

Special Salt Shortage meeting
Tuesday, August 28, 2018
Home Suite the Hilton
10:00 a.m. to 12:30 p.m.

AGENDA:

- 1) Introduction
- 2) Purpose – Jamie
- 3) The Issue Explained – Mark
- 4) Operational Strategies – Gerald
- 5) Legal Issues – Josh
- 6) Risk Management Issues – Marsh
- 7) Communication Strategies – Tony
- 8) Salt Supplier Perspective – Pat
- 9) Symposium Update – Jamie

Background:

Landscape Ontario invited a number of key Contractors and Suppliers in the Snow and Ice Management Sector to a meeting in order to share information, ideas and strategies to collectively deal with a potential serious salt inventory shortage.

The reasons for this inventory shortage include:

- An Ice storm just before spring depleted inventory
- The Compass Minerals Mine experienced a strike in the summer. This affected the amount of salt available for shipping and stockpiling
- There is a reputed water leak in another major mine that has reduced supply
- Municipalities are ordering more salt due to liability issues. This effectively reduces more supply for private contractors
- Municipalities have been given priority because of contractual obligations

Many contractors and suppliers were notified that there would be little or no supply from traditional sources. As a result suppliers are sourcing salt from all over the world. However transportation costs are higher and logistics are complex. In addition the process is full of risk from a quality, financial and potential fraud perspective. It is also necessary to pay up front for salt coming from other parts of the world. This adds to the difficulty in obtaining sufficient supply.

Many contractors are being asked to pre-pay for salt. Some suppliers and contractors are securing supply by taking delivery during the summer

OPERATIONAL STRATEGIES

- Work with your suppliers to secure salt as soon as possible
- Educate your clients so that they understand the issue and the difficulty. They may support pre-paying for salt.
- Work with clients to reduce service areas. It may not be necessary to treat all areas equally
- Close off areas that do not need to be plowed
- Develop a menu of service levels. This could reduce salt use considerably.
- Train your operators so that they are aware of the salt shortage and can apply product more judiciously
- Use treated salt. Treated salt allows salt to be spread more efficiently reducing waste.
- Communicate with your clients so that they understand that supply will be scarce and prices will be higher. This is the new normal.
- Manage expectations. There is a general agreement that because of liability fears there is a great deal of over-use.
- Calibrate equipment so that it is more efficient
- Improve documentation
- Become Smart about Salt Accredited. The Smart about Salt represents leading practices aimed at reducing salt use while maintaining health and safety.
- Eliminate pre-salting
- Conserve as much as possible
- Consider mixing salt with other materials including sand. (It was widely agreed that mixing sand should be a last resort)
- Plough more
- Use brooms and blowers where possible
- Avoid chemical plowing. (The use of salt to melt snow when plowing should be used)
- Use “Live Edge” plows
- Integrate the use of liquids
- Pre-wet salt to improve efficiency and accuracy
- Use optimum equipment size for the job
- Improve and enhance application techniques
- Inspect the property with the client preferably during a rain event. This will identify problem areas that can be dealt with before winter
- Consider group purchasing. Creating a co-op to increase buying power will assist in finding supply.
- Re-consider ice patrols. This practice may lead to using excessive salt
- Locate snow piles so that they do not create problems with ice forming on melting run-off
- Train staff – professional operators will conserve salt

LEGAL STRATEGIES

Josh Winter from Kennaley Construction Law was on hand to answer legal questions. He distributed the following article designed to protect members from legal issues arising from existing and new contracts.

“The Obligation to Supply Salt Under a Winter Maintenance Contract in the Event of a Salt Shortage
Rob Kennaley and Josh Winter, Kennaley Construction Law

Recent indicators are that Canadian winter maintenance contractors may face a substantial shortage of salt supplies

for the upcoming winter maintenance season. We understand that a strike at one of North-America's largest salt mines, coupled with flooding at another, has resulted in those primary suppliers advising that their supply will for the most part be limited to their largest institutional clients. This has the potential to impose significant impacts on owners, contractors and the public at large.

For winter maintenance contractors, the first thing to remember in assessing the risk of a salt shortage is that the contractor is not the owner or occupier of the premises at first instance. It is the contractor's client who has the responsibility to manage the risks associated with snow and ice on the premises. While the client can reasonably assign some or all of those obligations to a contractor under a contract for winter maintenance services, the impact of such a shortage is at first instance, and primarily, a risk to the clients.

The starting point is, accordingly, what the contractor has agreed to do under its contract. If the contractor has not agreed, expressly or by implication, to apply salt under the contract, it will not be impacted by a salt shortage. At the other end of the spectrum, however, if the contractor has assumed the obligation to supply salt (and unless the contract documents expressly or by implication provides otherwise) it will generally have assumed the risk of a salt shortage.

A contractor who cannot meet its obligation to supply salt under a contract should first have reference to the contract itself, to see what, if any, relief might be available. The Landscape Ontario standard form winter maintenance contract, for example, provides that "the Contractor will not be responsible to apply the Ice Melting Products if they are not commercially and reasonably available to the Contractor, at commercially reasonable rates". Other contracts may have similar clauses. Many might take the form of a 'force majeure' clause, which generally relieves a party from obligations which cannot be met due to acts of god and any other extraordinary events beyond its control, such as hurricanes and tornadoes, as well as civil insurrection or revolution.

Whether or not a clause will relieve the contractor from the obligation to supply salt, or from the risk of a salt shortage, will depend on the circumstances and the wording of the particular clause. Care should be taken to review and interpret these, if they are to be relied on.

If you are in the process of negotiating a new contract, or contract term, you should of course make it clear that salt will most likely not be available and that, accordingly, other suitable alternative products will have to be used. If suitable alternatives are not available, your best advice may be to decline any responsibility to apply ice-melting products except as directed by the client, with the client assuming all liability, which might arise from the failure to apply ice-melting products in any particular circumstance.

If an existing contract is silent on the issue of salt availability or force majeure, whether or not the contractor will be relieved of the obligation to provide salt will depend on an assessment of the individual circumstances. Contractors may, for example, be able to rely on the legal concept of 'frustration' to avoid contractual liability. In the end, however, this determination cannot be made in advance of the actual shortage or by way of general application. The contractor's obligations will depend on an assessment of who assumed the risk that salt might not be available in the context of whether or not the supply was truly unavailable, whether or not the lack of supply was foreseeable and what alternatives were available under the contract.

Regardless, and without question, if you believe you will not be in a position to provide salt under a contract for the coming season, you should advise your client(s) of this as soon as is reasonably practical, in writing. You should follow any notice procedures under your contract in that regard, to ensure that the proper individual(s) get notice of the issue. Given the associated safety concerns, you should follow up until the issue is addressed again, in writing.

Your clients should be informed that your ability to help them meet their obligations to manage the risks of ice in the coming season has been severely impacted by circumstances beyond your control. You should elaborate on the reasons why and confirm (if possible) that the contract will have to be changed to allow for alternative products to be supplied. The price of the alternative products should then be negotiated. You should be careful not to approve an alternative to salt, which will not perform as well as salt, unless the client assumes full responsibility for the risks associated with such a change. Optimally, the client should be encouraged to consider the use of non-chloride options that will perform as well as, or better, than salt.

If non-chloride alternatives are not available, you may need to consider advising the client that your ability to perform the contract is frustrated and/or that you are entitled to rely on a contractual clause in order to be relieved of the obligation to provide salt. It may also be necessary to help the client develop strategies to close off areas to traffic and to post signs about the shortage as a means of managing the issue. It should be clear, to the extent possible, that

these steps are taken to assist the client to meet the client's obligation and without any representation or warranty that they will necessarily be successful in managing the risk of a slip and fall.

Finally, if an appropriate change to the contract cannot be negotiated so as to manage the risk of ice responsibly without the use of salt, experienced counsel should be consulted. This is because every contract and circumstance will be different and, as the risks of a slip and fall in the circumstances can be significant.

This material is for information purposes and is not intended to provide legal advice in relation to any fact situation. Readers with concerns about particular circumstances are encouraged to seek independent legal advice in that regard."

Josh reiterated the following points:

- Do not allow clients to shift responsibility to the contractor. Avoid unreasonable "Hold Harmless" clauses
- It is essential to inform clients as soon as possible. This communication needs to be repeated until a response is received
- Check your contracts to ensure that you are protected from price increases and inability to source salt
- Use the Landscape Ontario Standard form contract where possible
- Do not sign unreasonable contracts
- Shift responsibility back to the client
- The concept of a "Frustrated Contract" offers the best protection
- Modify the contract to specifically refer to "bulk salt". This will prevent confusion because in some cases bagged salt may be available even when bulk salt may not be
- Ensure that contracts have an exit clause
- Work with your lawyer to develop clauses that protect against substantial price increases

INSURANCE STRATEGIES:

Representatives from Marsh and AIG were present to offer suggestions on how to mitigate risk.

- It is important to document all procedures. Most claims are settled at the "discovery phase". The discovery phase is influenced by the quality of documentation.
- Risk is based on the concept of reasonableness. "What would a reasonable contractor do?"
- It is important to inform your clients about the situation
- It is also important for information to go to the general public.
- Condo's and apartments need much more attention. They attract the most claims
- Ask the property manager to post signs (slippery areas)
- Notify clients about your processes and priorities

EDUCATION AND COMMUNICATION STRATEGIES

- It is important to research the salt shortage issue in detail. Accurate and credible information must be distributed to four target audiences
 1. The Snow and Ice Management Industry
 2. Clients and associations representing clients (BOMA. AICMA etc)
 3. General Public
 4. Government

Each audience requires specific and targeted messages

1. The Snow and Ice Management Industry

Messages:

- Salt shortage awareness
- Conservation techniques- discourage excessive use
- Operational techniques and practices
- Educate client
- Legal and Insurance strategies
- Negotiate contracts

Action

- Landscape Ontario has already started the communication process in the e-news, social media, magazines, meetings and symposium.
- We will continue to inform and educate the members about the seriousness of the issue.
- Articles will be written from many different perspectives using information and direction gleaned from this meeting

2. Clients and associations representing clients (BOMA, ACMO etc.)

Messages:

- Credible and accurate information about salt shortages
- Work with contractors to develop leading practices
- Importance of Smart about Salt Accreditation
- Legal and Risk Management Strategies
- Define the “new normal”

Action:

- LO will inform property managers and owners about the issue utilizing BOMA, ACMO and Property Management Magazines
- A sample letter will be provided to members so that they can inform their clients about the situation

3. The General Public

Messages:

- Accurate information about the issue (demand and supply)
- Importance of proper footwear

Action:

- LO will develop a press release about the situation and send to leading media

4. Government

Messages:

- Seriousness of the issue from a health and safety perspective
- Importance of reducing excessive use of salt by municipalities and road authorities
- Importance of helping snow operators obtain sufficient supply of salt
- Encouraging Ontario mined salt to be supplied to Ontario companies first before exporting to the US
- Removal of Hold Harmless Clauses

- Mandatory Smart about Salt Accreditation as long as accredited contractors are protected from liability

Action

- A government relations strategies will be developed and executed by the Snow Sector Group in partnership with the Government Relations Committee
- Prioritize advocacy activity because timing is right because of the salt inventory shortage

SUPPLIER PERSPECTIVE:

Pat Lamanna from G &L Group/Draylam presented the following perspective

- It is important to inform clients (industry and property managers) as soon as possible
- The issue emerged as early as March 2017.
- Inventory shortages will continue for the next few years until supply can be replenished. Situation will not change in the near future.
- Labour Issues at Sifto and mining issues in another mine caused the inventory shortage. After a labour dispute that lasted 3 months it is impossible to ramp up necessary supply before winter.
- Supply is coming from overseas but logistics are much more complex and risky. There may be quality issues. Potential fraud is also a problem
- Large vessels have difficulty navigating the St. Lawrence
- Weather events in the last few years has necessitated increased salt application
- Mines prefer to service public accounts. The private contractors are not a priority
- Important to pre-buy and store salt. Supply will be going to those who are able to pre-buy
- Expect substantial price increases. (Double in some cases)
- Estimates that only 1/3 of the supply required will be available this year