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**OVAA Newsletter
Publication Deadlines**

If you have a submission for the newsletter, please advise the editor ASAP so space can be reserved. The actual submission content (articles, advertising changes, etc.) must then be received by the following dates:

Newsletter Issue	Submission Deadline
January 2018.....	December 15, 2017

If at any time you do not receive your newsletter, please contact a member of the OVAA Executive.

O.V.A.A. Reservation Policy

The O.V.A.A. would like to remind its members of our booking policy for dinner meetings and events.

The O.V.A.A. is charged for each person who registers for an event, whether they are able to attend or not. It is therefore necessary for us to charge anyone who registers for an event and does not attend.

We appreciate your support and understanding in this matter.

2017-2018 OTTAWA CHAPTER EXECUTIVE

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SEMINAR SUGGESTIONS

During the course of planning our year, we look to our members, associates, advertisers and friends either to provide guest speakers for our monthly meetings or to let us know what topics are of interest.

Should you wish to present a seminar for the OVAA Membership or should you have an idea for a seminar topic you would like to see presented, please contact:

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President's Pen & REP'S Ramblings

H

o! Ho! Ho! Where did the year go? December is here at last... We have been very lucky with the weather so far. No snow days much to the children's chagrin. Milder temperatures and sunny skies have prevailed for the most part, thankfully. I know it is that time of year!! In a perfect world, we would have a light snow fall on Christmas Eve and Christmas Day... nothing to make travelling hazardous but very picturesque!! .Fingers crossed!!

Our November 21st seminar, presented by Shirley Niven, from Pario Engineering, was well attended, despite how busy everyone has been with all the claims over the past couple of months. I would like to thank Shirley for the very interesting presentation. Please note, that there will not be a luncheon seminar this month or in the month of January. They will commence again on February 27th, 2018. Jay Sutherland, from Relectronic-Remech Inc, will presenting on "Handling Electronic & Electrical Losses.

Please note, our final event of the year is the Inter-Association Social on the 19th of this month at the Officer's Mess. .

The Children's Christmas Party was held on the 24th of November at Funhaven. A fun time was had by all!! The children were able to sit on Santa's knee in his work shop and tell Santa what they would love him to bring them this Christmas. Santa gave all the children an early Christmas present because they all have been very good OVAA little boys and girls this year!! I would like to extend a big thank you to Santa for taking time out of his busy schedule, at this time of year. Thank you to all that were in attendance, sponsors of this event and a special thank you to the member's of the executive that were involved in helping make this night a success once again.

Our OIAA Christmas Party this year is being held at the Royal York on December 13, 2017 followed by our Professional Development Claims Conference on January 30th, 2018, at the Metro Claims Conference Centre in Toronto. There will be a couple of other seminars throughout the year and I will provide further details, at a later date on the upcoming events. It looks like an exciting year ahead.

Finally, once again I invite anyone who might be interested in submitting an article for consideration to be published our OVAA newsletter and/or WP magazine to please let me know as we're always looking for new material. I encourage all of you to visit our new OVAA website and look us up on facebook. Registration as well as payment for all of our events can now be done online. Paypal, visa and mastercard available.

I would like to take this opportunity, to thank everyone for their continued support and attendance throughout this past year. I like to wish you and your family, all the best over the holiday season.

Merry Christmas and Happy New Year!! See you in 2018!!

Cheers,

Cindy Bridge, CIP, CRM
OVA President/Ottawa Delegate

THE TOUGH SLOG OF SPOILIATION

BY ANNE HERRIOTTS

A sump pump, a washing machine hose, a ladder, a pressure cooker, and a sword. Ask any adjuster and they'll be able to give you a list of unusual items gathering dust in the corners of the claims office, collected as evidence and awaiting trial.

Most adjusters are also familiar with the threats from opposing counsel: "failure to retain item X will result in spoliation".

And some unlucky adjusters have experienced the horrible, sinking feeling of realizing that something they had intended to retain as evidence has been lost or damaged.

But what exactly is spoliation? And is your case for subrogation or liability defence truly sunk if the failed valve or fallen slot machine chair goes missing? A review of case law on spoliation shows that anyone who attempts to assert spoliation will have a tough slog proving it.

The Leading Cases

Read enough cases about spoliation and you will find the two cases that everyone cites: St Louis v. The Queen and Mcdougall v. Black & Decker Canada Inc.

St. Louis v. The Queen involved a plaintiff contractor who was suing the federal government for payment of a contract for construction of the Grand Trunk Railway. The government refused to pay on the basis that the invoices were inflated, claiming that the work was not performed. The plaintiff had destroyed documents related to the project, specifically the pay lists which were the basis for the disputed invoices. Talking about spoliation, the Supreme Court of Canada decision states: "the destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who

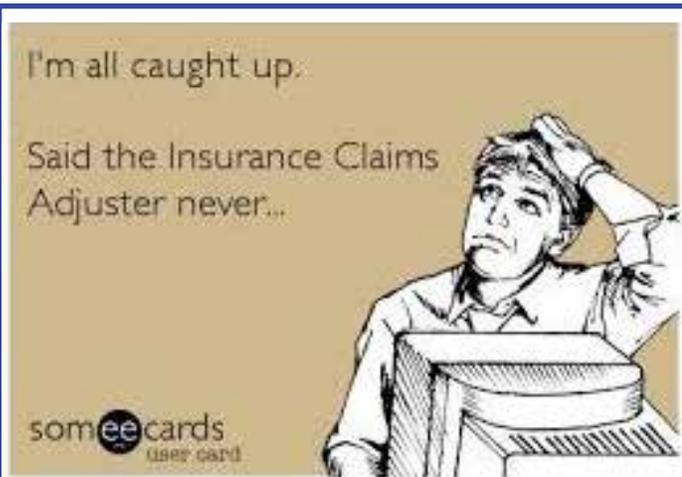
destroyed it, but that presumption may be rebutted".

In Mcdougall v. Black & Decker Canada Inc. a total loss house fire was deemed by fire inspectors to have originated either due to improper disposal of smoking materials or a faulty Black & Decker drill. The plaintiff's insurer retained the drill, but some of the components had been lost. The house and suspect garbage can, on the other hand, had been demolished before defendant Black & Decker was given an opportunity to investigate. Black & Decker was successful at having the subrogated claim against them dismissed on the basis of spoliation. At appeal, however, the Alberta Court of Appeal ruled that "spoliation in law does not occur merely because evidence has been destroyed. Rather it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation". There was definitely destruction of evidence in Mcdougall, and the plaintiff had missed numerous opportunities to give Black & Decker access to the house before demolition. Even so, dismissal of the action was not deemed an appropriate response. The action was reinstated and Black & Decker was given the opportunity to inspect what components of the drill remained.

The Test for Spoliation

The test for spoliation is best articulated in Burrill v. Ford Motor Company of Canada Ltd. The plaintiff alleged that a wheel on his brand new truck had not been properly assembled by Ford, causing a sudden loss of steering and a single-vehicle accident. Some of the components of the truck were lost or destroyed after both parties had conducted inspections, but before trial. The court articulated that, before a finding of spoliation can be made, the court must be satisfied that:

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If you have an article that will
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Entertain,**

kindly contact a member of the
OVAA Executive (See page 1
for Contact Info) for submission
guidelines and publication
deadlines.



Ottawa Valley Adjusters Association

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December 2017						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

December 19
Inter-Industry Christmas Social

December 25
Merry Christmas to All!!

January 2017						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

January 1
Happy New Year!! Wishing everyone all the best in 2018!!

January 30
OIAA 2018 Claims



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THE TOUGH SLOG OF SPOILIATION

BY ANNE HERRIOTTS

1. The evidence has been destroyed;
2. The evidence was relevant;
3. Legal proceedings were pending; and
4. The destruction was an intentional act of the party or the party's agent indicative of fraud or an intent to suppress the truth.

In *Burrill*, there was no indication that any destruction was intentional or meant to suppress the truth, so the allegations of spoliation were dismissed.

The Evidence Has Been Destroyed

This first part of the test for spoliation, that evidence has been destroyed, is usually an agreed fact. However, there are times when the assertion of spoliation fails from the start.

Take the case of *Nova Growth Corp. et al v. Andrzej Roman Kepinski et al.* There was a dispute over rights to the Niagara Falls Casino development. One of the defendants had saved all relevant files to a series of discs, but then had reformatted his computer. The plaintiffs asserted spoliation and requested equitable relief on the basis of the computer wipe.

The Ontario Superior Court agreed that some data was likely lost when the computer was reformatted, but that most of the lost information consisted of

internet files. There was no indication that "evidence" had been destroyed. The allegation of spoliation failed.

The Evidence Was Relevant

The second part of the test, that the evidence was relevant, is also usually not in dispute. But it is still a hurdle that has to be passed.

The facts in *Catalyst Capital Group v. Moyse* were similar to *Nova Growth*: the defendant employee of the plaintiff deleted certain items from his work computer before submitting it as evidence. The employer cried foul and spoliation.

Things did not look good for Moyse when it came out that he had deleted things from the computer. But what had he deleted? Nothing related to the claim. Any relevant documents would have been backed-up on the employer's server, too. Moyse had deleted his porn browsing history, scared that once that became part of the public record it would jeopardize his relationship with his girlfriend. While *Catalyst* was successful in proving that Moyse may have destroyed evidence, anything he destroyed was not relevant to the case. The test for spoliation failed.

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THE TOUGH SLOG OF SPOILIATION

BY ANNE HERRIOTTS

Legal Proceedings Were Pending

Here is a fact situation that comes up from time to time: the plaintiff asserts injury due to some object, but threw it out before it occurred to them to commence a claim. In *Stilwell v. World Kitchen Inc. et al.* the plaintiff was using a dutch oven when it broke into four pieces and lacerated his wrists. The plaintiff asked his wife to get the broken pieces out of the house entirely before he returned home from hospital. The defendant manufacturer of the dutch oven asserted spoliation.

The decision of the Ontario Superior Court of Justice described spoliation as being “the intentional destruction of relevant evidence when litigation is existing or pending”. *Stilwell* wasn't contemplating litigation when he was in hospital and asked his wife to dispose of the broken pieces. The jury was instructed not to consider the issue of spoliation.

In *Leon v. Toronto Transit Commission* there was CCTV footage of an incident on a TTC bus, but TTC policy was that bus footage was only retained for 15 hours before being automatically overwritten for privacy reasons. The footage was not dubbed and saved within that 15 hour window, so was lost forever. While the plaintiff tried to assert spoliation because the TTC failed to retain the footage, the court held that the mere fact that an incident may have

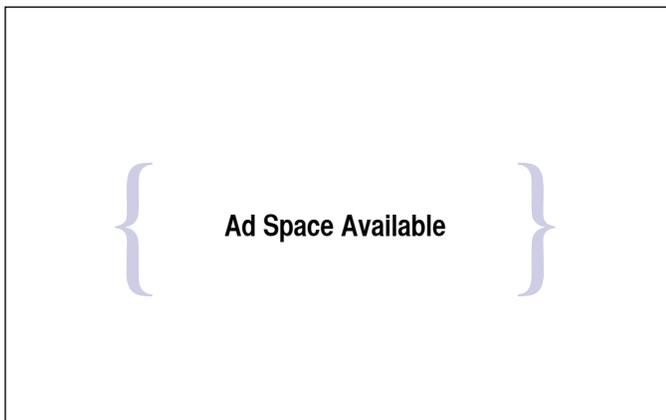
occurred was not sufficient for the TTC to anticipate potential litigation. There was no pending litigation when the CCTV footage was overwritten. The jury was therefore instructed not to consider the issue of spoliation.

Destruction Was Intentional To Suppress the Truth This is the part of the spoliation test where many cases get hung up.

There are a number of cases where documents were destroyed as part of regular business operations. In *Gutbir v. University Health Network* records of the plaintiff's 1984 birth were destroyed in 2000. The first notice to the hospital was in 2001 when plaintiff counsel requested the birth records. The hospital was found to have followed appropriate practices in having records more than 10 years old destroyed. The destruction was part of a massive project to clear thousands of old files and was not intended to suppress the truth or sway litigation. In fact, the hospital had no idea that there might be litigation when the files were destroyed.

Then you have the “accidentally lost” evidence cases. *Stein v. Zarei* dealt with a dispute over installation of a new kitchen. Photos of the kitchen taken by the plaintiff were copied and the original SD card lost, so the date of the photos was unknown. Although the defendants tried to assert spoliation,

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THE TOUGH SLOG OF SPOILIATION

BY ANNE HERRIOTTS

absent evidence of intentional destruction, the court refused to agree that spoliation would apply. In *Muskoka Fuels v. Hassan Steel Fabricators Limited* a failed fuel tank was lost after the plaintiff's expert had inspected it and the defendant had refused multiple opportunities to do the same. Absent any evidence on how the fuel tank was lost, the defendant failed in its bid for a finding of spoliation. Courts will not presume that evidence that is accidentally lost was actually intentionally destroyed.

Is Spoliation a Tort?

Spoliation is typically discussed as a "rule of evidence". But is spoliation a tort in its own right? Can you sue someone solely on the basis that they intentionally destroyed evidence? At present, the answer is: maybe. The Ontario Court of Appeal considered this in *Spasic Estate v. Imperial Tobacco Ltd.*

Spasic was a high-stakes litigation where the plaintiff with lung cancer was suing the tobacco industry. There was an allegation that the tobacco manufacturer had intentionally destroyed evidence relating to the inherent dangers of cigarette smoking. The appeal decision in 2000 related to a motion by the defendants to have the plaintiff's pleadings of spoliation as a separate tort struck.

The Court of Appeal decision states that a separate action on the basis of spoliation should only be allowed "if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim".

The *Spasic* decision did not create a new tort of spoliation, but it stands for the principal that the pleading of spoliation as a tort should not be struck on a summary basis; rather it should be left to be decided by a court. *Spasic* stands for the possibility

that, in the right fact situation, the tort of spoliation may, indeed, be held to exist. To date, I am unaware of any decisions in Canada that do recognize spoliation as a tort, but in future it might.

It is worth noting that spoliation has been recognized in some, but not all, US jurisdictions as a tort in its own right.

How Do You Remedy Spoliation?

Have you noticed a trend in the cases? None of the cases discussed found spoliation to have occurred. It is a tough test to pass. And there is no reverse onus; the party asserting spoliation has to prove all elements of the test.

Sometimes spoliation is found to have occurred, though. And since spoliation is not yet recognized as a tort (where the remedy would be a damages award) other remedies are available for a court to impose.

I have used the term "spoliation" but the Latin term *omnia praesumuntur contra spoliatorem* has been in use since Ancient Rome. This literally translates as "all is presumed against the person who destroys stuff", which is the starting point for remedies when spoliation has occurred: a presumption that if the evidence was produced, it would negatively affect the spoliator's case.

Spasic lists potential remedies as: (1) a rebuttable evidentiary presumption against the spoliator, (2) procedural sanctions for failure to produce a document, such as striking a pleading or shifting the burden of proof, (3) an order denying costs or awarding costs against the spoliator, or (4) a finding of contempt of court (e.g. If destructive testing was conducted contrary to a court order).

Continued on page 12 >

OVAA FEBRUARY LUNCHEON SEMINAR

Speaker: Jay Sutherland
Topic: Relectronic-Remech Inc.
Date/Time: February 27, 2018 – 12PM
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Speaker Bio: Jay Sutherland

As President of RELECTRONIC-REMECH INC., since 1992, Jay has been instrumental in growing the company to over 30 employees and his key to success has been to ensure excellent reports, superior customer service and fair pricing to all insurers, adjusters and contractors. Jay graduated from Conestoga College as an Electronic Technician in 1985 and began his career providing sales, service, restoration and preventive maintenance for all electronic software and hardware.



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THE TOUGH SLOG OF SPOILIATION

BY ANNE HERRIOTTS

In *Blais v. Toronto Area Transit Operating Authority* (where records of an incident were destroyed as part of a normal office process) additional Examinations for Discovery were suggested as a possible remedy for the prejudice that spoliation creates.

The defendant in *Wolfe v. Martinho Concrete Ltd.* was successful in proving spoliation by the plaintiff. In that case the remedy imposed by the court was that the plaintiff was not permitted to rely on any evidence or observations by the plaintiff or his experts from the date that spoliation had occurred going forward.

In Conclusion

Spoliation is a serious issue. The test to prove spoliation will be a tough slog for the party asserting it, but if it is proven the spoliator may face significant sanctions up to and including having all pleadings struck. As adjusters we need to be sure to follow best practices in securing, labelling and retaining evidence. Our files should document what evidence was retained and where it is being stored. Sometimes this is easier said than done: there is currently a full sized crowd control barrier taking up space in the ClaimsPro Ottawa branch office. But it still has to be done.

While we need to take preservation of evidence seriously, we also have to accept that life happens. Photos will get lost. Broken crockery will be thrown out. Lost evidence, and even intentionally destroyed evidence, does not automatically mean that litigation will fail. Do not fear spoliation. Work the case on its merits and, as always, fight the good fight.

What's the strangest piece of evidence that you've collected for a claim? Let me know at anne.herriotts@scm.ca.



BEST TECH GIFTS OF 2017

BY KEITH GREEN, NATIONAL DIRECTOR OF SALES & MARKETING AT CLAIMCONTROL

You're going to WOW them this year with what we found!

This year we have searched out the newest and coolest gifts that are out there so that you will be everyone's favorite Santa Claus. Check these out:



For the woman in your life we love Bellabeat smart jewelry. Not only is it versatile in its looks (you can wear it as a necklace, bracelet or clip) its their attractive designs that really stand out. You can choose between a recycled wood

composite that looks like stone or real wood for the body. Then choose silver or rose gold for the metal clip which encases the body and looks like abstract veins on a leaf. You sync the health tracker to the app and it will track your sleep, your activity, predict your stress levels and even provide you with guided meditations. Head to their Insta Shop for inspiration!



For the man in your life, this year Drones are the new in thing. However it might be overwhelming trying to choose one considering all the different models on the market today. We have

found this helpful site at MyFirstDrone to help with your decision making. They break them down into three categories: Camera Drones, Toy Drones and Racing Drones. So depending on your guy's hobbies or interests you can start by narrowing your search with their useful information.



The Nintendo Switch is great for both the gamer kids and for the whole family to enjoy and play together. This is both a handheld gaming system

that you can take with you anywhere and it also connects to your TV with the included dock for a console gaming experience. This highly popular item is selling out fast so get out early to buy this one!



Bring some nostalgia back to your parents this year. With this gift, hopefully they can take some old records out of storage and go back in time. With the resurgence of turntables there is a wide

variety of models to chose from and with prices ranging from the hundreds to the thousands, there is a model for every budget. Here is a list of the 10 Best Turntables under \$ 500.00 from Digital Trends which includes handy links straight to Amazon Canada to purchase.

STAFF PICKS FOR THE BEST TECH STOCKING STUFFERS

The Tile Style- For the person who has a habit of losing things, this is an anything finder.

LuMee Case- For the Selfie lover. It has a light feature that gives you the perfect glow for the perfect pic.

Panasonic Ergofit Earbuds- These sound great for the low price and come in an assortment of colors.

Anker Phone Charger- For the family member who is always running low on battery.

Microbots- Kids can build these robots and learn about electronics and coding.



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Is your son or daughter currently attending their first year of post-secondary education?

We are now accepting applications for the annual 2017 OVAA Bursary.



This bursary is given out annually to children of Association members to assist in their education.

All applications must be submitted prior to December 31, 2017. Please contact Cindy Bridge (cindy.bridge@dgig.ca) for further information.

Best of luck to all applicants!

YOUR PROPERTY IS TALKING, ARE YOU LISTENING?

BY SIMON STORM FRIGON, THIRD GENERATION DESIGN REBUILD CRAFTSMAN

There are always telltale signs that your house needs attention. While mapping out the best way to attack these projects is not an easy task, it should never be put on the back-burner. Whether it's curled up roofing shingles, condensation inside your windows, or an ugly brown water stain on your kitchen ceiling, your house is talking to you, and you should be listening.

The more you know about your home and what goes into repairs, the less aggravation you'll experience and less money you will spend down the road. By proactively recognizing the red flags that indicate potential problems, you can lower the chances of finding out after a disaster that your particular problem isn't covered by your insurance policy (ie: water infiltration, or seepage, which is usually not covered). By educating yourself about what might happen, you can then check your policy and decide whether you want, or need, to add to your insurance package. Spending the extra money to expand your coverage may be advantageous, as tackling that beautiful kitchen-design-rebuild may not be in the cards if you find out you're on the hook for that basement flood that's not covered under a particular insurance policy. Understanding that your house is talking to you is step number one and reacting to what it is saying is step number two. Turning a blind eye to an issue you have already red-flagged can, and will, eventually put you into the actual red.

Home renovations have an aura of glamour, until you start looking at all the details and minutiae that go into taking it from idea to actuality. One idea is to always consider going above minimum code when planning a project, in the same way that you beef up your insurance coverage in case something happens. The upfront cost might be slightly higher, but you need to consider the life expectancy of the material used,

and the labour involved in removing and replacing it when it doesn't last. Yes, a slate kitchen floor is more costly, but it will outlast a builder's, or even a higher grade, vinyl many times over. Furthermore a natural material like slate is timeless in its elegance, with very little maintenance, as opposed to looking at your floor in 4-5 years time and realizing it is no longer in style. Another great example is your roof replacement. There is no fashion, or style to worry about, however, selecting the typical 25-year,

3-tab shingle with felt, while certainly cost effective today, will leave you under the gun to replace them in about 12 to 14 years (depending on your region and exposure). That's why homeowners are often advised to go with an upgrade to a metal roof, adding on an ice and water shield as a secondary waterproof layer to prevent ice back-up during those variable winter months. It looks great, and unlike the asphalt shingles, are fire rated, giving you peace of mind for an extended period of time. Again, doing the math, a standard shingled-roof would need to be changed 3 times in the same period of time, making it more, rather than less expensive in the long run (not to mention having to endure the nuisance of having to go through the re-roofing process more frequently).

Whether it is your insurance policy, or renovations/maintenance you have planned, it is definitely worth taking the time to investigate the alternatives available to you. Speak to a professional, whether your insurance broker, or general contractor; they can help you find the best solution for your particular home and situation. Remember that paying a little more now may help you save even more down the road, because as they say, you get what you pay for.



2017 Past President's Night

The Ottawa Chapter of the OIAA

Has invited you to Dinner



As a member of the OVAA we are extending you an invitation to this year's Past Presidents Night at the Mill St Brew Pub. If you would like to attend the cost of registration is \$50/person.

Registration is limited this year, so please book early.

If you would like to attend please email ovadjustersassociation@gmail.com or call Jeff King @ 613-822-2734 x112 and leave a message.

Please RSVP to the OVAA at *OUR new email address:*

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If you would like to be a sponsor please reach out to the OVAA at the email below.

When: February 5th, 2018

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The deadline for applications:

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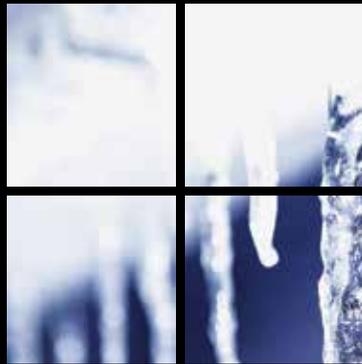
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