

Prize Winners



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21) Scotiabank/GHR Systems: Frank Schellenbach, Maria Peplowski; 22) Travel Underwriters; 23) Totten Group; 24) PolicyWorks/Tec4: Kevin Campbell; 25) Marshall & Swift/Boeckh: Rod Molloy; 26) Guarantee Co. of N.A.: Terry Hughes; 27) Cromwell Restoration: Will Cook; 28) Royal & SunAlliance: Tara Lynn Talsma, Janice Wavrecan; 29) South Western Group: Ean Bellamy, David Morris; 30) Encon; 31) Cellcom/Rogers AT&T: Michelle Restiaux



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Ball Prize Winners

Roger Tellier, Okanagan Insurance, won the DVD and TV from **A&B Claims**

Bruce Ryan, Vancouver Island InsuranCentres, won the two mountain bikes from **Canadian Northern Shield**

Sharon McKenzie, BC Land & McKenzie Coastland, won the DSC-VI digital camera from **Chutter Underwriting**

Peter Meegan, Mary-Ann Meegan Insurance, won the three-night stay at the **Delta Whistler Village Suites**

Don Patrick, Elliott Insurance Agencies, won \$800 in computer support services from **Digitally Hip**

Dave Mellin, Vancouver Island InsuranCentres, won a two-night stay and breakfast at the **Fairmont Empress Hotel**

Don Cochrane, Sea to Sky Insurance, won the .84-carat diamond pendant from **Harling's Jewellers**

Christine Gilbert, Tuffrey & Mills, won a two-night stay and dinner at the **Hyatt Regency Hotel**

Donna Cheeseman, Marsh Canada, won \$1,000 cash from **Metrix**

Doug Guedes, Seafirst Insurance Brokers, won the stainless-steel barbecue from **Parity Agencies/Janwest**

Dennis MacNeill, Central Agencies, won the jade carving from **Peace Hills Insurance**

Brett Palmer, McBurney's Insurance, won the jade carving from **Wawanesa**

Judy Shannon, Paragon Insurance, won the signed print from **Zurich Canada**

Table Prize Winners

Jason Wubs, Westland Insurance, won the \$300 GC from **BC Online**

Ann Buchanan, Parksville Insurance, won the DVD player from **CAFO, Inc.**

Wilfred Leong, Wilfred Leong Insurance, won the DVD player from **Canstar Restorations**

Arlene Creasy, Fred Holmes Insurance, won the artwork from **CGI Insurance Business Services**

Debra Fitzsimmons, Summit Agencies, won the DVD/VCD player from **Chubb Insurance**

Maurice Poulin, Poulin Agencies, won the Nikon Coolpix digital camera from **Coast Claims Service**

Roselyn Wishinski, TOS Insurance, won the Eagles CD set from **GCAN Insurance**

Brian Saunders, Vancouver Island InsuranCentres, won the MP3 player from **Lombard Canada**

Linda Burden, Marsh Canada, won the 14" TV set from **Mutual Fire Insurance**

Real Sigouin, Westview Agencies, won the fly-fishing rod & reel from **Pacific Marine Underwriting**

Gordon Chambers, Chambers Olson, won the mirror from **Speedy Glass**

Bob Bellows, Shaw Sabey & Associates, won the Kodak Easy Share digital camera from **TIC Travel Insurance**

Susan Fox, Nanaimo Insurance Brokers, won the Swiss army watch from **Citadel Assurance**

Shaun McLoughlin, Otto & Associates, won the mirror from **Broco Glass**

Dave Terry, Atkinson & Terry Insurance, won the Playstation from **Shumka Craig & Moore**

Special Prize Winners

Brett Palmer, McBurney's Insurance, won the Toshiba DVD player Trivia Quiz prize.

Tony Lau, Tony Lau Insurance, won the \$500 Trivia Broker prize, both compliments of **Aviva**.

Don Cochrane, Sea to Sky Insurance, and Mike Cameron, Underwriters Insurance Agencies, both won \$500 investment certificates in the AGM prize draws compliments of **ING Canada**

Friday's Table Prize Draws

Don Sache, Atkinson & Terry Insurance, won the \$500 GC from **A&B Claims**

Heather Prizeman, BCAA Insurance, won the hand-held DVD player from **CanWest Claims**

Robert Buchanan, Parksville Insurance, won the Toshiba DVD Video/VCD Player and Sony CD/DVD Player from **Chubb Insurance**

Daljit Sidhu, S&S Insurance Services, won the Tungsten Palm Pilot from **Family Insurance Solutions**

Lynne Yule, Nanaimo Insurance Brokers, won two nights accommodation & Sunday brunch at the **Grand Okanagan Resort**

Eileen Mitchell, Reliance Insurance, won two nights accommodation at **Manteo Resort**

San Minhas, Meridian Insurance Agencies, won the Sony Digital Camera from **Boiler Inspection & Insurance**

Rosemary Hruby, Advantage Insurance Services, won accommodation & dinner at the Ocean Promenade Hotel, White Rock, from **Special Risk Insurance**

Frank Astorino, John Fleming Insurance, won a \$250 GC at Northview Golf Course from **Kernaghan Adjusters**

Rick Feeney, Axa Pacific, won the Sony compact AV system from **IBABC**



Carol Jardine, left, of Canadian Northern Shield, presents two mountain bikes to Bruce Ryan



Say carat: Minutes before the draw for the \$7,400 Harling's diamond, Don Cochrane leaned over to Lynda, wife of his pal Don Patrick and said, "If my name is drawn I'll give it to you." He was as good as his word. Here Carol Cheney, left, of Harling's Jewellers presents the diamond to Lynda Patrick and Don Cochrane.

THE DAY AFTER TOMORROW, TODAY



Under new legislation, former owners of polluted property can be sued to recover environmental clean-up costs – even if the damage was done many years prior to their ownership. This doesn't just apply to owners of commercial properties. Homeowners, directors on corporate boards, and tenants can be caught in this net. This increases long-tail risks for insurers and E&O risks for brokers

By Neo Tuytel

Q: What do environmental contamination, liability insurance and insurance brokers have in common?

A: Millions of dollars more than you might have thought before you picked up this magazine, especially here in British Columbia.*

This article will outline some of the legal issues regarding:

- statutory liability for the cost of cleaning up environmental contamination, under the B.C. *Waste/Environmental Management Act*;
- defence and indemnity for such 'cost recovery' claims, under CGL or even homeowners policies; and
- related errors and omissions exposure of

insurance agents and brokers.

I will also make a few suggestions regarding loss prevention by brokers.

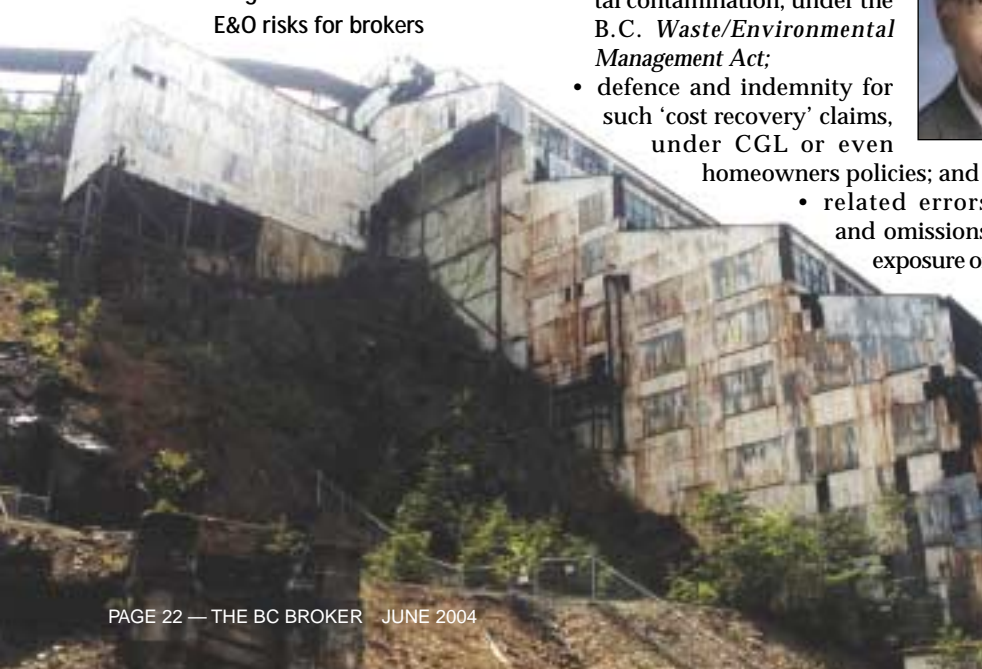
Environmental contamination and claims to recover clean-up costs

Our starting point is the *Waste Management Act (WMA)*, which is currently being amended and combined with the *Environmental Management Act*, the single most important piece of environmental legislation in this province. Under the act, all past or present "owners" and "operators" of a "contaminated site" are "absolutely, jointly and severally and retroactively responsible"



for reasonably incurred costs of cleaning up the contamination, whether that is done pursuant to a government remediation order or voluntarily, followed by

*NOTE: The May 10, 2004, issue of *Thompson's World Insurance News* reported on a \$1-billion class action by Nova Scotians who lived near the Sydney tar ponds since the nearby steel mill began operations in 1900. In the article, both plaintiffs' counsel and a prominent insurance defence lawyer were quoted with respect to the 'coverage chaos' that will likely be involved in sorting out a 'century of issues' about which liability insurers should be responding to those claims.



TRUDY LANCELYN PHOTO



Bottom left and above: the Britannia mine, about 10 km south of Squamish on Hwy 99, was the largest copper producer in the British Commonwealth. Left: View of Howe Sound from the mine. Acid mine drainage continues to discharge into Howe Sound to this day. Remediation plans include treatment of the acidified mine water and contaminated soil, and revegetation and stabilization of the hillsides. The Britannia mine was designated a national historical site in 1988. Today, the site operates as a mining museum and tourist attraction.

a court award of damages. What makes the act different from environmental legislation elsewhere in Canada – or the United States – is that it permits a party that has cleaned up a contaminated site to sue other ‘responsible persons’ to recover such costs.

Who are defined as “owners” and “operators” of contaminated sites, and therefore ‘responsible persons’, and subject to ‘cost recovery’ actions under the act? Well, “owner” means “a person who is in possession of, has the right of control of, occupies or controls the use of real property”. Cases have interpreted these words to include tenants who rent land or buildings, as well as commercial landlords or homeowners who are registered in the land title office. And directors or

officers of holding companies are also caught by the definition of “owners”. So the ‘corporate veil’, or limited liability of a company, does not protect directors or officers from personal responsibility.

Similarly, an “operator” is a company, director, officer or other person who “is or was responsible for any operation located at a contaminated site”. Examples of such operations include gas stations, dry cleaning stores or farms, as well as mines, petro-chemical plants or light industrial facilities, among others.

A “contaminated site” is a property where the soil or groundwater contains one or more of a long list of proscribed substances in higher amounts than permitted under the Contaminated Sites Regulation.

APPOINTMENT



René Fenez

Applied Systems Canada, Inc., a leading provider of insurance automation, is pleased to announce the recent addition of René Fenez to their team as Sales Consultant based out of Calgary, Alberta.

“René brings over 10 years of combined experience in the insurance, technology, sales and marketing industries,” affirms Jack Smith, VP of Sales at Applied Systems Canada. “We have been dedicated to seeking out someone of his caliber for some time and believe that his multi dynamic experience and expertise will bring tremendous benefit to new and existing Applied customers across Canada.”

Prior to joining Applied, René’s roles had him working on insurance related investigations; claims adjustment and examination; business development - building partnerships with Western Canada’s broker force in property and casualty lines of insurance. He is currently a member of the Insurance Professionals of Calgary and is an active committee member for the Canadian Association of Insurance Women 2004 convention.

According to Greg Purdy, Chief Executive Officer, “Applied Systems Canada recognized a need for more personalized representation in Western Canada. Having René based out of Alberta, we hope to fill that need and deliver enhanced point of contact service to new and existing customers in that region. We always take great strides to ensure a local presence within the national realm of our operation.”



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Community **CRASH REDUCTION** Challenge

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By encouraging your customers and communities to get involved in helping to reduce crashes, you demonstrated your ongoing leadership in road safety education. Follow the Challenge link at www.roadsafety.ca after June 21 to see your community's results in the Community Crash Reduction Challenge.



And what is meant by the phrase “absolutely, jointly and severally and retroactively responsible”? Breaking it down word by word, and using as an example the Britannia mine case in which the author was counsel:

1. “Retroactively” means that liability extends back in time to the date that the contamination occurred, or began, and continues until it is cleaned up. On the Britannia case, that was almost 100 years! That’s because the mine opened in 1905, and even though it closed in 1972, the old workings continued to pour acidic, metal-laden water into Howe Sound.
2. “Jointly and severally” means that any one ‘responsible person’, including an “owner” or “operator”, can be held legally liable for all of the clean-up costs, regardless of how much or little contamination they caused. Therefore, if

no other past or present owners of the Britannia mine could be found, then the only one left standing could end up footing the entire remediation bill.

3. “Absolutely” effectively

Brokers may face E&O exposure

means that, if a client of yours is now, or ever was, an owner or operator of what is now a “contaminated site”, then they are legally liable for the cost of cleaning it up, even if they were not negligent, did not breach any contracts and complied with all environmental laws at the time. On Britannia, this meant that the author’s client could have been ordered to pay the whole shot, even though it was a company that had never operated the mine, but only purchased the property after the mine had closed, and resold it a year later (after which the company was itself sold and then merged into another completely arms length company).

The WMA did not come into force until 1987, and it was not until 1999 that the Ministry of Environment began to pursue and threaten to issue a remediation order against former owners and operators of the Britannia mine. A group of former owners and operators, including two American multi-nationals, subsequently negotiated a \$35-million settlement with the provincial government, which was announced in early 2001.

In another case, the author represents an alleged owner of a former Koppers wood preservation plant that syndicated the property to investors after it had been redeveloped into a warehouse facility. In

1999, the province issued a remediation order to the American company, Beazer East, which operated the plant from 1969 until it closed in 1982, as well as to the CNR, which had owned the property since 1929. Beazer and CN then sued other alleged owners and operators in a ‘cost recovery action’, to recover tens of millions in clean-up costs to date. That case is still before the courts.

So the words “absolutely”, “jointly and severally” and “retroactively” can have very far-reaching implications for thousands of people and businesses in this province, many of whom are clients of B.C. insurance brokers. Take a moment and think about your book of business,

and all the gas stations, homes with oil tanks and other contaminated sites that may have been historically owned or operated in your area. How many of such owners or operators could be sued to recover clean-up costs under the act? Consider the countless liability policies that your office has placed for those clients over the years and even decades. How many of them could be called on to respond to cost-recovery actions?

Liability insurance and the not-so-absolute pollution exclusion

Turning to liability policies, there are two things that every broker should be aware of. The first is that coverage can



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be triggered under more than one policy, over numerous periods. Second, pollution exclusion clauses have not proved to be nearly as effective as their drafters must have hoped.

Particularly as a result of the leaky condo crisis, many B.C. brokers will be acutely aware of the "continuous" or "triple trigger" theory of coverage under occurrence-based liability policies. Generally speaking, an "occurrence" is defined to include "continued or repeated exposure to the same general harmful conditions". Further, the grant of coverage limits an insurers' exposure to the loss or damage which occurred during the period of a particular policy.

Unlike a motor vehicle accident, for example, a poorly constructed condominium does not leak and rot instantaneously. Such loss or damage usually happens over a number of years and, as we have seen, environmental contamination can take place over decades. Perhaps the most famous (because it happened in Ontario) case which illustrates this principle is *Alie v. Bertrand*. An earlier example here in B.C. is *Surrey v. General Accident*. Both are Court of Appeal decisions.

Alie concerned defective concrete, which deteriorated over time, and *Surrey* involved repeated flooding of a golf course. What these and other cases clearly establish is that where more than one policy is triggered, both indemnity and defence costs will be apportioned between



The remaining infrastructure of the Britannia mine provides a sense of the scope of the operation during its heyday. During its 70-year life, it supported 60,000 people who made their homes in nearby Britannia Beach, and produced metals that would today be worth \$1.3 billion.

of its loss or damage.

Continuous or triple triggerage is the first chink in insurers' armor regarding progressive injury cases, specifically regarding environmental contamination. The second is the narrow (*contra prof-*

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erentum) interpretation of exclusionary wording in insurance policies.

By the mid-1980s, most insurers had incorporated so-called 'absolute' pollution exclusion clauses into their liability policies. And since the 1970s, insurers limited the scope of such exclusions to 'sudden and accidental' escape of pollutants. But before then, environmental contamination was not on the insurance industry's radar screen at all. Absent such exclusions, both sudden and accidental and even slow and steady (if not actually deliberate) pollution was therefore a covered peril under liability policies.

Such long-tail environmental risks, most notably asbestos contamination and related disease, have cost insurance companies literally billions of dollars. Asbestos companies went bankrupt, and so did insurers such as Canadian Indemnity. As the Britannia and Beazer cases graphically illustrate, environmental contamination claims can have very long tails indeed. Think leaky condos, but add a zero to the time on risk. Not just years, but decades of liability policies can be called on to respond to such cases.

A typical 'absolute' pollution exclusion provides as follows:

Pollution Liability

a. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

1. At or from premises owned, rented or occupied by an insured;
2. At or from any site or location used by or for an insured or others for the handling, storage, disposal, processing or treatment of waste;
3. Which are at any time transported,

handled, stored, treated, disposed of or processed as waste by or for an insured or any person or organization for whom the insured may be legally responsible; or

4. At or from any site or location on which an insured or any contractors or subcontractors working directly or indirectly on behalf of an insured are performing operations:
 - a. if the pollutants are brought on or to the site or location in connection with such operations; or
 - b. if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
5. Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Over the past few years, courts in Canada as well as the United States have identified a number of weaknesses in such clauses. In B.C., there is a unique further loophole that could well be exploited as the law develops. Such problems for insurers include the following:

1. The wording of absolute pollution exclusions tends to focus on active polluters: (ex.) "transported, handled, stored, treated, disposed of or processed" contaminating substances. These clauses can therefore be less effective against owners, whose contribution to contamination is generally more passive (ex. CNR in the Beazer case) (see, ex. *Trafalgar v. Imperial Oil*)

(Continued on Page 37)



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NEWS BRIEFS



The B.C. Steering Committee of the Women in Insurance Cancer Crusade: (bottom, from left) John Dickinson, Carmen Place, Steve McDonald. Top: Lyn Bailey, Jennie Moushos, Janice Wavrecan, Terri Johnson, Marti Messam, Lindsay Olson, Patti Kernaghan. Since its inception in 2002, WICC B.C. has raised well over \$150,000, with 100% of all donations being passed on to support cancer research, support and education in the province.

Remembered

Retired average adjuster **Garth Coates** has passed away at the age of 83. Garth worked in the marine claims department at Johnson & Higgins and was a great supporter of the Marine Insurance Association of B.C. In fact, he was remembered as a regular attendee, even in retirement, at just about every AGM, dinner and seminar of that association – including their usual gathering at the Pan Pacific Vancouver earlier this year.



Garth Coates

Penn Taylor of West Vancouver, retired insurance broker, avid skier and yachtsman has died at the age of 90. During the Second World War he commanded the corvette HMCS *Galt* and on his return built his insurance career in downtown Vancouver at Horne, Taylor & Co.

Moving around

One of New Westminster's oldest-running insurance agencies, the **E.L. Lewis** company, has been sold. Forty years ago the street-level agency, which is located in a 100-year-old brick heritage structure on Columbia Street, was one of 60 licensed insurance offices operating in the bustling royal city. Today, through

www.ibabc.org

mergers and closures, there are barely 10. And interestingly, back then only one in three were members of IBABC; today, more than 80% belong.

Founded in 1923 by Evan Lewis, the father of current proprietor **Bill Lewis**, the office is one of two outlets purchased by **Atkinson & Terry**; the other is in Ocean Park, south Surrey. Bill, who is 75, will carry on with his licence but the day-to-day operation becomes a division of A&T.

In other A&T news, **Harold Lewington** has been hired as their new commercial lines manager; he is joined by **Claire Paquette**. Both move from Giffin Insurance.

Expanding: Renovations are underway at **Wawanesa** Vancouver with the upcoming takeover of the fifth floor in July. Wawa vice-president **Ken Coates** (no relation to Garth) says the additional 8,000 sq. ft. is necessary to house at least 24 extra staff which he is planning for, mostly in underwriting. Wawa currently occupies 11,000 sq. ft., all on the fourth floor.

Aviva senior vice-president **Wayne Wood** retires June 30 after 28 years with the company and its predecessors, CGU and Commercial Union. Wayne started as an engineering inspector in Halifax in

1976 and spent time in senior management in southwestern Ontario, Vancouver and the U.K., with his return to the Canadian head office in 1993. In 1998 he was appointed to the top job in the west, based in Vancouver.



Wayne Wood

Elite Insurance Company is marking its 50th anniversary this year with a reception in September and they're searching for old hands to join the celebration. If you are a former staffer, supplier or colleague, **Dave Lyons** wants to hear from you at 604-669-2626 (actually the phone number goes back only 20 years; remember MUTual 2-4794 in 1954?) Or for the not-so-old guys and gals, email him at david_lyons@avivacanada.com.

Axa Pacific marked 25 years' operation with its cocktail party in April aboard the revolving restaurant atop the Renaissance Vancouver Hotel – always a fun affair. It was in back in 1979 that a new Vancouver-based insurer started: **Paragon Insurance Company of Canada**. The office was on the 10th floor of the Scotia Tower on West Georgia and it was run by some familiar names: **Simon Farrow** was the executive vice-president and general manager... **Tim Bale**, secretary-treasurer... **Tim Bale**, secretary-treasurer... **marketing manager Jim Ball**... **Bert McCabe** was in charge of underwriting... and the company's first marketing rep **Brian Wills**. The following year, two more guys jumped on board, both from the Canadian Indemnity: **Dave Clarke**, appointed branch manager... and **Keith Duncanson** to run Vancouver Island.

By 1983, the little company had grown to include senior underwriters **Bob Nesbitt** and **Helen Ting**... marketing rep **Akbar Damji**... claims manager **Bill White** and marine boss **Joe Baxfield**. In Victoria, Keith had a new agency superintendent, **Ross Carbrey**. A year later their entire corporate landscape changed: new company name, new owners, new players and new location. The name became Laurentian Pacific – and a guy called **Vickerstaff** was in charge. With Bob's promotional bent, Laurentian Pacific Place was emblazoned in big red neon letters across the Vancouver skyline on West Pender. More names popped up like a flower garden: **Brunskill** and **Hageman** in Vancouver... **Joyce** in Prince George. The rest, as they say, is history.

– *Bill Earle, bearle@insurancewest.ca*

Island news

Doug Strong and **Doug Guedes** of Seafirst Insurance have purchased Salt

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Spring Insurance. The deal closed on June 1. The entire staff stays on to service their clients.

It was an honour to be invited to the **Dave Mellin** retirement reception held during the recent IBABC conference in Kelowna. It was a classy affair in which most of Dave's old insurance pals were able to wish him the best in retirement. Dave was a partner in Comox Valley InsuranCentre (formerly Comox Valley Insurance) in Courtenay for many years. Flying, boating and vacations are planned for Dave and his wife Barb starting in September. This great guy will be missed by all who know him!

Axa Pacific's annual reception held at the Laurel Point Inn in Victoria had a record turnout of brokers, adjusters and lawyers. The attendance of **Jennie Moushos** from Vancouver and **Jean-Francois Blais** and **Iain Hume** from Montreal made the occasion special.

I am pleased to hear my friend **Gregg Humphreys** of the Associated Island Adjusters office in Victoria has virtually made a complete recovery from his mountain bike accident. On St. Patrick's Day he had a very bad spill that resulted in a broken elbow, two sprained wrists, a torn rotator cuff and a concussion. He insists the accident occurred before drinking any green beer that day. I am not convinced! Also with **Associated Island Adjusters** news I hear they have moved their office in Courtenay to #201-780 Grant Avenue. The telephone and fax numbers remain the same.

People news

Joanne Evans has left Brown Bros. in Victoria; she is replaced by **Stacey Willmon**. **Shaun Fehr** of Tuffrey & Mills Ltd. has been elected as a VP of the local Better Business Bureau. **Mike Henfry** has left BC Land in Victoria to join Tuffrey & Mills, and leaving Tuffrey & Mills is **Janice Creuzot**. **Christine Prior** is new at Cumberbirch Insurance; she was previously with McTavish Insurance. **Shauna McDermid** has left Aon to join Anchor Insurance in Brentwood Bay. Up-island, **Wayne Post** joins Pringle Agencies in Duncan, and **Lisa Gard** has left BC Land/McKenzie Coastland in Campbell River. **Denise Davidson** has left **Rick Lanyon's** office in Nanaimo to join Associated Island Adjusters in Parksville.

It's with sadness that I report the passing of **Ross Carbrey**, who had spent so many years with the CI and Axa Pacific. It was just one year after his heart transplant. Also another great guy, **Robin Barnes**, has had some difficulty. He is recovering from a stroke that occurred while at work in the Nanaimo office of the Canadian Northern Shield. He is