ghost vanishes, Scrooge collapses into a deep sleep.

He wakes moments before the arrival of the Ghost of Brokers Past, a slightly inebriated phantom with red glowing cheeks. The spirit escorts Scrooge on a journey into the past. Invisible to those he watches,

Belle, a woman who had left Scrooge because his love for insurance was too strong as he spent all his time at so-called meetings with insurers on the fairways, with logo engraved golf balls in hand, or at cocktail parties with his adjusters. Scrooge, deeply moved, sheds tears of regret before the phantom returns him to his bed.

The Ghost of Brokers Present, a majestic creature with paperwork swirling all around her, takes Scrooge through London to unveil Renewals as it will happen that year. Scrooge watches the large, bustling Cratchit family prepare a miniature feast in its meagre home. He discovers Bob

tents. Broker service level agreements, indemnity clauses, non-disclosure agreements, certificates of insurance to be issued, credit ratings on insurance companies to be reviewed and endless documents that he never realized he had signed. She vanishes instantly as Scrooge notices a dark, hooded figure coming toward him.

The Ghost of Brokers Yet to Come ("GBYTC") introduces himself and leads Scrooge through a sequence of mysterious acronyms relating to as of yet unnamed insurance policies. Scrooge sees businessmen discussing cyber insurance policies, claims for complex technical failures that Scrooge does not understand, and questions from management about ERM. Scrooge, anxious to learn the lesson of his latest visitor, beseeches to know what all the acronyms mean. After pleading with the ghost, Scrooge finds himself confronted by a reservations of rights letter for a large claim. Knowing he had cheated and never read his insurance policies, he desperately implores the spirit to alter his fate, promising to renounce his insensitive, avaricious ways and to honour risk management with all his heart. All of a sudden, he awakens, safely tucked in his bed.

Overwhelmed with joy by the chance to redeem himself and grateful that he has been returned to Renewal Day, Scrooge renews his policies for a 13 month term so they will never overlap with the holiday season again. As the years go by, he holds true to his promise and honours his insurers, brokers and adjusters with all his heart: he treats Tiny Tim as if he were his own child, and Tiny Tim grows up to be a cyber insurance expert.



Scrooge revisits his previous exploits with a jolly broker named Fezziwig. They travel to the ORIMS golf and curling tournaments, pubs throughout the city, and unforgettable RIMS Canada conferences. And, he remembers his engagement to

Cratchit's crippled son, Tiny Tim, a courageous boy whose desire to work in insurance warms Scrooge's heart. As the day passes, the spirit shows Scrooge the mountain of paperwork that Scrooge had signed that evening with nary a glance at the con-

## TO PROMOTE AND ADVANCE EXCELLENCE IN RISK MANAGEMENT

### INSIDE THIS ISSUE

**1**

A Risk Manager's Holiday Carol

**2**

From The Courts – SETTLEMENT It Takes Two To Tango

**3**

Supply Chain Disruptions ...

**4**

Flood Risk – Is a Loss Inevitable?

**5**

Subrogation: Don't Forget To Get Your Rebate

**6**

Christmas Luncheon – Call For nominations

**8**

Chapter Events  
ORIMS Professional Development



# FROM THE COURTS

## SETTLEMENT:

### It Takes Two To Tango



■ **By Olivier B. Guillaume**, partner, Borden Ladner Gervais LLP

**F**or more than a decade now, I have had the privilege of representing mostly defendants and, to a lesser extent, injured victims, in personal injury actions. One common question no matter who I represent that often comes up is: “Why aren’t we able to settle now?”. While I have never answered any such inquiry with this response, my inner thought is always “It takes two to tango!”.

There are many reasons why actions -- and for the purposes of this article, I am really only thinking about personal injury actions -- are not ready to settle. I will only discuss a few of the most prevalent ones that I have come across. In my experience, the number one reason why actions are not ready to settle from a defendant’s standpoint is that the plaintiff’s lawyer has not turned his/her mind to the actual evidence to assess the claim. In some instances, it feels like, as the defendant’s lawyer, I know the case better than the plaintiff’s lawyer. This is not that surprising given that a lot of plaintiff side lawyers may carry up to — and sometimes even more than — 500 matters at one time. What invariably happens is that the plaintiff’s lawyer does not know or remember the evidence for each. Often, the plaintiff’s preliminary intake information was not even obtained by the plaintiff’s lawyer but by a staff member at his/her office. Even though the office of the plaintiff’s lawyer may have forwarded various productions to the defendant’s insurer and/or lawyers, the reality is that the plaintiff’s lawyer may not have reviewed the source documentation.

This same scenario can also occur from a plaintiff’s standpoint in that the defen-

dant’s insurer and/or lawyers may not have had the opportunity to review the documentation and therefore are not able to participate in a meaningful manner in any sort of settlement negotiations. I find that while this can occur, it does not happen as often simply because insurers need to set reserves for their files and therefore, there is more incentive for the insurance adjusters and/or the lawyers that they appoint to take a look at the plaintiff’s productions early on in order to assess the claim and allow the insurer to set adequate reserves.

Another frequent reason that I seem to encounter from a defendant’s standpoint on why a plaintiff may not be ready to settle is that the plaintiff’s lawyer does not want to settle until optimum conditions have been created. In other words, the plaintiff’s lawyer wants to build the plaintiff’s case by obtaining various expert reports before even thinking about talking settlement. This may seem unfair to the defendant who is required to wait and ultimately pay for all the expert reports before engaging in any settlement discussions. A similar type of scenario can also occur from the plaintiff’s standpoint where the defendant’s insurer and/or lawyer take the position that there is no evidence to substantiate negotiating a settlement. Given that I mostly practice on the defence side, I can state that it seems common for plaintiff side lawyers to issue a Statement of Claim close to the two-year mark after an accident and sometimes have little to no records to substantiate a plaintiff’s alleged injuries and damages at that time.

In my view, if one party is not ready to settle, there is no point in forcing the issue. However, you can get the opposing party’s attention by taking certain steps. If the action is not yet in litigation, it is rather difficult to force someone to the settlement table simply because there is no timetable to adhere to and/or any obligations to push the non-cooperating party.

Once an action is in litigation, there are many tools that may assist counsel in getting one party to the settlement dance. For example, bringing a motion can often force the opposing party’s lawyer to look at his/her file and even sometimes try to settle the claim rather than deal with the actual motion. A prime example would be motions for undertakings and refusals. These motions are often tedious and can be viewed as a complete waste of time for the party having to respond to the motion. After all, the responding party has not initially provided the various information and/or productions and is now obligated and/or pushed to do so due to various undertakings and refusals given at that party’s examination for discovery. Rather than putting the work to answer all of the undertakings and perhaps improperly refused discovery questions, it may be easier for the responding party to turn its mind to the merits of the case and try to negotiate a settlement.

Another strategy to force a non-cooperating party to the settlement table once the action is in litigation is to make a formal offer to settle open for acceptance until trial. While making a low-ball offer — that you know will never be accepted or that a judge or jury would never award

— will likely not garner any results, making a fair and reasonable offer to settle may prove to be quite worthwhile to push the matter to settlement. This works on both sides of the table. If you are a plaintiff lawyer representing an injured victim in a personal injury action, odds are that you are working on contingency and therefore the less amount of work that you have to do for your client to receive fair compensation, the better compensation that the plaintiff’s lawyer will obtain since he/she will spend less time to presumably earn the same amount of money. From a defendant’s perspective, insurers are often happy to settle claims at an early stage if they can do so at a fair and reasonable number. Why would an insurer pay a defence lawyer to come up with the same result two years down the road if the insurer can settle the claim for that amount early on?

The next time that you as the client wonder or you as the lawyer get asked “Why aren’t we able to settle now?”, do not get discouraged if you are unable to get the opposing party to the settlement table. The opposing party may simply not be ready yet or needs a nudge to get there. After all, it takes two to tango.

*Olivier B. Guillaume is a lawyer and partner at the BLG Toronto office practicing mostly insurance defence litigation.*



# Supply Chain Disruptions due to Technology Outages

## More Debilitating than Adverse Weather Events

**A**s risk managers continue to address and mitigate the cyber security risks facing their organizations, they may be overlooking a critical threat: the impact of technology failures on supply chains and general operations. Such outages and failures have the potential to cause significant loss of income, increase operating expenses, and damage an organization's reputation and need to be properly managed, according to the Marsh Risk Management Research briefing, *Cyber Risks Extend Beyond Data and Privacy Exposures*.

If unplanned, information technology (IT) outages are the most debilitating source of supply chain disruption, affecting 52% of the companies responding to the Business Continuity Institute's Supply Chain Resilience 2012 report. In fact, IT outages outpaced all other sources of supply chain disruption, including severe weather events, transportation disruptions, and product contamination.

These technology failures can affect a variety of applications used by companies' employees and customers. For example:

- Frequent trading software glitches have struck securities exchanges globally over the last several years, costing exchange operators, securities firms, and investors hundreds of millions of dollars.
- In February 2013, customers at a major US bank could not access their accounts via the internet, automated phone systems, or mobile banks for 10 hours.
- In April 2013, a reservation software crash forced an airline to delay or cancel nearly 2,000 flights. Periodic crashes of the same software, used by more than 300 airlines globally, have affected other airlines on a smaller scale.
- In August 2013, the website of a major US newspaper was unavailable to readers for several hours. Although a cyber attack was initially suspected, the source was later determined to be a server failure during regularly scheduled maintenance.



- Each year, businesses are disrupted by outages in their email and phone systems, a particularly troublesome event now that so many businesses rely on voice over IP (VoIP) technology.

Such IT disruptions can be costly. The average business loses 545 person-hours each year in employee productivity due to IT downtime, according to a 2011 survey published by CA Technologies. And a March 2012 report published by Aberdeen Group found that data center downtime cost businesses \$138,000 per hour, up from \$98,000 per hour in 2010. Businesses can also suffer loss of revenue and reputational damage, particularly from extended or repeated outages.

### The Evolution of Cyber Insurance

Cyber insurance coverage is increasingly being seen as a must-have by organizations. Historically, coverage was triggered when insureds were the victims of data breaches or hacking attacks. But as cyber insurance policies have evolved, many now provide coverage for a broad range of technology failures and outages.

Current cyber insurance policies can provide reimbursement for lost revenue,

including forensic costs and extra expense, as a result of a failure of technology, computer system outage, or cyber attack. This coverage can in many cases be expanded to include contingent business interruption due to a failure of a vendor, such as a cloud computing service provider. Policies can also be customized to fund public relations and crisis management services in connection with an IT failure.

Cyber insurance policies can fill many of the gaps in traditional insurance and provide direct loss and liability protection for risks created by the use of technology and data in an organization's day-to-day operations.



### Managing IT Outages

Managing the threat of an IT outage or software failure is essential and should be addressed in a well-planned and effective risk management program. In its report, Marsh suggests the following steps to prepare for an IT disruption and to mitigate potential business impact:

- Determine the criticality of various IT systems to ongoing operations and whether alternatives are available or enhanced protection is possible.
- Develop and test business continuity and crisis management plans that specifically address IT outages.
- Evaluate claims preparation and management plans.

Risk managers should ensure that their companies' IT departments are included in each of these actions. Frequent communication between risk and IT professionals can help both functions to better understand their organization's risks, and to respond quickly and effectively when technology fails.

No business can inoculate itself against all risk of technology failure. But with effective planning inside a comprehensive risk management program, businesses can better prepare for IT outages and minimize their impact on business operations, revenues, and reputations.

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# Flood Risk – Is a Loss Inevitable?

**W**e can now add Colorado to the list of this year's major flooding events, along with Calgary and Toronto. The Toronto floods experienced in July impacted hundreds of properties in the Greater Toronto Area.

Where properties are located in documented flood zones, the risks are generally seen as predictable, but are the resulting losses inevitable?

Maybe not.

Clearly, if new buildings are being planned, flood risk can be avoided by selecting locations that are not in flood zones. But for existing buildings, there are proactive steps that can be taken to minimize damage when flood conditions do occur.

To reduce the impact of flooding on your building, here are a few simple, practical steps you can take immediately to reduce your risk profile:

- Include flood hazard in your Emergency Response Plan - this includes on-going flood monitoring practices and liaison with local flood control agencies.
- Limit storage in basements and low-lying areas - if storage is necessary, make sure materials are kept 12" (30 cm) above 50 year flood levels. Avoid storing electronic equipment or valuable records in these areas.
- Remove vehicles from low-lying parking areas.
- When flooding is imminent, shut off gas and electricity supplies to minimize fire and explosion hazards. Notify fire department if fire detection equipment

is out of service and post fire watches.

- Keep sprinkler systems operational.
- Secure any equipment or objects that may be carried away or float - include above ground fuel oil storage tanks.
- Ensure all drains are clear of debris and pumps are operational.
- Check roof drainage systems to ensure they are clear of debris.

Recognizing the flood risks to your premises and taking a few proactive steps will go a long way to manage and mitigate your board's loss exposure.

*David Beal, Director of Risk Management,  
Ontario School Boards' Insurance Exchange*





# Subrogation: Don't Forget To Get Your Rebate



■ **By: Elliot D. Schuler**, Managing Director, SI Advisers

**H**ave you ever bought a product with a mail-in rebate only to fail to put the materials together and mail it to the manufacturer? As frustrating as this may be for the everyday consumer, this actually occurs quite frequently in the insurance context. While insurers and Risk Managers with SIR's or Deductibles, consistently pay out claims to cover losses, quite often no corresponding efforts are made to reclaim some or all of those funds from liable third parties by way of subrogation.

In times where every dollar counts, many insurers and Risk Managers are starting to realize that any recovery on previously paid claims can add significant amounts, potentially millions of dollars, to their bottom line. For most insurers and businesses, however, subrogation has largely remained an afterthought and in some cases, not even a thought at all. The question is simple – why have companies largely ignored this potentially lucrative revenue stream and left subrogation claims on the table?

## What Is A Subrogation Right?

When an insurer and or Risk Manager pays for a loss, it usually retains subrogation rights against any third-party that is partially or wholly responsible for the loss. Subrogation is essentially an indemnity right, which allows the insurer to pay on a claim even if the policyholder is not wholly at fault and then pursue the responsible parties to recover on that payment. In many cases, policies even have a specific provision that transfers all rights of the policyholder against any other party if payment is made on a claim.

While subrogation is most commonly associated with transportation and property losses, it actually exists in nearly all lines of insurance. It is especially important because the insurer is able to recover on payments that involve losses that were not caused by their policyholder's negligence. The failure to pursue subrogation also often results in increased insurance premiums for the policyholder, higher payout numbers on claims, and impacts the bottom line of the insurer or company.

## Opportunities to exercise subrogation

Nearly all insurers and businesses are sitting on files, including closed files, with subrogation opportunities that could be pursued at minimal to no upfront expense. As opposed to defense work where every dollar paid to attorneys increases the overall cost of the claim, subrogation efforts are performed mostly by plaintiff-minded professionals who operate on a contingency basis where they are only paid upon a successful recovery. Hence, universal problems like high hourly rates and unnecessary legal services, which are commonplace in the insurance defense arena, are not present in subrogation. Instead, subrogation entails virtually no risk of "throwing good money after bad," and thus remains one of those rare instances where insurers can actually recover money without increasing risk or overhead in the process.

In addition, the development of a subrogation claim requires minimal effort on the part of the insurer or the Risk Manager. The vast majority of information needed to establish a successful subrogation claim is typically gathered at the same time the insurer is adjusting the first party claim. However, if the insurer or Risk Manager does not advise its adjusters to look for subrogation opportunities, or the adjuster fails to consider anything beyond coverage, opportunities to recover may be lost.

Although there is no magic list of things that are required in order to strengthen the ability to recover money through the subrogation process, below are the top 5 issues that TPAs and adjusters should be aware of when adjusting first party claims.

## Obtain Complete and Accurate Witness Lists and Statements

- The adjuster may only need certain limited information to determine whether the loss is covered by the insured's policy and should be paid. Additional information, however, may be needed to prove the negligence or fault of a third party in a subrogation action. Consequently, it is particularly

helpful if interviews and witness lists are compiled with an additional eye on who may ultimately be responsible and not just whether the claim is covered.

## Properly Document the Incident

- Normally, any damaged property subject to a claim by the insured is available for inspection or analysis at the time the claim is filed. It is important to remember, however, that it is likely that repairs to the property may occur before any subrogation efforts are initiated. If the damage has not been properly analyzed and documented with sufficient supporting evidence (pictures, videos, etc.), it may make it difficult to recover in a subsequent subrogation action.

## Obtain Third-Party Independent Reports if Possible

- The quality of evidence that is available for a subrogation claim is important. While it is always helpful to have thorough investigation notes from the adjuster, third-party, non-biased evidence is often helpful in resolving subrogation claims and convincing a subsequent adjuster or insurance company that they should pay on the subrogation matter. As a result, items like a police or independent third-party report are invaluable to quickly resolving subrogation matters.

## Properly Document the Value of the Damage

- As part of the normal course of business, adjusters often settle claims for a compromised amount above what the insurance company believes the damage may be, but below what the insured contends is the proper value. Although this is sometimes necessary to resolve claims, it is important to note that the burden to prove damages in a subrogation claim rests on the party seeking recovery. Therefore, in the event a claim is settled, it is imperative that the adjuster does his best to document why the insured deserved a higher amount such as unknown history or circumstances surrounding the loss. This way, the insurance company can preserve an

argument for a full recovery of what it paid in its subrogation claim.

## Be Aware of Statute of Limitations

- Because subrogation claims normally are instituted after the initial claim has been settled, the adjuster needs to be aware of possible subrogation claims that could be brought and the statute of limitations on such claims. This is important because in most cases, the statute of limitations begins to run when the adjuster gathers all the information about the claim. Therefore, it is possible that the company may only have a short window of time to exercise its subrogation rights once the claim is resolved.

## Conclusion

It is estimated that hundreds of millions of dollars in potential subrogation claims are left unpursued by insurers and companies each year. Given the limited risk and substantial upside, those who make the most of their subrogation opportunities can quickly improve their bottom line. Educating adjusters to incorporate subrogation into their review process and incorporating professionals that understand how to best pursue subrogation should be on the minds of every insurer and Risk Manager. If you're not thinking about subrogation, and all of the benefits it has to offer, you're leaving money on the table – just like a consumer that fails to mail in their rebate.

For more information please contact:

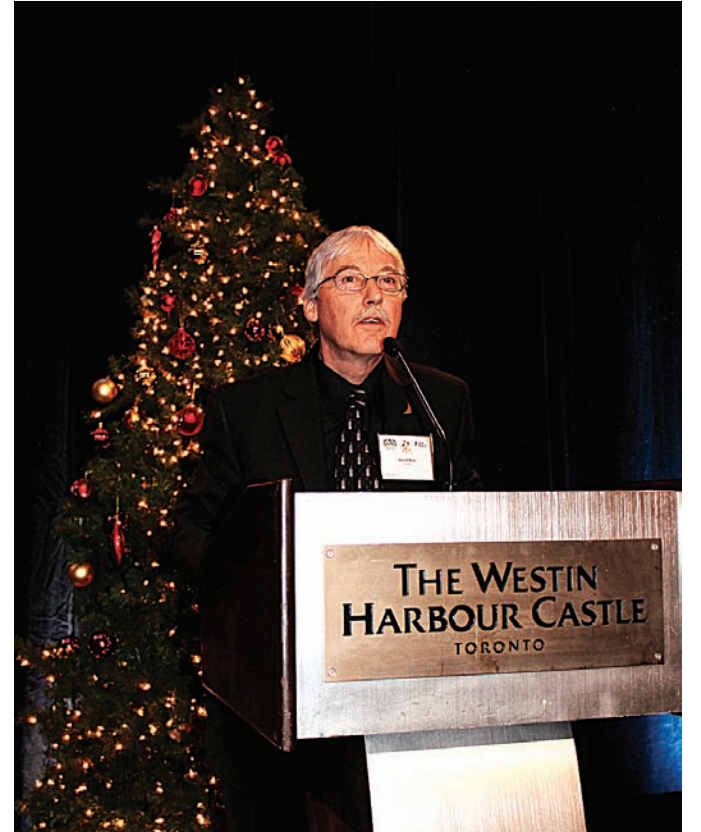
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# 2013 ORIMS Christmas Luncheon

**T**he annual ORIMS Christmas lunch was held in Toronto at the Westin Harbour Castle on December 12th, 2013. This event was a great success with around 660 attendees. \$10,000 was raised for the Daily Bread Food Bank in addition to two bins of food that were donated by attendees.



Photos: Courtesy of Canadian Underwriter Magazine



## Call For Nominations – ORIMS Board of Directors

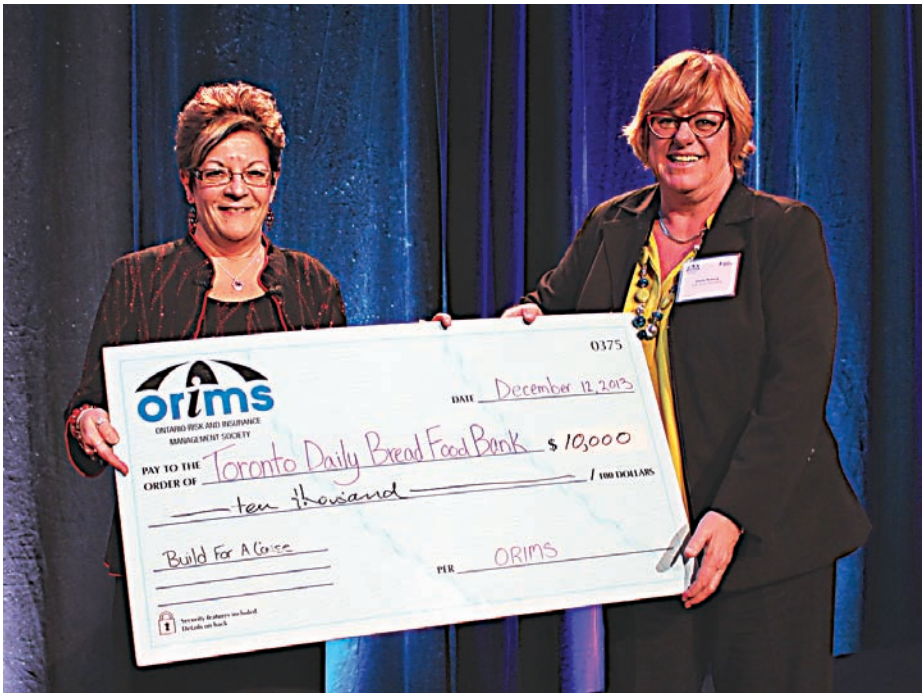
**W**ant to be involved with your Chapter? ORIMS is the largest Canadian Chapter of RIMS, and we are seeking committed volunteers to serve on the Board of Directors for the 2014-2015 term of office. To sit as a Director on the Board, you must be a Professional Member in good standing (NOTE:

This membership category replaces the previous Deputy membership category).

If you are interested in seeking a nomination for next year's Board, please contact Paul Provis, Vice President and Chair of the Nomination Committee before March 31, 2014.









# Chapter Events

## ORIMS Professional Development

**P**rofessional Development is defined as “the acquisition of skills and knowledge both for personal development and for career advancement”. ORIMS presents many opportunities for this type of camaraderie and learning through a series of Professional Development Seminars held over a morning, five times during our 2013/14 year. The early morning session is aimed at Risk Management “basic/refresher” skill development. It is taught by seasoned risk and insurance professionals that give of their time to help all of us learn and grow in our practice.

On Sept 10th we held our first session of the year, focused on the concept of Total Cost of Risk and how to use it in your organization.

The Oct 22 first session was all about (annual) Risk Management Reporting to stakeholders and Boards and was taught by Steve Pottle and Michelle Williamson-Reid. It was an awesome session of truly practical material. We also had two guests from the Disaster Recovery Information Exchange (DRIE) to share with us information about their association, business continuity and disaster recovery. Our

speakers were very engaging and provided a wealth of information. In light of the recent flooding in Calgary and Toronto this was a very helpful and enlightening session. Other partners that will be highlighted in future sessions include accountants and auditors, and health and safety professionals.

Our November 20th session featured a special guest that we “stole” from the RIMS Canada Conference agenda from Victoria. Joanna Makomaski shared with us her passionate approach to ERM as the Risk Manager of the PanAm and Para PanAm Games in 2015!

Each of the first three Professional Development events ended with a fantastic networking luncheon catered by Oliver Bonacini. It’s a great chance to chat with colleagues and ask questions of our guest speakers!

Other sessions for this coming term include: Risk Committees and Risk Communication. (Our final session of the year on April 8, 2014 will be a two and a half hour “how to guide” for developing Strategic Risk Management featuring Carol Fox from RIMS...be sure to register early!) The second session of the day has a theme for this curriculum year — that of introducing us to possible partnerships

and experts we may use and rely on in our own risk management and insurance programs. We have invited subject matter experts from various associations and organizations to tell us about their specialty and how it can relate and serve our needs. To date we have enjoyed this kind of sharing from professional engineers and a review of the legal use of such experts in the event of a legal proceeding. Previous guest speakers were Russell Brownlee of Giffen Koerth and Bob Traves of BLG.

Don’t forget along with our regular PD Sessions in 2013/14 there will be a full day of PD on Feb 12, 2014. This day will bring together hundreds of like-minded folks for a day of diverse learning and

networking....stay tuned for more details on this day very soon!

ORIMS PD sessions are the best value in town.....only \$55 for members and \$70 for non-members for awesome speakers and educators! Lots of time and work goes into preparation of these sessions! And it is a great opportunity to network and share with your colleagues and peers.

..... **COME OUT AND SUPPORT YOUR ORIMS!** We are open to suggestions of what you would like to see covered or speakers you would like us to approach. Drop me an email at [tina.gardiner@york.ca](mailto:tina.gardiner@york.ca)

Hope to see you at each session in the New Year!

## Announcement

The ORIMS Board wishes to inform the Membership that it has appointed David Beal as interim President for the

balance of the 2013-14 term, effective December 3, 2013.

## Upcoming Chapter Events

### ORIMS Professional Development Session

January 21, 2014 .... Toronto Board of Trade  
– Risk Communication;  
– Use of Expert: Health and Safety

### ORIMS Professional Development Day

This is a full day of Professional Development for

learning and networking. Not to be missed! February 12, 2014 .... Toronto Board of Trade

### ORIMS Edward C. Ricketts Curling Bonspiel

February 24th, 2014

## 2013-2014 Board of Directors

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The PULSE is a publication of the Ontario Risk and Insurance Management Society and is published periodically throughout the calendar year.

The opinions expressed are those of the writers and the volunteer members of the PULSE Editorial Committee. Articles submitted to the PULSE for publication are subject to the approval of the PULSE Editorial Committee. Approval of such articles is based upon newsworthiness, and perceived benefit to the readership. All decisions of the PULSE are not subject to appeal. Individuals submitting articles to the PULSE hereby acknowledge their acceptance of the PULSE Editorial Policy.

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