

## Landscape Ontario Horticultural Trades Association's

### 2017 Snowposium

## LEARN HOW TO DEFEND YOURSELF!

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What steps can snow maintenance contractors ("snow contractors") take to protect themselves before and during litigation? What are the "best practices" in winter maintenance cases? What can you do to defend yourself? How can you increase the number of successful litigation results (i.e. wins)?

### ***The simple answer is – Evidence!***

This article is intended to outline the steps towards a successful claim management strategy by addressing the standard of care; the importance of having a Snow Maintenance Contract ("Contract") in place; the benefits of accurate, contemporaneous and detailed documents; and the role of defence counsel in assisting in defending snow maintenance liability claims.

#### 1.0 DEFENDING YOURSELF - PRIOR TO THE INCIDENT

##### 1.1 Meeting the Standard of Care

To succeed in a snow maintenance liability claim, snow contractors must be able to "demonstrate" that their actions met the standard of a reasonably prudent snow maintenance contractor. In order to determine what a reasonable standard would be, the courts will refer to the Contract<sup>1</sup>. For the most part, snow contractors' obligations flow from the Contract. As such, the Contract will be the primary source of the snow contractors' obligations and failure to fulfill their contractual obligations will be evidence that the snow contractor failed to take reasonable care, and breached its duty to the plaintiff.

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<sup>1</sup> In cases where there is no Contract, the standard of care is one of "reasonableness" and expert evidence may be required to demonstrate that the snow maintenance contractor fulfilled its duty.

The first step in “defending yourself” is to have a clear understanding of the terms of the Contract. As such, a thorough and comprehensive review of the Contract should be completed prior to signing. We would also recommend providing a copy to your insurance broker before signing as to confirm that insurance will be available given the specific terms contained in the Contract.

The Contract should clearly describe the snow contractors’ duties and responsibilities.

At a minimum, based on the case law, it should clearly state:

- the term/period of the contract;
- the price;
- the areas of the property which are to be maintained (i.e. parking lot, walkways, entrance areas) and perhaps the areas that are not the snow contractors’ responsibility - such as City sidewalks, private entrances, stairs;
- when to attend – depth of snow, call-out by owner;
- whether the snow contractors are obligated to inspect the property. This is usually the owner/occupier’s residual responsibility under the *Occupier’s Liability Act* “to see that the premises are reasonably safe”;
- patrol obligations;
- obligations to monitor weather;
- the equipment to be used and where - such as hand shoveling between parked cars, snow plow, bobcat, snow blower, etc.);
- what is to be done with the snow pile – snow removal terms;
- salting and sanding obligations – when to salt, when not to, how much salt to apply, where, and associated charges;
- procedure for call out – by the owner, property manager or tenant;
- procedure for reporting to the owner problems or hazards, seeking instructions from the owner, etc.;
- record keeping obligations – standardized forms, details to be included, weather recording;
- mutual insurance obligations; and □ hold harmless provisions.

Other important elements to consider with respect to snow contractors' obligations and responsibilities, that may not be specified in the Contract, are items such as: where the property owner requires the snow to be piled (i.e. provide a map of the property); who will be responsible for snow removal from the site and when; internal policies, procedures, guidelines and/or manuals that are provided to the snow contractors upon hiring that may contain specific requirements; training attendance sheets and content of training which may be required; and specific timesheets, log records and/or software that is to be used.

## **1.2 Proving the Contract terms were met**

In order to demonstrate that the standard of care was met (i.e. the terms of the Contract and/or other requirements) to successfully defend a snow maintenance liability claim, proper evidence will be required. As defence counsel, we will work with the snow contractors to establish proof that the contractual obligations were met. In order to do this, we require proper evidence.

The Contract will be the starting point in defending the action and a very important piece of evidence. However, the best snow maintenance companies will have a comprehensive system in place and will insist that their snow contractors maintain a suite of standard documents that typically include the following:

- **Diary from Owner/property manager:** A diary providing inspection of the property, including call-out communications, special requests and/or concerns, and reporting of damage to the owner/property manager;
- **Patrol Logs:** including the time of the patrol, snow contractors performing the patrol, where the snow contractors walked, description of what the snow contractors observed, weather, temperature, sun / overcast / dark;
- **Weather Watch Diaries:** A diary kept by the person who watches the weather at the office to note the

weather conditions and weather patterns each day. This will take the place of having to preserve all of the documents relating to weather;

- **Snow Plow Logs:** including the time of snow removal, equipment used to remove the snow, precise location of snow removal, snow contractors performing the snow removal, weather, temperature, sun / overcast / dark;
- **Salt Logs:** including the time of salting, type of salt, amount of salt used, equipment used to spread salt, precise location of salting, snow contractors performing the salting, weather, temperature, sun / overcast / dark;
- **GPS records:** showing equipment whereabouts by time of day;
- **Hand Written Diaries:** snow contractors performing the salting and plowing keep hand written diaries each time they attend the site to note the state of the lot, weather conditions, any issues or deficiencies observed, information not able to fit on logs, work performed, etc.;

In the end, in order to successfully defend a claim, documentation will be required showing that the terms of the Contract were met on the day of the incident. Contemporaneous logbooks and maintenance records are good evidence that the contractual obligations were met and can be used to rebut the plaintiff's contention that the snow contractor failed to satisfy the requisite standard of care.<sup>2</sup>

We acknowledge that snow maintenance is very challenging work and keeping records can be tedious. However, the potential exposure to liability in negligent winter maintenance cases makes record keeping essential. Snow contractors who do not take

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<sup>2</sup> In *Dugdale v. Loblaw's Supermarket Ltd.* [2001] OJ No. 716 para. 22: I accept that keeping a log that records the time and area inspected/cleaned is good evidence of what the store's maintenance policy was and whether it was being followed by their employees.

the time to adequately record their hard work will have a much more difficult time defending these claims and may be found liable simply for not having a “reasonable system” of record keeping in place.

### **1.3 Reasonable system of record keeping**

#### *1.3.1 Adequate log notes*

In *Hawkins v. Village Mall Shopping Centre (2006) Inc.*, 2015 CarswellNfld 124, the plaintiff slipped and fell in a mall parking lot which had very slippery conditions – the snow contractor kept salting but it would freeze over quickly.

As was the practice, the snow contractor kept a log of his daily activity, including the day of the incident. He testified that his entry of the time of day on the log was made at the time of actual commencement of the activity described. On the date of the incident, he confirmed by reference to the log that he salted the Village Mall parking lot at 4:47 a.m., 3:00 p.m., 5:30 p.m. and 8:00 p.m. He also confirmed that, based upon the log recordings, sometime that day the parking lot was snow-plowed by a Volvo loader.

The question in this case was “*whether the system in place for dealing with snow removal and ice control was adequate*”. The court was satisfied that the snow contractor’s system in general disclosed a rigorous and vigilant control of the conditions as they occurred. The evidence was that during the afternoon of the incident, the salting operator was continuously applying salt in response to the conditions and directions from the owner and the operator’s supervisor. Even though the efforts themselves while not effective, they were a practical response as should reasonably be expected to the risk of the freeze and thaw and refreeze conditions that can and did prevail the day of the incident.

In the circumstance, the court was satisfied that the salting operator did not visualize a risk at the location of the fall and concluded that a regime was in place which was adequate to respond to the risk.

### 1.3.2 Insufficient Log Notes

In *Flowers v. Allterrain Contracting Inc.*, 2017 CarswellNS 527, the plaintiff slipped and fell on ice in front of Wal-Mart (part of Halifax Shopping Centre mall). The plaintiff sued the owner of the mall and the snow contractor in charge of the winter maintenance. The court determined the question was not whether there was ice in that area but “*whether the defendant had a reasonable and adequate system in place for keeping the area ice free*”.

The court was presented with log notes which contained little valuable evidence of inspection of that specific area. The evidence showed that some of the snow maintenance labourers were assigned to clear snow and salt that area, but “*we do not know when or how often*”. The evidence established that trucks drove by and deposited additional salt, but “*we do not know when and how much*”. The court further stated:

***“This is not ideal. Ideally, the evidence would show incidents of specific, repeated, salting of this particular walkway; and further, specific and repeated inspections of this walkway.”***

Although the system was not perfect in this case, the snow contractor maintained a system of repeated plowing and salting throughout the property, including walkways, in a concerted effort to render the property safe. That system had been described in evidence and while not perfect, it was a reasonable and adequate system as required by law. The court stated “*the law does not require perfection. The failure to reach a standard of perfection does not render the system unreasonable*”.

### 1.3.3 No Log Notes

In *Whelton v. A & B Deschenes Sales Ltd.*, 2012 CarswellNB 632, the plaintiff slipped and fell on ice in front of a Canadian Tire store. The defendant did have a log to be used by all employees whenever they did salting or snow removal during the winter months. However, the logs for the year of the incident (2008) were not available. The practice of the defendant, at the time of this incident, was to destroy these winter logs as soon as the

spring had arrived. Therefore, by the time the plaintiff's lawyer sent a letter to the defendant in August 2008 advising of the plaintiff's slip and fall, the logs for February 2008 had already been destroyed.

To make matters worse, the store manager had no recollection whatsoever of the day of the incident. He testified that the employees were aware of the written record or log that they were to record every time they did any salting, sanding or work of that nature. In addition, the employees were aware of the store policy that they were to use common sense and to address any conditions that were problematic and required attention immediately. The employees were reminded of these policies during daily morning staff meetings.

While the defendant's witnesses could confirm their general practices at the time of the incident, they were unable to confirm that these were the procedures followed on the date in question. Therefore, the court could not find that the inspection and maintenance system provided a reasonably safe entrance for the plaintiff on the date on the incident. The court went further and stated:

***“In the event that the defendant had records or witnesses to corroborate the inspections undertaken at the auto service entrance on February 5th, 2008, the plaintiff's claim in negligence may very well have failed. However, under the present circumstances there is no way for the court to ascertain, what, if anything, was done in terms of the maintenance and inspection of the sidewalk outside of the entrance of the auto service centre on the day in question. Further it must be highlighted that the sidewalk in question was at the entrance to the store. This is not a situation where the slip occurred in the parking lot where clearly the courts have accepted a much lower standard in terms of maintenance and inspection systems.”***

Had such logs still existed, the defendant would likely have escaped liability.

#### **1.4 “The devil is in the details”**

Log entries must have sufficient detail to remind the snow contractor at a later date (*sometimes +2 years or more*) of what he did on the day in question. The purpose of the log entry is to show that the terms of the Contract were met.

For example, if the Contract requires regular visits to inspect the site, then the log must show when the snow contractors attended at the site even if no work was performed other than the inspection itself. Silence in the records does not assist defence counsel who has to establish that the snow contractor attended at the site.

Log entries should include sufficient detail to show:

- the snow contractors were present at the site when required to be at the site;
- what time the snow contractors arrived and the weather condition upon arrival;
- what the conditions at the site were when the snow contractors arrived and when the snow contractors left the site;
- what did the snow contractors do while on site; ○ inspect only; ○ plow. If so, where; ○ apply salt. If so, where and how much; ○ what personnel were present; ○ what equipment was used;
- what time the snow contractors left and the weather condition before departure?

Some snow contractors keep a log for each location. Other snow contractors organize their records by date of attendance. To date, there are no standard forms in the industry. Even within individual snow maintenance companies, it's not uncommon to see record keeping that varies from snow contractor to snow contractor in terms of format, what information is recorded, and the quality of the records.

***Perhaps it's time to consider a standard set of records?***

#### **1.5 Technology**

Other maintenance businesses, such as elevator companies, have made the switch to electronic data. They are able to sort data by date, location, and type of service (maintenance or call out) and create records which are helpful in litigation. No doubt cost



is a factor. That said, some snow contractors have equipped their vehicles with GPS technology which shows the whereabouts of all ploughs and trucks at any particular time – making it easy to prove when a snow contractor arrived on site and when they left.

Modern GPS technology can assist in defending claims. GPS systems can demonstrate the location of the snow contractors' equipment at any time. The information can also be sorted by location to show when the snow contractors' equipment attended at the site of an accident, how long the equipment was there, etc. From this information, defence counsel can determine who was operating the equipment and secure statements from the operators as to what work was done during the attendance at the site.

There are other more advanced systems, such as "*Snow Tracker*", which have been designed specifically to reduce the time in keeping detailed log entries and records all the information in one convenient location which makes it easier for defence counsel to retrieve the relevant information, if and when a claim is commenced. The information can also be shared with the owner of the property (who will be notified when the snow contractor arrives on site and all communications can be recorded) or kept private for the snow contractor's individual use only.

For example, Snow Tracker has the capability of recording the following data – once you log on:

- the location;
- the snow contractor who attended;
- at what time the snow contractor arrived and left;
- the weather forecast upon arrival and periodic updates while on site, if requested;
- real-time material usage reporting;
- drop-down menu to select tasks performed;
- if salting, the type, the location, the quantity, etc.;
- what equipment was used;
- customized site geo-fencing;
- additional notes – which has voice recognition and will automatically type the information;

- contract, document and photo database; and
- communications with the owner, property manager, other snow contractors, etc.

Make no mistake, snow maintenance companies who maintain accurate, contemporaneous and detailed records have the best chance of success in defending cases. As such, if avoiding exposure to liability is important, a sound record keeping practice is essential.

## 2.0 DEFENDING YOURSELF - AFTER THE INCIDENT

When the snow maintenance company learns of an incident at one of its client's properties, it must be pro-active in collecting relevant information. Unfortunately, by the time the insurance company receives the claim and assigns an adjuster to investigate, weeks or months may have passed. Conditions will have changed. Photographs of a sunny day in June are not helpful in showing winter conditions that existed the day of an incident the previous February. Relevant documents must be gathered and kept in a file. The snow maintenance company must gather snow contractors' logs for the month before the incident and a week following the incident. Dispatch records, payroll records showing who was working that day, and weather records should also be collected.

### 2.1 Snow Contractors' Witness Statement

Snow contractors must cooperate in providing information. It is helpful for defence counsel to have the identity of the employees who attended the site, including contact information, a copy of their driver's license, and a statement taken as soon as possible after the incident. The snow contractor should re-read the log notes and provide a detailed statement at the earliest opportunity to elaborate on what may be brief notations in the logs. The snow contractor must record everything he/she can recall about what work was done on the day of the incident, including: what time they first arrived, conditions at the site, areas serviced, personnel in attendance and their contact information, equipment and tools used, where the snow was deposited, whether salt was applied, how it was applied, and how much, what the site was like when the snow contractor left and at what time he/she left the site. This information will be critical to defence counsel in proving that the Contract terms were met.

## **2.2 Photographs of the location of the incident**

Often, reports of injury are made to the property owner immediately after the incident. The property owner will then notify the snow maintenance company by email or text of the incident. It would be helpful if the snow maintenance company made it a priority to ask to be notified by its clients of any incidents, however minor, by email or text message. Upon receiving the message, it would be of great value for the snow contractor to re-attend at the site and take a photo of the spot where the person has alleged to have fallen – on the same day or as soon after the incident as possible. The investment of a half hour to re-attend at the site and take the photo will be of great benefit later on and may save the snow contractor many hours of litigation over a claim that could have easily been defended and dismissed early on had the photo been taken and proper records maintained.

## **2.3 Closed-circuit television camera (CCTV) images**

As well, the snow maintenance company should request that the property owner preserve any CCTV images of the location of the fall: to include the snow contractor's last visit at the site before the incident and the incident itself. Often, when CCTV images are available, they capture the slip and fall but they do not capture the snow maintenance that was done by the snow contractors beforehand.

## **3.0 CONCLUSION – THE BENEFITS OF A GOOD DEFENCE**

In conclusion, a little time spent by snow contractors recording their hard work and a proactive response in putting together the information to defend a snow maintenance liability claim is the foundation necessary to achieving a successful litigation outcome and saving the snow contractors time and money in the long run.