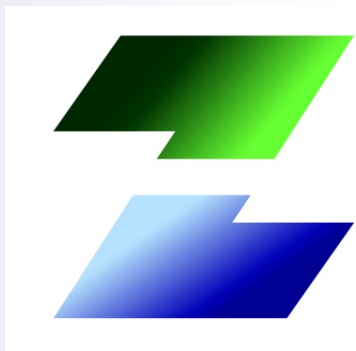


# Damage Prevention in the Canadian Courts

## Ontario Public Works Association ROW Damage Prevention November 13 2018



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Professional Corporation

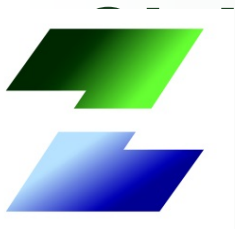
### Factors Impacting Damage Prevention Compliance

1. **Nature of work, e.g. sewer replacement vs. sidewalk and road resurfacing**
2. **Timing of Construction Contract Award and Commencement/Completion of Work**
3. **Scope of Work being Undertaken and Number of Ground Disturbances/Locates Involved**
4. **Number of Separate Utilities impacted and Locate Responses**
5. **Timeliness and Quality of Locate Responses, willingness to meet onsite**
6. **Duration of Locate Tickets, durability of markings**
7. **Penalties or other consequences of late completion of work**



## **OVERVIEW OF COURT CASES**

- **Criminal Cases**
- **Civil Actions by Stakeholders**
- **Regulatory Enforcement by a Federal Department or Provincial Ministry**



## **CRIMINAL CODE**

- **Most severe penalties including fines and/or imprisonment**
- **Proof Beyond Reasonable Doubt of all elements of the offence**
- **Offence elements include both Mens Rea (Intent) and Actus Reus (actions or inactions)**



## **Relevant sections of the CRIMINAL CODE**

### **Section 217.1 Duty of persons undertaking acts**

Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

### **Section 220 – Criminal Negligence Causing Death**

Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable ...

(b) .... to imprisonment for life.

### **Section 221 – Criminal Negligence Causing Bodily Harm**

Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years



# Relevant sections of the CRIMINAL CODE

### Section 22.1 – Offences of Negligence - Organizations

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

□ (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible ... or the senior officers, collectively, depart markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.



# CIVIL ACTIONS

- Civil claims have included the following damages:
  - Repair or Replacement Costs for damaged infrastructure including cleanup or site remediation costs
  - Lost product (e.g. fuel or water)
  - Lost profits (contractor downtime)



## REGULATORY ACTIONS

- Variety of non-criminal statutes and regulations ranging from *Occupational Health and Safety Act*, which deals with **worker safety**, to specific statutes or regulations focused on one industry, e.g. the *Technical Standards and Safety Act, 2000* specific to **natural gas pipelines**





## **REGULATORY ACTIONS**

### **Ontario (Ministry of Labour) v. Enbridge Gas**

Bloor Kipling explosion

Charges under the TSSA Act and the OHSA Act



## Damage Prevention in the Canadian Courts

### Ontario (Ministry of Labour) v. Enbridge Gas

Contractor pleaded guilty in 2006 and was fined \$225,000 for excavating without a complete locate for all work as required by s.228

Trial decision Oct 25 2007 - OHSA Charges against Enbridge and Precision Utility dismissed on 'technicalities' – defendants were not 'employers' within meaning of s.228



## Damage Prevention in the Canadian Courts

### Ontario (Ministry of Labour) v. Enbridge Gas

2014 version of section 228 O.Reg 213/91

228. (1) Before an excavation is begun,

(a) the employer excavating shall ensure that all gas, electrical and other services in and near the area to be excavated are located and marked;

(b) **the employer and worker locating and marking the services described in clause (a) shall ensure that they are accurately located and marked**; and

(c) if a service may pose a hazard, the service shall be shut off and disconnected.

(2) If a service may pose a hazard and it cannot be shut off or disconnected ...

(3) Pipes, conduits and cables for gas, electrical and other services in an excavation shall be supported to prevent their failure or breakage .



### Ontario (Ministry of Labour) v. Enbridge Gas

MOL and TSSA appealed 2007 acquittals

Appellate judge held that Enbridge and Precision were both employers within meaning of s.228. As the owners of the pipeline, the companies were the only companies that could ensure the accuracy of the locates. It was inconceivable that the legislature intended that to create the duty only on the excavator with no control or ability to do the locate or do it accurately.



### Typical Penalties Under Provincial Statutes

#### *Occupational Health and Safety Act*

- first offence, injury of worker \$50,000 plus
- first offence, fatality to work, \$150,000 plus
- second offences significantly higher than first

#### *Technical Standards and Safety Act*

- first offence by contractor, no injuries \$10,000 plus
- second offences double that of prior penalties

#### **Other Costs**

- Legal fees
- Time away from work for workers to prepare and attend trial
- Mandatory Victim surcharge (25%)

