



## 2015 Ontario Non-Profit Housing Association Conference

### Session #404: Weathering Winter Liability

Presented by:

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## Background

- CDSSAB / CDLHC
  - Large geographic area
  - 14 member municipalities – including City of Timmins (pop – 45,000)
- Traditional Operating Contracts
  - 3 year standing contracts
- Environment
  - Physical – Lots of snow
  - Vendor – competition or lack thereof
  - Inflation – insurance, fuel, equipment
  - Legal – aggressive litigation



## Considerations

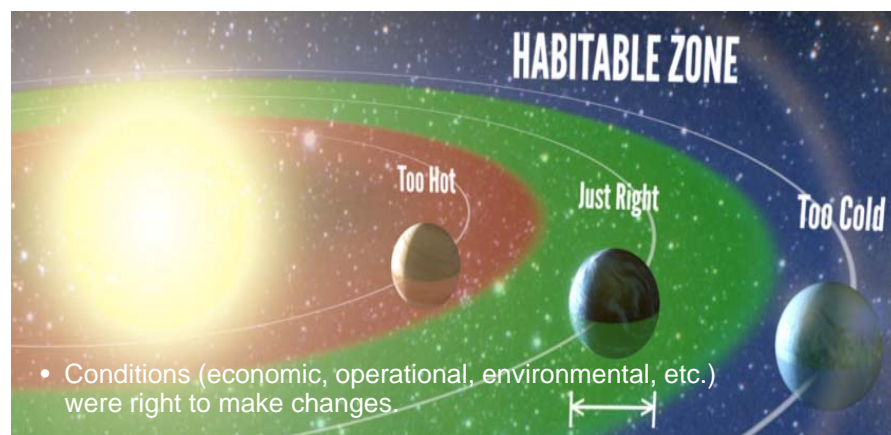
- \$\$\$
- Capacity and Infrastructure
  - Garage, storage, etc.
- Risk
  - liability (slip and falls, property damage)
  - Costs – equipment depreciation and wear
  - Human resources
- Service
- Labour relations
  - Union environment
- Vendor relationships
  - Eliminating one line of service can threaten other lines
- Sustainability / Scalability



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## Goldilocks Zone



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## Opportunity

“You never want a serious crisis to go to waste.  
[It] provides the opportunity for us to do things  
you could not do before. – Rahm Emmanuel

- EOA
- 10 Year Housing Plan
  - Demographics
  - Stock



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## Strategy - Sustainability

- Change with environment
  - Flexibility (in-house skills supported with labour service contracts)
  - Meet current demand
  - Save operational dollars
  - Expand business lines and market services
    - Insulate against future risk



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## Analysis



### ➤ Financials

- Snow contract direct compare
- Additional operational and capital services
- Expanded revenue lines



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## Financial Analysis

2015 Program Statement of Income	
<b>Revenue</b>	
Direct Savings (snow)	180,096
Snow Service Contracts	77,300
Construction Efficiencies	278,200
	<b>535,596</b>
<b>Expenses</b>	
Contracted Snow removal	111,440
Annual Operating	225,600
Capital Annual Amort*	131,855
	<b>468,895</b>
<b>Surplus / (Deficit)</b>	<b>66,701</b>
* 5 year straight line on equipment and garage	

10 Year Projection*	
<b>Revenue &amp; Savings</b>	
Years 1-5	333,505
Years 6-10	992,780
	<b>1,326,285</b>
<b>Cost Snow Contract</b>	
Annual Contract Cost (2013)	368,836
10 year Cost	<b>3,799,011</b>
<b>10 Year Difference</b>	<b>5,125,296</b>
*using 2015 service volume and equipment	



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## Next Steps

- Expand to include Providers
- Expand skill base
  - Next largest cost centre (plumbing)
- Scalability
  - Opportunities and limitations
- Exit Strategy



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## Key Questions

- Does the risk you create outweigh the risk you currently own?
  - Service / Costs / Savings
- Are you in the 'Goldilocks Zone'?
  - Operations / Administration / Business Lines
- What are you waiting for?
  - No one else is in your shoes



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## Slip and Fall Accidents, Winter Maintenance, Duty Owed by Contractors versus Owners



Daniel I. Reisler

REISLER



FRANKLIN

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The National Association of Public Works Contractors

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## ROADMAP, PART I:

### DUTY IN TORT:

- Who is an Occupier?
- To Whom is a Duty of Care Owed?
- What is the Standard of Care?
- Are there instances where a lower Standard of Care is owed?
- Discussion of (Owner) Liability, Slip and Fall Cases

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## ROADMAP, PART II:

### CONTRACTUAL ISSUES:

- Is there a way to pass off a Duty of Care?
- Suggestions/check-list when hiring a Contractor for the purposes of Winter Maintenance
- Discussion of (Contractor versus Owner) Liability, Slip and Fall cases



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## ROADMAP, PART III:

### INSURANCE:

- Reporting a Claim
- Examining the Duty to Defend
- Entering a Defence
- The Effect of a Property Owner Added as a named Insured to the policy of the Contractor

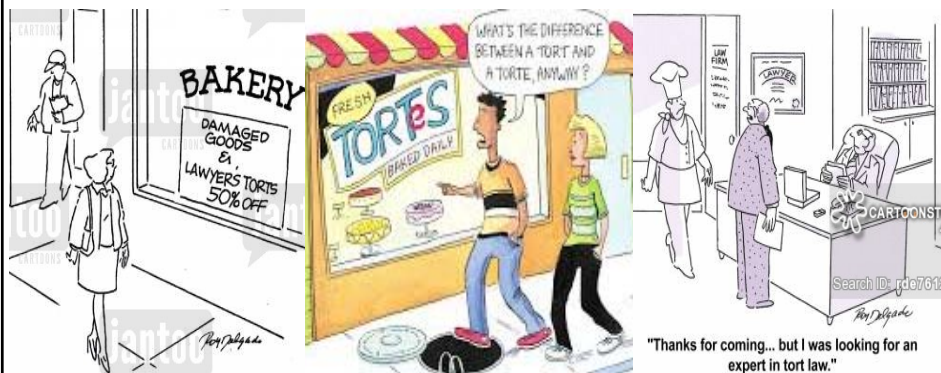


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## DUTY IN TORT



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## DUTY IN TORT

### Who is an Occupier?

According to Section 1 of the *Occupiers Liability Act*, an occupier includes...

- (A) A person who is in **physical possession** of premises, or
- (B) A person **who has responsibility for and control over the condition of premises** or the activities carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises ("occupant")

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## DUTY IN TORT



What does the Occupier's Liability Act  
mean for you and your facility

- The definition of an **occupier** under the *Act* is inclusive, rather than exhaustive.
- Any person who falls under either category is an **occupant**
- This differs from other Provinces, whereby an individual must fall under both categories to be considered an occupier



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## DUTY IN TORT

### To Whom is a Duty of Care Owed?

◆ Historically, there were three categories of entrants to land (as established by Common Law), with a different standard of care applying to each category:

1. Trespassers
2. Licensees
3. Invitees



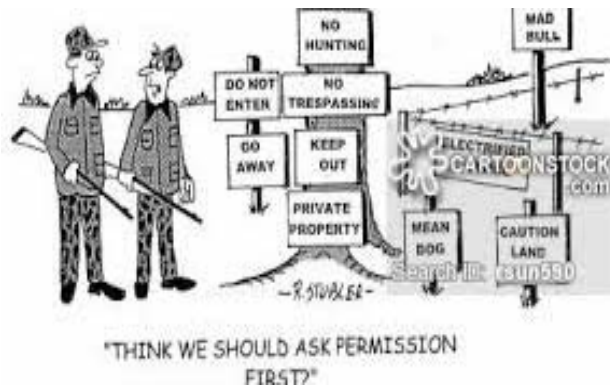
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## DUTY IN TORT

- **Trespassers:**

- Someone who entered the land without permission



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## DUTY IN TORT

- **Licensees:**

- A person who entered the land with permission but was there for business purposes (i.e. a customer in a store)



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## DUTY IN TORT

- **Invitees:**

- A person who entered the land with permission but was not there for business purposes (i.e. a social guest)



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## DUTY IN TORT

- ❖ These categories are no longer applicable
  - Instead, the *Occupiers Liability Act* establishes a **common duty of care**, owed to all entrants
  - The Act supersedes the Common Law and as such has effectively nullified the previous categories



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## DUTY IN TORT

### What Standard of Care is owed?

The duty is defined in Section 3 of the *Act* as follows:

- **3(1)**: An occupier of premises owes a duty to take such care as in all the circumstances of the case is **reasonable** to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises
- **3(2)**: The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.



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## DUTY IN TORT

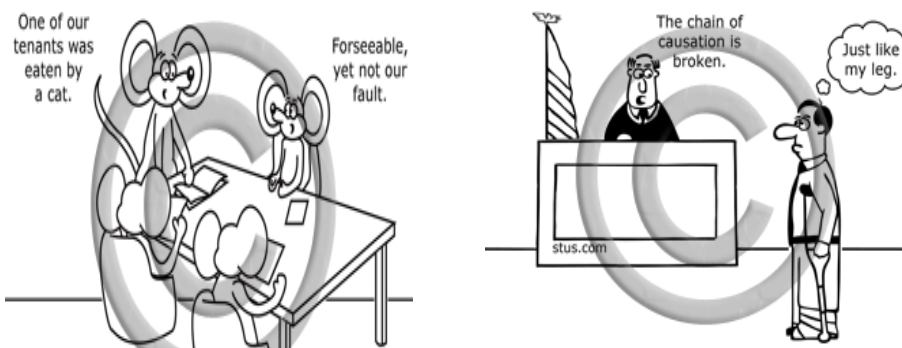
- This **duty is not absolute!**
- The Occupier does not function as an Insurer for all entrants. They are not liable for any damage suffered by the entrants
- Rather, they have a responsibility to **“take such care as in all the circumstances of the case is reasonable”**. The Occupier is only liable for damages that arise out of their failure to do so



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## DUTY IN TORT



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## DUTY IN TORT

- What is reasonable will vary
- In situations where a higher Duty of Care exists as a result of other statutes, the higher duty will prevail despite the *Occupiers Liability Act*
  - For example, if the occupier was an innkeeper or a bailee
- There are also situations where a lower Standard of Care is owed...

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## DUTY IN TORT

- A lower Standard of Care applies in the following situations:
  1. Rural or recreational property
  2. Entrants who are intending to commit a crime
  3. Entry is prohibited by the *Trespass to Property Act*



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## DUTY IN TORT

### Rural/Recreational Property:

- ◆ In many cases involving rural and recreational premises, the Duty of Care is simply to **not create a danger** with the deliberate intent of doing harm or damage to the entrant and his/her property



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## DUTY IN TORT

### Entrants who are Intending to Commit a Crime:

- ◆ This is outlined in Section 4 of the *Occupier's Liability Act*
  - If an entrant willingly assumed a risk, then the Occupier again simply has a duty to not create a danger with the deliberate intent of doing harm or damage to the entrant and his/her property
  - In order for the entrant to have voluntarily assumed the risk, there must be actual or implied consent by the entrant to accept the risk. Mere knowledge of the risk is not sufficient

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## DUTY IN TORT

### Prohibited Entry:

- ◆ Where an Occupier has enclosed the premises in a manner that has indicated his intention to keep other people off the premises, then the duty is lowered to that of not creating a danger with the deliberate intent of doing harm or damage
  - This can also be achieved by the use of a notice or sign. The *Trespass to Property Act* sets out the requirements for such a notice or sign (i.e. it must be visible in daylight from the approach by points of access)



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### Clear Notices for No Trespassing...



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## DUTY IN TORT

◆ The leading case on the Duty of Care in Ontario is the 1989 Ontario Court of Appeal decision in

*Waldick v. Malcolm*:

- “Occupiers [have] an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm...The duty is not absolute...**their responsibility is only to take such care as in all the circumstances of the case is reasonable**”



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## DUTY IN TORT

### Case(s) Where Liability Not Found:

◆ *Przelski v. Ontario Casino Corp [2001] OJ No. 3012*

- The Plaintiff was walking back to her motel and slipped on a patch of ice on the driveway. She sustained a fracture to her right ankle
- The Plaintiff testified that she did not see any ice or snow on the driveway
- The Court concluded the Plaintiff likely fell on a small icy or slippery spot on the driveway that was not easily detectable. The Plaintiff conceded that the lighting was adequate
- The inspection and maintenance program of the Occupier was also found to be adequate



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## DUTY IN TORT

### Case(s) Where Liability Found:

#### ◆ *Flentji v. Nichols [2006] OJ No. 3836*

- The Plaintiff slipped in the parking lot of Buckthorn Restaurant. As a result, she fractured her right leg and ankle
- The owner of the Restaurant, Nicholas, was usually diligent in his system of snow removal. However, his method was haphazard and on the night of the accident, ice had not been properly removed from the area and the area had not been salted
- As such Nichols and the Restaurant were found to be liable



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## CONTRACTUAL ISSUES

- A Duty of Care cannot be restricted or excluded by any contract to which the injured person was not a party to. This is an issue of privity of contract
- However, it is possible to have the Duty of Care assumed by another individual or by a company by the use of a contract
  - This is a common occurrence when independent contractors are hired for the maintenance of the property (i.e. snow removal)



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## CONTRACTUAL ISSUES

◆BUT...one must be careful when hiring a contractor as the Duty will not always be assumed by the contractor!

- In order for the Occupier to pass on the Duty of Care, they must first have satisfied their own duty in the hiring of the contractor
- The Occupier must have acted reasonably in entrusting the work to the contractor
- There are certain questions you should ask any contractor you plan to hire, and all research should be documented!



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## CONTRACTUAL ISSUES

1. Does the work involve technical expertise, if so, is it reasonable to believe that the contractor has that expertise?
2. Does the contractor have insurance with minimum liability limits of \$5 million?
3. Does the contractor's insurance policy name Property Manager and Owner as insured's under the policy?
4. Does the contract specify when the contractor is to come out (i.e. anything above 5 cm of snow)?
5. Does the contract specify about use of salt and sand and who is to supply these materials (sometimes it's on the home owner)?
6. Does the contractor maintain a log/records as is required?



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Ensuring the Contractor has the Expertise/Equipment Needed to Reasonably Maintain the Property...



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## CONTRACTUAL ISSUES

- Property owners may also have their own **in-house maintenance people**. In these instances, you want to ensure:
  - They have adequate insurance coverage and keep logs
  - They have adequate back-up (i.e. if one employee is sick)
  - There is a reasonable system of maintenance in place
  - **They use warnings**; there must be a system of inspection (i.e. if there is a possible dangerous area, make sure it is identified as such and entrants are cautioned)



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Use of Caution Signs...



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## CONTRACTUAL ISSUES

### Determining Liability:

- It should be noted that, regardless of any contract, the Occupier will still be liable for any Common Law duty which is non-delegable and/or if there is other legislation which states the Occupier is liable for the negligence of the contractor



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## CONTRACTUAL ISSUES

### **Case(s) Where Having a Contractor Resulted in No Liability for the Owner:**

#### ◆ *Gardiner v. Thunder Bay Regional Hospital [1999] OJ No. 833*

- The Plaintiff slipped and fell on her left hip while walking in the Hospital parking lot. The Hospital hired a contractor who was to remove snow and ice from the parking lot. Snow was to be removed when there was a buildup of 5 cm or more and sand was to be applied as determined by the contractor
- The parking lot was inspected early every morning by the manager of the buildings
- The court held that the Hospital had met the standard of care by hiring the contractors. The court did not find any fault with the snow removal system. The system, although not perfect, was reasonable



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## CONTRACTUAL ISSUES

### **Case(s) Where Having a Contractor *Still* Resulted in Liability for the Owner:**

#### ◆ *Britt v. Zagji Holdings Ltd. [1996] OJ No. 1014*

- The Plaintiff slipped on black ice while exiting her vehicle, on the Defendant's parking lot
- The Defendant hired a snow removal company and a separate salting company. However, none of the various aspects seemed to mesh. They did not communicate with each other or with the Defendant. The snow removal and de-icing system the Defendant had in place was very confusing
- The Court found that the system did not fulfill the Defendant's Duty of Care. The Defendant was not vigilant in ensuring that the parking lot was attended to



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## CONTRACTUAL ISSUES

### Case(s) Where Liability was Split Between the Contractor and Owner:

#### ◆ *Fragomeni v. Ontario Corp 1080486 [2006] OJ No. 1630*

- The Plaintiff fell in the parking lot of Ward Funeral Home and hit his head. He fractured his skull and subsequently developed cognitive and behavioral problems typical of progressive dementia
- The funeral home had hired a company, Belgrass, to remove the snow from the parking lot. The contract required Belgrass to remove snow upon accumulation of 2 inches or more and to salt on call, meaning they would salt if called upon by Ward to do so
- Belgrass claimed that they never salted without being told. However, Ward claimed that Belgrass often salted even without being called. As such, each party thought the other was deciding if and when salt
- What was the result?



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## CONTRACTUAL ISSUES

- ❖ The Court found that there was **no clear procedure in place** for determining who was responsible for deciding if and when to salt. Ward Funeral Home and Belgrass were held to be jointly and severally liable in negligence to the Plaintiff
- ❖ Each Defendant was responsible for 50% of the damages awarded



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# INSURANCE

- As soon as you receive notice of a claim, you must immediately inform your insurance company
- Your insurance company has a duty to defend you when your insurance policy provides for coverage against liability, and a claim is made which, if proven, would subject you to liability
- The duty to defend is determined by the insurance policy, the pleadings and any documents to which the pleadings refer or rely upon
- Your insurance company will retain legal counsel, who will begin defending against the claim...
  - It is important that you cooperate both with your insurance company and with the lawyer. A failure to cooperate can result in the loss of insurance



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## Just Saying...



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# INSURANCE

## Where Owner is Added as Named Insured:

- ◆ Some contracts with maintenance companies include insurance clauses which have the owner added as a named insured to the policy of the contractor
  - This clause would only come into effect when the contractor is found liable
- ◆ If the contractor is not liable, then the added insurance clause does not have the effect of increasing the insurance coverage of the owner. As such, the added insurance clause functions no differently than an indemnity clause



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ENJOYED THIS  
PRESENTATION...

THANK YOU FOR YOUR  
TIME!



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