

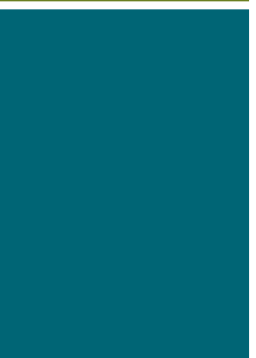


RESIDENTIAL AND
CIVIL
CONSTRUCTION
ALLIANCE OF
ONTARIO

An Independent Study Commissioned by

RCCAO

Constructing Ontario's Future



IMPROVING ONTARIO'S ONE CALL SYSTEM:

How to achieve more timely utility locates by applying enforcement practices used in other jurisdictions



RCCAO

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The Residential and Civil Construction Alliance of Ontario (RCCAO) is composed of management and labour groups that represent a wide spectrum of the Ontario construction industry. The RCCAO's goal is to work in co-operation with governments and related stakeholders to offer realistic solutions to a variety of challenges facing the construction industry and which also have wider societal benefits.

RCCAO has independently commissioned more than 30 reports on planning, procuring, financing, and building infrastructure, and we have submitted position papers to politicians and staff to help influence government decisions.

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- Joint Residential Construction Association
- LIUNA Local 183
- Ontario Formwork Association
- Residential Carpentry Contractors Association
- Toronto and Area Road Builders Association

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An independent research study prepared for the Residential
and Civil Construction Alliance of Ontario (RCCAO)

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EXECUTIVE SUMMARY



Utility location requests (herein referred to as “locate requests”) are requests made by an excavator to the owner or operator of underground infrastructure such as natural gas distribution pipes, buried fibre-optic cables or sanitary sewers, to have such owner/operator identify, via drawings and paint marks at the site, the location of buried infrastructure so that the excavator can avoid damaging the infrastructure while working in that area. Locate requests impact most construction projects, particularly in the civil and residential sectors. Until 2012, many utilities did not have a formal obligation to respond to locate requests and were not required to participate in a single central locate request clearing service known as “One Call.”

In 2012, Ontario established a mandatory one call system under the *Ontario Underground Infrastructure Notification System Act, 2012* (the “*One Call Act*”)¹ to allow homeowners, construction contractors, developers, builders and other excavators to make one locate request to a call centre instead of the previous practice of separate calls to each of the utilities.

The concept of the *One Call Act* is a significant improvement over the patchwork of laws, guidelines and practices that previously existed. Unfortunately, enforcement and compliance of the *One Call Act* and the other laws is inconsistent. Construction contractors still face long delays in waiting for all utilities to provide complete and reliably accurate locate information. The delays are compounded by the fact that all utility locates have a relatively short validity period, and once expired a request must be resubmitted. If all utilities do not respond within a set period, construction contractors cannot commence any excavation and must contend with starting from scratch with a fresh set of locate requests. Not only can this result in downtime costs of \$10,000 or more per day per crew, it can trigger delay penalties against the contractor by the municipality or other owner. The lack of timely locates can postpone the reopening of roads or the completion of vital infrastructure projects.

While the basic requirements under the *One Call Act* are not in dispute, tardy response times of weeks or months, instead of the mandatory five business days, are hindering progress on vital infrastructure such as roads, water and sewer systems. More than 1,000 complaints have been filed with Ontario One Call since mid-2014 about late or misleading locates, but there have been no convictions or charges against any person for violation of the *One Call Act*. The enforcement director for Ontario One Call has a long backlog estimated to be several hundred complaints from excavators that have not yet been investigated and the backlog, according to several excavators, continues to grow.

While the basic requirements under the *One Call Act* are not in dispute, tardy response times of weeks or months, instead of the mandatory five business days, are hindering progress on vital infrastructure such as roads, water and sewer systems.

Not only do apparent violations of the *One Call Act* go unpunished, there is real doubt whether penalties of up to a maximum of \$10,000 under the *One Call Act* would be a significant deterrent to a large utility with tens of thousands of customers and billions of dollars in assets.

Each of the 50 states in the U.S. has a mandatory One Call system. Processes in the U.S. which have evolved over a longer period of time could hold key elements that could improve locate responses in Ontario. To determine how enforcement of the obligations to provide timely and reliable locates are addressed across the U.S., a representative sample of 10 U.S. states was chosen, with a focus on enforcement issues. Based on this review, Ontario's One Call system could be improved by the following changes:

- 1. A Memorandum of Understanding** among all Ontario enforcement agencies to provide a clear understanding of which agencies will take the lead for responding in order to avoid duplication and delays in investigation and enforcement.
- 2. Adequate Enforcement Resources for the *One Call Act*** to ensure that there is some tangible enforcement of the new laws. Without some active enforcement, stakeholders, particularly operators of underground infrastructure, will have little incentive to provide timely and reliable locates.
- 3. Consistent Penalties Among All Ontario Laws Governing Locates** will help to ensure that response times improve. The failure of a utility to respond with timely and reliable locate information should have similar consequences regardless of whether the utility is natural gas, electrical energy or water-related.
- 4. Eliminating the Potential for Bias and Conflict of Interest** will result in a system that is not only impartial but is seen by all stakeholders as being impartial. In other enforcement agencies such as the Ministry of Labour, the TSSA and the ESA, the investigators and enforcement personnel

are totally independent of their respective regulated communities. Consideration should be given to delegating all investigation and enforcement of the *One Call Act* to an independent and unbiased agency or replacing the compliance committee with an independent body.

5. **Escalated Sanctions for Repeat Violators** will provide further incentives to locate providers to deliver timely and accurate information. Significantly higher penalties (fines) should be put in place for chronic or repeat offenders.
6. **Sufficient Resources to Respond to Locate Requests.** Owners of all underground infrastructure, whether it is electrical distribution, regional water or local municipal traffic control systems, to name a few, must establish sufficient resources to respond to all locate requests in a timely manner. The obligation to respond to locate requests is a legislated safety requirement and agencies, including municipalities, need to ensure that sufficient resources are in place to contribute to public safety.
7. **Clarify and Codify Civil Consequences from Violation of *One Call Act*.** Confirming civil consequences if there is a lack of adherence to the *One Call Act* and other One Call laws and regulations could be an effective form of deterrence, particularly if a utility knows that they could be liable to a contractor for delays caused by a late or inaccurate locate.
8. **Higher Fines for Corporations** in all One Call laws. Higher fines for corporations vs. individuals is an enforcement tool that is used in other Ontario statutes including the *Environmental Protection Act*, the *Occupational Health and Safety Act*, and the *Technical Standards and Safety Act, 2000*. This tool is absent in the *One Call Act*.
9. **Publication of Convictions.** Not only must justice be done, it must be seen to be done. Publishing convictions of Ontario's One Call laws on the Internet will likely have an added deterrence impact.

1.0 INTRODUCTION AND PURPOSE OF THIS REPORT



1.1. Introduction

The *Ontario Underground Infrastructure Notification System Act, 2012* (the “*One Call Act*”) received Royal Assent on June 19, 2012 and as of June 19, 2014 applies to all Ontario municipalities and utilities. Pursuant to section 6 of the *One Call Act*, owners of underground infrastructure must, in most circumstances, respond to locate requests within five business days by providing both a completed locate form and appropriate ground markings at the site as to the location of buried infrastructure. Under section 8, failure to comply with section 6 can result in a penalty of up to a maximum of \$10,000 plus applicable victim surcharge.²

Notwithstanding the provisions and penalties under the *One Call Act*, many construction contractors must wait significantly longer than five business days to receive a completed locate from all utilities. Within the past year, there have been several thousand complaints regarding delayed locate responses with many of the longest delays arising in the Greater Toronto Area. The delays in obtaining reliable locate responses can add unnecessary costs to the construction project and significant delays in opening or reopening roads and other vital infrastructure. Some of the responses to locate requests may be incomplete or contain misinformation. If the locate lacks all of the necessary

data, then this may inadvertently create misleading positioning by falsely indicating that a conduit is two metres east of a curb when it is actually four metres east of the curb, the excavator could suffer added delays due to the need to find and expose the conduit. In many cases, inaccurate locates can lead directly to damaged underground infrastructure which in turn causes additional delays for the construction contractor to await investigation and repairs by the affected utility or utilities.

The purpose of this study is to compare Ontario's regulatory framework for utility locates to those in selected U.S. jurisdictions in relation to enforcement mechanisms, penalties and other elements of the one call framework. Each U.S. state has had some form of mandatory one call law since the mid-2000s and some states have had mandatory one call since the early 1970s. Except for extreme circumstances such as the flooding in New Orleans and record snowfalls in parts of the U.S. northeast, contractors across the U.S. generally do not experience the types of delays in getting locates that a significant number of Ontario contractors have experienced. Processes in the U.S. which have evolved over a longer period of time could hold key elements that could improve locate responses in Ontario.

1.2 Scope and Methodology

General

Since there are no comprehensive One Call laws in Canada other than Ontario, and very limited locate related laws outside of North America, the scope of this study was simply limited to an examination and review of the laws and procedures of a significant number of U.S. jurisdictions to compare scope, time frames, penalties and other consequences as dictated by local One Call laws and enforcement agencies. The study includes comparative reviews between Ontario and 10 separate U.S. states of their respective locate response obligations in terms of time and the consequences of non-compliance. The study also identifies whether or not these 10 jurisdictions have other civil consequences for failure to provide a timely or accurate locate, such as allowing the contractor to proceed without the benefit of a locate and making the utility responsible for any damages.

1.3 List of Jurisdictions

The list of jurisdictions outside of Ontario examined by this study are the U.S. states of Arizona, California, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Jersey, Oklahoma and Pennsylvania.

1.4 Principal Issues of Concern

While the passage of the *One Call Act* and proclaiming it in force has reduced the number of calls that construction contractors must make to obtain locates from all owner/operators of buried infrastructure, it has not been uncommon for excavators to experience long delays in locate deliveries and in some cases incomplete and/or inaccurate locate information.

Many utilities such as natural gas distributors have multiple roles in relation to utility locates. In addition to providing locates to contractors, companies such as Enbridge Gas and Union Gas are also in the business of constructing new buried infrastructure or replacing older pipes. In turn, these companies must also await the delivery of locates from other infrastructure owners such as municipal water services and telecoms, before proceeding.

The principal concern to those in the construction sector, whether the firms are building roads, water distribution systems, residential housing (low- and high-rise), natural gas distribution systems, waste-water collection systems or buried telecom ducts, is that such contractors receive timely and accurate responses to their locate requests.

Utility locates often have a shelf life of 30 or 60 days from the date of issue, depending on the locate service. A contractor waiting for five separate utilities to respond might get all “all clears” from two of them in the first week and wait until Day 20 before getting two more. Until the fifth locate is delivered, the contractor cannot commence any excavation activities in the vicinity. If the fifth locate arrives after Day 30, then the contractor must request renewals of the other four locates.

Construction crews for water mains or sewers typically consist of three to 12 workers depending on the project. If the contractor cannot find immediate alternate work for all of the members of that crew, the contractor is out of pocket for wages paid to those workers while waiting for locates. When you factor in the cost of large excavation equipment such as cranes and backhoes, air compressors, traffic barriers, “flag persons,” etc., daily standby costs to a contractor often exceed \$10,000 per day per crew.

Even though municipalities often expect that construction will commence on time, a contractor cannot control the speed and completeness of locate responses. If a locate response includes inconsistencies between the paint marks on the ground and the sketch provided by the utility, the contractor must get a clarification from the utility or request a new complete locate. Work windows on major roads may be limited, there is often a deadline for re-opening the road, and the municipal owner and members of the local community may unfairly blame the contractor for the delays. Enforcement of locate response laws, most notably the *One Call Act* regarding timely and complete locate responses is therefore essential to construction contractors to commence projects in a timely fashion. The priorities of responding utilities may be influenced by two factors: (1) the penalties or other sanctions associated with delays; and (2) the likelihood that the regulatory agency has procedures and resources to enforce locate response laws.

Consequently this report examines and compares Ontario to other jurisdictions in regard to:

1. Deadlines for delivery of complete locates;
2. Penalties and Sanctions if Utilities fail to comply; and
3. Enforcement Agencies Resources and Procedures.

Enforcement of locate response laws is essential to construction contractors to commence projects in a timely fashion.

2.0 GOVERNANCE AND ENFORCEMENT OF UTILITY LOCATES IN ONTARIO



2.1 History of Utility Locates in Ontario

Since 1971, the Ontario statute previously known as the *Energy Act*, imposed a duty upon all excavators to request a locate from natural gas distributors before commencing excavation and required natural gas distributors to provide reasonable location information in a reasonable time. With the exception of requirements under the *Occupational Health and Safety Act*, there were no other Ontario laws regulating the need to obtain and the obligation to deliver utility locates until 2002.

During the past few years, the number of locate requests received by Ontario One Call has increased to its current level of just under one million in 2014. Across Ontario, the number of reported incidents each year in which a buried utility was damaged by excavation activities has decreased from more than 6,000 in 2009 to about 4,500 in 2013.³

2.2 Ontario Utility Notification Law and Regulations

In 2012, Ontario established a mandatory one call system under the *Ontario Underground Infrastructure Notification System Act, 2012* (the “*One Call Act*”) to allow homeowners, developers and construction contractors to make one locate request to a call centre instead of the previous practice of separate calls to each of the utilities.

Under that legislation, an excavator can request a locate by phone or other means and the one call centre forwards appropriate locate requests to those members (utilities) with buried infrastructure in the area of the proposed excavation. Each member must then respond within five business days with drawings and surface markings of its buried infrastructure near the proposed excavation or provide a written “all clear” that it has no buried infrastructure nearby.

Given the scope of this legislation and its impact upon Ontario municipalities and other buried infrastructure owners not previously governed by some form of locate response laws, the *One Call Act* came into force in stages. Following the passage of the governance regulation⁴, the *One Call Act* came into effect as of June 2014. There was a significant increase in the number of locate requests received by many owners particularly municipalities and electrical power distributors who had opted not to be part of On1Call until the *One Call Act* came into full force.

While the call centre for Ontario One Call may have been prepared for a significant increase in locate requests, the same does not appear to be the case among municipalities, water boards, electrical energy distributors and some telecoms who were only brought into Ontario One Call in 2014. In some cases, the number of locate requests received by some municipalities was up to four times higher than the call volumes that they had received prior to 2012. Many owners of underground infrastructure simply did not have sufficient resources on hand in 2014 to respond to all of these locate requests in a timely manner as required by the *One Call Act*.

More than 1,000 complaints have been filed with Ontario One Call since mid-2014 about late or inaccurate locates. However, there have been no convictions or charges against any utility for violation of the *One Call Act*. The enforcement director for Ontario One Call has a long backlog of hundreds of complaints from excavators that have not yet been investigated and the backlog, according to several excavators, continues to grow.

A violation of the *One Call Act* can result in a fine of up to \$10,000, which is ordinarily reserved for the worst potential repeat offender in the worst circumstances under generally accepted principles of sentencing in Canadian courts.

Ontario One Call has a director of enforcement and compliance who reports to a compliance committee which is made up of member infrastructure owners of Ontario One Call. There is no additional staff for the investigation and enforcement function and there are no published plans to retain directly or indirectly any significant additional resources.

The status of One Call enforcement through Ontario One Call raises two critical issues, the first being the minimal level of Ontario One Call enforcement resources. Publications by the Ontario Regional Common Ground Alliance⁵ indicates that there are approximately 5,000 separate underground infrastructure damage incidents in Ontario each year. Additional investigators and other enforcement personnel would be required if the intention was to investigate as few as 200 damage incidents a year. The second critical issue is a perceived bias on the part of the Ontario One Call compliance committee, as it is made up almost entirely of member utilities. As such, there is a serious potential for bias and conflict of interest of the compliance committee not to convict “one of their own.” In other enforcement agencies such as the Ministry of Labour, the TSSA and the ESA, the investigators and enforcement personnel are totally independent of their respective regulated communities. For that reason, consideration should be given to investigation and enforcement by an independent and unbiased agency.

Given the absence of a memorandum of understanding among enforcement agencies; minimal staffing levels for investigations and enforcement at Ontario One Call; and no apparent budgetary or other published plans to increase enforcement efforts, utilities that choose to delay locate responses face little risk, if any, of conviction.

Even if convicted, the maximum fine that can be imposed is very modest when compared to some of the costs of delayed utility locate responses upon contractors and the general public.

2.3 Natural Gas Distribution

As indicated above, natural gas distributors have been required by statute to provide locate response since 1971. Since 2000, the technical requirements for the distribution of natural gas distribution have been governed by the *Technical Standards and Safety Act, 2000*, and enforced by the Technical Standards and Safety Authority (“TSSA”). The TSSA regulates a number of activities including the construction and operation of elevators, escalators, amusement rides, ski lifts, propane refuelling facilities, gasoline stations and natural gas distribution lines. Technical requirements for natural gas distributors include the obligation to respond to locate requests by providing “as accurate information as possible on the location of any pipeline within a reasonable time in all the circumstances”⁶.

The standard for information provided by a gas distributor, “as accurate as possible,” pursuant to the TSSA regulation appears to be relatively stringent whereas paragraph 6(1)(a) of the *One Call Act* does not impose any language regarding the accuracy or reliability of locate information.

The time frame for a locate response under the TSSA regulation is “within a reasonable time” as compared to a time frame “within five business days of the day the member receives notification about the proposed excavation or dig” under the *One Call Act*⁷. The phrase “within a reasonable time” was

the subject of several successive publications by the TSSA under the name of ‘Guidelines for Excavations in the Vicinity of Gas Lines.’ In 2001, the TSSA Guideline called for a locate response within 48 hours, a time frame that is consistent with the locate response deadlines of a majority of the U.S. states.

In 2003, notwithstanding the opposition of many stakeholders in the civil construction industry, the timeframe for a locate response was doubled to four business days. The most recent version of that guideline was jointly published by both the TSSA and the Electrical Safety Authority and called for locate responses within four business days.⁸

TSSA inspectors have the authority, as provincial offences officers, to issue orders, directives and administrative penalties to ensure compliance with safety laws. The TSSA can also lay charges and prosecute individuals and companies who have committed serious offences under safety laws. Maximum penalties under the Act are \$50,000 per count for individuals and \$1,000,000 for corporations. The largest fine ever imposed for violation of the TSSA’s locate response laws was \$350,000 in relation to a 2003 gas explosion in the west end of Toronto that killed seven people and was attributable to incomplete and inaccurate locate responses.⁹

2.4 Occupational Health and Safety and Regulations (Ontario)

The Ministry of Labour has had jurisdiction through the *Occupational Health and Safety Act* and the Construction Projects Regulation to ensure that construction is carried out safely and to prosecute employers, supervisors and workers for unsafe practices. The Ministry has significant resources and a relatively aggressive inspection and enforcement program. In 2011, the Ministry undertook more than 20,000 inspections at construction sites and conducted almost 8,000 separate investigations resulting in more than 60,000 compliance orders.¹⁰ The results in 2011 were more than 900 convictions and fines totalling just under \$10 million.

For decades, the Construction Projects Regulation¹¹ and its precursors imposed an obligation upon employers prior to the commencement of an

excavation to ensure that all utilities were located and marked. In 2009, subsection 228(1) was amended to provide an additional obligation upon persons providing locates to ensure that the utilities were accurately located and marked. The 2009 amendment was prompted by a court decision involving Enbridge Gas and the Bloor/Kipling gas explosion of 2003 as the initial trial judge had ruled that Enbridge and its contract locator were not “employers” for purposes of subsection 228(1) and that the only party that was liable for prosecution was the excavator.¹²

Although the Construction Projects Regulation imposes a duty on certain utilities to respond to locate requests, the regulation is silent on the matter of response times. An individual convicted of a violation of subsection 228(1) of the Construction Projects Regulation can result in a fine of not more than \$25,000 or to imprisonment for a term of not more than 12 months, or to both. If the person is a body corporate, the maximum fine is \$500,000.

While there have been a few prosecutions by the Ministry of Labour against excavators for failing to request locates, there is no record of any prosecutions back to early 2013 and no available records to search prior to that time. Based on available public records, there were no prosecutions against utilities for failing to provide a reliable locate with the exception of the Enbridge prosecution¹³ associated with the Bloor/Kipling gas explosion.

Abuse of Power

An electrical power distributor in southern Ontario was asked to provide locates in a densely populated area. The distributor took it upon itself to set a policy that mandated a site meeting with the excavator for every locate response. To make matters even more difficult for the contractor, the distributor would only agree to meet during two specific time slots each week. The contractor was extremely frustrated to learn that there was in fact no nearby underground wiring and the distributor was providing an “all clear.”

Shocking Lack of Information

A construction contractor was widening a culvert and had requested and was provided with a locate of buried electrical lines. A prior electrical construction practice by the utility of looping a secondary line meant that the equipment used by locators made it difficult to accurately reflect the location of buried lines. The unmarked buried line was struck by a hand shovel. The damaged line caused the project to stop and a local hydro crew made the necessary repairs. As the utility determined that the excavator was not at fault, the electric utility did not attempt to recover the cost of electrical repairs from the contractor.

2.5 Electricity Act and Regulations

The Electrical Safety Authority (“ESA”) is Ontario’s electrical counterpart to the TSSA with respect to electrical power distribution and electrical appliances. The ESA administers and enforces the licensing and safety requirements of the *Electricity Act, 1998* and the regulations thereto including the Electrical Distribution Safety Regulation 22/04. Maximum penalties under the *Electricity Act, 1998* and the regulations thereto are \$50,000 per count and imprisonment of one year for individuals and a fine of \$1,000,000 for corporations.

The formal legal obligation for electric energy distributors to respond to locate requests came into effect in 2004.¹⁴ The obligations are similar to the requirements under the Construction Projects Regulation administered and enforced by the Ministry of Labour.

The ESA has a large and knowledgeable staff of electrical inspectors and a recent conviction by the ESA even included jail time for an individual.¹⁵ However, there appears to be no reported case of any conviction or fine against an electrical distributor for not providing a locate as required by subsection 10(4) of Ontario Regulation 22/04. It is certainly not the case that every electrical distributor has always provided reliably accurate information in a reasonable time. In 2013, there were 197 cases where a buried electrical line was damaged during excavation.¹⁶ It is highly likely that a certain proportion of these events was attributable to the utility’s failure

to provide a reliably accurate locate. Ontario data through the Ontario Regional Common Ground Alliance's (ORCGA) most recent "DIRT" report¹⁷ suggests that overall, up to 20% or more of all utility damages are attributable to invalid or outdated utility maps, locator error or other miscellaneous causes.

2.6 Other Laws Dealing with Utility Locates

Other statutes and regulations either directly or indirectly require a construction excavator to request a locate and require utilities to respond with reliably accurate locate information including the *Public Utilities Act*¹⁸ and federal laws such as the *National Energy Board Act*¹⁹ and the *Canada Labour Act*.²⁰ A detailed review of these laws and enforcement measures is outside of the scope of this report.

2.7 Penalties Under Various Utility Locate Laws in Ontario

There are four principal statutes that require excavators to obtain locates and that also require the respective utilities to respond with reliably accurate information about the nature and location of buried infrastructure.

Given that the different statutes are all Provincial regulatory statutes, there is a reasonable expectation that the penalties might not be identical but would be comparable. The fines for corporations are most relevant as owners and operators of underground infrastructure are almost always corporations and not individual persons. Table 1 outlines that the maximum corporate fines for one or more violations of the *One Call Act* are much lower compared to other statutes.

Call Me Later

A major telecom company, as part of an effort to reduce costs, has not only extended the life of the locate from 30 days to 60 days, the locate duration is to be extended to the full duration of the construction project whether it is 10 weeks or 10 months. If the construction contractor is unable to preserve and renew the paint marks and other indicators, the telecom will arrange to refresh the markings, but at the excavators' expense!

Table 1: Maximum and Minimum Penalties

Statute or Regulation	Minimum Punishment, Individuals	Maximum Punishment, Individuals	Minimum Punishment, Corporations	Maximum Punishment, Corporations
TECHNICAL STANDARDS AND SAFETY ACT, 2000: Oil and Gas Pipeline Systems Regulation 210/01	No minimum	Fine of \$50,000, imprisonment of 1 year or both	No minimum	\$1,000,000
ELECTRICITY ACT, 1998: Electrical Distribution Safety Regulation 22/04	No minimum	Fine of \$50,000, imprisonment of 1 year or both	No minimum	\$1,000,000
OCCUPATIONAL HEALTH AND SAFETY ACT: Construction Project Regulation 213/91	No minimum	Fine of \$25,000, imprisonment of 12 months or both	No minimum	\$500,000
ONTARIO UNDERGROUND INFRASTRUCTURE NOTIFICATION SYSTEM ACT, 2012	No minimum	Fine of \$10,000	No minimum	\$10,000

2.8 Interaction and Co-operation Among Enforcement Agencies

As noted in the previous sections each of the four principal statutes has a distinct history and the enforcement agencies for each of those laws have various resources. Notwithstanding the potential for overlap among the statutes and regulations there is no rule, guidance document or memorandum of understanding among the four enforcement agencies as to which agency would take the lead and there is no opportunity for any one agency to prosecute on behalf of the other agencies. For instance, the Ministry of Labour does not have legislative authority to enforce Ontario Regulation 22/04. Although representatives of various enforcement agencies will generally agree that a memorandum of understanding on enforcement of utility locate laws is in the general interest of the agencies and the public, especially regarding the safety of the public, there is no indication that any such memorandum will be finalized in the near future.

The objectives of each of Ontario's four locate laws is to damage prevention of underground infrastructure and to enhance public and worker safety. Each of those four laws has two basic elements:

- (1) to require excavators to request and receive locates to avoid damage before commencing excavation; and
- (2) to require the respective infrastructure operators to provide reliably accurate information in a timely manner.

Violations of either one of these two requirements must be investigated and enforced by all regulatory agencies in an objective and consistent manner. To do otherwise is to frustrate the very purpose in creating the four locate laws in Ontario.

2.9 Selected Court Decisions Centred on Utility Locates

Bell Canada v. COPE (Sarnia) Ltd. – Ontario Superior Court of Justice January 1980²¹

Nature of Case: Claim by Bell Canada against the defendant COPE (Sarnia) Ltd. for damaging a telephone cable during excavation work.

Factual Background

- Defendant requested a locate from Bell. Bell personnel planted only one line of stakes and not two lines of stakes, even though the drawings clearly showed two Bell cables buried side by side.
- Defendant started digging and hit a two-inch, plastic-covered cable in which Bell wires had been placed.
- Defendant called Bell who sent out a crew. The Bell crew concluded that it was only an abandoned cable and that it could be safely ignored.
- Digging resumed and the backhoe operator hit some concrete.
- Concrete was approximately two feet long and one foot wide. Defendant's crew inspected the damaged part of the concrete conduit and could only see some water.

Court Decision and Findings

- The contractor was negligent in not comparing drawings to stakes on the ground before digging and by cutting into the concrete pipe without checking it out further.
- Bell was also negligent – the Bell locator did not compare the stakes to the plan and failed to deliver the plan drawings to the contractor when he knew that work was commencing that day.
- Having found that both the plaintiff and the defendant were negligent, responsibility was split as two-thirds against Bell and one-third against the defendant.

Ontario (Ministry of Labour) v. Enbridge Gas – Ontario Superior Court of Justice, April 2010²²

Nature of Case: Appeal by the provincial Crown from a directed verdict dismissing charges against the defendants Enbridge Gas and Precision Utility.

Factual Background

- In 2003, seven people were killed in an explosion caused by the dislodging of a gas pipe as a result of excavation for roadwork conducted by Warren.
- Enbridge owned the natural gas distribution system. Precision was the company that it contracted with to locate the underground pipeline. Enbridge and Precision were charged with various offences under the *Occupational Health and Safety Act* (OHSA) and the *Technical Standards and Safety Act* (TSSA) for failing to provide Warren with an accurate locate of a service line.
- Warren pleaded guilty to charges in a separate proceeding.
- Enbridge and Precision argued that the only legal duty at issue fell upon Warren, and that they could not be charged with providing an inaccurate locate, as no locate was ever provided.
- Since Enbridge and Precision neither owned nor controlled the workplace and had not contracted for Warren's services, the responsibility for the safety of the workplace remained with Warren.

Court Decision and Findings

- The Crown's appeal was allowed.
- Despite their discrete functions at the worksite, the trial judge erred in finding that neither company was an employer under the OHSA. Both companies had contracted for the services of one or more workers on the worksite and had a corresponding duty to ensure the health and safety of all workers associated with the project.

-
- The trial judge erred in concluding that the OHS Act did not place a legal duty on either company to provide Warren with an accurate locate. As the owners of the pipeline, the companies were the only parties that could ensure accuracy of the locate. It was inconceivable that the legislature intended to create an exclusive duty on an excavator to request a locate with no control or legal ability either to do the locate or to do it accurately.
 - The trial judge also erred in failing to find that Enbridge was required to ensure that Precision delivered accurate information. To find otherwise would allow Enbridge to avoid its obligations through a subcontracting relationship.

Birnam Excavating Ltd. v. Union Gas Limited – Ontario Superior Court of Justice, January 2012²³

Nature of Case: A claim by Birnam for standby charges and idled crew costs as a result of negligent locates provided by Union and its locators between 2003 and 2009. The courts generally characterize such damages as pure economic loss.

Factual Background

- On each occasion, the plaintiffs relied upon a written report from the defendant which showed the location of gas pipelines in the area of proposed excavation. The plaintiff contractor claims from the costs of crew and equipment downtime they suffered when they hit a gas line by reason of the misleading locate.
- When a gas line is hit, all work must stop until Union Gas attends, makes repairs and declares the workplace to be safe.

Court Decision and Findings

- Union Gas has a duty statutorily and at common law to operate in the public's safety and that duty includes the duty to provide accurate locates.
- It cannot be good public policy to relieve Union gas from liability for its errors when it provides misleading locates.
- Imposing liability on the defendant Union Gas would reinforce and further promote Union Gas's duty to protect the public. Damages were awarded in favour of the plaintiff contractor.

**Rogers Communication Partnership Inc. v. Network Site Services Ltd. –
Ontario Superior Court of Justice, Small Claims Court, Kitchener,
July 2013**

Nature of Case: a claim by Rogers for damage to its fibre-optic network.

Factual Background

- The City of Stratford hired Network to construct a road improvement. During excavation the plaintiff’s fibre optic and co-optic cables were cut.
- Rogers claims that Network was negligent because it failed to properly interpret the utility locate. Network denies liability saying that Rogers and CCS misrepresented the location of its utilities by providing Network with an inaccurate site diagram.
- Construction had been delayed for several months and upon each delay, Network requested a new locate from Rogers.
- Section 228(1)(a) of the regulation to the OHSA imposes a clear duty on Network to “ensure” the service is located and marked.
- Section 228(1)(b) imposes a duty on Rogers to ensure that services are “accurately” marked.

Court Decision and Findings

- Rogers’ claim was denied.
- Section 228(1)(b) results in a duty and liability on both the owner of service and the subcontractor hired by the owner to perform the locate.
- Re-providing the June sketch in August and September without new measurements meant that the paper portion of the September locate was not up-to-date or current when it was provided to Network. The locate by CCS was inadequate when compared to the quality of the locate provided by Bell/GTell for the same project.

3.0 ONE CALL ENFORCEMENT IN SELECTED U.S. STATES



3.1. U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA)

PHMSA is an agency within the U.S. Department of Transportation that develops and enforces regulations for the safe, reliable, and environmentally sound operation of the U.S.'s 2.6-million-mile pipeline transportation system as well as shipments of hazardous materials by land, sea and air.

In 1997, the U.S. Congress directed the Secretary of Transportation²⁴ to undertake a study of damage prevention practices associated with existing one-call notification systems to determine which one-call notification systems practices were the most effective in protecting the public, excavators, and the environment and in preventing disruptions to public services and damage to underground facilities. The 'Common Ground Report,' a collaborative effort among more than 160 stakeholders representing utility

owners, excavators and regulators, was completed and released in 1999. The co-operation established by those stakeholders during the preparation of the study was the genesis of what is now known as the Common Ground Alliance (CGA).

The U.S. DOT, through the PHMSA not only provides continuing support to the CGA, it administers several sets of independent grants to state agencies and state one call services which are dependent on the existing mandatory one call utility locate laws in that state²⁵ as well as to those states which have enacted legislation for mandatory one call. Other federal grants for the construction of state and local infrastructure are also dependent on maintaining and enforcing one call laws. The PHMSA recently proposed strengthening the minimum fines and enforcement efforts of local states as a condition to continued receipt of specific federal grants.²⁶

The PHMSA also has regulatory oversight and enforcement powers for interstate energy systems, as well certain powers to enforce other laws at the state level. In 2012, In April 2012 the PHMSA published a Notice of Proposed rulemaking that provides federal authority for PHMSA to enforce one-call laws in states where the agency determines state laws for enforcement are inadequate states that do not take action on their own to enforce state one-call laws.²⁷

Overall the network of laws calling for mandatory participation of utilities in One Call notification systems is significantly influenced by U.S. federal DOT programs and initiatives and was a significant factor in the decision on the part of several U.S. states to pass One Call legislation. Each of the separate state laws places an obligation on the excavator to request a locate through the one call system, requires utilities and other agencies to be members of that one call system and to respond with locates in three business days or less with reliably accurate information. The PHMSA and the CGA have confirmed that the number of incidents of damaged utilities decreased in the years following the introduction of mandatory One Call laws in each state.

A December 2014 report by Canada's Standing Senate Committee on Energy, the Environment and Natural Resources has recommended that the Canadian federal government proceed with similar incentives to Canadian Provinces for the establishment of One Call centres across Canada.²⁸

3.2 State of Arizona

In the State of Arizona, one call systems and utilities are governed the *Arizona Underground Facilities Law*, Title 40-360.22 to the Arizona Revised Statutes.

The deadline for all utilities to respond to locate requests is two business days provided that the request was received during regular business hours. Notices cannot be submitted more than 10 business days in advance of excavation.

The enforcement agency for the Arizona Underground Facilities Law is the Arizona Corporations Commission's Pipeline Safety Section, which is the equivalent of combining Ontario's TSSA, ESA and Ontario Energy Board into a single regulatory agency.

Fines can be as high as US\$500,000 if the damage relates to natural gas or hazardous materials.

3.3 State of California

In the State of California, one call systems and utilities are governed by California Government Code 4216 – Protection of Underground Infrastructure.

The deadline for all utilities to respond to locate requests is two business days provided that the request was received during regular business hours. Locate requests cannot be submitted earlier than 14 calendar days prior to excavation.

The enforcement agency for California Government Code 4216 is the California Public Utilities Commission but only through the Attorney General, District Attorneys or local permitting agencies. The California Public Utilities Commission is similar to Ontario's Ontario Energy Board

but also regulates water services as well as electrical energy and natural gas. The California government is considering an expansion of regulatory powers to allow the CPUC to undertake enforcement of Government Code 4216 directly without the need to work through the elected officials or permitting agencies.

Fines under California Government Code 4216 can be as high as US\$10,000 if the damage was caused negligently US\$50,000 if the damage was caused knowingly and willfully. Unlike several other U.S. states such as Arizona and Louisiana, the California law does not establish any civil remedies or immunities.

There are two One Call services in the State of California: Dig Alert, which services southern California, and USA North 811 which services the northern portion of the State.

3.4 State of Illinois

In the State of Illinois, one call systems and utilities are governed by the *Illinois Underground Utility Facilities Damage Prevention Act*.

The deadline for all utilities to respond to locate requests is two business days provided that the request was received during regular business hours. There is no restriction on longer notices.

The enforcement agency is the Illinois Commerce Commission. The Illinois Commerce Commission is similar to Ontario's Ontario Energy Board, TSSA and ESA in one regulatory agency. The ICC has an active enforcement program having issued 230 violation notices in 2013 and assessing fines totaling just under US\$1.5 million during that period. Fine revenues are dedicated to funding the One Call service.

The One Call service for the City of Chicago is DIGGER – Chicago Utility Alert Network and the One Call service for the rest of the State of Illinois is JULIE, the Joint Utility Information for Excavators.

Fines under Illinois One Call law can be as high as US\$5,000. Additional penalties of up to US\$2,500 may be assessed and are also civilly liable for damage or injuries caused by their failure to comply with the One Call law.

3.5 State of Indiana

In the State of Indiana, one call systems and utilities are governed by *Indiana Code Chapter 26 Damage to Underground Facilities*.

The deadline for all utilities to respond to locate requests is two working days provided that the request was received during regular business hours, but notice cannot be given more than 20 calendar days in advance of the excavation.

The enforcement agency is the Indiana Utility Regulatory Commission. The Commission is similar to Ontario's Ontario Energy Board, TSSA and ESA in one regulatory agency. The IURC's enforcement program resulted in more than 1,100 violations in 2013 but less than 600 violations in 2014. The Pipeline Safety Division is required to investigate each alleged violation and then forward its findings to the Underground Plant Protection Advisory Committee which then makes recommendations for penalties to the IURC.

The One Call service for the State of Indiana is Indiana 811.

Fines under Indiana One Call law can be as high as US\$25,000 per violation per day with a cumulative limit of US\$1 million. With respect to utility damages and civil actions, the One Call law also provides that not only can the utility recover damages and legal fees, they can also pursue a punitive award of up to three times the actual damages. It is a defence to such an action if the defendant shows that the utility fails to comply with its duties under the One Call law.

3.6 State of Louisiana

In the State of Louisiana, one call systems are governed by the *Louisiana Underground Utilities and Facilities Damage Prevention Law*.

The deadline for all utilities to respond to locate requests is two business days provided that the request was received during regular business hours but notice cannot be given more than five business days in advance.

The primary enforcement agency is a unit within the Louisiana State Police called the Hazardous Materials Response and Explosives Control Unit. Any other law enforcement officials can also enforce the Act. Excavators are not the sole focus of all incident investigations, fines have also been levied against utilities for failing to locate their utilities within the relevant time period. Enforcement also has a graduated escalation of fines for certain offences namely failing to mark utilities will be given a warning letter on the first offence, a fine of not more than US\$250 for the second offence and in the event of a fifth or subsequent violation, a penalty of not less than US\$2,000 nor more than US\$25,000. Other offences have no minimum penalty and a maximum fine of US\$25,000.

The One Call service for the State of Louisiana is LA One Call 811.

Excavators are immune from any civil claims from utilities if they gave notice requesting a locate and otherwise complied with the provisions of the One Call law and the utility failed to mark or provide information.

3.7 State of Massachusetts

In the State of Massachusetts, one call systems and utilities are governed by *Dig Safe Law in Massachusetts Chapter 82 Section 40*.

The deadline for all utilities to respond to locate requests is three working days provided that the request was received during regular business hours, but notice cannot be given more than 30 calendar days in advance of the excavation.

The enforcement agency is the Massachusetts Department of Public Utilities. The Department is similar to Ontario's Ontario Energy Board, TSSA and ESA in one regulatory agency.

The One Call service for the State of Massachusetts is Dig Safe, a not-for-profit clearing house for utility locates that also provides services for the states of New Hampshire, Rhode Island and Maine.

Fines under the Dig Safe Law are fixed at US\$1,000 for a first offence and then may vary between US\$5,000 and US\$10,000 for subsequent offences within a 12 consecutive months. Unlike several other U.S. states such as Arizona and Louisiana, the Massachusetts law does not establish any civil remedies or immunities.

3.8 State of Michigan

In the State of Michigan, one call systems are governed by the *Miss Dig Underground Facility Damage Prevention and Safety Act*, Act 172 of 2013. The One Call centre is known as Miss Dig.

The deadline for all utilities to respond to locate requests is three business days provided that the request was received during regular business hours but notice cannot be given more than 14 calendar days in advance.

The enforcement agency is the Michigan Public Service Commission, an agency within the Department of Licensing and Regulatory Affairs which is similar to Ontario's Ministry of Government and Consumer Services.

Excavators are not the sole focus of all incident investigations, however persons causing damages to facilities are subject to fines of not more than US\$5,000, imprisonment of up to one year or both, whereas other violators are only subject to a fine of not more than US\$5,000. Unlike several other U.S. states such as Arizona and Louisiana, the Michigan law does not establish any civil remedies or immunities.

3.9 State of New Jersey

In the State of New Jersey, one call systems are governed by the *Underground Facility Protection Act*, P.L. 1994, c.118. The One Call system for the state is New Jersey One Call.

The deadline for all utilities to respond to locate requests is three business days provided that the request was received during regular business hours but notice cannot be given more than 10 business days in advance.

The enforcement agency is the New Jersey Board of Public Utilities which is similar to Ontario's Ontario Energy Board, TSSA and ESA in one regulatory agency.

Excavators are not the sole focus of all incident investigations. However, persons causing damages to facilities are subject to fines of not more than US\$100,000 per day and cannot exceed US\$1 million for any related series of violations. Other penalties are limited to a maximum fine of US\$25,000. Prosecutions are published on government websites and typically range from a minimum of US\$1,000 to US\$3,000 per charge and there appears to be between 100 and 200 one call related convictions per year. Unlike several other U.S. states such as Arizona and Louisiana, the New Jersey law does not establish any civil remedies or immunities.

Each of the 50 states in the U.S. has a mandatory One Call system. Processes in the U.S. which have evolved over a longer period of time could hold key elements that could improve locate responses in Ontario.

3.10 State of Oklahoma

In the State of Oklahoma, one call system rules are established by the *Oklahoma Underground Facilities Damage Prevention Act*, Laws 1981, c.94. The state wide one-call system is known as Call Okie.

The deadline for all utilities to respond to locate requests is two business days provided that the request was received during regular business hours but notice cannot be given more than 10 business days in advance.

The State of Oklahoma is among the minority of U.S. states with no enforcement authority to punish excavators who accidentally damage pipelines or utilities who fail to provide timely locates. A state-wide task force has recommended that the Corporation Commission, the principal public utility regulatory body in the State of Oklahoma, be given that authority since it already has a pipeline safety division and administrative law system to handle complaints, enforcement and penalties.

The State of Oklahoma also provides a large number of exemptions from its one call laws for public agencies engage in routine maintenance work. Municipalities are also able to opt out of the One Call system.

Any excavator who damages or cuts an underground facility, as a result of negligently failing to comply with the provisions of the *Oklahoma Underground Facilities Damage Prevention Act* shall be liable to the operator of the underground facility for the repair of the damaged underground facility and may enforce that remedy through a civil court action. There does not appear to be any comparable rights for excavators if the utility fails to provide reliable accurate information within the required time frames.

3.11 State of Pennsylvania

In the State of Pennsylvania, one call systems are governed by the *Underground Utility Protection Act, Act 287*. The One Call system for the state is Pennsylvania One Call System, Inc.

The deadline for all utilities to respond to locate requests is three business days provided that the request was received during regular business hours but notice cannot be given more than 10 business days in advance.

The enforcement agency is currently the Department of Labour and Industry however a legislative bill HB 1607 proposes to transfer that enforcement authority to the Pennsylvania Public Utility Commission. The proposed bill would also establish a funding mechanism to pay for enforcement of the *Underground Utility Protection Act*.

Enforcement of the legislation is currently seen by several key stakeholders as limited and inconsistent.

Any violation of the Act results in a fine of not less than US\$2,500 or more than US\$50,000. The maximum fine is adjusted if the utility damage falls below certain value thresholds; e.g. if the damage caused is less than US\$3,000 then the maximum fine is US\$5,000.

If a utility is not a member of Pennsylvania One Call, they have no civil rights to recover damages in the event of a utility hit.

3.12 Enforcement and Penalties of U.S. One Call Laws

Table 2 is a summary of penalties and other enforcement matters for violations of the respective utility locate laws in each of the relevant U.S. states. Note that the maximum penalty for an individual or corporation from the jurisdictions studied is US\$100,000 per day in New Jersey.

Table 2: Summary of Penalties and Enforcement

U.S. State	Penalties, Individuals	Penalties, Corporations	Other Enforcement Matters
ARIZONA	No minimum US\$100,000 maximum	US\$100 minimum US\$100,000 maximum	<ul style="list-style-type: none"> • First-time offenders may be given a warning letter if they attend training course • Increased penalties if damage related to natural gas or other hazardous materials • Additional rights to recover damages for repairs, product and pure economic loss
CALIFORNIA	No minimum US\$50,000 maximum	No minimum US\$50,000 maximum	<ul style="list-style-type: none"> • Enforcement constrained by need to work through Attorney General or District Attorneys • A legislative proposal has been tabled to allow California Public Utilities Commission to investigate and prosecute offenders
ILLINOIS	No minimum US\$5,000 maximum	No minimum US\$5,000 maximum	<ul style="list-style-type: none"> • Maximum penalties are either \$1,000, \$2,500 or \$5,000 depending on the specific utility and excavator • Illinois Commerce Commission prosecutes more than 400 cases yearly
INDIANA	No minimum US\$25,000 per day per offence maximum	No minimum US\$25,000 per day per offence maximum	<ul style="list-style-type: none"> • Cumulative maximum limit of US\$1 million for related series of violations
LOUISIANA	First fine minimum of US\$2,000 for certain violations; maximum is US\$25,000	First fine minimum of US\$2,000 Maximum is US\$25,000	<ul style="list-style-type: none"> • Enforcement can be through Dept of Public Safety or any local law enforcement agency

Table 2: Summary of Penalties and Enforcement (continued)

U.S. State	Penalties, Individuals	Penalties, Corporations	Other Enforcement Matters
MASSACHUSETTS	Minimum of US\$1,000 Maximum of US\$10,000	Minimum of US\$1,000 Maximum of US\$10,000	<ul style="list-style-type: none"> • First offence minimum US\$1,000 and maximum US\$5,000 • Second offence US\$5,000 minimum and US\$10,000 maximum
MICHIGAN	No minimum US\$5,000 and/or 1 year imprisonment maximum	No minimum US\$5,000 maximum	<ul style="list-style-type: none"> • Excavators not liable for any damages if facilities improperly marked
NEW JERSEY	No minimum US\$100,000 per day maximum	No minimum US\$100,000 per day maximum	<ul style="list-style-type: none"> • About 200 convictions per year, publicly posted and typical fines range from US\$1,000 to US\$3,000
OKLAHOMA	No set minimum or maximum fines	No set minimum or maximum fines	<ul style="list-style-type: none"> • One of very few U.S. states with no primary enforcement agency • Reckless excavators can be subject to restraining order
PENNSYLVANIA	Minimum of US\$2,500; maximum of US\$50,000 and/or imprisonment for 90 days	Minimum of US\$2,500 Maximum of US\$50,000	<ul style="list-style-type: none"> • Minimum fines can vary based on the quantum of damages caused by the violation

4.0 ELEMENTS THAT WOULD IMPROVE ONTARIO'S ONE CALL SYSTEM



4.1 Memorandum of Understanding among All Ontario Enforcement Agencies

Most of the U.S. states reviewed in this report have a single enforcement authority for all utility locate laws. Given the diversity of laws and agencies in Ontario, it is unlikely that the legislature would be able to consolidate all of the locate laws into a single statute.

If the separate provincial laws remain, there is no clear understanding of which agencies will take the lead for specific violations. One of the most significant cases in Ontario's recent past related to the charges by various government agencies against Enbridge Gas and Warren Excavating in relation to the Bloor/Kipling gas explosion of 2003. In the court proceedings related to that event, both the TSSA and the Ontario Ministry of Labour expended significant resources into investigation and prosecution of the various defendants. Since 2003, the ESA and Ontario One Call each have

new laws to enforce, potentially creating even more confusion as to which agency would take the lead in investigations and enforcement.

It is strongly recommended that the respective Ministries and enforcement agencies negotiate and execute a memorandum of understanding that would not only identify which agency would take the lead, but would also expressly facilitate the sharing of information and other resources among the respective enforcement agencies.

There are a number of U.S. states that authorize more than one law enforcement agency to investigate and prosecute offences under their one call laws. Measures should also be taken in Ontario, either by regulation or a memorandum of understanding, to facilitate the delegation of authority so that where one agency, e.g. the TSSA or the Ministry of Labour, takes the lead in investigation and prosecutions, that agency can enforce and prosecute all of Ontario's locate-related laws.

4.2 Adequate Enforcement Resources for the *One Call Act*

While the Ontario Ministry of Labour and the Electrical Safety Authority each appear to have significant investigation and enforcement resources, the same cannot be said for Ontario One Call, which is the only agency authorized to enforce the *One Call Act*. This is a problem also faced by a number of U.S. states. In the U.S., the federal PHMSA has set certain enforcement guidelines for state agencies and states that meet those criteria are eligible for certain federal grants.

Given that data from the ORCGA and Ontario One Call indicate that there are up to 5,000 damages to buried infrastructure per year related to the failure of excavators to request or the failure of utilities to provide utility locates, Ontario One Call and the Minister of Government and Consumer Services should take such measures as are needed to ensure that Ontario's *One Call Act* is enforced. Without some active enforcement, stakeholders, particularly operators of underground infrastructure, will have little incentive to provide timely and reliable locates.

4.3 Bias and Conflict of Interest

In other enforcement agencies such as the Ministry of Labour, the TSSA and the ESA, the investigators and enforcement personnel are totally independent of their respective regulated communities.

With respect to enforcement of the *One Call Act*, any specific investigation or enforcement action must be approved by a specific compliance committee in which a very large majority of votes of that compliance committee are held by member utilities.

It is common practice for enforcement agencies such as police forces, to be subject to administrative oversight by an independent body as it is recognized that police departments are perceived as biased if there is an allegation that an officer violated any applicable codes, acts or regulations. Police agencies across Ontario and Canada have recognized the inherent potential for conflict of interest and have put systems and independent agencies in place to provide oversight and to address potential conflicts of interest if an officer is investigated or charged.²⁹

For that reason, all investigation and enforcement of the *One Call Act* should be delegated to an independent and unbiased agency or the compliance committee should be replaced with an independent body.

4.4 Consistent Penalties Among All Laws Governing Locates

There is some discrepancy among the four principal Ontario laws related to utility locates with penalties for violating Ontario's *One Call Act* being significantly lower than the other three. While many excavators are individuals, most if not all underground infrastructure owners are corporations or government agencies who are less likely to amend their behaviour if the maximum fine is only \$10,000.

This is not an issue in most U.S. states as there is ordinarily only one statute that governs the need to request and deliver utility locates.

Similar wrongs should result in similar consequences and the four Ontario laws should be harmonized, particularly Ontario's *One Call Act*, so that the failure of an excavator to request a locate or the failure of a utility to respond with a timely and reliable locate has similar consequences regardless of whether the utility is natural gas, electrical energy or water-related.

4.5 Escalated Sanctions for Repeat Violators

A number of U.S. states set increasing minimum fines for second and subsequent offences. This sentencing practice is also used in several Ontario statutes such as the *Environmental Protection Act*.³⁰

It is recommended that Ontario's *One Call Act* be amended to impose significantly higher fines for repeat offenders.

4.6 Establish Adequate Staffing and Other Resources to Respond to Locate Requests

A number of municipalities were ill prepared for a significant increase in the number of utility locate requests, in some extreme cases more than double the pre-2012 call volume. This increase in call volumes has not always been matched with an appropriate increase in resources.³¹

Responding to locate requests is a safety issue and the *One Call Act* mandates a response within five business days. While most stakeholders expect that there will be peak demand times for locates which might require a slight delay,

Slower the Second Time Around

A contractor working in the roadway of a major intersection in the Greater Toronto Area required a refresh of locates for traffic signals and other wiring from the local municipality. The municipality's locating company refreshed the marks 24 days later, far longer than the mandated five business days. Adding to the frustration, the workcrews were already at the site but could not do any further excavating.

response times of more than 15 business days on a routine basis is not a common occurrence in any of the U.S. states and should not be acceptable in Ontario.

4.7 Civil Consequences from Violation of the *One Call Act*

Civil consequences are distinct from any fines or imprisonment for violating the *One Call Act* or any other One Call laws. Civil consequences are the rights and liabilities of participants to seek compensation through a claim under the *Courts of Justice Act* and the Rules of Civil Procedure.

The one call laws in a number of U.S. states authorize an excavator to proceed with excavation if the utility has not responded within the legislated time frame, and that if such excavation results in damage to underground infrastructure, the excavator is legally immune from any damage claims. While such an arrangement might encourage dangerous activities on the part of the excavator and its crews if they were to excavate without knowing if they are likely to contact buried gas or electrical lines, there should be some clarification about civil consequences if an excavator or utility fails to comply with the *One Call Act*.

It is generally accepted law in Ontario that if an excavator negligently or willfully damages buried infrastructure by not requesting a utility locate, that such excavator is liable for the repair costs to such utility, and if such damage results in the loss of product such as natural gas fuel or drinking water, that the excavator would also be liable for the value of such lost commodity. At the opposite end, there is at least one Ontario Superior Court of Justice decision³² that holds a natural gas distributor liable for down time of construction crews and equipment where the utility failed to provide reliably accurate locates. That court case might not apply in the case of other utilities such as telecoms and municipal water authorities.

Consideration should be given to confirming that where a utility provides an inaccurate and misleading locate that leads to construction contractor losses, that such losses are recoverable through civil action.

4.8 Higher Fines for Corporations

Several Ontario statutes including the *Environmental Protection Act*, the *Occupational Health and Safety Act* and the *Technical Standards and Safety Act, 2000* have significantly higher maximum fines for corporations as compared to individuals in the event of violation of the respective statutes.

Given the likelihood that utilities and other operators of buried infrastructure will be corporations with significant assets and less likely to be concerned about smaller fines, the maximum penalties for corporations should be significantly higher than the maximum fines for individuals under Ontario's *One Call Act*.

4.9 Publication of Convictions

The Ontario Ministry of Labour, the Ministry of the Environment and Climate Change and the TSSA each issue press releases or other information regarding fines and penalties for recent convictions. Several U.S. states also follow this practice with respect to their one call laws as a reminder that not only are the laws being enforced, but that future potential offenders could face similar consequences.

Canadian jurists are familiar with the phrase that “not only must justice be done, it must be seen to be done.” The stigma of having a corporate name on a published list of convictions may influence purchasers, shareholders and other stakeholders to put added pressure on the violator to ensure future compliance.

It is recommended that as a means of reminding potential offenders of the importance of compliance, that any convictions under the *One Call Act* or any of the other Ontario statutes or regulations related to utility locates be published on the Internet.

It is commendable that Ontario has passed the One Call Act, but a number of improvements to the current investigation and enforcement elements will result in greater safety outcomes.

5.0 CONCLUSIONS

As a result of Ontario's unique history in relation to construction safety issues, there are four separate laws that require excavators to request locates and for specific utilities to respond with reliable information.

The existence of four separate laws instead of one is inefficient and can lead to inconsistent or conflicting results depending on which agency is enforcing a particular statute.

The most recent and primary utility locate response law is the *One Call Act*. However, enforcement of that statute is problematic in terms of:

- a) the resources available to investigate and enforce violations by both utilities and excavators;
- b) the low level of fines and penalties as compared to other statutes regulating locates for natural gas lines and buried electrical lines; and
- c) inherent bias and conflict of interest in an organization that is expected to investigate and prosecute its own members.

It is commendable that Ontario has passed the *One Call Act*, but a number of improvements to the current investigation and enforcement elements will result in greater safety outcomes.

APPENDIX 1: ACRONYMS AND DEFINITIONS

811 – the three-digit number authorized by the U.S. Federal Communications Commission for exclusive use of locate request; in some U.S. states, the actual one call centres might use those digits as part of its name; e.g. Indiana 811.

All Clear – a response to a locate request by an operator of buried infrastructure that there is no buried infrastructure known to that subsurface buried infrastructure operator within the locate requester's proposed area of excavation or ground disturbance.

CGA – Common Ground Alliance, a U.S. national not-for-profit industry association advocating for damage prevention of buried infrastructure.

DIRT – Damage Information Reporting Tool: a reporting system owned and administered by the CGA for collecting data on subsurface infrastructure damage prevention.

ESA – Electrical Safety Authority, a quasi-governmental agency established and authorized by the *Electricity Act, 1998* to regulate safety standards for electrical appliances, electrical wiring systems and electrical energy distribution systems.

Locate – a response to a locate request by an operator of buried infrastructure that consists of both surface markings such as paint marks or flags and a drawing showing the location of specific buried infrastructure such as natural gas distribution pipes, buried fibre-optic cables or sanitary sewers.

One Call Act – as used in this report, this refers to the *Ontario Underground Infrastructure Notification System Act, 2012*.

‘On1Call’ or ‘Ontario One Call’ – the not-for-profit corporation authorized by the *One Call Act* to administer and operate the requests for and responses to utility locates.

Ontario Regulation 213/91 – the Construction Projects Regulation is a regulation under the *Occupational Health and Safety Act*.

Ontario Regulation 210/01 – the Oil and Gas Pipeline Systems Regulation is a regulation under the *Technical Standards and Safety Act, 2000*.

Ontario Regulation 22/04 – the Electrical Distribution Safety Regulation is a regulation under the *Electricity Act, 1998*.

ORCGA – Ontario Regional Common Ground Alliance, an Ontario national not-for-profit industry association advocating for damage prevention of buried infrastructure.

PHMSA – the Pipeline and Hazardous Materials Safety Administration is a division of the U.S. Department of Transport that regulates interstate pipelines and movements of hazardous materials.

TSSA – Technical Standards and Safety Authority, a quasi-governmental agency established and authorized by the *Technical Standards and Safety Act, 2000* to regulate safety standards in the natural gas distribution and other industries.

U.S. DOT – The federal Department of Transport for the United States.

APPENDIX 2: BIRNAM V UNION GAS

APPENDIX 3: ROGERS COMMUNICATION

PARTNERSHIP INC. V. NETWORK SITE SERVICES LTD.

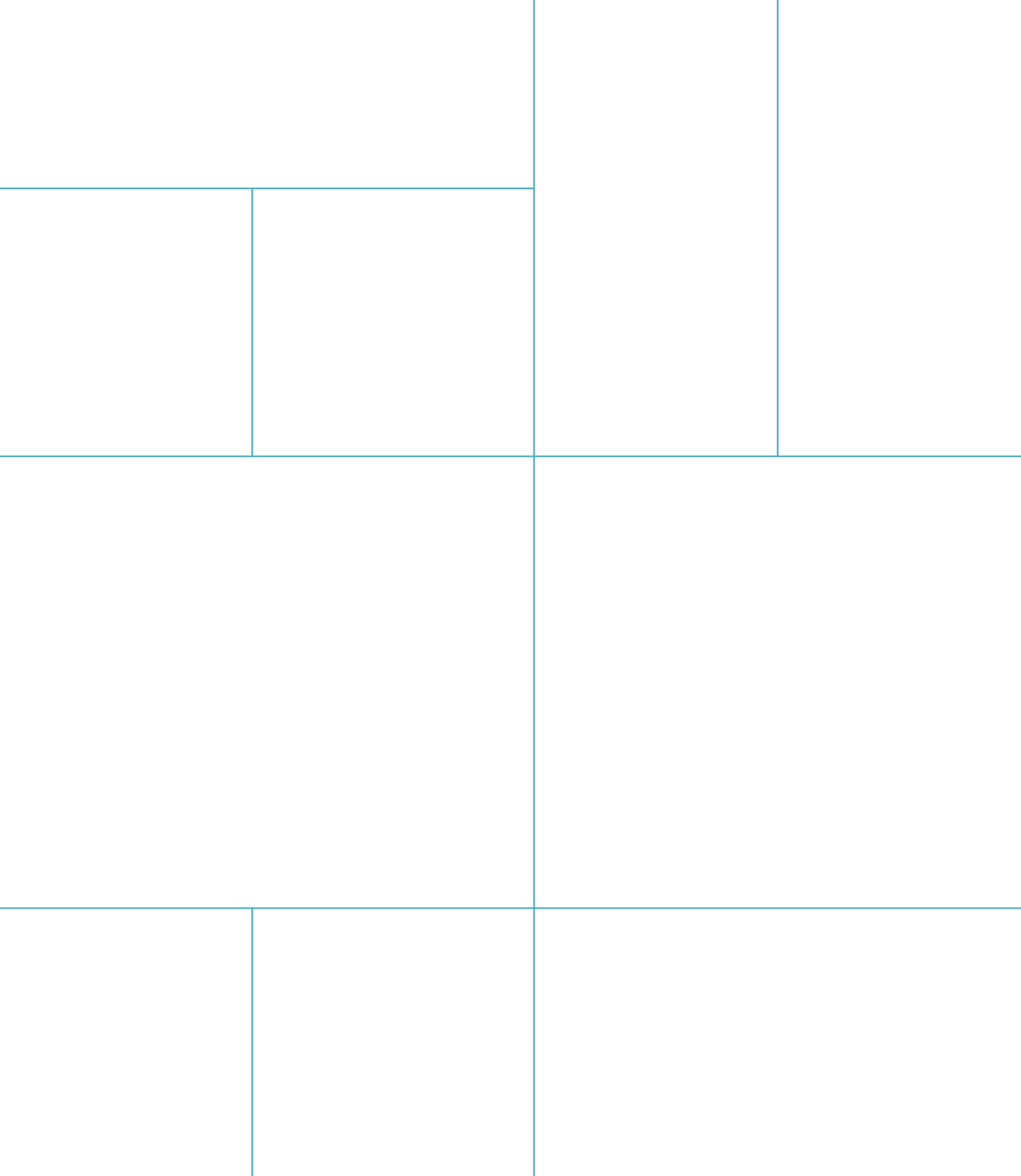
Go to rcao.com and click on Research & Reports (under Ontario One Call) to view these two legal files.

ENDNOTES

- 1 A copy of the One Call Act is accessible via the Internet at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_12o04_e.htm
- 2 Section 8 of the Act establishes liability for non-compliance with the Act. Section 3 of Ontario Regulation 92/14 fixes the maximum fine as \$10,000.
- 3 See Damage Information Report Tool report published by the ORCGA at <http://www.orcga.com/Portals/0/Publications%20and%20Resources/Documents/2013%20Dirt%20Report%20for%20the%20Web%20-%20Rev.%20Sept.%202014.pdf>
- 4 See Ontario Regulation 92/14 at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_140092_e.htm
- 5 See the DIRT report at <http://www.orcga.com/Portals/0/Publications%20and%20Resources/Documents/2013%20Dirt%20Report%20for%20the%20Web%20-%20Rev.%20Sept.%202014.pdf>
- 6 Subsection 9(2) of the Oil and Gas Pipeline Systems Regulation, O.Reg 210/01 at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_010210_e.htm#BK8
- 7 Subsection 6(2) of the Ontario Underground Infrastructure Notification System Act, 2012
- 8 See http://www.esasafe.com/assets/files/esaeds/pdf/ALL/Guideline_for_Excavation_in_the_Vicinity_of_Utility_Lines.pdf
- 9 See <http://www.tssa.org/corplibrary/ArticleFile.asp?Instance=136&ID=0A65366927F111E1AFDF24947EB9258C&Admin=0&Notify=0>
- 10 See Ministry of Labour statistics at <http://www.labour.gov.on.ca/english/hs/pubs/enforcement/index.php>
- 11 See section 228 at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_910213_e.htm

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- 12 See court decision R. v. Enbridge Gas Distribution Inc. at <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2013/2010onsc2013.html>
 - 13 See court decision R. v. Enbridge Gas Distribution Inc. at <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2013/2010onsc2013.html>
 - 14 See Electrical Distribution Regulation O.Reg 22/04 at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_040022_e.htm
 - 15 See <http://www.esasafe.com/assets/files/esasafe/Newsroom/Richard%20Hazel%20-%20Jail%20Conviction%20100614%20-%20FINAL.pdf>
 - 16 See Damage Information Report Tool published by the Ontario Regional Common Ground Alliance at <http://www.orcga.com/Portals/0/Publications%20and%20Resources/Documents/2013%20Dirt%20Report%20for%20the%20Web%20-%20Rev.%20Sept.%202014.pdf>
 - 17 At <http://www.orcga.com/Portals/0/Publications%20and%20Resources/Documents/2013%20Dirt%20Report%20for%20the%20Web%20-%20Rev.%20Sept.%202014.pdf>
 - 18 See section 56 at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p52_e.htm
 - 19 See the National Energy Board Pipeline Crossing Regulations, Part II, SOR/88-529 at <http://www.canlii.org/en/ca/laws/regu/sor-88-529/latest/sor-88-529.html>
 - 20 See subsection 3.12 of the Canada Occupational Health and Safety Regulations, SOR/86-304 at <http://www.canlii.org/en/ca/laws/regu/sor-86-304/latest/sor-86-304.html>
 - 21 A copy of the reasons for decision in this case is available over the Internet at <http://www.canlii.org/en/on/onca/doc/1980/1980canlii1868/1980canlii1868.html?searchUrlHash=AAAAAQAiQmVsbCBDYW5hZGEgdi4gQ09QRSAoU2FybmlhKSBMdGQuIAAAAAAB&resultIndex=1>

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- 22 A copy of the reasons for decision in this case can be found at <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2013/2010onsc2013.html?searchUrlHash=AAAAAQAmb250YXJpbyBtaW5pc3RyeSBvZiBsYWJvdXIgdi4gZW5icmlkZ2UAAAAAAAAQ&resultIndex=3>
 - 23 Copies of the reasons for the Birnam and Rogers cases can be found at www.rccao.com.
 - 24 See primis.phmsa.dot.gov/edu/cgstudy.htm
 - 25 See primis.phmsa.dot.gov/comm/damagepreventiongrantstostates.htm
 - 26 See phmsa.dot.gov/pv_obj_cache/pv_obj_id_298206BE6E922A6EBD0461B0C934273775780500/filename/Excavation%20Damage%20Prevention%20NPRM%202012.pdf
 - 27 <http://primis.phmsa.dot.gov/comm/DamagePrevention.htm>
 - 28 <http://www.parl.gc.ca/Content/SEN/Committee/412/enev/rep/rep09dec14-e.pdf>
 - 29 For an example of a discussion of this issue see an RCMP Conflict of Interest Review at https://www1.toronto.ca/inquiry/inquiry_site/cd/gg/add_pdf/77/Conflict_of_Interest/Electronic_Documents/Cdn_Governments/Federal/RCMP_COI_Discussion_Paper.PDF
 - 30 See section 187 of the Act at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e19_e.htm#BK281
 - 31 See Rules of Civil Procedure (Ontario) at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm
 - 32 *Birnam v. Union Gas*, Ontario Superior Court of Justice, January 17, 2012





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