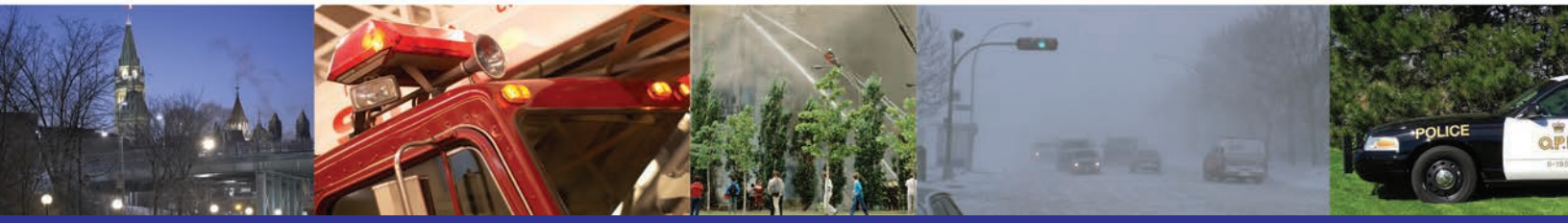
OIAA OTTAWA VALLEY ADJUSTERS ASSOCIATION
A CHAPTER OF OIAA



APRIL 2019

WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

THIS LITTLE PIGGIE CAUSED A $24-MILLION SUBROGATED CLAIM

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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**
May 2019	April 15, 2019

If you have an article that will **Enlighten, Educate or 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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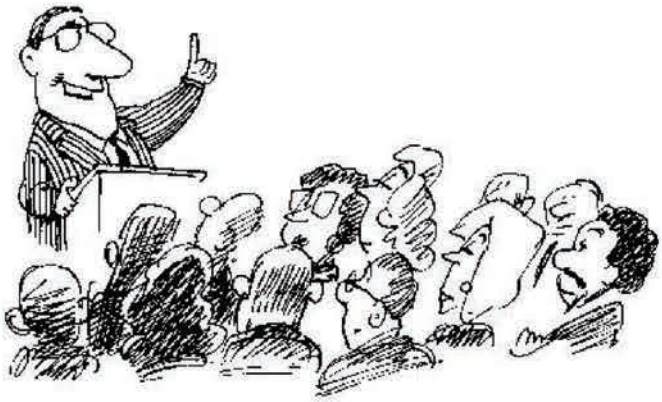
SEMINAR SUGGESTIONS

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:

Conar Marcoux, BA & CIP
613 564 7184



Ottawa Valley
Adjusters Association

UPCOMING LUNCHEONS & EVENTS

KO in the Capital: 2019 Claims Conference
May 2-3, 2019

Join us for the upcoming Claims Conference next week!

TIAA & OVAA Adjusters are free – register now!

Register by emailing OIAA2019.KO@gmail.com

Firth Annual Summit for Adjusters
May 23, 2019

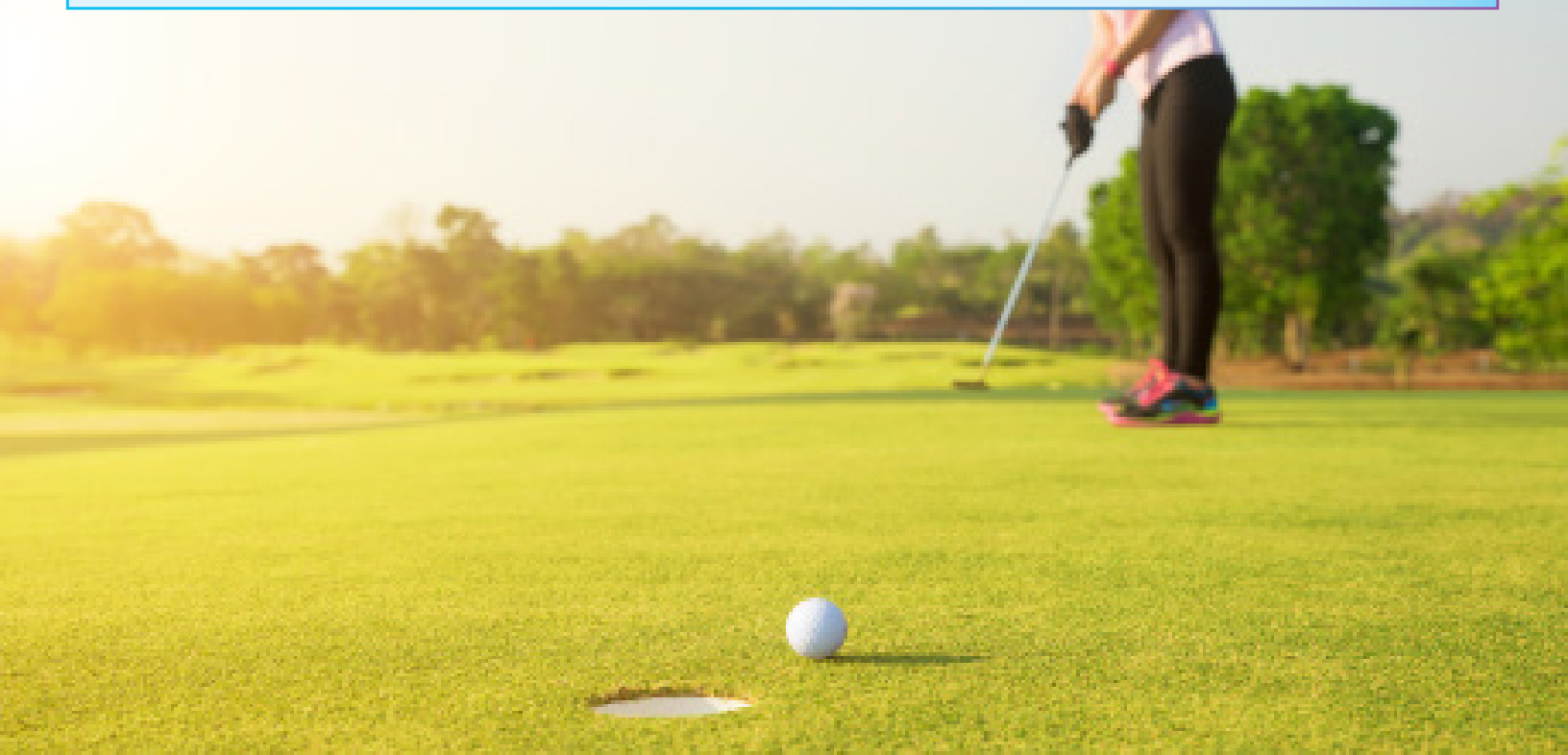
"The Coverage Journey"

Presented by: Forget Smith Barristers/Avocat(e)s

Where: Sala San Marco Event & Conference Centre
215 Preston St, Ottawa ON K1R 7R1

RSVP to to
Crystal Nelms at cnelms@forgetsmith.com

OVAA Golf Tournament - Save the Date!
June 27, 2019



President's Pen & REP's Ramblings

Happy Spring to everyone …. April came in like a lion and will likely go out like a lion but the nice weather is just around the corner I know it! This year it seems that there has been no break in between weather events…. The tornado/windstorms have lead into flooding due to the excessive amount of snow we received over the winter season. It started early this year in October and still we have seen snow in the early days of April.

Our luncheon seminars are over for this term. They will commence again in September. Keep a watch on our website for information on the topic and speaker to kick off our new term in September.

Our Provincial Claims Conference – Co-hosted with TIAA, will take place on May 2nd and 3rd at the Shaw Centre. Our annual Golf Tournament will take place on June 27, 2019 at the Meadows Golf and Country Club. Please note our earlier date**** and 10:30 shotgun start. Sponsorship opportunities are available. Please visit our website for the list of upcoming, seminars, speakers, dates, topics, events and to register.

Upcoming events for the OIAA – June 6th, Annual Golf Tournament

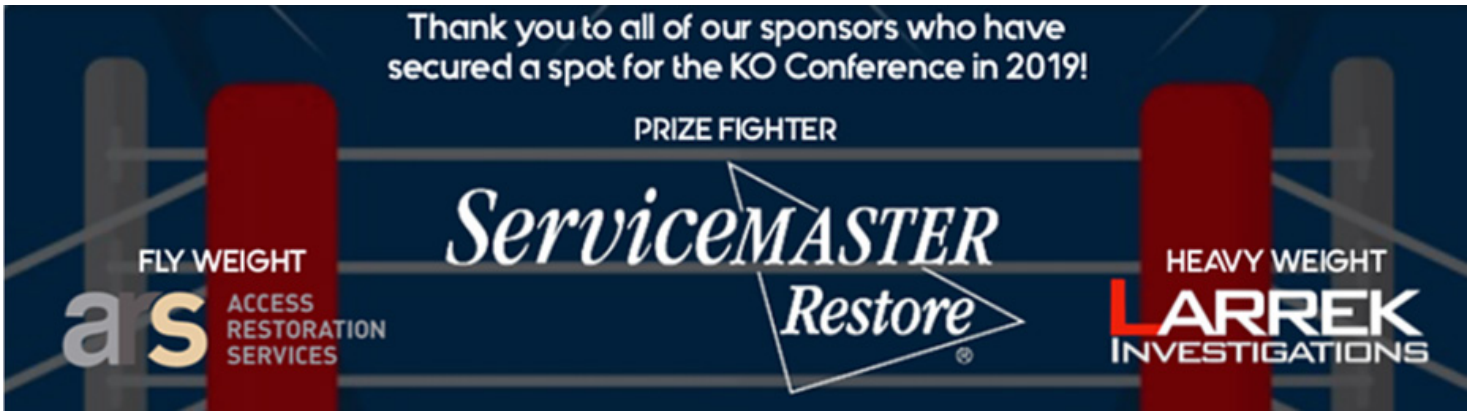
- September 11th, 2019 Kick Off

Finally once again, I invite anyone that would like to submit an article for consideration for our magazine and/or the WP, please submit it for review. Also, if you are interested in joining our Executive, please send an email to ovaa.ca.

I hope to see everyone soon.

Sincerely,

Cindy Bridge, CIP, CRM
OVAA President/Ottawa Delegate



We Want to Stay Connected with You!

Canada's Anti-Spam Legislation (CASL) came into effect on July 1, 2014 and requires that we obtain your express consent to receive any communications from us sent after this date. Although we received several responses via email, we note that several are still outstanding. As our email blasts are one of the most important methods in getting information to our members, we need your help!

Please copy and send this page via email with "I Agree" in the subject line to allow us to communicate with you electronically in the future OR with "Disagree" in the subject line if you do not wish to receive further email communications.
These emails can be forwarded to ovadjustersassociation@gmail.com

By agreeing you are consenting to receive electronic messages from the OVAA (ovadjustersassociation@gmail.com) about the OVAA and its events, etc...
I understand I have the right to withdraw this consent at anytime by informing OVAA, in writing / email that I no longer wish to receive OVAA-related electronic messages.

Please note that on membership expiry / removal from the OIAA membership Listing, your name will be automatically removed from the OVAA's email list.

WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

WRITTEN BY MARTIN FORGET AND JULIA FALEVICH

Introduction

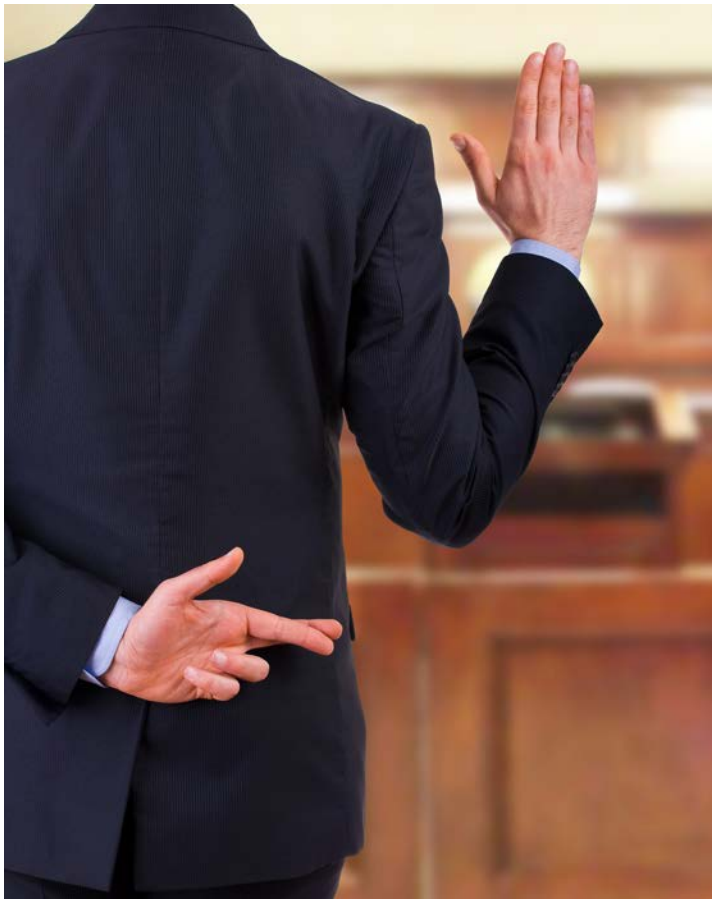
Although the reciprocal duty of "good faith" is the legal principle that defines the insurance relationship, its application in practical terms can be fraught with danger. Nothing illustrates such danger more than the impact of a false statement in a submitted claim. The insured could have his or her claim vitiated by reason of having made a false statement. On the other hand, if the insurer alleges that the insured made a false statement but then fails to prove it, the insurer can be liable to pay punitive damages.

The duty of good faith does not diminish the insureds' right to maximize his or her recovery under the policy. The insured pays the premiums, and is entitled to full benefits afforded by the policy. At times however, when seeking to maximize entitlement under the policy, some insureds might make false statements, either inadvertently, or in some cases, fraudulently.

As we discuss in this article, the line between statements that maximize benefits under the policy, and those that have the effect of vitiating the entire claim is not always clear. The question of whether the insured intended to deceive may be viewed by some insurers as the bright line for determining whether a false statement on the Proof of Loss is sufficient to vitiate the entire claim. However, as illustrated by the recent case of Pinder v. Farmers Mutual where a Peterborough jury was tasked with deciding this thorny issue, the law says otherwise. In fact, the verdict in Pinder, and in particular, Justice Vallee's instructions to the jury dispelled the myth that there must be an **intent to deceive** in order for a false statement to vitiate a claim.

Pinder v. Farmers' Mutual

Pinder involved a coverage claim by a homeowner following a fire which destroyed her residence. As is typical, the insured submitted a Proof of Loss appending to it a Schedule of Loss listing her claim for personal property alleged to have been destroyed in the fire. The insurer denied coverage on the basis, in part, that the Schedule of Loss contained several willfully false statements. The



insurer relied on Statutory Condition 7 which states as follows:

> *Fraud – any fraud **or willfully false statement** in a statutory declaration in relation to any of the above particulars **vitiates the claim** of the person making the declaration.*

The insurer asserted that the insured had made willfully false statements relating to 68 of the items listed in the Schedule of Loss. These included statements falsely claiming that certain items (such as fur coats, electronics, TVs, and furniture) were involved in the fire (where the evidence was that they had not been damaged or were not even in the house at the time of the fire), as well as statements involving false descriptions of the items, their

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WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

WRITTEN BY MARTIN FORGET AND JULIA FALEVICH

origin and their value. The insured denied making any willfully false statements, arguing that any inaccuracies in the Proof of Loss were the result of inadvertence and made without any intent to mislead.

The insured sued for indemnity under the policy, and added a claim of $1,000,000 in punitive damages alleging that the insurer breached its duty of good faith by improperly denying the claim on the basis that the insured had been dishonest.

The case went to trial before a jury in Peterborough. The insured called numerous witnesses in an attempt to prove the truthfulness of the statements and the legitimacy of her claims. She testified that some of the inaccurate statements might have been made due to her lack of familiarity with the process, but none were made with the intent to deceive the insurer.

The case required Justice Vallee to instruct the jury on what was necessary to establish a "willfully false statement" as contemplated by Statutory Condition 7.

The law in this regard was set out by the Ontario Court of Appeal in its decision in Gregory v. Jolley wherein Sharp J.A., adopted the law as set out by the House of Lords in Derry v. Peek, 1889 14 A.C. 337 [1886-90] All E.R. 1, where it was held that a willfully false statement is one that is made:

(1) knowingly;
(2) without belief in its truth; or
(3) recklessly without caring whether it is true or not.

Importantly, in response to the insured's defence that her

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WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

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claim could not be vitiated as she did not intend to mislead the insurer, the House of Lords in Derry stated as follows:

> *If fraud be proved, **the motive of the person guilty of it is immaterial**. It matters not that there was no intention to cheat or injure the person to whom the statement was made.*

The Court added:

> *to prevent a false statement from being fraudulent there must, I think, always be an **honest belief in its truth.***

The law is therefore clear that where an insured makes a false statement, it will be held to have been a *willfully* false statement if made: knowingly; without belief in its truth; or recklessly without caring whether it is true or not.

The only defense available to an insured in the case of having made a false statement is that he or she had an honest belief in the truth of the statement at the time it was made and that such honest belief had been grounded in a reasonable foundation. The Trial Judge relied on *Sienema v. B.C.I.C* where the court held:

> *if I thought that the person making a false statement had **shut his eyes to the facts**, or **purposely abstained from inquiring into them**, I should hold that honest belief was absent and that he was just as fraudulent as if he had knowingly stated that which is false.*

It is therefore no answer for the insured to simply assert that the false statement on the Proof of Loss was made without the intent to deceive, or was the result of a mistake. There must have been an honest belief that the false statement was true for the insured to avoid the consequence of having his or her claim vitiated.

In Pinder, the insured argued that the Court of Appeal's decision in *Pereira v. Hamilton Township* somehow changed the law and required the insurer to establish that the insured intended to mislead. In Pereira, Borins J.A, in obiter, appears to have incorrectly described a passage in *Gregory v. Jolley* as stating that fraud required the intention to mislead or deceive. Justice Borins' brief comments read as follows:

> *As a general statement of law, fraud requires some form of intention to mislead or deceive: see **Gregory v. Jolley** [citation omitted]. This requirement applies to the proof of loss forms and Statutory Condition 7.*

In fact, Sharpe J.A. stated the very opposite in *Gregory v. Jolley*. Gregory adopted, as proper law, the statement of the House of *Lords in Derry v. Peek* that the motive of the person guilty of making the false statement is immaterial. In any event, Borins J.A.'s mischaracterization of Gregory was made in obiter, therefore considerably diminishing its precedent value.

After considerable argument on this issue in Pinder, Justice Vallee agreed with the insurer's position that a willfully false statement as contemplated by Statutory Condition 7 does not require the insurer to prove that the insured intended to deceive when making a false statement. She correctly followed the law as set out in *Gregory v. Jolley* (adopting *Derry v. Peek*) that a false statement will be considered willfully false where it is made: (1) knowingly; (2) without belief in its truth; or (3) recklessly without caring whether it is true or not, and that only an honest belief in the truth of the false statement will allow the insured to avoid the consequences of Statutory Condition 7. Vallee J. added that the honest belief in the truth of the statement must be grounded in a reasonable foundation, stating as follows:

a statement will not be a willfully false statement if the person who made the statement had an honest belief in its truth. The honest belief in its truth must be grounded in a reasonable foundation. A person making a statement cannot shut his or her eyes to the facts or purposefully refrain from inquiring into them.

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WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

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Thus, it is no answer for the insured to simply state "I did not intend to deceive" or "I made a mistake". The mistake has to be grounded in a reasonable and genuine belief in its truth.

Importance of Jury Questions

In Pinder, a dispute arose about the form of the Jury Questions in relation to the insurer's Statutory Condition 7 defence. As the insurer was alleging that the insured had made at least one false statement in relation to 68 items, counsel proposed that a schedule listing all those items be included with the Jury Questions, asking the Jury to determine as to whether a willfully false statement had been made regarding each item.

The plaintiff objected to this format as it would require the Jury to answer 68 separate questions in the negative in order for her to succeed. Knowing that just one affirmative answer would have the effect of vitiating the entire claim, the plaintiff argued that it would be unfair for the questions to be framed in this format.

Justice Vallee agreed with the insurer and held that since a willfully false statement in relation to any of the items represented a separate and full defence to the claim, it was appropriate for each item to be listed in the questions to Jury. She further instructed the Jury to answer every question without exception in order to ensure that each of the insurer's defences was adjudicated upon.

Ultimately, the Jury returned a verdict finding that the insured had made willfully false statements in connection with 39 of the 68 items raised. Having made at least 39 willfully false statements, the insured was in breach of Statutory Condition 7, and her claim was vitiated in its entirety. The Jury also dismissed the claim for punitive damages against the insurer.

The insured then moved to set aside the verdict arguing that it was unsupported by the evidence and therefore perverse, and that in any event, she should be granted relief from forfeiture.

Justice Vallee rejected the plaintiff's argument that the verdict was perverse, finding that the insured could not *"shut her eyes to the facts"*, or *"purposely refrain from inquiring into them"*. She held that there was evidence upon which a Jury could find that the insured had made willfully false statements regarding the items listed. The verdict was therefore not disturbed.

Relief from Forfeiture

The insured then argued that she should be granted relief from forfeiture for her breach of Statutory Condition 7, relying on section 129 of the *Insurance Act* which reads as follows:

> ***Where there has been imperfect compliance with a statutory condition as to the proof of loss*** *to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and* **the court considers it inequitable** *that the insurance should be forfeited or avoided on that ground,* ***the court may relieve against the forfeiture*** *or avoidance on such terms as it considers just.*

As the section provides, the equitable remedy of relief from forfeiture is only available in cases of *imperfect* compliance with the statutory condition, as opposed to total non-compliance.

Relief from forfeiture is more readily granted in cases where the insured fails to promptly provide notice or fails to provide sufficient particulars. Unlike other statutory conditions which impose a positive obligation on the insured to act (and where there could arguably be "imperfect compliance"), Statutory Condition 7 does not impose a positive obligation. In fact, it merely provides a legal consequence in the case of a willfully false statement – namely, vitiating the insured's claim.

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WHEN A FALSE STATEMENT VITIATES A CLAIM: PINDER V. FARMERS' MUTUAL INSURANCE COMPANY

WRITTEN BY MARTIN FORGET AND JULIA FALEVICH

The insurer thus argued that it was not possible to have "imperfect compliance" with a condition that does not require the insured to do anything, and therefore, there could be no relief from forfeiture from a breach of Statutory Condition 7.

The insured argued that as there was no specific finding of fraud, she should be granted relief from forfeiture. Justice Vallee disagreed, holding that making a willfully false statement is "something much more" than imperfect compliance with a condition of the policy and therefore, relief from forfeiture was not available.

As a result, the plaintiff's entire action was dismissed, and the insurer received judgment for the recovery of the mortgage it had paid to the mortgagee under the Standard Mortgage Clause.

What Can The Insurers Take From This Case?

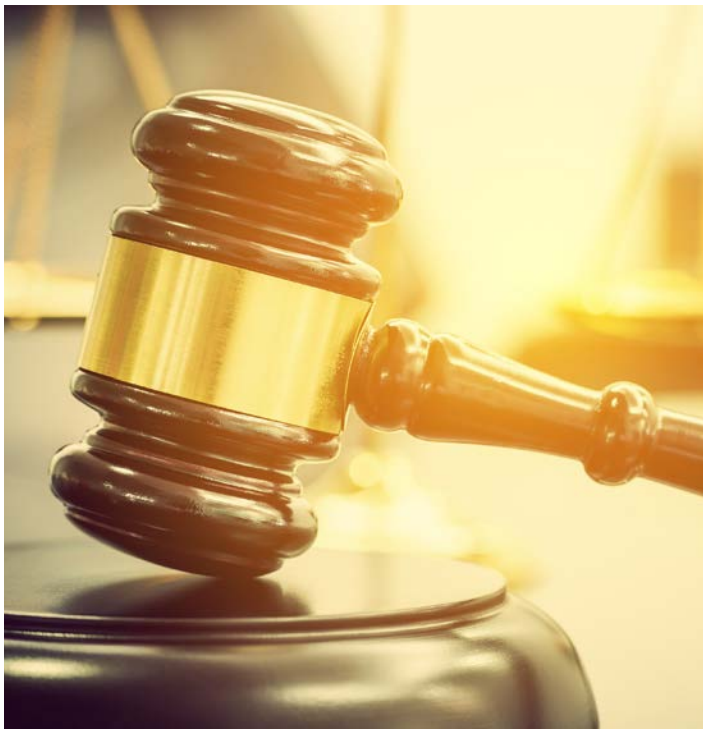
Pinder v. Farmers Mutual represents a rare instance where the insurer successfully defended an action relying on the protections afforded by Statutory Condition 7. It is the first case in over 20 years that followed *Gregory v. Jolley* and *Derry v. Peek*, confirming, that to succeed in establishing a willfully false statement, the insurer need not prove that the insured *intended* to mislead or deceive. If a false statement is made: (1) knowingly, (2) without belief in its truth, or (3) recklessly without caring whether it is true or not, the statement will be held to be "willfully" false as contemplated by Statutory Condition 7.

Pinder thus dispels the myth that the insurer needs to establish that the insured had a subjective intent to mislead or that the insured could avoid the consequences of making a willfully false statement by merely asserting that they did not intend to deceive.

Rather, the test is objective: only an honest belief in the truth of the false statement, based on reasonable grounds, will prevent the claim from being vitiated. As stated by Justice Vallee, the insured cannot simply "shut his or her eyes to the facts" or "purposely refrain from inquiring into them". If a statement contained in the Proof of Loss is false, it will vitiate the claim unless the insured has a reasonable and honest belief in its truth. It follows that where the insured does not take any steps to verify the accuracy of the information contained in her claim, the insured could be held to have submitted that claim recklessly, without caring whether it is true or not, and therefore in breach of Statutory Condition 7.

In terms of equitable relief, *Pinder* confirms that a willfully false statement in violation of Statutory Condition 7 is "something much more" than imperfect compliance, and therefore, the insured is not entitled to relief from forfeiture in case of a breach.

Finally, making willfully false statements may result in serious cost consequences for the insured. In *Pinder*, substantial indemnity costs were awarded against the plaintiffs following trial. We will explore this costs award together with Justice Vallee's reasons for her costs decision in the upcoming Part II of this article.



ANALYSIS OF DISCOVERABILITY IN PROFESSIONAL LIABILITY INCLUDES TWO UNIQUE FACTORS: HYDROCLAVE SYSTEMS CORP. V. GAMMON

WRITTEN BY ANNE HERRIOTTS

Last week's Ontario Superior Court of Justice decision in ***Hydroclave Systems Corp. v. Gammon***, 2019 ONSC 1959 highlighted additional factors that should be considered in evaluating when the limitation period starts running in a case of professional liability.

In 2014, Hydroclave was alerted of suspicious transactions on credit cards. The concern reported by Royal Bank of Canada traced back to a Hydroclave accounting manager who had been concealing personal purchases as legitimate corporate purchases. Over the course of five years, the employee defrauded Hydroclave of $640,000.

The defendants in this action, Gammon and his firm, were accountants retained by Hydroclave for a "review engagement".

When the fraud was discovered, and over the following years, Gammon and Hydroclave's owner, Richard Vanderwal, had many conversations about the matter. Gammon told Vanderwal that a review mandate for accounting would not be expected to catch fraud of this nature. Gammon also assisted Hydroclave in finding ways to recoup the loss. Finally, Gammon continued to reassure Vanderwal about his lingering concerns that the fraud should have been discovered earlier by Gammon's firm.

Vanderwal consulted a different accounting firm in 2016 and filed suit against Gammon in 2017. The defendants to the action sought summary dismissal on the basis of expired proscription.

We know that the *Limitations Act* in Ontario presumes that a claim is discoverable on the day the act or omission causing the loss occurred. But there are circumstances where discoverability is later, such as the date that the plaintiff knew that injury occurred, knew that the injury was a result of an act or omission, knew that the act or omission was committed by a certain person, or the date that the plaintiff "knew … that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek remedy to it", Limitations Act, 5(1)(a)(iv).

When the plaintiff is working with the potentially liable professional, discoverability might not be until the date the plaintiff knew that a proceeding against the professional was "appropriate".
When there is professional liability at play, two factors must be considered:

1. Ameliorative Efforts – A legal proceeding may not be appropriate if the professional involved may be able to resolve the alleged wrongdoing without recourse to the courts.

2. Reasonable Reliance on Ameliorative Efforts – A legal proceeding may not be appropriate if the plaintiff is relying on the superior knowledge and expertise of the defendant, in a manner which is often present in a professional relationship, to remedy the loss.

The efforts by Gammon to resolve the matter, and Hydroclave's reliance on Gammon's efforts, worked together to defer the date of discoverability against the defendants.

This scenario opens an interesting question with regard to coverage. Generally, Professional Liability policies are claims-based, require a report of any circumstances which might reasonably give rise to a claim when the policy commences, and exclude circumstances which the insured should have reported. Ask yourself – when did the accountant "discover" the potential exposure? While the claimant's action wasn't discoverable until he sought an opinion from another accountant, Gammon's discoverability date for reporting to his Professional Liability insurer would have been much, much earlier. If

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ANALYSIS OF DISCOVERABILITY IN PROFESSIONAL LIABILITY INCLUDES TWO UNIQUE FACTORS: HYDROCLAVE SYSTEMS CORP. V. GAMMON

WRITTEN BY ANNE HERRIOTTS

Gammon didn't report the incident in a timely manner, he may not have coverage and would be personally exposed for liability.

Discoverability is always a fact driven analysis.

Finally, Hydroclave decision also references the Ontario Court of Appeal decision in ***Chelli-Greco v. Rizk***, 2016 ONCA 489 to point out that a determination of discoverability is always a fact driven analysis. Be certain that you're getting a thorough investigation up front from experienced and knowledgeable claims adjusters.

THIS LITTLE PIGGIE CAUSED A $24-MILLION SUBROGATED CLAIM

WRITTEN BY GREG MECKBACH

A $24.3-million lawsuit by an oil and gas company against a contractor over an accident that spilled 60 cubic metres of oil is one of Canada's largest-ever subrogated claims, a lawyer for the plaintiff says.

In *ISH Energy Ltd v Weber Contract Services Inc.*, Justice Gillian Marriott of the Court of Queen's Bench of Alberta ruled that Kerrobert, Sask.-based Weber was negligent and in breach of contract.

ISH made a claim on its pollution policy after a spill was discovered July 17, 2007.

"I believe this is one of the largest ever subrogation trial awards in Canada," WeirFoulds lawyer Raj Datt, who represented ISH, told Canadian Underwriter last week.

Datt said Friday his client did not want the name of the insurer disclosed to the media.

ISH owns an oil field, pipelines and facilities near Fort Nelson, B.C. From the source wells, an emulsion – a mix of crude oil, gas and water – flows through a series of pipelines to a plant that separates the oil from the water. Weber was contracted to maintain the pipelines. Weber's role included "pigging the lines."

Pigs are devices that scrape the interior walls of the pipeline to remove deposits that are stuck there. A consultant for ISH described six different types of pigs to the court. For example, ball pigs are round objects while ribbed pigs – intended to create a seal in the interior as they move down the pipe – have ribs in the front and a cup area in the back. On July 6, 2017 a pig was put into the main line from a pig launcher located upstream from the plant. That pig got stuck and workers introduced 200 pounds per square inch of pressure from a gas well.

A spill was discovered the following day. Pollution clean-up was done between that time and November 2007.

ISH sued Weber for negligence and breach of contract.

Justice Marriott ruled against Weber in her decision released March 28. ISH was awarded a total of $24,372,897.87 – $10,712,197.49 for pollution clean-up and $13,660,700.38 for repairs to the oil field.

The parties disagreed on some of the facts. Much of Justice Marriott's 41-page ruling focussed on expert reports on samples of pipelines analyzed after the accident, Weber's contract and how Weber operators used pigs to maintain the lines.

ISH argued leaks were caused by a high-pressure event July 16 2007. But Weber countered that ISH made its argument only to ensure the leaks were covered by the insurance policy.

Weber's theory was that for all leaks to be covered as one incident, a sudden event was needed and that had to be reported within 30 days.

Judge Marriott was not convinced by Weber that over-pressure allegations were developed for purpose of securing insurance coverage. This finding was based in large part on expert witnesses called by ISH.

Justice Marriott found that Weber was in breach of contract. The pigging was done but not as frequently as required by the contract, she ruled. She also found that Weber did not sufficiently treat the pipelines with corrosion inhibitor.

"This inadequate maintenance caused the pipelines to become corroded, and compromised the integrity of the

Continued on page 20

THIS LITTLE PIGGIE CAUSED A $24-MILLION SUBROGATED CLAIM

WRITTEN BY GREG MECKBACH

pipelines. When combined with a high pressure event that occurred when Weber pinched or closed the Inlet Valve after a pig had been stuck in the Main Line, it created a perfect storm that resulted in the leaks. Weber's actions may not have been the sole causes of the leaks, but for the resulting corrosion combined with pinching or closing the Inlet Valve, the leaks would not have occurred."

The written record of pigging in the plant log books suggest that pigging was rarely done. Some witnesses testified that Weber complied with the pigging schedule. There were inconsistencies among witnesses as to the use of the plant log book and pigging activities. Justice Marriott found the witnesses were not dishonest but rather inattentive to keeping records and did not always remember details.

ISH argued that a high-pressure event was caused when a Weber operator pinched or closed an inlet valve to regulate flow into the plant on July 16. This, ISH said, was done after a pig had been stuck and allowed excessive pressure to build up.

ISH relied on circumstantial evidence that that valve was closed.

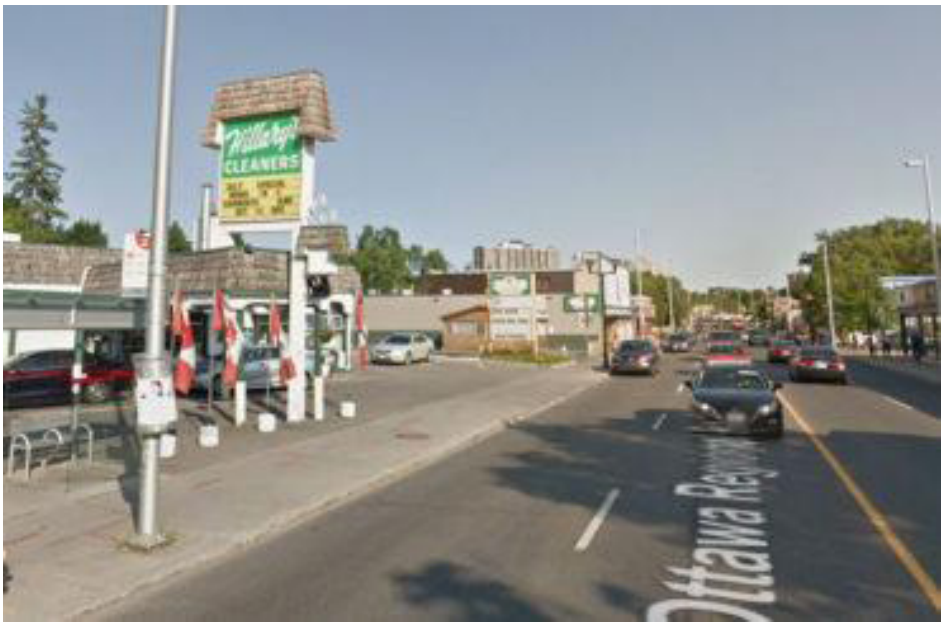
Justice Marriott concluded a valve was closed and this led to trapped pressure between the stuck pig and the plant. The judge was convinced, on a balance of probabilities, that one of the Weber operators at the time had closed the inlet valve.

HOW THIS DRY CLEANER GOT SUED OVER 50-YEAR-OLD POLLUTION

WRITTEN BY GREG MECKBACH

An Ottawa dry cleaner is liable for nearly $2 million in environmental clean-up costs resulting from spills that occurred at least 45 years ago, as a result of a Supreme Court of Canada ruling released Thursday.

The top court's ruling in *Fraser Hillary's Limited v. Eddy Huang, et al.* did not involve an insurer but the underlying circumstances are common and pose an issue for brokers. Clients can face civil suits and regulatory penalties – sometimes in the millions – if their properties are alleged to be polluted.



Moreover, the circumstances leading to the lawsuit against Fraser Hillary's has similarities with a commercial liability coverage dispute in B.C. involving two large insurers.

Fraser Hillary's, a dry cleaners on Bank St. north of the Rideau River (pictured), used chemicals containing tetrachloroethylene (a degreaser) and trichloroethylene between 1960 and 1974. Some of those chemicals spilled into the ground. It was in 1974 that the dry cleaner brought in new equipment that pretty much eliminated pollution risk.

But the cleaner was sued by Eddy Huang, who owns nearby properties and sought money to clean up his properties and reimburse him for environmental professionals he had hired. Huang was awarded more than $1.8 million in damages by the Ontario Superior Court of Justice in 2017, a ruling upheld on appeal. The dry cleaner applied for leave to the Supreme Court of Canada, which announced April 11 it will not hear an appeal. The top court does not issue reasons for denying leave to appeal.

Another Canadian dry cleaner sued by neighbouring property owners over pollution was West Van Lions Gate Cleaners Ltd., which filed claims with both Intact Insurance Company and Economical Mutual Insurance Company. In *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, released April 5, the British Columbia Court of Appeal ruled that neither Intact nor Economical had a duty to defend West Van because the CGL policies had pollution exclusions. Initially, a B.C. Supreme Court judge had ruled that Economical and Intact did have a duty to defend West Van.

While no insurers were parties in *Fraser Hillary's Limited v. Eddy Huang*, the circumstances of that Ontario case are of interest to commercial brokers because anyone with responsibility over property – whether an owner or tenant – can be held liable for contamination that occurred decades earlier.

A key argument – which the dry cleaner lost on appeal – was that the Ontario Superior Court of Justice judge Pierre Roger "retrospectively applied" part X of Ontario's Environmental Protection Act, which became effective in 1985. A section of the 34-year-old Ontario law gives plaintiffs the right to compensation – for losses as a result of spills of pollutants – from persons having "control" of those pollutants.

"While the spills may have occurred before Part X of the EPA was enacted, Fraser's obligations under that part of

Continued on page 22

HOW THIS DRY CLEANER GOT SUED OVER 50-YEAR-OLD POLLUTION

WRITTEN BY GREG MECKBACH

the legislation are ongoing," Justice William Hourigan of the Court of Appeal for Ontario wrote in its unanimous ruling in 2018. Even if the spills of dry cleaning chemicals stopped in 1974, the obligation to clean up the pollution remains, Justice Hourigan wrote.

Huang owns property south of Fraser Hillary's. Engineering reports indicate that ground water is carrying dry cleaning chemicals from soil on Fraser Hillary's property southeast into the soil on Huang's property. In 2002 Huang sought financing from a bank so he could develop properties he owned. Huang got an environmental report which stated the concentration of TCE on his property exceeds provincial standards and recommends remediation.

"Up to the mid-70s, the adverse effects of tetrachloroethylene were unknown to both the industry and the environmental engineering community. It was then understood that you could dispose of tetrachloroethylene by pouring it onto the ground. The thinking was, apparently, that it would evaporate," Justice Roger wrote in his 2017 ruling. From 1960 to 1974, used tetrachloroethylene was be stored by Fraser Hillary's in cardboard boxes in the parking lot at the rear of its property and left there until the weekly garbage collection, Justice Roger added.

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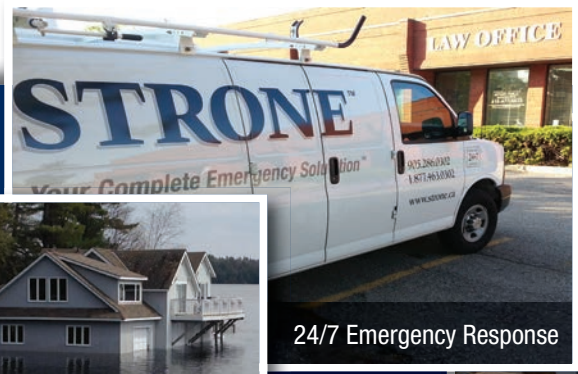

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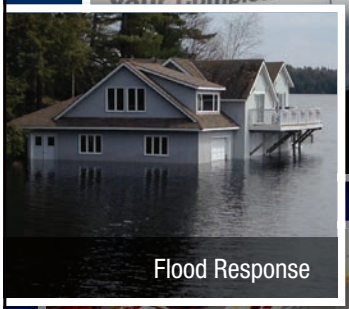
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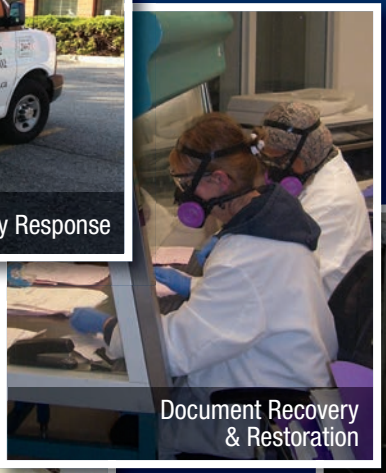
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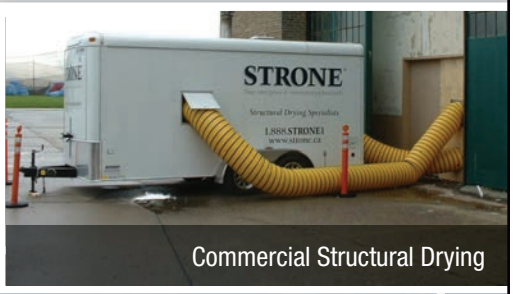

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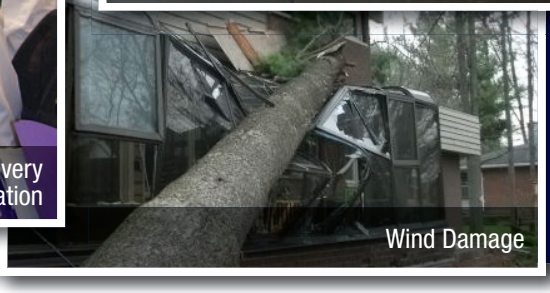
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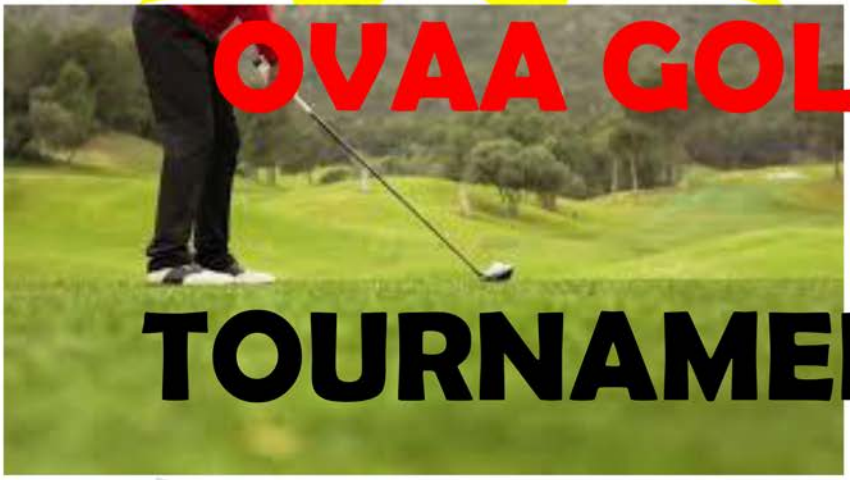

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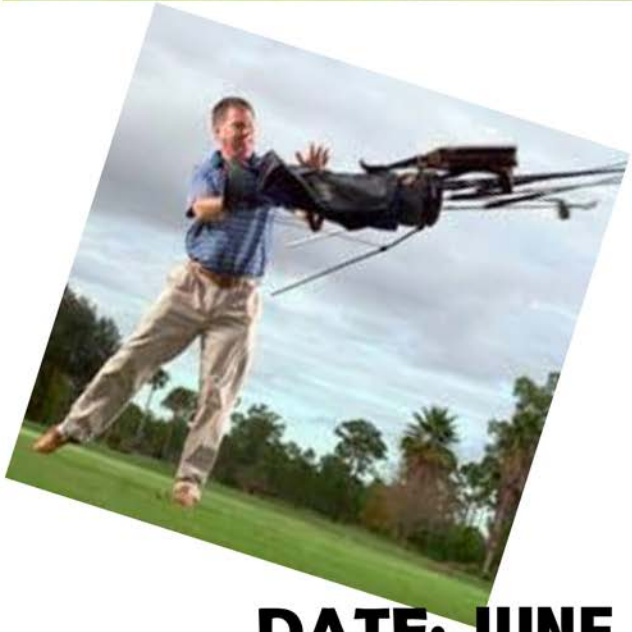

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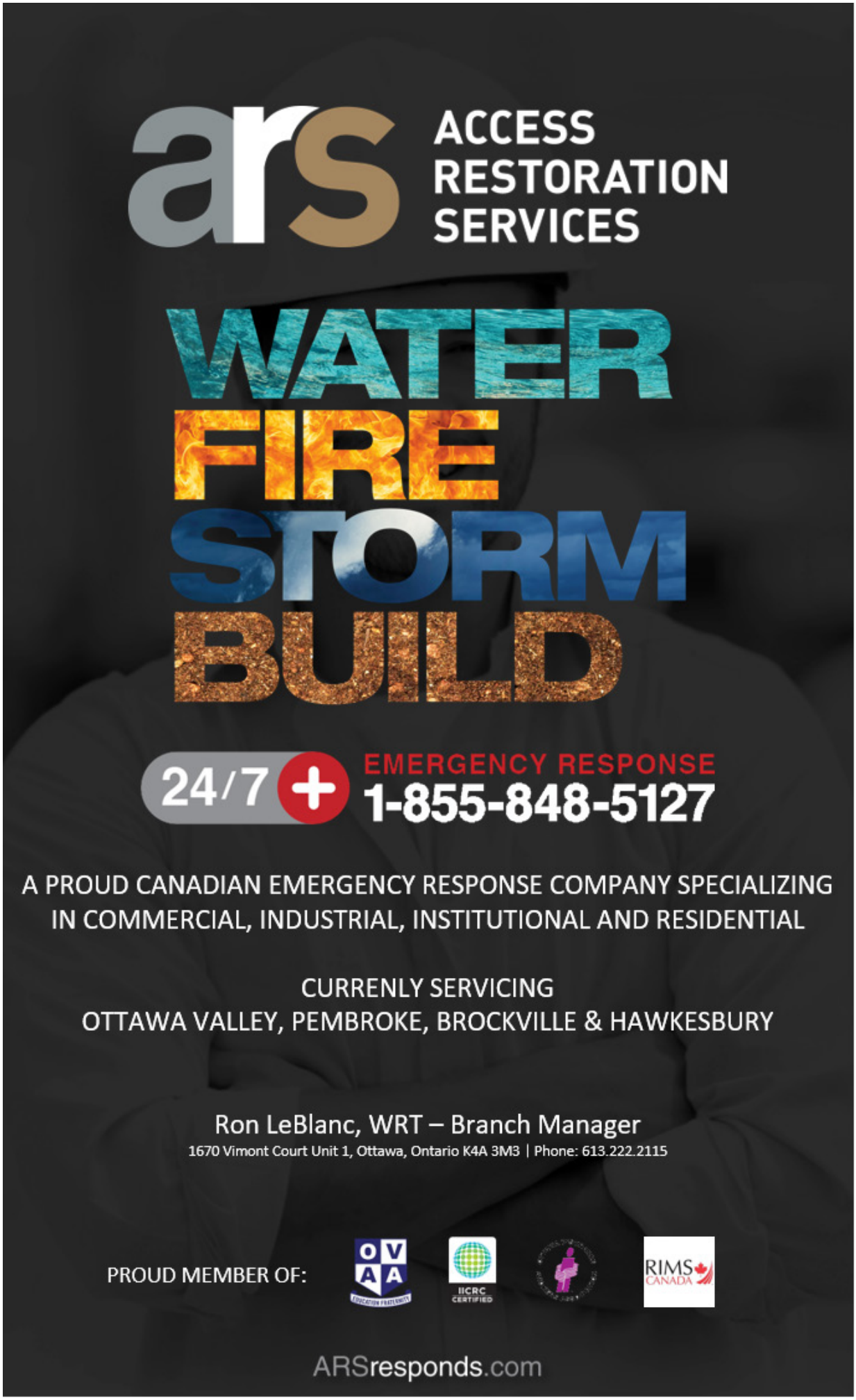
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