

FLOOD RISK: A Growing Concern and Yet, No Clear Solution

by **Jocelyn Aucoin**, senior associate, Clyde & Co

Storms, power outages, landslides, and road closures; as a result, last year's floods were identified as the weather event of 2019 in Quebec. Indeed, tens of thousands of residences and businesses were flooded, and an even greater number of citizens were affected.

Floods of varying intensity occur every year in Canada. Historically, the country has been susceptible to flooding across various provinces. Manitoba's Red River Valley is famous for being particularly subject to situational vulnerability—its most severe flood being recorded in 1997, which damaged an estimated 1,000 homes. Similarly, Alberta's flood in 2013 resulted in an approximate \$6 billion in property damage and financial losses, and the evacuation of an estimated 80,000 residents. These major floods and many others that cause the forced evacuation of residents, represent the heavy economic burden that threatens the financial situation of the businesses and citizens affected.

How can we protect ourselves against such risk? First, it should be noted that most basic residential insurance policies do not cover damage resulting from floods caused by the overflow of a body of water. Such absence of coverage is explained by the fact that flood zones are clearly identified and that rising water is a foreseeable natural phenomenon, whereas the fundamental principle of insurance is that it covers “unforeseeable” situations.

For several years, however, certain land development has created vulnerable areas leading to inadequate drainage infrastructure. In Ontario, for example, changing levels in the severity of precipitation from one extreme to the other have raised concern for volatility and the increased likelihood of flooding. With the impact of climate change, the damage caused by water will likely continue to increase in frequency and significance.

INSURERS' RESPONSE

Considering the proliferation of claims in this regard, some



insurers have developed products to respond to consumer demand for insurance coverage specific to floods. Such coverage is nevertheless quite rare, and, when offered, generally carries high deductibles combined with low coverage limits. While coverage may be available for certain properties, those located in high flood-risk zones are almost never covered. A common misconception has been that residents of high-risk zones can afford higher insurance premiums. However, Craig Stewart, vice

president of federal affairs of the Insurance Bureau of Canada (IBC) has addressed the limited evidence for these claims, suggesting the lack of correlation between high-risk activity and income. A flood model developed by the IBC determined that approximately 1.8 million households in Canada are regarded as being at very high risk for flooding.

Typically, flood policies that are available for purchase are subject to a limit; however, several

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insurers have implemented additional flood endorsements to extend coverage for policyholders. While a benefit to these add-ons is they help to streamline the claims process, the language used to define “flood” has contributed to disputes over application.

THE COURTS' INTERPRETATION

A recent Ontario decision, *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company, 2020 ONCA 487*, addressed this topic. Following a historic rainstorm event in the Greater Toronto Area on July 8, 2013, the premises owned by Le Treport Wedding & Convention Centre Ltd. was flooded. Water entered the building through the doors, floor drains and ceilings, and caused extensive damage to the premises. A claim was made to Co-operators General Insurance under its “all-risks” insurance policy. There was a dispute as to whether the flood endorsement of the policy applied to the claim.

The Ontario Superior Court of Justice held that the flood endorsement did not apply for two reasons. First, the trial judge concluded that the damage to the insured's property was caused by “surface water,” which was defined in the Policy as “water or natural precipitation temporarily diffused over the surface of the ground.” Consequently, the “surface water” exclusion contained in the policy operated to exclude coverage. Second, the trial judge found that the event was not

caused by a “flood” as defined in the flood endorsement. Therefore, the Ontario Superior Court of Justice held that the insured was not entitled to coverage under the Flood Endorsement.

The Court of Appeal reviewed in great detail the wording of the policy in order to determine whether the event constituted a “flood” within the meaning of the policy.

The Court of Appeal concluded that the trial judge erred in importing the exclusion of “surface water” flooding into the Flood Endorsement for two reasons. First, the Court of Appeal ruled that an endorsement does not operate independently from the policy, as it does not have “a standalone existence” from the policy; they must be read together. Second, giving effect to the definition of “surface water” when interpreting the flood endorsement would effectively nullify or render nugatory the intended coverage. Indeed, flood coverage would be nullified in almost all cases as most buildings are located some distance from water. Accordingly, the flood endorsement must be read without giving effect to the surface water exclusion.

The Court of Appeal further concluded that the event was a “flood” within the meaning of the flood endorsement. The ordinary meaning of the word “flood” included “the massive, forceful, and fast-moving flow of water” into the property. Further, the flood endorsement did not require a body of water to have a permanent existence. In other words, a creek

or a drainage ditch constituted a “body of water” even though they may have been dry for several hours before an overflow. Finally, the Court of Appeal reiterated that the provisions granting coverage, such as the flood endorsement, must be construed broadly. Construing the flood endorsement otherwise would nullify coverage for the “obvious risks” identified in the endorsement and defeat the legitimate expectations of the insured as to the coverage purchased. Accordingly, the flood endorsement applied to the loss suffered by the Insured and caused by the flood.

However, coverage has not always been granted in favour of the insureds. In an earlier decision, *Parker Pad & Printing Ltd. v. Gore Mutual Insurance Company, 2017 ONSC 3894*, the Court dismissed the plaintiff's claim for coverage under its flood endorsement, citing lack of evidence that the damaged premises surrounded a “body of water.”

ALTERNATIVES TO TRADITIONAL INSURANCE

In addition to insurance, alternate opportunities may exist to receive compensation for losses sustained due to flooding. However, it is important to note these alternatives are also subject to limitations. In Quebec, for example, citizens may be eligible for the province's public safety department's general indemnity and financial assistance program. The program was enacted by Order in Council on April 10, 2019, and aid may be granted, in particular,

to compensate for the additional costs of accommodation and food during evacuation, for repairing or replacing essential personal property that was damaged, and for repairing damage to the main residence.

Even so, the program is now more restrictive than it was previously and includes several limits to the amounts that may be granted.

Nevertheless, when floods of the magnitude that affected Quebec in the spring of 2019 occur, thousands of citizens seek support from their government, which is then faced with a significant economic burden. Aid is therefore also available through the federal Disaster Financial Assistance Arrangements (DFAA), administered by Public Safety Canada, to compensate those who have experienced losses and to finance recovery.

Flood-related issues continue to be an ongoing concern across the country. The federal government recently considered creating a low-cost national flood insurance program to protect homeowners at high risk of flooding who are without adequate insurance protection. When asked about developments for the program, Public Safety Canada did not offer a direct response, simply expressing “full consideration” for recommendations proposed by IBC in its June 2019 report, titled *Options for Managing Flood Costs of Canada's Highest Risk Residential Properties*.

After reviewing international experience, IBC analyzed three

potential schemes that could be implemented:

- **Option I:** A pure market solution pursuant to which private properties would no longer be eligible for government financial assistance and the risk would be borne by homeowners. Homeowners would therefore have to move, self-insure, or transfer their flood contingent liability to the private insurance market. Since premiums are risk-based, a portion of high-risk homeowners would opt out of the insurance market, and the government could invest in adaptive infrastructure.
- **Option II:** An evolved status quo in which the risk would be borne by a combination of homeowners and governments. As this option is the closest to the current state of affairs, the private insurance market would continue to provide insurance coverage in accordance with its risk appetite, and government aid

would be provided in cases where premiums are too high. The government's exposure could also be reduced by transferring some of the risk to the global reinsurance market.

- **Option III:** Create a high-risk flood insurance pool. A high-risk flood pool of properties would be separated from what is considered normally insurable risk. The group would be managed by a public-private partnership, administered by the insurance industry but governed and guaranteed by the government/global reinsurance market. The pool would need pre-capitalization to get up and running as well as ongoing capitalization that would be supported by premiums paid into the pool and levies assessed on all homeowners or municipal ratepayers and financed by levies or through government contributions.

The governments of other countries have already implemented

similar measures to address the issue of the insurability of flood risk. The United Kingdom has launched Flood Re, a reinsurer subsidized by a levy imposed on all insurers that offer home insurance. The United States created the National Flood Insurance Program (NFIP) in 1968. To benefit from NFIP flood insurance, the property must be located in a community that participates in the program and that agrees to apply sound floodplain management standards. In some cases, NFIP premiums may be subsidized.

The complete withdrawal of government aid would allow the government to focus on mitigation rather than disaster management, an area in which insurers are generally more efficient, but could also lead to avoidance by homeowners, who may simply choose not to purchase insurance and risk financial ruin in the event of a loss. Conversely, placing too much emphasis on the availability of insurance (by subsidizing premiums, for

example), creates the possibility that the premium rate paid will not reflect the full risk of loss and that the funds available in the event of a loss will prove insufficient.

In short, regardless of the perspective from which the issue is addressed, the allocation of costs among citizens, their insurers, and both levels of government after a flood is a significant challenge. For that reason, all participants must increase their efforts to implement measures that are preventive, rather than corrective. Whether that consists of elevating critical equipment (heating, ventilation, electrical transformers, communication systems, etc.) in commercial buildings above expected flood levels or even using technology that allows buildings to float above water during a flood, there is no doubt that improving infrastructure and implementing preventive measures will contribute to reducing the risk and, in so doing, make it somewhat more insurable. ■

RISQUE D'INONDATION: UNE PRÉOCCUPATION CROISSANTE, TOUJOURS SANS SOLUTION CLAIRE

par Jocelyn Beaudoin, avocat sénior, Clyde & Co

TEMPÊTES, PANNES DE COURANT, glissements de terrain, fermetures de routes : c'est en raison de ce bilan que les inondations de l'année dernière au Québec ont été désignées comme étant « l'événement climatique de 2019 ». En effet, des dizaines de milliers de résidences et de commerces ont

été inondés et un nombre encore plus important de citoyens en ont été touchés.

Des inondations d'intensités variables se produisent chaque année au Canada. Historiquement, le pays a été vulnérable aux inondations dans diverses provinces. La vallée de

la rivière Rouge au Manitoba est réputée pour être particulièrement sujette à la vulnérabilité situationnelle. Enregistrée en 1997, sa plus grave inondation a endommagé environ 1 000 propriétés. De même, l'inondation de 2013 en Alberta a entraîné des dommages matériels et des pertes

financières d'environ 6 milliards de dollars, ainsi que l'évacuation de près de 80 000 personnes. Lorsqu'elles sont majeures et causent l'évacuation forcée de résidents, le fardeau économique qu'elles représentent peut mettre en péril la situation financière

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des entreprises et des citoyens affectés.

Comment peut-on se prémunir contre de tels risques? D'abord, il faut savoir que la plupart des polices d'assurance résidentielle de base ne couvrent pas les dommages résultant des inondations provoquées par le débordement d'un cours d'eau. Cette absence de couverture s'explique du fait que les zones inondables sont clairement identifiées et que la crue des eaux y constitue un phénomène naturel prévisible alors que le principe de base en assurance est de couvrir les situations « imprévisibles ».

Pourtant, depuis plusieurs années, certains aménagements du territoire créent des zones vulnérables et engendrent l'insuffisance des infrastructures d'évacuation. En Ontario, par exemple, l'évolution de la gravité des précipitations allant d'un extrême à l'autre a soulevé des inquiétudes quant à l'instabilité climatique et à la probabilité accrue d'inondations. Avec l'impact des changements climatiques, les dommages causés par l'eau continueront vraisemblablement d'augmenter en fréquence et en importance.

RÉPONSE DES ASSUREURS

Considérant la multiplication des réclamations à ce titre, certains assureurs ont développé des produits pour répondre aux demandes des consommateurs cherchant une couverture d'assurance particulière aux inondations. Ces couvertures se font néanmoins plutôt rares et, si elles sont offertes, s'accompagnent

généralement de franchises élevées jumelées à des limites de couverture peu élevées. Même si une offre de couverture existe pour certaines propriétés, celles qui sont situées dans les zones à haut risque d'inondations ne sont presque jamais couvertes.

Une idée fausse courante est que les résidents des zones à haut risque ont les moyens de payer des primes d'assurance plus élevées. Cependant, Craig Stewart, vice-président des affaires fédérales du Bureau d'assurance du Canada (BAC), a abordé les preuves limitées de ces réclamations, suggérant l'absence de corrélation entre les activités à haut risque et le revenu. Un modèle d'inondation mis au point par le BAC a déterminé qu'environ 1,8 million de ménages canadiens sont considérés comme étant à très haut risque d'inondation.

En règle générale, les polices relatives aux inondations sont soumises à une limite. Cependant, plusieurs assureurs ont mis en place des avenants supplémentaires contre les inondations pour étendre la couverture des assurés. Bien que ces avenants aident à rationaliser le processus de réclamation, le langage utilisé pour définir le terme « inondation » a contribué à des litiges concernant l'application.

L'INTERPRÉTATION DES TRIBUNAUX

Un récent jugement en Ontario, *Treport Wedding & Convention Centre Ltd. c. Co-operators General Insurance Company, 2020 ONCA 487*, traitait de ce sujet. À la suite d'un orage historique s'étant déversé sur la région du Grand Toronto le 8

juillet 2013, les locaux appartenant au Treport Wedding & Convention Centre Ltd. ont été inondés. L'eau s'est infiltrée dans le bâtiment par les portes, les drains de sol et les plafonds, et a causé d'importants dommages aux locaux. Une réclamation a été présentée à Co-operators, une société d'assurances générales en vertu de la police d'assurance « tous risques » (la « police »). Il y a eu un litige pour savoir si l'avenant de la police portant sur les inondations s'appliquait à la réclamation.

la couverture. Deuxièmement, le juge a conclu que l'incident n'avait pas été causé par une « inondation » au sens de l'avenant. Par conséquent, la Cour supérieure de justice de l'Ontario a statué que l'assuré n'avait pas droit à une couverture en vertu de l'avenant relatif aux inondations.

La Cour d'appel a revu en détail le libellé de la police afin de déterminer si l'incident constituait une « inondation » au sens de la police.

La Cour d'appel a conclu que le juge de première instance avait



La Cour supérieure de justice de l'Ontario a statué que l'avenant sur les inondations ne s'appliquait pas pour deux raisons. Premièrement, le juge de première instance a conclu que les dommages aux biens de l'assuré étaient causés par « l'eau de surface », qui était définie dans la police comme « de l'eau ou des précipitations naturelles ruisselant temporairement sur la surface du sol ». Par conséquent, l'exclusion « eaux de surface » de la police avait pour effet d'exclure

commis une erreur en important l'exclusion sur les inondations causées par des « eaux de surface » dans l'avenant pour deux raisons. Premièrement, la Cour d'appel a statué qu'un avenant ne fonctionne pas indépendamment de la police, car il n'existe pas sans elle; ils doivent être lus ensemble. Deuxièmement, donner effet à la définition d'« eaux de surface » lors de l'interprétation de l'avenant relatif aux inondations annulerait ou rendrait effectivement inopérante la

couverture prévue. En effet, la couverture contre les inondations serait annulée dans presque tous les cas, car la plupart des bâtiments sont situés à une certaine distance de l'eau. Par conséquent, l'avenant relatif aux inondations doit être lu sans donner effet à l'exclusion des eaux de surface.

En outre, la Cour d'appel a conclu que l'incident était une « inondation » au sens de l'avenant relatif aux inondations. Le sens ordinaire du mot « inondation » comprenait « l'écoulement massif, puissant et rapide de l'eau » dans la propriété. De plus, cet avenant n'exigeait pas que le plan d'eau soit présent en permanence. En d'autres termes, un ruisseau ou un fossé de drainage constituent un « plan d'eau » même s'ils peuvent avoir été secs pendant plusieurs heures avant un débordement. Enfin, la Cour d'appel a réitéré que les dispositions accordant une couverture, comme l'avenant relatif aux inondations, doivent être interprétées au sens large. Sinon, son interprétation annulerait la couverture des « risques évidents » qui y sont identifiés et irait à l'encontre des attentes légitimes de l'assuré quant à la couverture achetée. En conséquence, l'avenant relatif aux inondations s'appliquait à la perte subie par l'assuré et causée par l'inondation.

Cependant, la couverture n'a pas toujours été accordée en faveur des assurés. Dans un jugement antérieur, *Parker Pad & Printing Ltd. v. Gore Mutual Insurance Company*, 2017 ONSC 3894, la Cour a rejeté la demande de couverture du demandeur en vertu de son avenant relatif aux inondations, invoquant le manque de preuve que les

locaux endommagés entouraient un « plan d'eau. »

SOLUTIONS DE RECHANGE À L'ASSURANCE TRADITIONNELLE

En plus de l'assurance, il existe d'autres possibilités pour recevoir une indemnisation pour les pertes subies en raison d'une inondation. Cependant, il est important de noter que ces options de rechange sont également soumises à des limitations. Au Québec, par exemple, les citoyens peuvent avoir accès au Programme général d'indemnisation et d'aide financière du ministère de la Sécurité publique. Adopté par décret le 10 avril 2019, ce programme vise notamment à compenser les frais supplémentaires pour se loger et se nourrir pendant l'évacuation, à réparer ou remplacer les biens meubles essentiels qui ont été endommagés et à réparer les dommages à la résidence principale.

Maintenant plus restrictif qu'auparavant, le programme comporte plusieurs limites aux montants qui peuvent être octroyés.

Malgré tout, lorsque se produisent des inondations de l'ampleur de celles qui ont frappé le Québec au printemps 2019, ce sont par milliers que les citoyens se tournent vers leur gouvernement pour obtenir du soutien, lequel fait alors face à un fardeau économique très important. Il existe donc également des Accords d'aide financière en cas de catastrophes (AAFCC) du fédéral, gérés par Sécurité publique Canada, pour indemniser les sinistrés et financer le rétablissement.

Les enjeux liés aux inondations

continuent d'être une préoccupation partout au pays. Le gouvernement fédéral s'est récemment penché sur la création d'un programme national d'assurance inondation à faible coût afin de protéger les propriétaires de maisons à haut risque d'inondation qui ne bénéficient pas d'une protection d'assurance adéquate. Interrogée sur les développements du programme, Sécurité publique Canada n'a pas offert de réponse directe, exprimant simplement « une pleine considération » pour les recommandations proposées par le BAC dans son rapport publié en juin 2019, intitulé *Options de gestion des coûts de propriétés résidentielles les plus à risque d'inondation au Canada*.

Au terme d'un examen d'initiatives prises à l'échelle internationale, la BAC a étudié trois schémas potentiels qui pourraient être mis en place :

- **Option I :** Une solution de marché à l'état pur où les propriétés privées ne seraient plus admissibles à l'aide financière gouvernementale et où le risque serait assumé par les propriétaires-occupants. Ceux-ci devraient par conséquent déménager, s'autoassurer ou transférer leur responsabilité civile éventuelle en cas d'inondation au marché privé de l'assurance. Les primes étant fondées sur le risque, une partie des propriétaires à risques élevés se retireraient du marché et le gouvernement pourrait investir davantage dans des infrastructures de protection.
- **Option II :** Un statu quo adapté où le risque serait assumé

par une combinaison des propriétaires-occupants et des gouvernements. Cette option étant plus près de l'état actuel des choses, le marché privé continuerait d'offrir une couverture d'assurance en fonction de sa tolérance au risque et une aide gouvernementale serait offerte dans les cas où les primes seraient trop élevées. L'exposition du gouvernement pourrait aussi être diminuée en transférant une partie du risque au marché mondial de la réassurance.

- **Option III :** Créer un pool d'assurance en fonction des risques élevés d'inondations. Un groupe de propriétés à risque élevé d'inondation serait distingué de ce qui est considéré comme un risque normalement assurable. Le groupe serait géré par un partenariat public-privé, administré par l'industrie de l'assurance, mais régi et garanti par le marché de la réassurance gouvernemental/mondial. La formation de ce pool nécessiterait une précapitalisation pour sa mise en place ainsi qu'une capitalisation permanente qui serait d'une part assurée par des primes versées et des redevances prélevées auprès de tous les propriétaires-occupants ou de contribuables municipaux et d'autre part financée à l'aide de redevances ou de cotisations du gouvernement.

Les gouvernements d'autres pays ont déjà mis en place des mesures similaires pour faire face

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au problème d'assurabilité des risques liés aux inondations. Au Royaume-Uni, on a lancé Flood Re, un réassureur subventionné par une taxe imposée à tous les transporteurs qui souscrivent des assurances habitation. Aux États-Unis, le National Flood Insurance Program (NFIP) a été créé en 1968. Pour bénéficier d'une assurance inondation dans le cadre du NFIP, une propriété doit se trouver dans une communauté qui a adhéré au programme et qui accepte d'appliquer des normes

de gestion saine des plaines inondables. Dans certains cas, les primes du NFIP peuvent être subventionnées.

Un retrait complet de l'aide gouvernementale permettrait d'un côté au gouvernement de mettre l'accent sur l'atténuation plutôt que la gestion de catastrophes, domaine dans lequel les assureurs sont généralement plus efficaces, mais pourrait d'un autre côté mener à de l'évitement de la part des propriétaires, ne souscrivant tout simplement plus à une assurance et risquant la ruine financière en cas de sinistre. À l'inverse, en insistant trop sur l'accessibilité de

l'assurance (en subventionnant les primes, par exemple), il y a une possibilité que le taux de prime payé ne reflète pas le risque réel de perte et que les fonds disponibles en cas de sinistres s'avèrent insuffisants.

En bref, quel que soit l'angle par lequel on aborde le problème, l'attribution des coûts entre le citoyen, son assureur et les deux paliers de gouvernements après une inondation représente un véritable casse-tête. C'est d'ailleurs l'une des raisons pour lesquelles chacun de ces acteurs doit investir plus d'efforts dans la mise en place de mesures préventives,

plutôt que correctives. Qu'il s'agisse d'élever des équipements critiques (chauffage, ventilation, transformateurs électriques, systèmes de communication, etc.) au-dessus des niveaux d'inondation prévus dans les immeubles commerciaux ou même d'utiliser une technologie permettant à un bâtiment de rester au-dessus du niveau de l'eau pendant une inondation, il ne fait pas de doute qu'en améliorant les infrastructures et qu'en employant des mesures préventives, on contribue à réduire le risque et à le rendre du même fait un peu plus assurable. ■

NEWS

2019 RIMS CANADA WELCOME RECEPTION NAMED FINALIST FOR EVENT AWARD

RIMSFest, the Welcome Reception for the 2019 RIMS Canada Conference, has been nominated as a finalist for an International Live Event Association Esprit Award. The globally recognized awards honour the best, most creative and innovative contributions to the event planning industry.

Inspired by the conference theme TRANSFORM and Edmonton's reputation for being Canada's festival city, RIMSFest kicked off the 2019 RIMS Canada

Conference and brought together nearly 1,000 risk management innovators and practitioners to celebrate and connect in a digital arts and entertainment environment for a transformative event experience. RIMSFest is one of nine nominees in the non-profit organization category along with events hosted in Seattle, Los Angeles, Columbus, Charleston, Houston, Cleveland, Toronto and Fort McMurray. The event planner, Site6 Entertainment, nominated RIMSFest for the honor.



ARE ADULT HOSTS RESPONSIBLE FOR THE SAFETY OF UNDERAGE PARTY GUESTS?

by Janet C. Kwong, associate, Alexander Holburn Beaudin + Lang LLP

In *McCormick v. Plambeck*, 2020 BCSC 881, the British Columbia Supreme Court examined the issue of whether adults who host minors at their home, knowing they will be consuming alcohol and/or drugs, owe a duty of care as a social host to those underage guests.

Mr. McCormick was a 17-year-old guest at a party hosted by the teenage daughter of Stephen and Lidia Pearson at their Salt Spring Island home. It was a general custom for parents on Salt Spring Island to host teenagers and allow them to drink alcohol and use marijuana, as this reasonably controlled environment was preferable to the teens holding an unsupervised gathering in the woods.

The Pearsons agreed to host the party on certain conditions: There was to be no drinking and driving; car keys would be collected from guests who drove to the party; Mr. and Ms. Pearson would circulate throughout the party; and the party would end at 1:00 a.m. Guests were expected to walk home, call their parents for rides, or get a ride from either Mr. or Ms. Pearson.

Mr. McCormick had been invited to the party through a Facebook event in which the Pearson's daughter linked a video produced by an anti-drinking and driving campaign and asked those invited not to drive under the influence. He and a few friends walked to the party at approximately 10 p.m. and drank beer and smoked marijuana on the way. They brought their own alcohol to the house, and Mr. McCormick's evidence was that he drank fewer than six beers at the party.

Mr. McCormick left the party on foot with his friend Ryan Plambeck. But soon after, he found himself in the back seat of a vehicle Mr. Plambeck had stolen from the Pearsons' neighbour. Mr. Plambeck, who did not have a driver's license, caused the car to leave the paved roadway travelling in excess of 70 km/hr.

Mr. McCormick and Mr. Plambeck both sustained serious injuries; Mr. Plambeck's injuries proved fatal.

Mr. McCormick sued various parties seeking damages for personal injury. In his claim against the Pearsons, he alleged that as adult social hosts, the Pearsons owed him, a minor, a duty of care and that they breached that duty by allowing him to become intoxicated on their property and then failing to stop him from leaving in that state. The Pearsons denied that they owed Mr. McCormick a duty of care, in the circumstances, and further that the motor vehicle accident, and the Plaintiff's subsequent injuries, were caused by Mr. Plambeck's negligent operation of the vehicle and not by anything they did or failed to do.

This case required the court to revisit tort principles as they pertain to social host liability, including *Childs v. Desormeaux*, 2006 SCC 18, wherein the Supreme Court of Canada rejected the argument that a social host owes a general duty to users of public highways injured by adult party guests. In *Childs*, The Supreme Court determined injury to a plaintiff by a defendant driver who was coming from a party where he had consumed alcohol was not reasonably foreseeable by the hosts of said party.

Foreseeability was also determinative in this case. Mr. McCormick contended that:

the proper question to be asked here is whether the type of harm suffered; personal injury, was reasonably foreseeable to someone in the position of the Pearsons when considering the safety of minors who have consumed alcohol and/or smoked marijuana, leaving their home at approximately 1:00 a.m. into the unlit, rural roads of Salt Spring Island.

However, the Chief Justice determined that the real question was whether a duty extends to foreseeing that one or more party guests would

leave the party on foot, steal a car and drive it unsafely. The court held that no duty arose on the facts of this case.

The court was not persuaded that the plaintiff was intoxicated when he left the party. Nevertheless, the risk of injury to Mr. McCormick was possible, but not foreseeable. The Pearsons reasonably assumed he was walking home from the party, which was a historical custom for many underage guests at these types of parties on Salt Spring Island. The stolen vehicle had been unlocked with the keys inside. The evidence was this was common practice on Salt Spring Island. This practice, the court found, indicated that vehicle theft was highly unlikely, and thus the risk of theft too remote to create a duty on the Pearsons to anticipate that a guest would steal a vehicle upon leaving their home.

The court went on to find the Pearsons took all reasonable steps to minimize the risk of harm to their guests. The evidence was that the Pearsons followed through on the rules they had established: car keys were collected; Mr. and Ms. Pearson were present over the course of the night; and at around 1:00 a.m., the music was turned off and the lights were turned on. Some guests were picked up, some left on foot, and Ms. Pearson drove some guests home. There was no evidence that other guests drove while impaired or rode with a driver who had been drinking.

While hosting a party where alcohol is consumed by minors is a breach of the *Liquor Control and Licensing Act*, R.S.B.C. 1996 c. 267, that fact alone did not demand a higher standard of care. The court took judicial notice of the fact that graduation parties are an established custom in British Columbia, notwithstanding that they constitute, when minors are involved, a breach of the law. The standard remains one of reasonableness; not perfection.

The court therefore dismissed the plaintiff's

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ORIMS HOSTS VIRTUAL CONFERENCE

The Ontario chapter of RIMS (ORIMS) hosted a virtual country-wide professional development seminar jointly with Sedgwick and with the support of RIMS Canada on October 6, 2020.



It consisted of three informative segments:

- **HOW ARE THEY DOING?** A peak into the insurance market in 2021 and beyond;
- **HOW ARE WE DOING?** What service providers are doing to meet the challenges under COVID-19 restrictions
- **HOW ARE YOU DOING?** Well-being and coping strategies during the COVID-19 pandemic

The date was specifically selected in recognition of the annual RIMS Canada Conference, Vision Ottawa which was postponed this year due to the pandemic and is now set to take place on October 4-7, 2021. The sessions featured speakers from the insurance industry and a variety of service partners, along with the help of senior risk managers acting as moderators. ORIMS is tremendously grateful for the spectacular talent, knowledge and support provided by all the event participants.

The first session made clear that the market factors challenging us today are expected to continue into 2021 and perhaps beyond. Extended periods of under-pricing risks, low interest rates, catastrophic losses, and the impact of uncertainty on risk appetite and corporate liquidity will continue to affect both the insurance and reinsurance markets and their subsequent risk pricing. It was also noted that the World Economic Forum's risk register was dominated by risks relating to sustainability and climate change.

Session two centered around the measures service providers are implementing in order to continue to support their clients in the face of the pandemic, including work-from-home capabilities and new technology employed to manage remote inspections. We were told how COVID-19 has changed litigation and impacted indemnity payments and claims expenses. We learned about the new demand for disinfecting services and help in adapting workplace design, while applying stringent procedures to protect employees who are executing these services.

Our third and final session of the day allowed us to consider the many stories of resilience that have emerged throughout the pandemic. Positivity, empathy and staying connected were consistent themes and messages. There were, however, some distressing statistics around mental illness and addiction; isolation, relationship challenges; balancing home and work responsibilities, and the financial stresses that are taking their toll on many families. Going forward, we will need an organized plan that contemplates human behavioural factors at the centre of any cohesive and coordinated response. Empathy and collaborative support are important in understanding that everyone's solution will be different.

Overall, the day was a tremendous success thanks to the pooling of efforts from our guest speakers, moderators and volunteers who gave the attendees much to consider. If you missed it and would like to catch the replay, you can find the recorded link on the ORIMS website at <https://www.ontariorims.org/2020-orims-virtual-conference/>.

NEWS

Betty Clarke Honored with 2020 Donald M. Stuart Award

The RIMS Ontario Chapter (ORIMS) announced that Elizabeth "Betty" Clarke, manager of corporate risk and recovery for the City of St., John's, Newfoundland, was chosen as 2020 the Donald M. Stuart Award winner. The Donald M. Stuart Award is widely recognized as Canada's highest honour within the risk management field.



Since 1979, the annual award has celebrated Canadians who have made outstanding contributions to the risk management profession.

Please join us in congratulating Betty for her leadership, involvement and support of the RIMS community in both Newfoundland and throughout Canada. We look forward to celebrating with her in person at the 2021 RIMS Canada Conference in Ottawa.



RCC Welcomes New Members

The RIMS Canada Council is pleased to welcome two new board members:

Sarah Morris is the manager of commercial underwriting at Insurance Corporation of British Columbia and actively participates in RIMS as the B.C. Chapter Vice President. Originally from Halifax, Nova Scotia, Sarah is a maritimer at heart and has called Vancouver, B.C. home for the last 12 years. She has held a variety of positions in the insurance and risk management sectors, including municipal risk management and property casualty underwriting management. As an active member of the B.C. Chapter for the last 10 years, Sarah is looking forward to participating on RIMS Canada Council this term.

Suzann Lewis is the manager of insurance at Pembina Pipeline Corporation where she is responsible for the placement of the corporate insurance program and claims management. She started her insurance career in Manitoba in 2001 before moving to Calgary, Alberta in 2005 and enjoyed the opportunity to work as a broker before moving into the area of risk management in 2013. Suzann is the current president of the RIMS Southern Alberta Chapter (SARIMS) and has been a member of the chapter since 2017.

MOT DE LA PRÉSIDENTE

Ca y'est, j'ai finalement atteint ma limite avec la pandémie COVID-19! La dernière fois où je vous écrivais, des confinements commençaient à être imposés et maintenant, nous reculons. Rien n'a été normal depuis 7 mois et nous nous demandons maintenant quelle sera la nouvelle normalité et quand un retour sera possible.

Plus que jamais, nous devons être résilients—et je sais que je devrai l'être avec les jours plus froids qui approchent à grands pas.

La gestion des risques n'est-elle pas aussi une question de résilience? Fait intéressant, l'Université du Québec à Montréal offre un nouveau diplôme d'études supérieures en Résilience, Risques et Catastrophes—si seulement j'avais le temps!

La gestion des risques consiste à gérer ce qui pourrait interférer avec les objectifs et la mission d'une organisation, tandis que la résilience est la capacité d'une organisation à résister aux perturbations et à rester fonctionnelle. C'est assez évident que l'un ne va pas sans l'autre. En tant que gestionnaires de risques, notre

travail consiste non seulement à contribuer à l'identification et au traitement des risques, mais aussi à faire en sorte que l'organisation pour laquelle nous travaillons puisse se remettre rapidement et avec succès des perturbations.

J'imagine que vous vous demandez où je m'en vais avec ça...

Eh bien voici. Comme le RIMS Canada Council est un comité regroupant des gestionnaires de risques de chacun de nos chapitres canadiens, nous nous efforçons de supporter tous les chapitres afin qu'ils résistent aux perturbations et continuent de vous offrir les services que vous recherchez localement pour poursuivre votre développement ou maintenir vos acquis en tant que professionnels de la gestion des risques. La résilience est un concept bien intégré par nos chapitres qui demeurent résilients à travers cette pandémie et continuent de vous proposer des activités éducatives, quoique virtuellement pour le moment. Et la beauté de cette «virtualité» est que nous pouvons bénéficier des événements offerts par nos collègues. Tout récemment, ORIMS a organisé une

mini-conférence à laquelle ont participé plus de 200 personnes et NARIMS offrira une session éducative en octobre à tous nos collègues canadiens.

Pour moi, c'est aussi ça RIMS Canada: soutenir des occasions d'échanges et offrir des avenues pour coordonner des activités.

Sur une note différente, permettez-moi de souhaiter la bienvenue à 2 nouvelles représentantes au sein de notre équipe:

- **Sarah Morris**, directrice de la souscription commerciale à Insurance Corporation of British Columbia et représentante de BCRIMA
- **Suzann Lewis**, superviseur des assurances chez Pembina Pipeline Corporation et actuelle présidente du chapitre SARIMS.

Malheureusement, leur arrivée signifie également qu'il faut dire au revoir à leurs prédécesseurs:

- **Jennifer Clarke** qui représentait BCRIMA depuis 2017
- **Curtis Desiatnyk** qui représentait SARIMS depuis 2015



Ce sont deux personnes formidables et nous leur sommes reconnaissants pour leur dévouement; leur personnalité et leur sagesse nous manqueront. Le comité de nomination et de gouvernance de RIMS a maintenant la chance de pouvoir compter Curtis comme membre.

Une dernière chose avant de vous laisser; au moment où j'écris ces quelques lignes, nous «célébrons» notre Action de Grâce et certains peuvent se demander à quoi rendre grâce en 2020? Eh bien moi, je suis reconnaissant pour une bonne santé, des liens familiaux solides, mes amitiés (et un animal aimant), mon travail, un endroit où vivre, et enfin, pour mon rôle de présidente du RCC qui me permet d'échanger avec vous.

J'espère que vous avez de nombreuses raisons d'être reconnaissants. Profitez de l'automne, restez en bonne santé, prenez soin de vos proches et demeurez résilients! ■

ARE ADULT HOSTS RESPONSIBLE FOR THE SAFETY OF UNDERAGE PARTY GUESTS?

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claim finding that he had failed to establish the existence of a duty of care between the Pearsons and himself and that, even if a duty of care had existed, the Pearsons met the standard of care.

Parents may take some comfort in knowing that if they take reasonable steps to protect underage guests from harm, they are not

automatically exposing themselves to legal liability because the guests have had alcohol or marijuana at the premises. However, as always, this decision turns on its facts. It may be recalled that in *Childs*, the Supreme Court of Canada left open at least the possibility of a different verdict had there been evidence that the host knew of the guest's intoxication, was aware that he or she will be driving home or was otherwise implicated in the creation or

enhancement of risk. The finding made by the courts in *Childs* and in *McCormick* was that the injury was not reasonably foreseeable *on the facts established in those cases*. It remains to be seen how the court will apply the law to younger teenagers, rather than the 17-year-old Mr. McCormick, where a young person consumes drugs or alcohol supplied at the adult host's premises or where a young guest leaves a party visibly intoxicated or high. ■

A Message from RCC Chair Ginette Demers

That is it, I have finally reached my COVID-19 pandemic limit! Last I wrote you, lockdowns were starting to be imposed and now, we are heading backwards. Nothing has been normal for the last seven months and we now find ourselves questioning what will be the new normal and when will going back to it be possible.

More than ever, we need to be resilient—and I know I will have to with the colder days fast approaching.

Isn't risk management all about resilience too? Interestingly, the Université du Québec à Montréal is offering a new graduate degree in Resilience, Risks and Disasters—if only I had time!

Risk management is about managing what could interfere with the objectives and mission of an organization while resilience is the capacity of an organization to resist disruption and remain functional. Pretty obvious that one does not go without the other. As risk managers, our job is to contribute to not only identifying and treating exposures, but to ensure that the organization we work for can quickly and successfully recover from disruptions.

Where am I going with this must you think...

Here you go. As the RIMS Canada Council is a committee regrouping risk managers from

each of our Canadian chapters, we strive to support all chapters so they resist disruptions and can continue to provide you with the services you are locally seeking to keep developing as risk management professionals. Resilience is a concept well integrated by our chapters who are remaining resilient through this pandemic and continue to offer you educational activities, albeit virtually for now. And the beauty of this "virtuality" is that we can actually benefit from our fellow chapter's events. Just recently, ORIMS organized a mini-conference attended by over 200 participants and NARIMS is offering an educational session in October to all our Canadian colleagues. To me, this is what RIMS Canada is also about: supporting those opportunities to exchange and provide avenues to coordinate activities.

On a different note, allow me to welcome two new representatives on our team:

- Sarah Morris, commercial underwriting manager at Insurance Corporation of British Columbia and representing BCRIMA
- Suzann Lewis, supervisor insurance at Pembina Pipeline Corporation and current Chair of the SARIMS Chapter.

Sadly, their arrival also means we must say goodbye to their predecessors:



- Jennifer Clarke who has represented BCRIMA on the RCC since 2017
- Curtis Desiatnyk who represented SARIMS since 2015

They are both great people and we are thankful for their dedication; we will surely miss them and their wisdom and the RIMS Nominating and Governance Committee is lucky to count Curtis as a member.

One last thing before I let you go; as I am writing these words, we are "*celebrating*" our Canadian Thanksgiving and some may wonder what should we be thankful for in 2020? Well, I am thankful for good health, strong family bounds, friendships (and a loving dog), my work, a place to call home, and finally, for my role as RCC Chair allowing me to write to you.

I hope you have many reasons to be thankful for. Enjoy the fall, remain in good health, take care of your loved ones, and above all, stay resilient! ■

EDITORIAL POLICY

The RIMS Canada Newsletter is a publication of the RIMS Canada Council and is published periodically throughout the calendar year. The opinions expressed are those of the writers and volunteer members of the RIMS Canada Newsletter Editorial Committee. Articles submitted to the RIMS Canada Newsletter for publication are subject to the approval of the RIMS Canada Newsletter Editorial Committee. Approval of such articles is based on newsworthiness and perceived benefit to the readership. All decisions of the RIMS Canada Newsletter Editorial Committee are final and not subject to appeal. Individuals submitting articles to the RIMS Canada Newsletter hereby acknowledge their acceptance of the RIMS Canada Newsletter Editorial Policy.

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Thank you to all of our newsletter contributors! If you are interested in writing an article for the RIMS Canada Newsletter, please submit the article to a member of the Editorial Committee for review. Any questions about the production or distribution of this newsletter should be directed to the Editorial Committee.

The RIMS Canada Newsletter is produced on behalf of the RCC by RIMS.

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Visit the RIMS Canada website at rimscanada.ca or simply scan the QR code below on your smartphone for access to RIMS Canada risk management resources, including conference and education information.




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