

**THINK BEFORE YOU DIG:  
Land Development &  
Site Preparation Workshop**

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# OUTLINE

1. Legal liability
  - a) Occupational Health & Safety legislation
  - b) Civil liability
  
2. Example

# 1. LEGAL LIABILITY

## a) Occupational Health & Safety Legislation

### *Occupational Health & Safety Act*

- Duties on employers, owners and contractors to “take every precaution that is reasonable in the circumstances to ensure the health & safety of persons at or near a workplace”
- OH&S responsibilities cannot be delegated under contract

# 1. LEGAL LIABILITY

## a) Occupational Health & Safety Legislation

### Occupational Health & Safety General Regulations

153 (1) Where the location of any underground electrical, gas or other utility line or piping is likely to endanger a person at a workplace, **an employer shall** ensure that **before beginning** an excavation or trench **the utility that owns or operates** the underground electrical, gas or other utility line or pipe is contacted in order **to have the utility clearly locate and mark** the underground electrical, gas or other utility line.

# 1. LEGAL LIABILITY

## a) Occupational Health & Safety Legislation

Defences to OH&S charges:

- i) Due diligence (often relied upon); and
- ii) Reasonable mistake of fact (rarely relied upon).

# 1. LEGAL LIABILITY

## a) Occupational Health & Safety Legislation

### i) Due diligence

- Must show that every reasonable precaution in the circumstances was taken
- Very high standard to meet; more difficult than it appears
- Not good enough to have a system in place for locates; must show follow-up on regular basis to ensure system is working; *Ontario (Ministry of Labour) v. Taggart Construction Ltd.*, 2007 ONCJ 660

# 1. LEGAL LIABILITY

## b) Civil liability

### i) Negligence

Must prove:

- Owed a duty of care
- Breached the standard of care (standard industry practice)
- Breach must have caused damages
- Damages must not be too remote

# 1. LEGAL LIABILITY

## b) Civil liability

### ii) Nuisance

Must prove:

- Interference with use or enjoyment of property

# 1. LEGAL LIABILITY

## b) Civil liability

### iii) Contract

- Only where there is a contract between the parties
- Responsibility for locates often assigned to contractor
- How to deal with unknown underground services, e.g. private services that locates may not identify?

# 1. LEGAL LIABILITY

## b) Civil liability

### iv) Damages

- Direct
  - e.g. cost to repair damaged services, restore property
- Indirect (consequential)
  - e.g. business interruption, loss of profits, lost rent
  - can be unlimited and most insurance policies do not cover them
  - must be within contemplation of the parties at time of contract;
  - must be foreseeable/not too remote

## 2. EXAMPLE

An owner hires a contractor to carryout an excavation. There is no signed contract. The contractor does not bother clearing underground services and hits a water line that causes flooding in the building and in an adjacent building.

Is the contractor liable?

Is the owner liable?

What damages could be claimed?