
Workplace Health and Safety Update

The webinar will begin at 9:00am EST – March 6, 2024

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Agenda

■ **Workplace Safety and Insurance (Ontario) Update**

- ❑ Recent changes to rates and benefits
- ❑ Amendments to the WSIB accident reporting process
- ❑ New WSIB policy on communicable illness
- ❑ Update on chronic mental stress claims
- ❑ Practical tips to manage claims and reduce liability

Agenda

■ **Health and Safety (Ontario) Update**

□ Recent trends in charges and fines

- Critical Injury Trends
- Ministry of Labour Blitzes
- Enforcement Trends

□ *Inspection vs. Investigation*

□ Impact of *R. v. Sudbury* on construction site owners

□ Due diligence – practical tips to minimize risk

Workplace Safety and Insurance (Ontario) Update



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Workplace Health and Safety Update - Current as of March 6, 2024

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Workplace Safety and Insurance Update

Recent changes to rates and benefits

- WSIB benefit rates have increased significantly over the past two years in light of inflation
 - **January 1, 2023** - 6.5% cost of living increase
 - **January 1, 2024** – 4.4% cost of living increase
- Some concern in employer community that increases will impact employer premium rates

Workplace Safety and Insurance Update

Recent changes to rates and benefits

- On **October 31, 2023**, WSIB confirmed average premium rate for employers will remain unchanged going into 2024
 - \$1.30 per \$100 of insurable payroll
- Since 2018, have seen an overall reduction in employer premiums of \$8.5 billion

Workplace Safety and Insurance Update

Recent changes to rates and benefits

- *Working for Workers Four Act, 2023 (Bill 149)*
 - If passed, will amend *Workplace Safety and Insurance Act* (“WSIA”) to allow the Province to prescribe an additional indexing factor above annual cost of living adjustment
 - This will allow for a “super index” increase above the annual rate of inflation

Workplace Safety and Insurance Update

Recent changes to rates and benefits

- Effective **December 13, 2023**, three additional occupational diseases recognized as eligible for benefits
 - Poisoning due to work-related exposure to ammonia, chlorine, or hydrogen sulfide
 - Categorized on Schedule 3, meaning employer can rebut assumption the disease is work-related

Workplace Safety and Insurance Update

Amendments to WSIB accident reporting process

- Effective **September 29, 2023**, an employer must file an employer's accident report (Form 7) within **three (3) business days** after it learns of its reporting obligation
- Earlier policy had required Form 7 to be filed within **seven (7) business days**

Workplace Safety and Insurance Update

Amendments to WSIB accident reporting process

- Section 21(1) of WSIA requires report within three (3) days
 - However, WSIB policy provided a seven (7) day window to account for possible mail-related delays
 - Change in policy aligns with WSIA and reflects current reality that most employers now file electronically

Workplace Safety and Insurance Update

Amendments to WSIB accident reporting process

- Failure to file timely Form 7 can result in late-reporting fine of \$250 or \$1,000 if filed more than 30 calendar days after obligation to report
- In extreme cases, may also result in prosecution as an offence under the WSIA

Workplace Safety and Insurance Update

Communicable Illness Policy

- WSIB's new Communicable Illness Policy took effect **December 1, 2023**
- Entitlement guidelines for a communicable illness claim arising out of or in the course of employment

Workplace Safety and Insurance Update

Communicable Illness Policy

- **“Communicable illness”** means “an illness resulting from infectious agents such as viruses, bacteria and fungi” (*e.g.*, influenza, norovirus, COVID-19)

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Communicable Illness Policy

- To establish entitlement, WSIB will determine if:
 - ❑ worker contracted a communicable illness, and
 - ❑ worker's communicable illness arose out of and in the course of employment (*i.e.*, did employment significantly contribute to contracting the communicable illness?)

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Communicable Illness Policy

- To establish that worker contracted a communicable illness, WSIB will generally require:
 - ❑ positive result from laboratory or diagnostic test, and/or
 - ❑ diagnosis by a treating health professional qualified to provide such diagnosis based on a clinical assessment of the worker during the period of illness

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Communicable Illness Policy

- To establish illness arose out of or in the course of employment, WSIB will generally require:
 - ❑ established work-related source, and/or
 - ❑ increased risk due to employment

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Communicable Illness Policy

- Increased risk factors:
 - rate of illness higher in employment setting than in general population
 - employment activities create opportunity for exposure or transmission that exceeds opportunities in typical daily activities
 - activities require contact with animals that carry illness

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Communicable Illness Policy

- activities require handling or contact with material susceptible to fungal contamination
- activities require worker to have contact with infectious substances, or contaminated objects or surfaces
- worker staying in employer-provided accommodation with one or more person(s) known to have, or suspected of having, illness

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Communicable Illness Policy

- Relevant factors when evaluating work-relatedness include:
 - potential exposure outside of employment
 - mode of transmission
 - duration, frequency and intensity of potential exposure
 - workplace control measures
 - compatibility with incubation period

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Communicable Illness Policy

- When claim for communicable illness is allowed, worker may be entitled to benefits for period of communicability, even if worker is asymptomatic, if communicability prevents ability to return to work
- If worker is required to self-isolate or sent home because of exposure **but** does not have symptoms or positive test/diagnosis, **not** entitled to benefits

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Communicable Illness Policy

- Benefits will *not* be denied solely because the worker is not immunized against the communicable illness when there is a claim for benefits

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Chronic Mental Stress

- Worker may be entitled to benefits for **chronic mental stress** if:
 - ❑ worker has appropriately diagnosed mental stress injury
 - ❑ a substantial work-related stressor is the predominant cause of injury
 - ❑ injury arose out of and in the course of employment

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Chronic Mental Stress

- Commonly related to workplace harassment or jobs with a high level of routine stress
- Worker not entitled to benefits for stress caused by decision or action of employer related to employment (*e.g.*, discipline, termination, change to work, *etc.*)

Workplace Safety and Insurance Update

Chronic Mental Stress

- To date, vast majority of chronic mental stress claims have been denied (90% vs. 25% for all other claims)
- 2021 Ontario Divisional Court decision confirmed that ability to claim for chronic mental stress at WSIB will not bar constructive dismissal claim based on same conduct (*e.g.*, workplace harassment)

Workplace Safety and Insurance Update

Chronic Mental Stress

- Recent decision of Workplace Safety and Insurance Appeals Tribunal (*WSIAT Decision #693/20*; see also *#693/20R*) held that WSIB's predominant cause test is too restrictive and WSIB should use less restrictive causation test for physical injury
- This area of the law is unsettled; further clarification is needed from WSIB and/or WSIAT

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Practical Tips

- Given potential that claims costs will increase due to super indexing, employers should more closely/proactively manage their WSIB claims. Consider:
 - prompt return of injured workers to work where suitable work exists
 - challenge initial entitlement if applicable
 - document and investigate harassment allegations

Workplace Safety and Insurance Update

Practical Tips

- Ensure all front line staff are aware of the change in timeline to file Form 7
- Review and improve internal policies to identify and take reasonable steps to address outbreaks of communicable illnesses
 - Sick leave policies, personal protective equipment, etc.

Health and Safety (Ontario) Update



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Health and Safety Update

Charges and Fines – Summary of Legislative Changes

- \$2,000,000* for corporation
- \$1,500,000* for director or officer
- \$500,000* for all other individuals
- 2-year limitation period
- Aggravating factors legislated on sentencing
- Note also separate liability for criminal charges¹

**Per offence plus additional mandatory victim fine surcharge*

Health and Safety Update

Charges and Fines

Date	Fine/Sentence	Description
June 2022	\$50,000 fine for constructor plus 25% VFS	A self-employed owner of a sub-contractor was fatally injured at the workplace when they fell approximately six meters to the bottom of an unguarded elevator shaft. The constructor failed to ensure that the opening to the elevator shaft was protected by a guardrail to prevent a worker from falling into the shaft. This is an offence under section 26.3(1) of Regulation 213/91 of the Occupational Health and Safety Act.
July 2022	\$125,000 fine for employer plus 25% VFS	During construction of high-rise residential towers, a worker was fatally injured when a thirteen-ton counterweight from an excavator fell on them. The employer failed to ensure the safety measures and procedures for removing a counterweight from an excavator, prescribed in section 93(3) of O. Reg. 213/91 were followed,
Aug 2022	\$200,000 fine for employer plus 25% VFS	A worker suffered a fatal injury while performing work in an underground electrical vault.

Health and Safety Update

Charges and Fines

Date	Fine/Sentence	Description
November 2022	\$55,000 fine for constructor and \$35,000 fine for employer Plus 25% VFS	A worker was struck by a reversing delivery truck while acting as a signaller on a construction project. The constructor failed to ensure that the project was planned and organized so that vehicles were not operated in reverse or were operated in reverse as little as possible, as required by the Regulation for Construction Projects. The employer failed to ensure that the signaller wore appropriate high-visibility clothing, as required by the Regulation for Construction Projects.
December 2022	\$150,000 fine for constructor \$200,000 fine for employer \$15,000 fine for supervisor \$15,000 fine for director Plus 25% VFS	Two workers were critically injured from a fall, caused by an elevator shaft platform collapse. The convicted parties failed to ensure that the measures and procedures required by Section 89(2) of Ontario Regulation 213/91 were carried out.
February 2023	\$100,000 fine for employer Plus 25% VFS	A worker was critically injured when a rope attached to a tensioner-puller machine pulling an aerial cable over the span of the bridge broke. The employer failed to ensure that measures and procedures prescribed by regulation were carried out at a worksite.

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Charges and Fines

Date	Fine/Sentence	Description
February 2023	\$110,000 fine for employer Plus 25% VFS	A worker was fatally injured during the installation of a roofing membrane. The worker, who was not wearing fall protection, fell 3.26 metres onto pavement. The employer failed to ensure that the measures and procedures prescribed by section 26.1(2) of Regulation 213/91 were carried out at a workplace, contrary to section 25(1)(c) of the Occupational Health and Safety Act.
February 2023	\$75,000 fine for employer for three offences (\$25,000 per count) Plus 25% VFS	A worker was seriously injured when they slipped on ice that had accumulated on an elevated platform and fell through a gap between the platform and a wall. The employer failed to ensure that the platform was free of ice and that equipment was used in accordance with the manufacturer's operating manual, as required by Ontario Regulation 213/91: Construction Projects.
February 2023	\$125,000 fine for employer plus 25% VFS	The employer failed to protect a worker from falling through a work surface opening by ensuring a protective cover was securely fastened and adequately identified.
February 2023	\$55,000 fine for employer Plus 25% VFS	A worker was injured by a steel truss that tipped over. The employer failed to ensure material or equipment at a project was stored and moved in a manner that did not endanger a worker.

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Critical Injury Trends

- Overall reduction in total injuries from 2022 to 2023*:

Reporting months	Fatalities	Critical Injuries	Total
Jan 1 to Dec 31, 2023	16	316	332
Jan 1 to Dec 31, 2022	18	375	393

*Data limited to construction settings

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Ministry of Labour, Immigration, Skills and Training Development (“MOL”) - Blitzes

■ Current and continuing:

□ Fall from heights (single family residential)

■ April 1, 2023 – March 31, 2024

□ Focus: education, outreach, and awareness

□ Struck-by equipment (construction setting)

■ April 1, 2023 – March 31, 2024

□ Focus: education, outreach, and awareness

Health and Safety Update

MOL Blitzes

- ❑ Materials Handling (industrial facilities)
 - April 1, 2023 – March 31, 2024
 - ❑ Focus: education, outreach, and awareness
- ❑ Asbestos in building structures
 - April 1, 2023 – May 31, 2024
- ❑ Prevention of musculoskeletal disorders (health care settings)
 - April 1, 2023 – March 31, 2024
 - ❑ Focus: education, outreach, awareness supported by Public Services

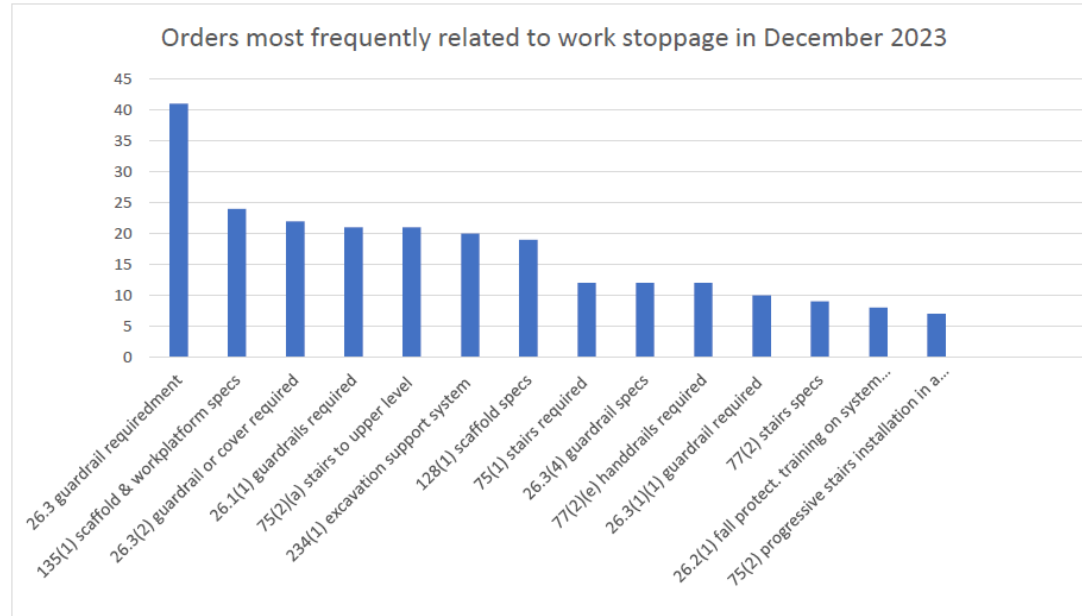
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Enforcement Trends

- MOL construction inspectors conducted 1,040 field visits in December 2023 (808 workplaces)
- Issued 212 stop work orders
 - 164 during proactive inspection
 - 48 during investigation arising from an event

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Enforcement Trends



*Events consist of complaints, work refusals, critical injury, fatality, an occurrence, or injury as prescribed

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Inspection vs. Investigation

- MOL inspector has authority to conduct an **inspection** and an **investigation** under OHSA
- Concepts differ in terms of employer rights and obligations; important to be aware of impact of each

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Inspection vs. Investigation

■ Inspection

- ❑ To determine compliance with OHSA
- ❑ Inspector has broad powers to compel witness interviews, collect documents, enter premises, *etc.*
- ❑ Failure to comply with inspector's order or request is itself a violation of OHSA

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Inspection vs. Investigation

■ Investigation

- Once an inspection becomes an investigation, a ‘defendant’s’ rights and obligations change
- Greater protections for individuals and corporations:
 - individual has a right not to participate if could incriminate themselves (*e.g.*, manager or supervisor)
 - corporation is protected against unreasonable search and seizure – warrant now required

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Inspection vs. Investigation

- Not always clear when inspection becomes investigation
 - When inspector has ‘reasonable grounds’ to lay a charge (even if a charge has not yet been laid)
- Inspector may not clearly advise that they have moved into an ‘investigation’

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Inspection vs. Investigation

- When there has been a workplace accident, and a risk of charges, it is critical to reach out to experienced OHS counsel *immediately* for assistance, including how and when to respond to the MOL
- Refer to SK's **12 Step Accident Checklist**
- *SK can assist!*

Health and Safety Update

R. v. Sudbury 2023 SCC 28

PART III

DUTIES OF EMPLOYERS AND OTHER PERSONS

<u>23.</u>	Duties of constructor
<u>24.</u>	Duties of licensees
<u>25.</u>	Duties of employers
<u>25.1</u>	Footwear
<u>25.2</u>	Naloxone kits
<u>26.</u>	Additional duties of employers
<u>27.</u>	Duties of supervisor
<u>28.</u>	Duties of workers
<u>29.</u>	Duties of owners
<u>29.1</u>	Duties of owners — washroom access
<u>30.</u>	Duty of project owners
<u>31.</u>	Duties of suppliers
<u>32.</u>	Duties of directors and officers of a corporation

Health and Safety Update

R. v. Sudbury 2023 SCC 28

■ Various roles and corresponding duties

- ❑ **“Employer”**: a person who employs one or more workers or contracts for the services of one or more workers ...²
- ❑ **“Constructor”**: means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer
- ❑ **“Owner”**: includes a trustee, ... tenant, lessee, or occupier of any lands or premises used or to be used as a workplace *Note: s 1(3)

Health and Safety Update

R. v. Sudbury 2023 SCC 28

■ What happened?

- ❑ City of Sudbury contracted with a constructor (Interpaving Ltd.) to repair a water main and repave streets
- ❑ Interpaving was the general contractor and provided its own employees to perform the work
- ❑ City employed two quality control inspectors to inspect the project

Health and Safety Update

R. v. Sudbury 2023 SCC 28

- ❑ During construction, an Interpaving employee tragically struck and killed a nearby pedestrian with a road grader
- ❑ MOL investigation concluded:
 - No fence to separate construction work from public; and
 - No traffic plan in place (no signaler).
- ❑ MOL charged Interpaving and City as “employers” under OHSA
- ❑ City also charged as a constructor

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R. v. Sudbury 2023 SCC 28

- ❑ City conceded it was an owner and sent its employees for quality control
- ❑ City disputed it was an employer
 - Not in control of how Interpaving workers performed work
- ❑ Trial judge agreed with City
 - City an owner but neither constructor nor employer; City lacked requisite control.

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R. v. Sudbury 2023 SCC 28

- ❑ Court of Appeal for Ontario overturned decision
 - City employed one or more workers at the project site (*i.e.*, quality control employees) and thus meets definition of “employer” under OHSA
 - Section 1(3) exemption does not preclude an owner from becoming an employer

Health and Safety Update

R. v. Sudbury 2023 SCC 28

- ❑ Supreme Court of Canada – 4:4 split decision – therefore **Court of Appeal decision stands**
 - **In favour** – City *is* employer of Interpaving employees
 - ❑ “Belt and braces” approach – *i.e.*, overlapping obligations
 - ❑ Level of control is not relevant to finding that City is an employer
 - **Against** – City is *not* employer of Interpaving employees
 - ❑ Definition of employer not intended to cover situation where a project owner retains another party – such as a constructor – to undertake a project
 - ❑ “Absurd” to require owner to be responsible for workers hired by a constructor where no control over those workers

Health and Safety Update

Due Diligence to Minimize Risk

- Many steps an employer can take **now** to minimize the risk of workplace health and safety issues

Health and Safety Update

Due Diligence to Minimize Risk

➤ **Be Aware**

- Review potential risks and hazards regularly
- Monitor compliance
- Ask for and review reports and information

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Due Diligence to Minimize Risk

➤ **Act**

- Implement regular, meaningful training.
- If you see non-compliance, address immediately
- If a decision impacting safety is required, don't delay
- If more information is required, obtain it
- Follow up to make sure action items are executed

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Due Diligence to Minimize Risk

➤ **Prioritize safety**

- ❑ To the extent reasonably possible, ensure all workplace parties comply with their contractual safety obligations (*i.e.*, subcontractors)
- ❑ Champion safety in the workplace and make safety a key performance indicator

Health and Safety Update

Due Diligence to Minimize Risk

➤ **Allocate sufficient resources**

- ❑ Fund safety initiatives and improvements
- ❑ Whenever feasible, implement temporary/interim measures before remediation can be completed

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Due Diligence to Minimize Risk

➤ **Document**

- Safe work practices
- Training
- Remediation
- Discipline

■ *SK can assist!*

12-Step Accident Checklist

12 STEP ACCIDENT Checklist 2024

No one wants a critical injury at the workplace. Unfortunately, accidents happen. When they do, this 12 Step Accident Checklist will help guide you through the process.

For assistance with any Step, including information about compliance across Canada, contact the health and safety experts at Sherrard Kuzz LLP, a 5-Star Safety Law Firm (Canadian Occupational Safety®)

- 1. Provide Medical Assistance:** Provide first aid and call for emergency medical assistance as needed.
- 2. Preserve the Scene:** Other than to preserve life, provide first aid or prevent unnecessary damage to equipment or property, secure the area and do not move anything until the labour regulator determines if it will conduct an investigation, and/or release the scene.
- 3. Contact your Lawyer:** Call your Sherrard Kuzz LLP lawyer or the Sherrard Kuzz LLP 24 Hour Line (416.420.0738). We'll help protect your organization.
- 4. Consider the Seriousness of the Injury:** If the injury meets the legislative definition of "critical" there may be a requirement to notify, report, and investigate (see below).
- 5. Notify:** If the injury triggers a duty to notify, promptly contact the applicable labour regulator, workplace Joint Health and Safety Committee, and trade union (if applicable).
- 6. Report:** If the injury triggers a duty to report, submit the report with the required information to the labour regulator within the timeframe specified (e.g., 48 hours for Ontario) and provide a copy to the workplace Joint Health and Safety Committee and union, if applicable. An employer subject to a workers' compensation scheme may have additional reporting obligations. For assistance contact Sherrard Kuzz LLP.
- 7. Investigate:** If the injury triggers a duty to investigate, or if an internal investigation is appropriate, this should be undertaken without unnecessary delay. For assistance contact Sherrard Kuzz LLP.
- 8. Collect Information/Documentation:** Record the full name and contact information of each witness and individual providing first aid. It may be important to reach these people in the future. Begin to collect copies of any documents relevant to the incident (e.g., the organization's health and safety policies, training records, written work procedures, and equipment manuals). These documents may be required by the labour regulator and for the purposes of any investigation.
- 9. Co-operate:** Every organization is required by law to co-operate with a labour inspector or the police. However, employers have rights to know what they are. To prevent unnecessary disclosure of incriminating evidence contact Sherrard Kuzz LLP for advice before responding to a request for an interview or for documents by the labour regulator or police. In addition, maintain records of any communications with and/or steps taken by a labour inspector or police.
- 10. Protect the Investigation Report from Disclosure:** Steps should be taken to protect the results of an investigation from disclosure to a labour regulator or the police, if possible. To learn how, contact Sherrard Kuzz LLP.
- 11. Obtain Independent Expert Advice:** Consider the benefit of retaining an expert to comment on conditions at the time of the incident (e.g., engineer, health and safety consultant, etc.).
- 12. Take Proactive Steps:** Consider undertaking a workplace health and safety audit to review policies, practices, training, and inspection schedules. An audit may enhance worker protection, demonstrate a commitment to maintaining a safe workplace, provide grounds for a due diligence defence if charges are laid, and reduce any penalty ordered against the workplace and/or management resulting from an incident.



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Questions?



References

- **Footnote 1** – *R v Kazenelson*, [2018 ONCA 77](#)
- **Footnote 2** – *R v Wyssen*, [1992 CanLII 7598](#) (ONCA)



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