

Collecting & Preserving Evidence

September 25, 2025



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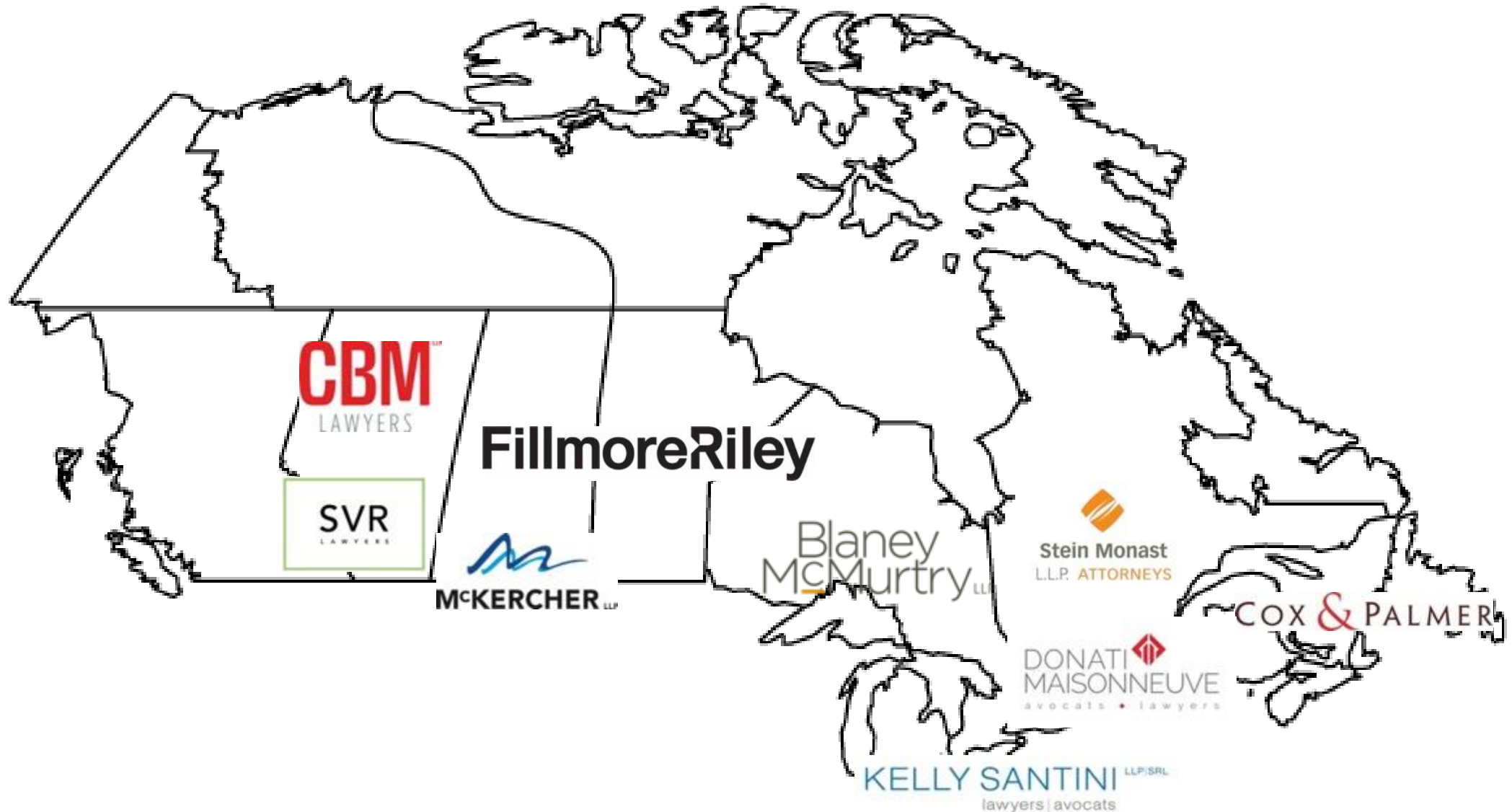
About RMC

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National Coverage





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Collecting & Preserving Evidence



Property Claims and Preserving Evidence

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Preserving Evidence



**PRESERVING EVIDENCE IS UNDERSCORED BY THE
PRINCIPLE OF TRIAL FAIRNESS.**

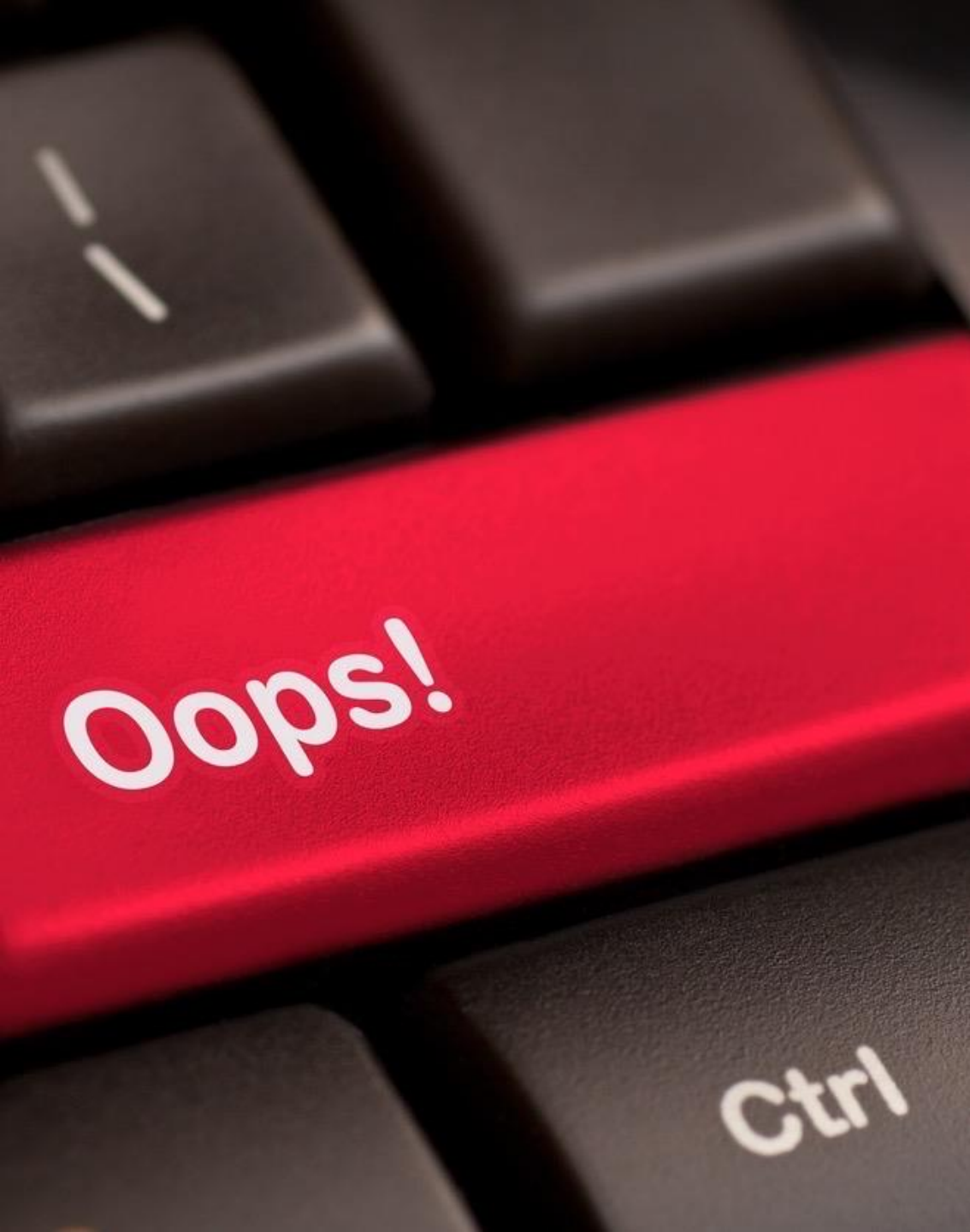


**TO ENSURE FAIRNESS AT TRIAL, PARTIES TO LITIGATION ARE EXPECTED NOT TO
DESTROY IMPORTANT EVIDENCE, AT LEAST UNTIL THE OPPOSING PARTY OR
PARTIES HAVE HAD A FAIR OPPORTUNITY TO EXAMINE THAT EVIDENCE.**

Destruction of Evidence and Spoliation

- Real Example:
 - Claim alleging defects and damage to a boiler in a car wash
 - Car wash owner disposed of the boiler around the time they commenced litigation against the installer of the boiler
 - The boiler is no longer available for inspection





Destruction of Evidence and Spoliation

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.

Destruction of Evidence and Spoliation

Outside this general framework other remedies may be available – even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.

The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.

Destruction of Evidence and Spoliation

Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.

Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

Key Requirements for Spoliation

1. An intentional destruction of evidence;

2. The evidence was relevant to ongoing or contemplated litigation; and

3. A reasonable inference can be drawn that the evidence was destroyed to affect the litigation.

Remedies for Destruction of Evidence

Adverse inference;

Striking out a claim or defence;

Exclusion of evidence;

Costs;

Monetary awards.



Occupiers' Liability
Claire Dowden

COX & PALMER
The difference is a great relationship

Occupier's liability claims

Arise when a visitor to a premises suffers injury or damage while on that premises due to the occupier's failure to take reasonable care to ensure their safety



Commonly: slips, falls, or injuries caused by hazards such as sharp objects



Key elements:

Duty of care

Breach of that duty

Causation

Damage

Statute vs. Common Law

Has Occupier's Liability Legislation

- British Columbia
- Alberta
- Manitoba
- Nova Scotia
- Prince Edward Island

Doesn't Have Occupier's Liability Legislation

- Saskatchewan
- Newfoundland and
Labrador
- Nunavut
- North West Territories
- Yukon

Defending an Occupier's Liability claim

Typical defences

- Met the standard of care
- Entrant was trespassing or committing a criminal act
- The danger was obvious or voluntarily assumed by the entrant
- There was a statutory exclusion limiting liability
 - Such as signage under Ontario's *Act*

Common types of evidence



Corporate records

Cleaning logs

Accident reports

Employee testimony



CCTV footage



Photographs



Measurements

Corporate Records

Cleaning logs

- Obtain employee timecards to ascertain who executed the log
- Interview relevant employees
 - Keep employee information

Accident reports

- Interview relevant employees

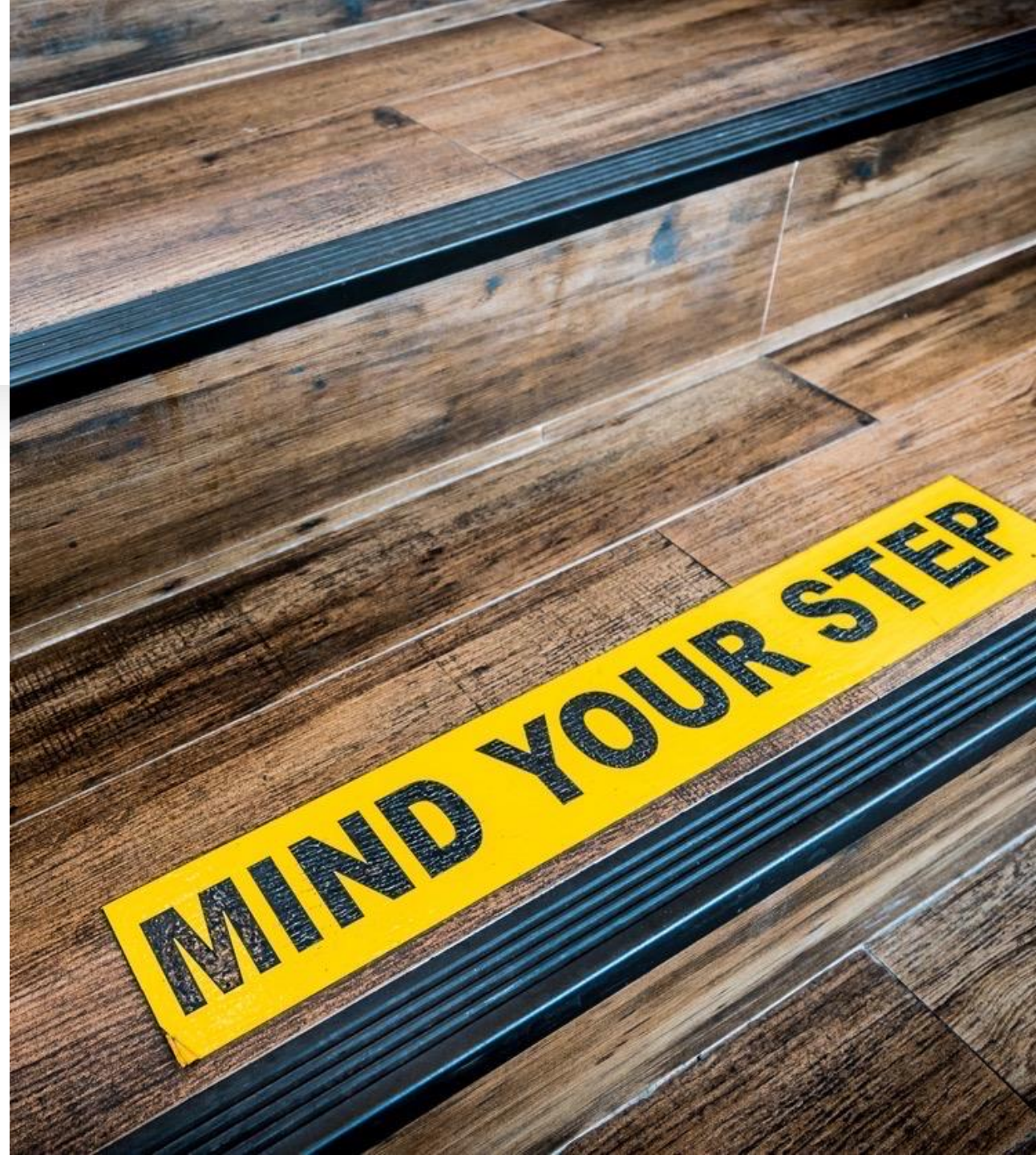


CCTV footage

- Not just the incident, but the circumstances surrounding
 - 1 hour back
 - Operates to:
 - Establish routine system of maintenance
 - Establish claimant was not keeping a proper lookout

Photographs

- As soon as possible to incident
 - Time stamped
 - Wide and narrow



Measurements



Important that done right, and as soon as possible to incident



Cromarty v. Waterloo (City), 2022 **ONSC 1322**

Evidence established sidewalk was **not** in a state of disrepair according to minimum maintenance standards – claim dismissed

Court preferred Defendant's evidence vis-à-vis height differential between two adjoining sidewalk slabs

- Plaintiff – measured with ruler
- Defendant – measured with combination square



Digging for Evidence

Anna Iourina

Blaney
McMurtry^{LLP}

LOCATED AREA: EXCAVATOR SHALL NOT WORK OUTSIDE THE LOCATED AREA WITHOUT OBTAINING ANOTHER LOCATE

FROM: S/FC FINCH AVE E

TO: 8.0m N/S/FC FINCH AVE E

FROM: 20.5m W/W/FC WARDEN AVE

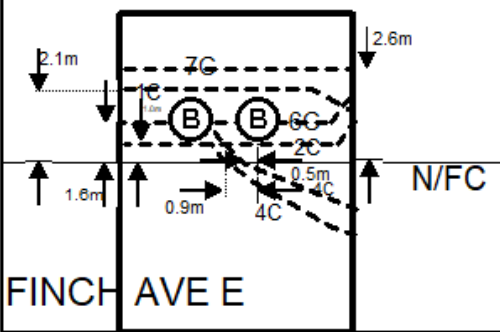
TO: 29.5m W/W/FC WARDEN AVE

- Legend
- Building Line — BL—
 - Fence Line — FL—
 - Face of Curb — FC—
 - Road Edge — RE—
 - Property Line — PL—
 - Curb Line — CL—
 - Driveway — DW—
 - Catch Basin  CB
 - Sidewalk  SW
 - Demarcation  DM
 - Railway 
 - Pole  O
 - Flush to Grade Pedestal 
 - Pedestal  X
 - Buried Cable — B—
 - Conduit — C—
 - Buried Service Wire — BSW—
 - Manhole  MH
 - Fibre Optic Cable — FO—
 - Gas Main — GM—
 - Gas Service — GS—
 - Valve 
 - Hydrant 
 - Transformer 
 - Hydro — H—
 - Hydro Pole — X—
 - Street Light Cable — SL—
 - Street Light 
 - Water Main — W/M—
 - Water Service — W/S—
 - Sanitary Main — S/M—
 - Sanitary Lateral — S/L—
 - Storm Drain — STM—
 - Storm Catch Basin 
 - North — N.
 - South — S.
 - East — E.
 - West — W.

Hand dig cautiously within 1m as measured horizontally from the field markings to avoid damaging the underground utilities. If you damage the plant, you may be held liable.
If you damage underground plant, contact the facility owner immediately.
Depth varies and MUST be verified by hand digging or vacuum excavation.
LOCATED AREA HAS BEEN ALTERED AS PER:



CAUTION
Unlocatable Future Use Cables, Structures and/or Conduits in or near Located Area



FINCH AVE E
S/FC

LOCATED AREA

W/FC

WARDEN AVE

THIS FORM VALID ONLY WITH Primary Locate Form. This sketch is not to scale.
Any privately owned services within the located area have not been marked- check with service/property owner.

A copy of this Auxiliary Locate Sheet(s) and the Primary Locate Sheet must be on site and in the hands of the machine operator during work operations. If sketch and markings do not coincide, the Excavator must obtain a new locate.

May 16, 2022 10:32:51 AM



May 16, 2022 9:57:08 AM



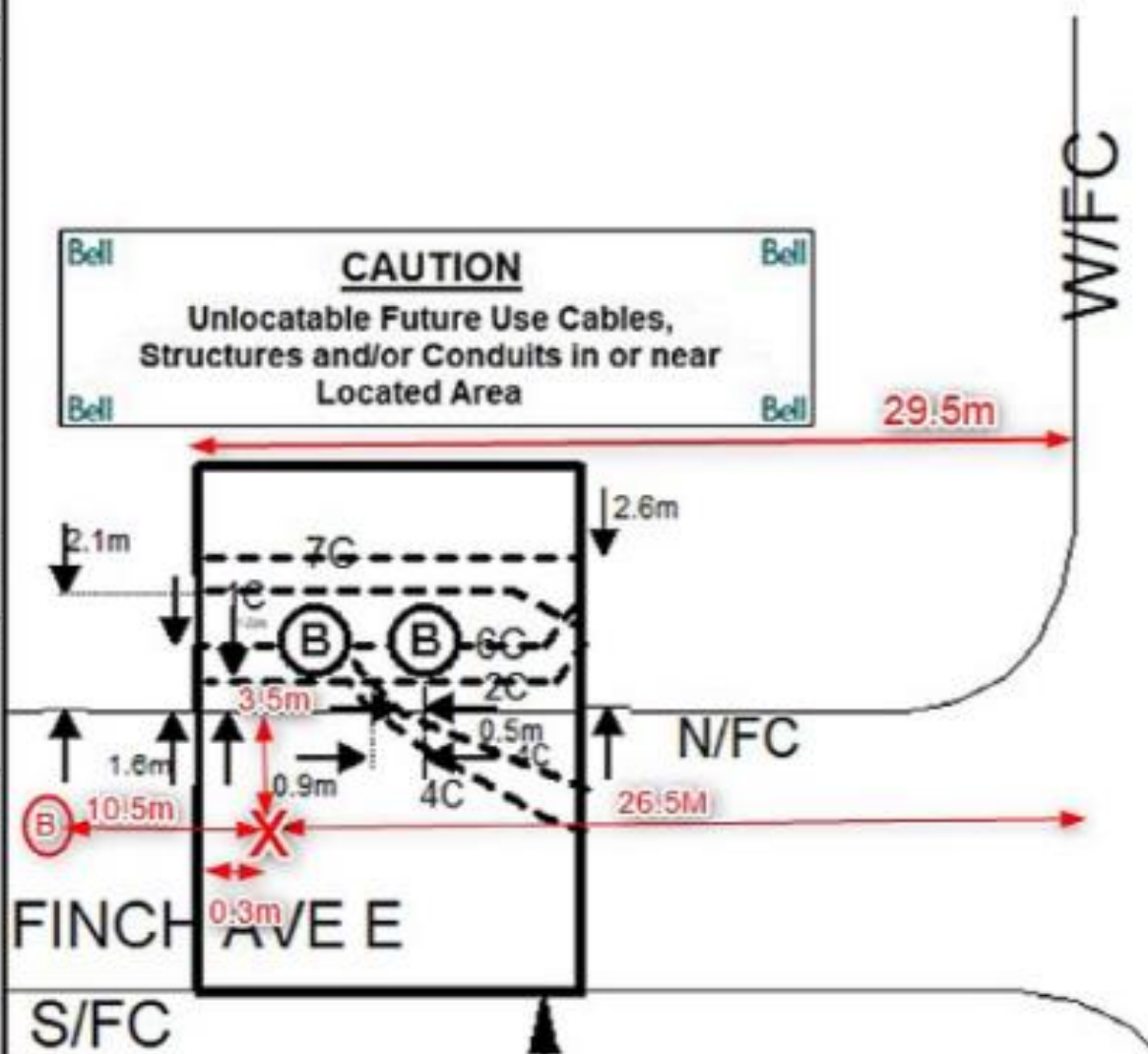
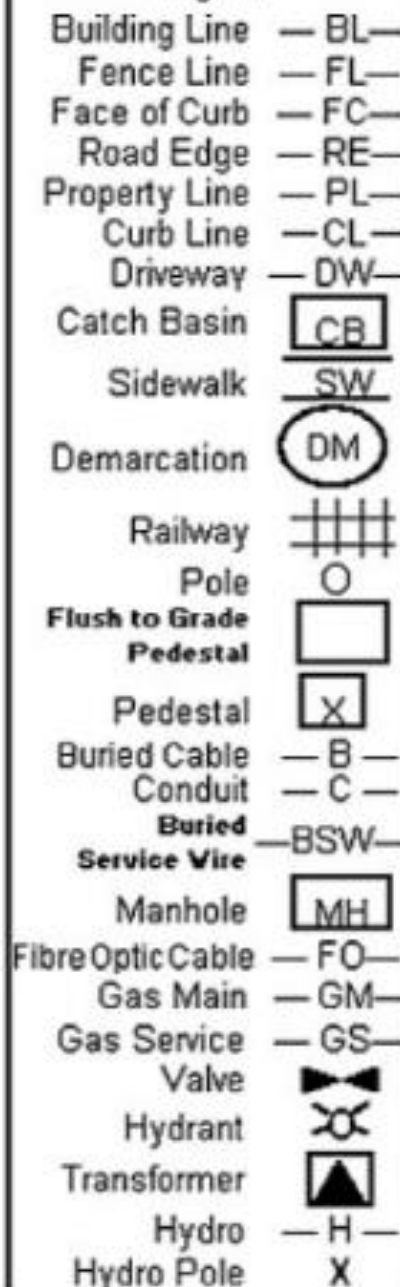
PROJECTED WEST FACE CURB LINE
WHERE LOCATED AREA LIMITS ARE
MEASURED OFF FROM.

TO: 29.5m W/W/FC WARDEN AVE

Hand dig cautiously within 1m as measured horizontally from the field markings to avoid damaging the underground utilities. If you damage the plant, you may be held liable.
If you damage underground plant, contact the facility owner immediately.
Depth varies and **MUST** be verified by hand digging or vacuum excavation.
LOCATED AREA HAS BEEN ALTERED AS PER:

N
+

Damage confirmed to be within the limits of the locate as per an additional inspection performed by Bell DPM Chris Faith. Cables also confirmed to be missed by locator as locate does not indicate any Bell Plant at the damage location.



Case Law Examples



*Enbridge
Gas
Distribution
Inc. v.
Froese,
2012 ONSC
6437*

-
- The Defendant was mechanically digging to uncover a leaking septic tank without a Locate and severed a gas main.
 - The Plaintiff sued the Defendant for digging without a Locate contrary to industry standards which only allow an excavator to dig in the area where a Locate has been completed and must hand dig without 1 m of the gas main.
 - The Defendant admitted that the only information he obtained prior to digging was from a visually inspection of the property and from conversations from the property owner and neighbour who advised that the property line was 50 to 60 feet from the home.
 - The Defendant testified at trial that he knew the gas main would not be located on private property.
 - At trial, the Defendant admitted that he knew what a Locate was, what it would show, and how to obtain it but did not do so and that a Locate would have prevented the incident. He also admitted that he did not follow industry standards when mechanically digging.
 - The Defendant used a machine to dig 0.4 m above the septic tank. Turns out the location of the property line ended up being incorrect and the septic tank was 2 inches below the gas main.
 - At trial, the Plaintiff's employee testified that he attended at the property after the incident and observed that the gas main was severed, gas was blowing and there was a backhoe in the ground with a hole in the ground of approximately 4 to 6 feet.
 - There was a large gas service outage to 91 customers.



What do you think happened at trial?

- a) Defendant found 50% liable for the property damage and costs of repair with a 50% deduction for betterment
- b) Defendant found 100% liable for the property damage and costs of repair
- c) Defendant found not liable
- d) Defendant found 75% liable for the property damage and costs of repair with a 25% deduction for betterment



Takeaway

Panchal v. Wal-Mart Canada

- Panchal alleged injuries from a slip and fall at a Wal-Mart store, allegedly caused by cherries dropped on the floor by an unidentified individual (John Doe).
- Before filing her Notice of Civil Claim (“NOCC”), Panchal requested that Wal-Mart preserve CCTV footage and its sweep log from one hour prior to the incident.
- Wal-Mart agreed in writing to preserve the video but said it would not produce it until litigation commenced.
- After litigation began, Panchal sought to amend her NOCC to allege that Wal-Mart deliberately destroyed portions of the video, in breach of the agreement.
- She also alleged Wal-Mart had a policy of systematically destroying potentially probative evidence to protect itself from liability in frequent slip and fall litigation, seeking to plead spoliation as an independent cause of action





Was the application allowed?

- a) Application was allowed in full
- b) Application was allowed in part – Panchal could amend her claim to plead Wal-Mart's deliberate destruction of evidence, but not spoliation as an independent cause of action
- c) Application was allowed in part – Panchal could amend her claim to plead spoliation as an independent cause of action, but not Wal-Mart's deliberate destruction of evidence
- d) Application was not allowed

McDougall v. Black & Decker Canada Inc., 2008 ABCA 353

- Plaintiffs lost their house to a fire reportedly caused by a malfunctioning cordless electric drill manufactured by the defendant.
- The drill was retained by an investigator hired by the plaintiffs' insurer.
- By the time the lawsuit commenced, certain parts of the drill had gone missing.
- The defendant applied to have the claim dismissed on the basis of spoliation, claiming it was unable to defend itself properly without being able to investigate the fire scene or the drill.



What was the outcome of the defendant's application to dismiss given it was no longer able to investigate the relevant evidence?

- a) The application was dismissed and the issue was left for trial.
- b) The application was dismissed and it was determined there was no spoliation of evidence.
- c) The application was granted and the plaintiff's claim was struck.
- d) The evidence was located prior to the application.



Questions?
