



# RIMS CANADA

## NEWSLETTER

MAY 2009

BROUGHT TO YOU BY THE RIMS CANADA COUNCIL

## GREETINGS FROM THE RIMS CANADA COUNCIL CHAIR, KIM HUNTON

**T**he RIMS Canada Council (RCC) and its subcommittees continue to work on behalf of RIMS members in Canada to provide Canadian focused risk management education and representation. Each RIMS chapter in Canada has one representative on the Council.

Delivering on our ambitious Strategic Plan, you will be offered more relevant professional and networking opportunities. Some of the milestones recently achieved include:

- The National Conference Committee (NCC) released a Request For Proposal (RFP) in the fall of 2008 for a National Event Planner. Evaluations are complete and a new firm has been selected for a three-year term commencing after our September 2009 conference in St. John's, Newfoundland. Together with the Edmonton local organizing committee, the new firm will plan our 2010 conference.
- The National Education Committee (NEC) is preparing additional educational offerings for the fall of 2009. Two webinars are currently being developed and will be available to Canadian members at no cost. Watch for webinars on ISO 31000 and Risk Assessment.
- The Communications and External Affairs Committee (CEA) is putting the finishing touches on the RCC Communications Plan. Implementation will quickly follow. Too, RIMS has published its state/local Legislative Handbook and the CEA will adapt this for our Canadian chapters.

In September 2008, the Toronto chapter hosted an outstanding RIMS Canada Conference. Some of the results from the post-conference survey are included in this newsletter for your reading pleasure.



The local organizing committee for this year's RIMS Canada Conference has organized a not-to-be-missed 2009 conference. All of the great things offered at this year's conference themed "Charting the Course: Navigating Your Risk" are described in the article below. Be sure to read it and see what is in store for you. You will not want to 'miss the boat'.

Let us know if you have any comments or questions. The RCC can be reached at [canada@rims.org](mailto:canada@rims.org)

Enjoy this issue of the RIMS Canada Newsletter. I look forward to seeing all of you in St. John's in September!

Kim Hunton

### CHART YOUR COURSE IN ST. JOHN'S 2009



**T**he Newfoundland and Labrador Chapter of RIMS is honoured to host the 2009 RIMS Canada Conference in St. John's, Newfoundland from September 13-16. The local organizing committee has been working tirelessly to ensure your journey to the "Rock" will be an event you will never forget. We welcome the opportunity to share with you the beauty and culture of our land with its rugged coastline and friendly people. Whether your visit to the conference will be your first trip to Newfoundland and Labrador or a return visit, we promise the memories of your journey will last a lifetime. Some say there is magic in this place and we invite you to experience that magic as you chart your course for the 2009 RIMS Canada Conference.

The theme of the 2009 Conference is "Charting the Course". In keeping with the theme, the Program Committee is planning educational sessions that will provide risk managers with the skills to chart their courses in these times of historic economic stress. While plans are ongoing, we can share with you our goal of presenting four plenary sessions and twenty-

five concurrent sessions and panels over the span of the conference. We will bring together industry leaders, risk managers and service providers to share their knowledge and expertise through educational sessions and peer networking opportunities.

Our keynote plenary speaker is Ret. General Rick Hillier, a proud Newfoundlander and one of Canada's most celebrated leaders as Chief of Defence Staff, Canada's highest ranking position in the Canadian Forces. General Hillier, a truly impressive public orator, will share his experience and guidance on the topic of "Corporate and Military Risk Management Strategies". Other plenary speakers, include international columnist Gwynne Dyer presenting "Global Events Affecting Canadian Business", Dr. Elliott Leyton, social-anthropologist, educator and author and, last but not least, closing keynote speaker, Rex Murphy, a well known national columnist and media personality, who describes himself as a Newfoundlander first and foremost. We are proud to say that all plenary

speakers are Newfoundlanders, so there is no question that you will be not only educated but entertained as well.

Final selection of topics for concurrent sessions should be complete in the near future, however, the committee would like to share with you some of the session topics already indentified as follows: Enabling and Empowering Risk Management, ERM, Public Sector Risk Management, Global Security, Marine Insurance, Risk Control Techniques, Oil & Gas Risk Management, Risk Management Technology. Stay tuned to the conference website for further updates to be posted shortly.

Start planning your attendance today by visiting [www.rimscanada.ca](http://www.rimscanada.ca) which will direct you to the conference site to book your hotel or contact Marlea Whitley of My Travel Sinfonia at [rims@mytravel.ca](mailto:rims@mytravel.ca). Downtown hotels are filling up fast and while many have a waiting list, rest assured, there are other hotels just outside the downtown core with available space. A shuttle service to and from the Conference Centre will be

available to all those booking rooms through My Travel Sinfonia with the furthest hotels being only a 10 minute bus ride.

There is limited space still available for exhibitors. At present 78 booth spaces have been negotiated with only 22 remaining. We are very optimistic that all spaces will be taken so to ensure your company has representation, please contact us at your earliest convenience.

Take advantage of the exciting sponsorship opportunities to showcase your company to key decision makers in the industry by contacting Betty Clarke at [eclarke@stjohns.ca](mailto:eclarke@stjohns.ca) or Paul Power at [powerpaul@nl.rogers.com](mailto:powerpaul@nl.rogers.com).

To guarantee you don't miss the opportunity to embark upon this educational and cultural journey, book your passage now!!

ALL ABOARD!!

## COMMUNITY: THE NEW SOCIAL NETWORKING PLATFORM ON [www.RIMS.org](http://www.RIMS.org)

**T**here's a new button on the [www.RIMS.org](http://www.RIMS.org) website, and Canadian RIMS members and RIMS Canada Council subcommittees are already using it to share ideas, best practices and house meeting and project notes.

The new Community section of the RIMS website is an online social network for RIMS members. Members can interact with colleagues across Canada and around the world, discover new tools and resources, blog about recent events, download podcasts, upload white papers or articles, post comments and questions, and much more.

Within the new online community, RIMS members have access to a profile, similar to popular social and professional networking sites. Within these profiles, members can create networks and groups based on certifications, interests, job history and education specified. From here, members can:

- browse the Risk Glossary for risk management terms and definitions;
- join eGroups to connect and share knowledge in 40+ discussion groups;
- visit the Resource Library to view, rate and comment on white papers, industry-focused reports and publications;
- and search the Member Directory for local colleagues in the area or around the world to connect with.

The Resource Library section has a new feature that enables "communities" to create their own libraries. Libraries can either be public, with access for all RIMS members, or private, for committees or chapter boards to store documents.

RIMS Canada Council and its subcommittees have started to create libraries to store committee meeting minutes and project documents. Chapters can create their own libraries and link them directly to their websites. Besides documents, other media such as photos, slides shows and videos can be stored in and accessed from the libraries. For instance, in the new RCC library, you can now find the RIMS Canada Conference promotional videos starting from the 2006 conference in Calgary up to the video for next fall's conference in St. John's. Chapters can use this feature to archive everything from meeting minutes to event photos and chapter memorabilia.

There is also a feature where members can create blogs, and many members have published blog entries that can be accessed from the "Blogs" link on your member profile. Blogs can also be linked to chapter websites, for instance, a chapter president might choose to create a blog for their chapter members that can be accessed directly from the chapter website.

Everyone is encouraged to test out the features of the community section. Visit [www.RIMS.org/Community](http://www.RIMS.org/Community) to get started.

### Let's Celebrate! 2008 Membership Growth Awards and Ron Judd "Heart of RIMS" Award Winner

Six Canadian chapters qualified for 2008 Membership Growth Awards.

Membership Star Award (6-8.9% growth)

- Southern Alberta (8.4%)
- Newfoundland & Labrador (7.1%)
- Ontario (6.9%)
- British Columbia (6.0%)

Membership Super Star Award (9%+ growth)

- Saskatchewan (17.5%)
- Maritime (16.1%)

Congratulations!

The Risk and Insurance Management Society (RIMS) honoured the industry's shining stars at RIMS 2009 Annual Conference & Exhibition in Orlando, Florida on April 20, 2009. The Ron Judd "Heart of RIMS" Award was presented to Marley Drainville, CRM, risk manager at Enerplus Resources Fund; and Al Gorski, risk manager at the Orange County Transportation Authority. The award pays tribute to the legacy of Ron Judd, who served as RIMS executive director for 22 years. Individuals are nominated by chapters for outstanding performance in furthering risk management at the chapter level.



L-R: Marley Drainville, Joe Restoule, Al Gorski



## SOCIAL NETWORKING WEBSITES – NEW FERTILE GROUND FOR EVIDENCE

BY BRUNO DE VITA

As I reported in the April 2008 edition of the RIMS Canada Newsletter, the production of electronic information in civil lawsuits, including email communications, is now a reality in litigation involving your organization.

Most recently, a judgment of the Ontario Superior Court of Justice has confirmed the expansion of discovery of electronic documents into the new generation of social networking websites. Although the case deals specifically with the Facebook networking site, the decision applies equally to sites such as MySpace, Twitter and personal blogs. The importance of the decision is that while your employees may think that what they write or post on personal time on their networking sites is exempt from company related litigation, that is likely no longer the case.

In *Leduc v. Roman*, 2009 CanLII 638 (ON S.C.), the Ontario court granted an appeal of a Master's decision to deny production of the plaintiff's Facebook site pages. The Ontario court found that the plaintiff had put into issue the impact of accident related injuries on his life. During a defence psychiatric assessment, the plaintiff had mentioned to the doctor that he had a lot of "Facebook friends". However, his Facebook page was closed to public access.

The court confirmed that content posted on these social networking sites are "data and information in electronic form" producible as documents if it relates to any matter in issue in the action. This is true even if the party restricts its profile pages so that they are only viewable by online friends. The court found that it is reasonable to infer from the social networking purpose of Facebook and the applications it offers that users intend to take advantage of those applications to make personal information available to others. The court stated that the very purpose of these sites is to share information about who the person is, where the person goes, what they do, and so forth. Therefore, it is a reasonable inference that there is information on the site that is applicable to the litigation. The court found that "to permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to

material that may be relevant to ensuring a fair trial".

This Ontario decision does not stand alone, as other jurisdictions have been forced to deal with the relatively new online social networking phenomenon. Courts in British Columbia have indicated a similar willingness to find Facebook profile pages producible. In *Cikojevic v. Timm*, [2008] B.C.J. No. 72, the court found that photographs posted on the Plaintiff's profile pages were admissible as evidence since the Plaintiff had put into issue his loss of enjoyment of life and inability to work.



Furthermore, information found on social networking sites can open up the potential for further production requests. In *Weber v. Dyck*, [2007] O.J. No. 2384, the presence of photographs arising from a party on a MySpace page were grounds for a request to produce additional photographs arising from that party not previously made public.

The cases noted above are personal injury cases where a defendant has benefitted from being able to access information from the

plaintiff's Facebook profile. However, one can foresee other circumstances where relevant evidence might be found within social networking sites and used to advance a claim against a defendant. One example is the host liability case where either a commercial establishment or employer hosts an event where alcohol is served. Evidence supporting a claim of over service of a particular individual might well be found within photographs or postings created by employees who were participating in the event. Likewise, one could foresee how comments posted on such sites for "friends" who happen to be fellow employees might become relevant in employment and/or human rights litigation. What is becoming clear is that the proliferation of information in our current age and the relative ease of its distribution have created fertile ground for the production of potentially damaging evidence in civil lawsuits.

In summary, while many companies are aware of the benefit of managing investigations into circumstances that might lead to claims, little thought has had to be paid to what employees might write or post outside of the work setting. The advent of social networking sites opens up a new area that requires just as careful management and consideration of one's risk as any electronic documents created in the work setting.

Bruno De Vita is a partner in the Vancouver law firm of Alexander, Holburn, Beaudin & Lang LLP and practices in the area of civil litigation with an emphasis on insurance law, municipal liability and personal injury litigation. He is recognized in *Lexpert* and *The Best Lawyers in Canada* as a leading lawyer in the field of insurance law.

### Preparedness is a Competitive Advantage.

Make the advantage yours. Become a qualified Risk Management Professional.

Enroll in a RIMS Designation Program:

Canadian Risk Management (CRM)

RIMS Fellow (RF)

To learn more about these programs and other learning opportunities, visit: [www.rimscanada.ca](http://www.rimscanada.ca)



The Risk and Insurance Management Society (RIMS) is the world-leading risk management professional association. RIMS offers educational programs that can help you manage the load.



## AN INTERVIEW WITH RIMS PRESIDENT JOSEPH RESTOULE, CIP, CRM

**E**nthusiastic.

This one word best describes Joseph Restoule and his approach to risk management. When you spend a little time with him talking about managing risk, you can hear the passion build in his voice.

Joe's energetic and hands-on approach to the profession are traits that he has nurtured throughout his career. He has honed these traits in his current position as a leader of risk management at NOVA Chemicals Corporation—one of Canada's largest petrochemical companies. Joe characterizes the environment at NOVA as one where he is "allowed to be creative and innovative." And as RIMS president for 2009, he's calling on other risk practitioners to re-ignite their passion for the discipline and take action to challenge their risk I.Q.

"I want practitioners to step back and look at their programs from a different perspective—get creative and try to learn from their experiences to find new ways to do their jobs better," says Joe. "In this harsh economic climate, everybody is faced with budget constraints and dwindling resources. Practitioners shouldn't focus all their energy on the negative—they need to create ways to turn troubled waters into opportunity."

Joe was fortunate to find the inspiration in his discipline early in his career. After 10 years at State Farm Insurance Co., Joe took a job with NOVA Chemicals and was mentored by William H. McGannon, a strong supporter of Canadian RIMS chapters. Joe was eager to



partner with McGannon because he was one of the first risk managers in Canada to establish a full service risk management department with loss prevention agencies and statistical support. "I was keen on learning from a practitioner who was 'ahead of the curve,'" he says.

Currently, Joe is involved in all areas of NOVA's risk management program, including risk analysis and financing, loss prevention, safety, business continuity and emergency response. He has been with the corporation for 20 years, and has been responsible for mergers and acquisitions as well as risk management activities for the company's previously-owned gas transmission branch.

And, now, Joe finds himself standing in the shoes of his mentor, as the founding president of the William H. McGannon Foundation—a Canadian charitable organization similar to

Spencer Educational Foundation in that it raises funds to advance risk management through grants for education, research, mentoring and work experience programs. The program also provides students with scholarships, internships and paid attendance at the annual RIMS Canada Conference. The Foundation was established in 1999 after RIMS Canada Council identified a need to help advance the risk management profession in Canada. Joe says he finds enjoyment in working with the students and helping them to find their niche in the industry.

Joe also says his involvement in RIMS played a significant role in his career and has helped him better prepare for his future in the industry. He has served on RIMS board of directors since 2001 in various capacities, including vice president and secretary, was chair of RIMS Canada Council from 1997-2000, co-chair of the 2006 RIMS Canada Conference, and served on Spencer Educational Foundation's board of directors from 2007-2008. He has been an active board member on RIMS Southern Alberta Chapter since 1992. And, in 2004, Mr. Restoule was the recipient of the Donald M. Stuart Award, RIMS highest honour for risk management in Canada.

According to Joe, it doesn't matter what type of risk practitioner you are, or what kind of risk management you practice—traditional, enterprise or strategic. He boasts that RIMS provides risk professionals from all walks of life with an abundance of resources and tools to do their jobs, and learn how to do them better.

## THE WILLIAM H. MCGANNON FOUNDATION

**T**he William H. McGannon Foundation (the Foundation) started off the New Year with its Annual Planning meeting in January. We reviewed the previous year, planned the activities of the current year and pondered the impact of the current global economy on all aspects of life in the Risk Management and Insurance world here in Canada and the Foundation itself. The past year has been a busy time for the board. The first milestone was the awarding of scholarships outside the province of Alberta. Two scholarships were granted to students from Ontario and one from Nova Scotia. Danielle Clements - Lewis from Dalhousie University was the first recipient of the John Faulds Memorial scholarship for pursuing studies in the field of Risk Management at a post graduate level. In all, \$17,500 was granted in the past 12 months.

2008 was also a year in which we were delighted to receive pledges from RIMS and the RIMS Canada Council (RCC) for \$30,000 each. This kind of support is much appreciated and will greatly assist the goals set by the

Foundation for furthering both Risk Management education and exposure in Canada.

We also continue our support of Junior Achievement in central Ontario and we are proud to announce that we expanded this initiative to British Columbia in February with the support of our partner FM Global Insurance. We had a very successful day-long workshop in Vancouver with 45 high school students participating, representing both in and after-school company programs from 15 schools located in the greater Vancouver area.

We also want to remind you that the Foundation has a Student Involvement Program for students enrolled in post-secondary study programs in Risk Management, Insurance or related programs. The Foundation offers a unique opportunity for these students to attend the Annual RIMS Canada Conference where they will learn about



risk management and network with professionals in all segments of our industry.

This year, as you know, the Conference will be held in St John's, Newfoundland from September 13th-16th 2009. Please let your friends and colleagues in Risk Management and Insurance know about this exciting opportunity for a young person to get a glimpse of our industry, and at no cost to the student! You can't beat that offer. Student applications and all supporting materials must be received by the Foundation no later than August 31st, 2009. If awarded, the Foundation will provide registration fees, hotel expenses, reasonable transportation to and from the conference, and a small honorarium to cover reasonable out of pocket expenses incurred during the Conference.

We are currently working with the RIMS Canada Council to find mentors for these students at the conference. For the mentors it would require simple options such as allowing the student to attend some of the seminars with the mentor, showing them around the exhibit hall or even explaining the kind of work you do in "your" risk management career. If you would be interested in mentoring a student for an hour or two during the conference in September please contact Wayne Hickey (whickey@methanex.com) or Niver Rubenyan (Niver.Rubenyan@sunlife.com) of the Foundation or Jeff Schaafsma (JSchaafsma@surrey.ca) of the National Education Committee. I think you would find this experiencing very rewarding while you help a student at the same time. Thank you for your support and remember to visit our website at [www.mcannonfoundation.com](http://www.mcannonfoundation.com). Stay tuned for ongoing updates on the work of the Foundation.

## SURVEY SAYS...

**E**very fall, the RIMS Canada Council surveys RIMS Canada Conference participants to find out who they are and why they attended, and to help evaluate what aspects of the conference worked well and what could use improvement for next year's conference.

Here are some highlights from the Toronto 2008 RIMS Canada Conference, "The Exchange":

- 77% of delegates were risk managers, and another 6% were claims managers. Another 12% were either brokers or insurers.
- There were a variety of answers about delegates' primary reason for attending the conference. The highest response, at 47%, was for the educational content, and 21% said that their primary reason was networking opportunities. Other primary reasons included doing business with brokers and underwriters, and being new to the profession and wanting to learn the business of risk management. A number of



respondents commented that they attend for several or all of the above reasons.

- Although over 90% of delegates used the online conference program, there was still a preference to keep producing a hard copy program for a variety of reasons, including sharing with managers and colleagues, and for travel.
- Other suggestions for a greener conference included eliminating water bottles and disposable lunch bags, minimizing paper handouts and having sessions and case studies on energy conservation and social responsibility.

Overall, 88% of respondents rated their overall satisfaction with the conference as excellent or good.

"Great work! and thanks to all the volunteers who worked hard to make it a success!"

"This was my first RIMS Canada Conference and I enjoyed the experience. I would recommend the conference to others and would attend another RIMS Canada Conference."

## RIMS CANADA COUNCIL SUBCOMMITTEE MEMBERS



National Education Committee (L-R): Christopher Cross, Glen Frederick, Jim Swanson, Dave Jackson, Betty Clarke, Jeff Schaafsma, Maureen Graham, Carrie Green, Lynda Lyttle, Angela Haywood. Absent: Adib Samaan.



Communications and External Affairs (L-R): Michael Bailey (Guest), Cathy Myles, Phil Corbeil, Steve Pottle, Melissa Ferreira, Tino Brambilla, Elaine Henley, Lance Kayfish. Absent: Gary Locke, Chris Grelson.



National Conference Committee (L-R): Roman Parzei, Barbara Carscadden, Doug Brown, Marilyn Leonard, Gwen Tassone, Michel Turcotte, Marley Drainville, Karin McDonald, Bruce Tainsh.

## FINANCIAL SERVICES COMMISSION OF ONTARIO (FSCO) FIVE YEAR AUTO REVIEW

Last July, the RIMS Canada Council (RCC) together with the RIMS Ontario and Canadian Capital Chapters, submitted comments to the Ontario Auto Insurance Five Year Review. We canvassed RIMS members in Ontario who manage risk for organizations in a wide variety of industries, including public and private sector entities, for issues that needed to be addressed in the consultation process. These members deal with a wide range of motor vehicle ownership and operations issues, from municipal mass transit to private passenger-carrying vehicles to automobile fleets.

The main area that we addressed was to propose changes to the Statutory Accident Benefits Schedule (SABS). We believe that changes and improvements to SABS could reduce the current degree of complexity involved in claims, as well as enhance compliance. Following are some of the specific areas where we proposed changes:

- Our members deal with claims where individuals who do not have their own auto insurance are injured riding in vehicles owned by our member organizations, including city public transit vehicles, motor coaches, school buses, charter services and automobile fleets. In these cases, if passengers are injured, even with no fault to the organization that owns the vehicle, the organization's insurance has to pay for benefits. These benefits can be costly and cases can take years to resolve. With increased privacy laws, it can be difficult to determine whether claimants qualify for Statutory Accident Benefits claims. Our members have had situations involving claimants who denied having auto insurance at the time of their loss, both in statement and on application forms, even when they were actually insured. Claimants have denied knowing or having details about their last known auto policy number, insurer or type of car. Even when such information is eventually identified, there have been situations where the insurance company denies accepting priority due to time delays, even though the policy was in force at the time of the loss. This results in further expenses and increased costs for arbitration and other claims management functions. Since claimants must be responded to while investigations continue, we believe that insurers should not be exempt from paying for their claimants' accident benefits or disputing priority if there is a delay in information confirming valid coverage.
- Members who own vehicles that carry passengers would like to see a cap on liability for auto accidents. We suggested the cap be set at \$1 million, the same as the recently approved rental vehicle cap.
- Our members report that SABS forms are too long, and they would like to see revisions to make these forms more user-friendly. We offered to provide feedback to FSCO from our members to help reduce complexity and improve efficiency and compliance for the paperwork that is required.

We also addressed consumer protection for victims of non-catastrophic injuries, and specifically suggested that the housekeeping limit of two years for this type of injury be reviewed. Accident victims may be well along the road to recovery after two years, but still need housekeeping and/or home maintenance assistance. Extending paid housekeeping services would help accident victims put their energies toward recovery and returning to work. A suggested revised limit could be four years or four months after a person returns to work full time. Such benefits should be accessible to consumers immediately and without litigation.

The final issue we addressed was the 2006 ruling on priority of payments for rental vehicles that made the renter's personal insurance the primary coverage for daily rentals, even if the vehicle is being rented to conduct business for an employer. This change to the Insurance Act was intended to close a loophole for vicarious liability imposed on long term leased vehicles, however, daily rental vehicles were also included in this change, causing a great deal of misunderstanding both by consumers and rental agencies. This has resulted in an inequity whereby an employee who rents a vehicle for his or her employer's business personally bears the primary liability associated with operating that vehicle. We believe that this ruling needs to be reviewed.

The report on the Five Year Review of Auto Insurance, which contained 39 recommendations, was released by FSCO on March 31, 2009. The Executive Summary and the Recommendations related to the issues we addressed read in the report as follows:

FSCO received submissions from eight municipalities and municipal transit authorities regarding their experience with the Ontario auto insurance system. Many of the issues they raise are similar to those raised by insurers, including rapidly increasing utilization of assessments and attendant care benefits. Injuries are often not reported at the time of the incident but days or weeks later, and without the driver having any knowledge of the incident. The transit authorities must accept these claims in good faith because it is often impossible to even verify whether the claimant was a passenger of the vehicle. One transit authority reported that 73% of claims do not involve an actual collision. These claims are for injuries resulting from bumps and falls while entering and leaving vehicles, standing in aisles and getting in and out of seats.

FSCO agrees that public transit services operated by municipal authorities should be provided with additional protections that reflect their unique status. Injuries sustained on public transit vehicles involving collisions should continue to be covered under the auto insurance legislation. However, all other injuries should fall under a general liability insurance policy.

Recommendation #37: The government should consider legislative amendments to reflect the unique status of public transit services operated by municipal authorities by excluding injuries from no-fault where no collision has occurred.

Virtually every stakeholder commented on the complexity of the existing accident benefit system. A number of stakeholders compared the Statutory Accident Benefits Schedule (SABS) to the Income Tax Act. To provide some context to this issue, the current SABS is estimated to be six times the length of the schedule that was introduced under Bill 68. The current SABS is also estimated to be 40% longer than the Bill 164 SABS which stakeholders used to refer to as "bloated." An argument could be made that the SABS has increased the regulatory burden on both consumers and the insurance industry.

The technical provisions of the SABS periodically impose impractical time deadlines in obtaining and forwarding claims information. For example, under section 42 of the Regulation, claimants are at risk of having benefits suspended if they do not comply with the requirement to forward relevant documents to assessors within five business days. Roughly only 25% of the SABS contain a description of accident benefits available to claimants; the remainder sets out the procedures for applying



for benefits or denying entitlement. However, based on feedback from stakeholders, these procedural provisions in the SABS may not be accomplishing what they were created to do.

Faced with such complexity, consumers must turn to those more familiar with the system for guidance. Entirely new industries have been created to support the accident benefits system. When the first-party benefit system was introduced under Bill 68, it was contemplated that consumers would be able to access benefits without a representative. In 2007, data from FSCO's Dispute Resolution Group indicated that the percentage of claimants represented by a lawyer or paralegal at mediation was 98%.

## ALBERTA GETS A NEW INSURANCE ACT, B.C. CLOSE BEHIND

BY MICHAEL BAILEY, CATHY MYLES & LANCE KAYFISH

**T**he Insurance Amendment Act 2008 was passed by the Alberta Legislature into law on November 4, 2008. This update to the province's insurance law is the most substantial change to insurance legislation to take place in Canada in several decades.

Given Supreme Court of Canada statements in recent years that indicate many provincial insurance acts are out of touch with the reality of insurance products and practices today we can expect other provinces to follow suit in the years to come. British Columbia policy makers worked closely with Alberta in the development of a Bill to update the insurance act in that province with the goal of achieving general harmonization with the revisions proposed in Alberta. The Bill to amend B.C.'s Insurance Act that received first reading in the legislature in 2008 meets that objective. However, that legislation will have to wait until after the provincial election in B.C. on May 12, 2009, to be reintroduced to the legislature. RIMS Canada Council (RCC) provided feedback to both governments during the development of the new legislation.

In Alberta, the sections of the Amendment Act that effect some of the most substantial changes to the Insurance Act, do not come into force until proclaimed. Those sections are heavily subject to regulations that are yet to be established. Information from the office of the Alberta Superintendent of Insurance suggests that those sections will not be proclaimed until late 2009. Legislative Counsel is now working with the Superintendent's office to draft the regulations which are allowed for – and contemplated by – many of the substantive amendments.

Although the drafting or preparation and passage of regulations need go no further than the Minister responsible (on approval of Cabinet), and therefore do not require any further scrutiny of the Legislative Assembly, we understand that the Superintendent of Insurance intends to circulate a discussion paper (seeking input from interested stakeholders) soon. That discussion paper will be reviewed by a working group to prepare a response on behalf of the RCC. The RCC welcomes any comments from RIMS members and encourages anyone interested to put their name forward to be a member of the working group. Comments or expressions of interest can be directed to Bonnie Wasser, Canadian Consultant at bwasser@sympatico.ca.

The amendments (subject to proclamation) can, generally, be characterized as consumer-friendly legislation. Some selected highlights are:

- Instead of an array of different limitation periods governing actions against an insurer on a policy, the limitation period will now be two years.
- "Innocent Co-insureds" will be entitled to recover their proportionate interest in the lost or damaged property (notwithstanding the application of the "criminal or intentional act" exclusion).
- New "Fire Following" provisions state that insurers cannot exclude loss or damage arising from fire except as prescribed by regulation.

Recommendation #2- Review the SABS to identify provisions that: a) are overly complex and could be simplified without changing the intent of the Regulation, or b) are essentially ineffective and could be eliminated without changing the impact of the Regulation.

Keep in mind, these are all still recommendations which may or not be adopted in whole or in part by FSCO.

- In Life and Sickness & Accident insurance situations, if the insured person believes that the existence of coverage puts his/her life or well-being in peril, the court can terminate the policy or reduce coverage.

The change to the consistent limitation periods and recognition of innocent co-insureds are consistent with the RCC response and positions to initial consultations conducted in both BC and Alberta. In 2007 RIMS endorsed both these policy changes.

The RCC has strongly advocated that fire following the peril of earthquake not be permitted to be "unbundled" from property insurance coverage that protects against fire. Although no changes to the current requirement that coverage for fire following earthquakes be included in policies that cover fire, until regulations are put in force it is uncertain where the Albertan government will land on this issue. Although the final outcome of this legislative update rests with the regulations, Alberta has led the way in moving to legislation that may be the model for harmonization across Canada that should benefit industry and consumers alike.



**Don't Miss the Boat!**  
CHARTING THE COURSE  
*Navigating Your Risk*

The Newfoundland and Labrador Chapter of RIMS warmly invites you upon a voyage of discovery.

**Destination: The 34th Annual RIMS Canada Conference, St. John's, NL  
September 13-16, 2009.**

Don't miss this opportunity to embark upon an educational and cultural journey, in a land awash with maritime history. Here, where life itself has depended upon charting the right course and expertly navigating risk, you will gain valuable insights on making smart risk management decisions. At the end of the day, join the whole crew for a whale of a time... and immerse yourself in St. John's unique character and charm. We'd love to welcome you aboard - so don't miss the boat - book your passage now for this intriguing adventure.

We'll see all hands on deck, **St. John's, 2009!**

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# AN IMPORTANT TREND IN THE LAW OF NUISANCE IN B.C.

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**A**pproval of subdivisions, issuance of building permits, administration of parks, and the ownership of land are just a few of the myriad matters that involve local government. These activities have the potential to attract liability, as do most areas of responsibility over which local government accepts authority. This is especially so when local governments, in dealing with these land issues, find that hazardous conditions amounting to nuisances are in existence.

There are well known cases involving claims that have been brought against local government for such things as land slippage. The law of nuisance is evolving in respect of the responsibility of governments to remedy or prevent hazards that constitute nuisances.

The law traditionally recognized that, in order for a claim founded in nuisance to be successful, damage from flooding, rock fall, erosion, land slippage, and similar events must have resulted from an actual event or escape of something from one person's land to another person's land. In other words, the landowner, whose land contained the hazard that threatened another's land, would be responsible for damages caused by that hazard, unless the landowner had taken steps to eliminate the hazard. Furthermore, the liability would arise only after the occurrence had taken place and the damage was sustained. The claimant had to prove that he had sustained damages.

Fast forward to today and we find that the courts are now utilizing the concept of "impending harm". This concept means that a landowner may be required to take steps to alleviate a hazard before an event or an escape occurs, on the basis that it is reasonable to do so at some point. Thus, the aggrieved party need not wait to be harmed or for damage to be sustained before bringing an action to require that the hazard constituting the impending harm be remedied or eliminated.

It is understandable that the Courts have moved to a more preventative stance from its past reactive position on the law of nuisance. On proper evidence, if the nuisance can be seen to constitute an "impending harm" to such extent and degree that a damaging event is virtually inevitable, it seems reasonable to order that steps be taken to eliminate the eventuality. This may be particularly true in cases where the hazard constituting the nuisance was created or caused by human activity. The law of nuisance traditionally dealt with the creation of man-made hazards. From a local government perspective, such hazards could include approving

subdivisions, granting building permits where the geographic conditions are not appropriate, or in altering or diverting watercourses if those activities may cause flooding.

However, along with expanding the breadth of nuisance law through the concept of impending harm, our Courts appear to be moving toward the application of that principle to naturally occurring conditions or hazards, not limiting it to hazards otherwise created.

This new expansion of the law of nuisance to hazards both impending and naturally occurring should be of great concern to local government. For example, parkland and protected areas are often dedicated as such to protect their natural features. Often, local government takes ownership or responsibility for those lands primarily to preserve the green space and natural features with little or no alteration.

The law of nuisance now appears to contemplate that an owner whose land has a naturally occurring condition that may be a hazard to adjoining properties, may be responsible to take steps to eliminate that hazard, despite the harm being merely impending and the condition not being man-made.

Some courts have suggested that there may be a duty to do what is reasonable to reduce or eliminate a naturally occurring hazard with the potential to cause damage to other properties. We know of claims brought by property owners adjacent to parkland where the natural features of that park have been identified for rock fall potential. Whether such a duty will be imposed, and under what circumstances it is deemed to be "reasonable" to reduce or eliminate the hazard, is dependent upon such things as the nature of the danger, the respective financial means of the parties, and the cost to rectify the nuisance or hazard.

Local government has been granted some limited statutory protection, under certain circumstances, such as Section 56 of the Community Charter, in which geotechnical concerns can be addressed on lands prior to the issuance of building permits. However, this does not cover all of the eventualities and conditions under which hazards, including those naturally occurring, may arise or be found.

Currently, a local government faced with identified natural hazards on lands it owns or over which it may have authority has few satisfactory options. The local government's

options are to (a) attempt to remedy the problem at potentially enormous cost, (b) purchase the neighbouring or adjacent lands threatened by the nuisance, or (c) suffer the risk and expense of significant damages and liability imposed by the Courts if such a claim was brought successfully.

In addition, the remedy may result in the obliteration of natural features, which were originally considered to be worthy of preservation.

It may be time for local government to seek legislation from the Province which would provide some protection and relief from claims in nuisance which are derived from naturally occurring conditions. Without such protection, given the manner in which the law of nuisance is evolving, local government can expect to bear the burden of ever increasing liability in this area.

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This article was published in Fall 2008 and may be superseded by changes in the law at a later date. It is for general information only. Specific legal advice should be obtained from a qualified lawyer.

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