SPRING CONSTRUCTION LAW FORUM

MAY 12, 2021

GOWLING WLG

LEGAL DISCLAIMER

- The presentation today is not intended as legal advice.
- Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation, your applicable contract or subcontract, or the nature of your project.
- For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime.
- As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information.

AGENDA

Topic	Speaker
Welcome & introduction	Ted Betts
Case law update	Sahil Shoor
The new 2020 version of CCDC 2	Cindy Kou
Managing COVID-19 risks in the workplace	Neena Gupta Tushar Anandasagar
Closing & introduction to breakout rooms	Ted Betts
Breakout rooms by province	All

CASE LAW UPDATE

SAHIL SHOOR – PARTNER, GOWLING WLG

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CASES TO REVIEW

- Ontario (Labour) v Sudbury (City)
  2021 ONCA 252
- Tremblar Building Supplies Ltd. v 1839563 Ontario Limited
  2020 ONSC 6302
- Schindler Elevator Corporation v Walsh Construction Company of Canada
  2021 ONSC 283
- Urbancorp Cumberland 2 GP Inc. (Re)
  2020 ONCA 197
- C.M. Callow Inc. v Zollinger
  2020 SCC 45
- Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District
  2021 SCC 7

Ontario (Labour) v Sudbury (City), 2021 ONCA 252

ONTARIO (LABOUR) V SUDBURY (CITY), 2021 ONCA 252

Facts

- Individual struck and killed by road-grader driven by an employee of paving company hired by City of Sudbury.
- No signaller or fencing erected between public way and worksite, as required by law.
- Company and City charged with violations of Occupational Health And Safety Act (OHSA) regulation.
- City charged as “constructor” and “employer”.
- Trial judge determined and the Divisional Court upheld finding that City was neither employer nor contractor.

ONTARIO (LABOUR) V SUDBURY (CITY), 2021 ONCA 252

Analysis

- Did the Divisional Court made an error in finding that City was not an “employer”?
- To answer this, it was not necessary to determine whether “control” was requirement where city hired third party.
- If found to be an “employer”, did the City have a successful due diligence defence?
- Court of Appeal examined *OHSA’s* definition of “employer”.
- The City was in fact an “employer” within the meaning of the *OHSA* (the City employed its own safety inspectors on site) and liable unless it established a due diligence defence.
- The *OHSA* is public welfare law and should continue to be read generously to protect health and safety.

ONTARIO (LABOUR) V SUDBURY (CITY), 2021 ONCA 252

Analysis Continued…

- The *OHSA* contemplates possibility of multiple employers and overlapping duties in a workplace – i.e. there can be one or more employers or an entity can be an employer, owner, and constructor.
- The *OHSA* puts employers in position of “insurer who must make certain” health and safety regulations complied with before work is undertaken.
- On due diligence defence, City argued it met obligations through its tendering process.
- However, facts concerning due diligence were not sufficiently addressed and the matter is sent back for another hearing.

ONTARIO (LABOUR) V SUDBURY (CITY), 2021 ONCA 252

Significance

- Expands infrastructure project owner liability as an “employer” under the *OHSA* – i.e. not just an owner.
- City assumed heightened liability by virtue of sending in inspectors despite not directly overseeing grading work.
- Overlapping duties of workplace parties can exist on constructions sites under *OHSA*.

Tremblar Building Supplies Ltd. v 1839563 Ontario Limited, 2020 ONSC 6302

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Facts

- Tremblar Building Supplies Ltd. (subcontractor) entered subcontract to provide materials to 1830563 Ontario Limited (the contractor).
- No contract between Tremblar and Lighting Boutique (the owner).
- Tremblar was not fully paid for materials – $30,326.95 outstanding.

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Facts Continued…

- Following the contractor's filing for bankruptcy protection, Tremblar commenced an action against Lighting Boutique for breach of trust under the *Construction Lien Act* (CLA) and for unjust enrichment based on the alleged benefit, to the owner, of Tremblar's unpaid materials and services.
- Tremblar was entitled to, but did not register a claim for lien pursuant to the *CLA*.
- Lighting Boutique moves for summary judgement and wins – lower court says *CLA* requires "privity of trust" for a trust claim under the Act.

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Analysis

- Appeal dismissed.
- Pursuant to *CLA* statutory trusts (ss. 7 and 8), owners hold funds in trust for contractors with whom they have a contractual relationship.
- No contract between Tremblar and Lighting Boutique meant no funds were held in trust.
- Section 8 of *CLA* obliges contractors, not owners, to retain trust funds for the benefit of subcontractors.

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Analysis Continued…

- Allowing Tremblar's trust claim would create a new remedy not contemplated by the *CLA* and would effectively require owners to ensure that contractors distribute their funds properly.
- Divisional Court was not willing to take this step.

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Finding and Analysis Continued…

- On unjust enrichment, *CLA* provides a comprehensive code for securing obligations.
- A plaintiff must establish: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff, and (iii) an absence of juristic reason for the enrichment.
- Court has held a contract between contractor and owner provide a juristic reason to prevent unjust enrichment claims by subcontractors against owners.
- In this case, the Divisional Court went a step further and confirmed the *CLA* does not provide for unjust enrichment claims where there is no privity of contract, i.e. between subcontractors and owners.

TREMBLAR BUILDING SUPPLIES LTD. V 1839563 ONTARIO LIMITED, 2020 ONSC 6302

Significance

- Relevant decision for subcontractors where contractor faces bankruptcy.
- Without privity to owner, subcontractors cannot declare a trust.

Schindler Elevator Corporation v Walsh Construction Company of Canada, 2021 ONSC 283

SCHINDLER ELEVATOR CORPORATION V WALSH CONSTRUCTION COMPANY OF CANADA, 2021 ONSC 283

Facts

- Partnership between Walsh Construction and Bondfield Construction (WBP) began construction for redevelopment of Women's College Hospital.
- Schindler Elevator Corporation hired as elevator contractor – brings ~$1 million claim against WBP for unpaid services and materials.
- WBP counterclaimed for approximately ~$2.2 million, mostly for damages flowing from delay.
- WBP argued other concurrent delays caused during same period by subcontractors – Schindler was responsible for its share of the delay.
- WPB had to establish that Schindler was responsible for delay causing WPB's losses.

SCHINDLER ELEVATOR CORPORATION V WALSH CONSTRUCTION COMPANY OF CANADA, 2021 ONSC 283

Analysis

- Determining concurrent delay is complex and speculative – requires breakdown of overall delay and apportioning of time, responsibility, and costs.
- Court adopted realistic view that “[i]t is not necessary for the independent causes of delay to occur exactly at the same time for them to be considered concurrent. Indeed, it is rare that concurrent delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events”.
- Schindler’s performance was delayed, resulting in some damages, but did not case material delay to the project as a whole.

SCHINDLER ELEVATOR CORPORATION V WALSH CONSTRUCTION COMPANY OF CANADA, 2021 ONSC 283

Significance

- New direction for assessing concurrent delay that will result in a fair and just result – important implications for the construction pyramid.
- Court recognized complexity of construction projects and that it is unrealistic to reach a precise determination as to who is responsible for delay. That is, concurrent delays need not begin and end at exactly the same time.

Urbancorp Cumberland 2 GP Inc. (Re), 2020 ONCA 197

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Facts

- Residential condo developer (Cumberland Group) granted insolvency protection under the *Bankruptcy and Insolvency Act* (BIA) and under the federal *Companies' Creditors Arrangement Act* (CCAA).
- Cumberland Group starts proceedings under the *BIA* – Proposal Trustee is court authorized by Approval and Vesting Order and Sales Process Order to conduct sales for Cumberland Group condo assets.

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Facts Continued…

- Further, an order granted Cumberland Group protection under the *CCAA* and appointed Proposal Trustee as Monitor – sales process to continue under *CCAA* proceedings.
- Under Approval and Vesting Order, proceeds of sales were ordered to stand in place of units to determine priorities of claims and encumbrances, as though units not sold.
- Appellants, who supplied materials to condo project and were owed ~$3.8 million, claimed a statutory s. 9(1) trust arose in their favour from sale proceeds of condo units.

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Analysis

- Court of Appeal reverses motion judge's rejection of a s. 9(1) trust.
- Section 9(1) of the *Construction Act* provides for a trust in favour of unpaid contractors over the sale proceeds of certain property.
- Monitor had brought motion and judge determined trust not created because sale proceeds by the *CCAA* Monitor and not the "owners".

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Analysis Continued…

- Court of Appeal agreed with appellants that units were sold by the "owner" – fact that Cumberland Group entities entered into sales agreements through a representative (Proposal Trustee/Monitor) did not detract from the fact that they were the vendors of the units.
- Further, units were not registered in name of Proposal Trustee/Monitor.
- It is irrelevant whether the sale was effected by a representative of the owner who had control over the process.

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Analysis Continued…

- Section 9(1) creates a valid trust in accordance with general trust law – it does not conflict with *BIA* or *CCAA*.
- Trust could only be displaced by doctrine of paramountcy if it conflicts with specific priority created under the *CCAA*.
- Court of Appeal distinguished *Urbancorp* from other cases because a positive balance resulted from the sales, i.e. s. 9(1) trust cannot arise where sale of property is insufficient to discharge security or where value of consideration is zero.
- Expenses for CCAA proceedings were given priority in this case, but a positive balance allowed for a provincial trust.

URBANCORP CUMBERLAND 2 GP INC. (RE), 2020 ONCA 197

Significance

- Good news for contractors with insolvent owners.
- Reassurance that contractors may hold a valid trust claim to sale proceeds when owners initial *BIA* or *CCAA* proceedings – but contingent on sale proceeds exceeding indebtedness and other priorities granted under federal legislation.
- Bad news for creditors – successful statutory trust claims will shrink estate value for secured parties.

C.M. Callow Inc. v Zollinger, 2020 SCC 45

C.M. CALLOW INC. V ZOLLINGER, 2020 SCC 45

Facts

- A group of condo corporations, management group, and property manager (Baycrest) engaged contractor C.M. Callow Inc. (Callow) in winter maintenance agreement with a two-year term, from Nov 2012-April 2014.
- Provision that Baycrest could unilaterally terminate contract without cause after giving 10 days' notice.
- The parties had a separate agreement for summer maintenance, which ran from May 2012-Oct 2013.

C.M. CALLOW INC. V ZOLLINGER, 2020 SCC 45

Facts Continued…

- To avoid souring the relationship and given the termination notice, Baycrest decided to delay informing Callow of the termination decision until after the completion of summer work.
- In April 2013, Baycrest terminated agreement before the following winter due to multiple complaints.
- Throughout the spring and summer, Callow had discussions with directors at Baycrest to renew the winter contract for an additional two-year term. In the context of these discussions, Baycrest did not disclose its intention to terminate the existing winter contract.

C.M. CALLOW INC. V ZOLLINGER, 2020 SCC 45

Analysis

- Lower court held Baycrest breached common law duty of honest performance and acted in bad faith by not informing Callow of intention to terminate winter contract in order to ensure performance of summer contract and by representing that it would renew the contract.
- Court of Appeal reversed lower court, finding that Baycrest's conduct was not honourable but did not rise to the high level requires to establish a duty of honest performance.
- The Supreme Court of Canada found Baycrest breached the duty of honest performance and knowingly mislead Callow into believing they would not terminate the winter contract.

C.M. CALLOW INC. V ZOLLINGER, 2020 SCC 45

Significance

- Clarified that duty of honest performance applies to performance of obligations and the exercise of rights under a contract.
- The scope of the duty is controlled by its link to the performance of the terms of a contract – valid provisions must be exercised or performed honestly.
- Dishonest performance is highly-fact specific – can include lies, half-truths, omissions, even silence depending on circumstances.
- Parties may be found to mislead where they fail to correct misapprehension caused by own conduct.

Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District, 2021 SCC 7

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WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Facts

- Heard alongside *C.M. Callow Inc. v Zollinger*.
- Contract between Wastech (transports and disposed waste to one of three facilities) and Metro (administered waste disposal – told Wastech where to deliver waste. Longer distance increased profit for Wastech).
- Contract said the parties' intention was to incentivize each other to "maximize efficiency and minimize costs", provide for the "maximization" of the capacity of one of the facilities, and to be "sensitive to significant changes in operating standards, services or system configuration".

WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Facts Continued…

- Contract has an operating ratio that provides a certain operating profit and has various adjustments (with a threshold) to protect Wastech's profits, but no guarantee of profit.
- In 2011, Metro directs Wastech to closer facility, which negatively impacts operating ratio of Wastech.
- Wastech brings claim alleging that Metro breach duty of good faith when it allocated waste that prohibited Wastech from meeting its target profit.

WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Analysis

- Builds on seminal SCC case *Bhasin*: “the organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.”
- Decision clarifies what it means to exercise “discretionary power” in good faith.
- If contract allow for choice, parties must “exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in Bhasin, to exercise their discretion reasonably.”

WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Analysis Continued…

- A party's decision must be connected to the reason it was given the power to make that decision in the first place.
- “Unreasonable” depends, in large part, on the context and intention of the parties as disclosed by their contract.
- Where a decision made is unconnected to the reasons the power to make that decision was granted, the decision will be considered unreasonable – breaching the duty to exercise decision-making power in good faith.
- “Unreasonable” depends, in large part, on the context and intention of the parties as disclosed by their contract.

WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Significance

- Another chapter in the “good faith series” in Canadian law.
- Good faith and honesty are central to contract law.
- Guidance on what kinds of discretionary powers can be susceptible to objective measurement (shrinking range of reasonable outcomes), i.e. operative fitness, structural completion, marketability.
- Guidance on discretionary powers not readily susceptible to objective measurement (increasing range of reasonable outcomes), i.e. taste, sensibility, personal compatibility or judgement of the party.

WASTECH SERVICES LTD. V GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, 2021 SCC 7

Significance Continued…

- Does your contract provide for any sort of discretionary decision-making power? Consider the risks.
- Another chapter in the “good faith series” in Canadian law – good faith and honesty are central to contract law.
- Guidance on what kinds of discretionary powers can be susceptible to objective measurement (shrinking range of reasonable outcomes), i.e. operative fitness, structural completion, marketability.
- Guidance on discretionary powers not readily susceptible to objective measurement (increasing range of reasonable outcomes), i.e. taste, sensibility, personal compatibility or judgement of the party.

THE NEW CCDC 2 (2020)

5 HIGHLIGHTS

CINDY KOU – ASSOCIATE, GOWLING WLG

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PHASING OUT THE CCDC 2 (2008)

CCDC

2

2020

CCDC 2 - 2020
Stipulated Price
Contract

- New CCDC 2 released late December 2020
- CCDC will support CCDC 2 (2008) until the end of 2021
- CCDC will exchange any 2008 seals for their 2020 equivalents through their regular document outlets

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#1 – LEGISLATIVE UPDATES

- **New** "**Payment Legislation**" concept for legislation governing payment under construction contracts, if any
  - **Invoice contents:** per Payment Legislation and:
    - with every invoice, evidence of compliance with worker's compensation legislation
    - with every invoice after the first, CCDC 9A statutory declaration
  - **Process:** Invoices go to the Consultant and the Owner at the same time, and the Owner gives the Contractor any written notification of a revision or rejection, with reasons
  - **Payment timelines:**
    - Pay in 28 days, and in any case per Payment Legislation
    - Holdback paid w/i 10 working days of expiry of holdback period or per Payment Legislation
    - Final payment w/i 5 days of final certificate of payment
- **New** acknowledgement that the contract does not impact adjudication prescribed by applicable legislation

#2 – “READY-FOR-TAKEOVER”

- **New “Ready-for-Takeover”** concept
  - Complements “Substantial Performance of the Work” definition
  - “Substantial Performance” now only as defined under applicable law
  - Various obligations that were tied to Substantial Performance of the Work are now tied to Ready-for-Takeover as a milestone (ex: insurance, warranty, indemnity, waiver of claims)

Requirements to apply for Ready-for-Takeover

- Consultant has certified/verified Substantial Performance of the Work
- Compliance with requirements for occupancy
- As-built drawings completed to date on site
- If required by the Contract Documents:
  1. Final cleaning and waste removal
  2. Operations and maintenance documents for immediate O&M given to the Owner
  3. Start-up and testing required for immediate occupancy
  4. Ability to secure access to the Work provided to the Owner
  5. Demonstration and training scheduled by the Contractor

#3 – “EARLY OCCUPANCY”

- **New “Early Occupancy”** concept
  - “Early” = before Ready-for-Takeover
  - the Owner can occupy early if the Contractor agrees and relevant authorities approve
- If the Owner occupies part of the Work early:
  - any part that the Owner occupies early is deemed to be taken over by the Owner on the date of occupancy
  - that part falls under the care/responsibility of the Owner
  - warranty period for that part starts
- If the Owner occupies the whole Work early:
  - subject to applicable lien legislation, the Work is deemed to achieve Ready-for-Takeover
  - the Contractor still has to complete the Work in a timely manner

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#4 – CONSTRUCTION SAFETY

- The Contractor is now responsible for establishing, initiating, maintaining, and supervising all health and safety precautions and programs in accordance with the applicable health and safety legislation
- The Owner will cause its own forces, the Consultant, and Other Contractors to comply with site's health and safety program
- The Contractor and the Owner will both:
  - comply with health and safety legislation
  - comply with the health and safety program at the site

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#5 – INDEMNIFICATION

- Scope of indemnity is narrowed – a party now indemnifies for "anyone for whose negligent acts or omissions that party is liable"
- Indemnity for a party's losses now limited to direct damages only
- Indemnity for all claims by third parties is now uncapped and not limited to direct damages
  - Indemnities arising out of obligations re toxic and hazardous waste, patent infringement, and defect in or lack of title to the Place of the Work remain uncapped and not limited to direct damages
- Increased indemnity cap: the indemnity for a party's losses for which insurance is required to be provided is now capped at $10m (if bid closing happened on or after December 14, 2020)

COVID-19 IN 2021

NEENA GUPTA – PARTNER, GOWLING WLG

TUSHAR ANANDASAGAR – ASSOCIATE, GOWLING WLG

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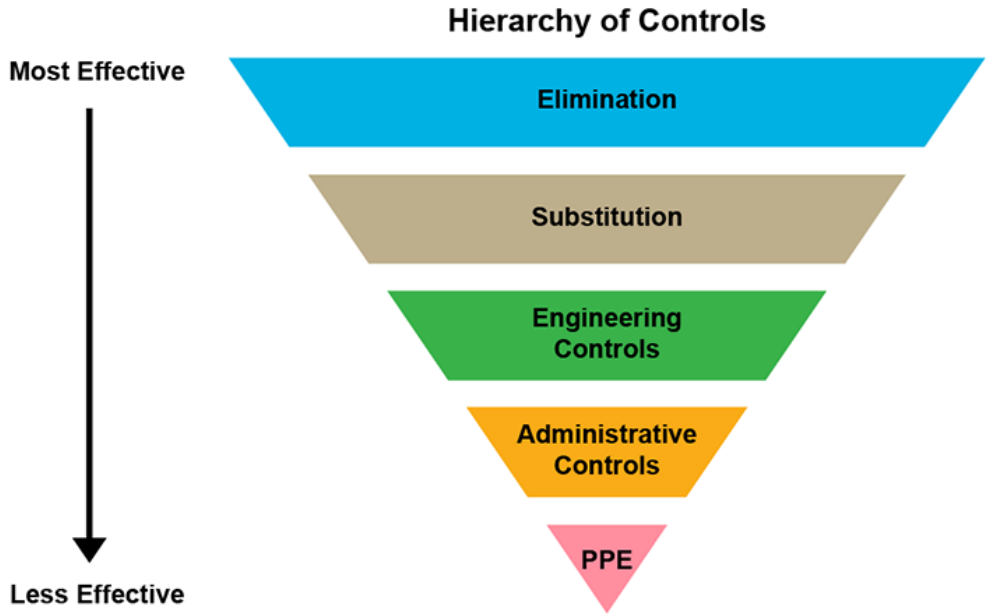
COVID-19 WORKPLACE SAFETY PLAN

- **Key considerations:**
  - How will you ensure all workers know how to keep themselves safe from COVID-19?
  - How will you screen for COVID-19?
  - How will you control the risk of transmission at the workplace?
  - What will you do if there is a potential case of COVID-19 at the workplace?
  - How will you manage any new risks caused by changes to the way you operate your business?
  - How will you make sure your plan is working?
- **Train, update, revisit regularly – regulations are changing <u>faster than ever</u>**



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VACCINATION IN THE WORKPLACE

- **To mandate, or not to mandate?**
  - Why?
    - Health & Safety
    - Public schools / child care workers
    - “Vaccinate or Mask”
- **Proof of Vaccination**
  - Privacy & data security
- **“Vaccination passports”**

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VACCINATION IN THE WORKPLACE

- **Possible “pinch points”**
  - Human Rights & the Duty to Accommodate
  - Constructive Dismissal
  - Tort / Negligence
- **Risk Management**
  - Workers’ compensation coverage?
  - Vaccination Injury Support Program?
  - **Incentivize, rather than mandate**

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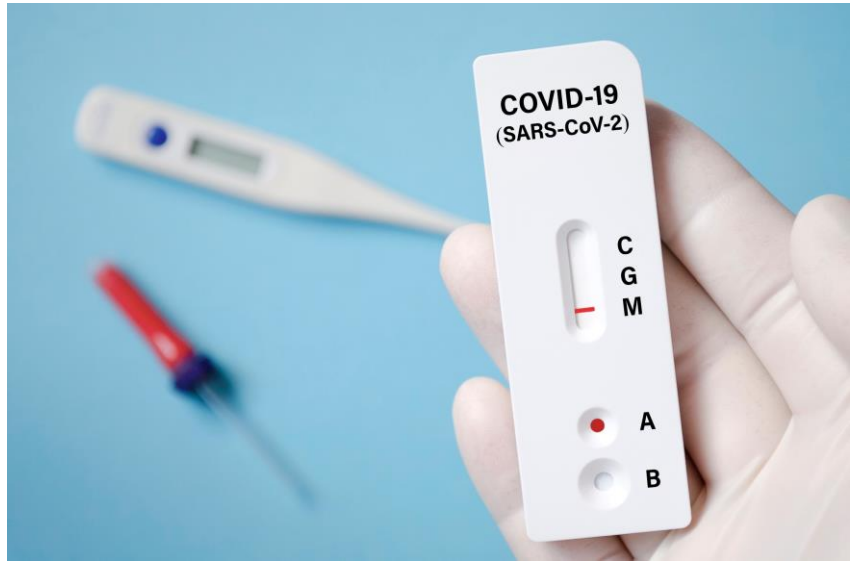
WORKPLACE RAPID ANTIGEN TESTING

- **Can workplace testing be <u>required</u>?**
  - *CLAC v Caressant Care Nursing & Retirement Homes*
    - Arbitrator says: mandatory PCR testing policy is **legal**

- **Provincial Antigen Screening Program (PASP)**
  - Public Health – heavily involved
  - Focus on “workplace transmission”
  - Training, collection & disclosure
  - “Preliminary Positive” vs. “Presumed Positive”



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WORKPLACE RAPID ANTIGEN TESTING

- **Privately Initiated Testing**
  - Limited PHU involvement
  - Develop compliant processes *before* testing
  - Reporting obligation
- **Legal implications**
  - Privacy
  - Civil exposure
  - **Managing "Preliminary Positives"**
    - Implications of "preliminary positive" reporting **MUST** be clear

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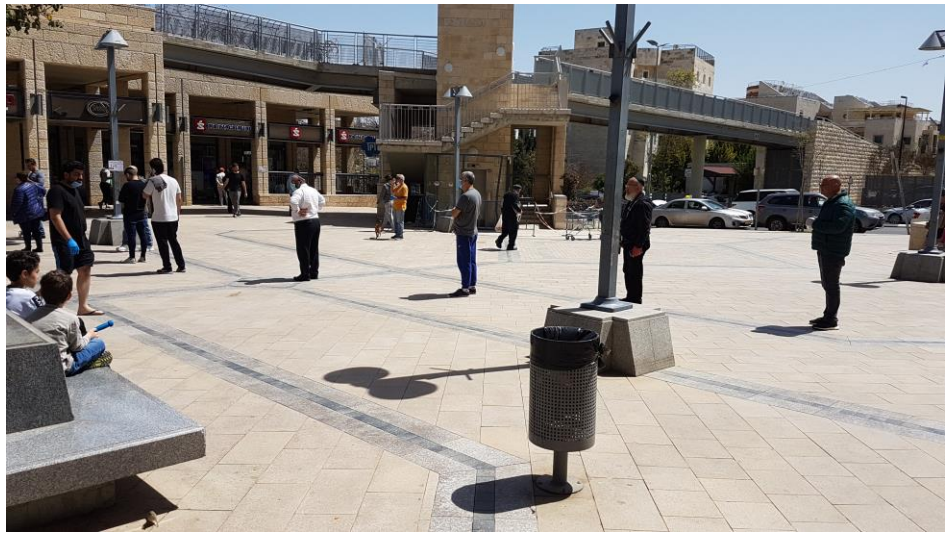
PUBLIC HEALTH CLASS ORDERS: 5+ CASES = 10 DAYS OF CLOSURE

- **Toronto, Peel, Hamilton**
  - 2+ cases within any 14 day period
  - 5+ cases within any 14 day period
- **General considerations**
  - These powers are not new
  - PHU's are putting employers "on notice"
  - Substantial discretion (e.g. partial vs. full closure)
  - Appeal routes?
- **<u>Key takeaway</u>: Be proactive, not reactive**



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KEY TAKEAWAYS: RISK MANAGEMENT IS THE BEST WAY TO AVOID A CLOSURE

- **Mandatory:**
  - COVID-19 Safety Plan (sector specific)
  - “Active screening”
  - Physical distancing / Enhanced Sanitation
  - Engineering / Administrative Controls

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KEY TAKEAWAYS: RISK MANAGEMENT IS THE BEST WAY TO AVOID A CLOSURE

- **Recommended:**
  - Medical grade vs. cloth masks
  - Rapid Antigen Testing
  - Vaccine Incentive / Encouragement Policy

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CASE STUDY:
NELMAR DRYWALL

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CASE STUDY – NELMAR DRYWALL

- **Employees of drywall subcontractor hire exotic dancer**
  - Booze-fuelled party
  - No regard for province-wide Stay-at-Home Order
- **Video / photo evidence:**
  - Party was being held at the job site
  - No masks or physical distancing
  - Employees wearing “Nelmar Drywall” shirts
- **Outcome:**
  - All involved workers were terminated
  - Possible legal implications?

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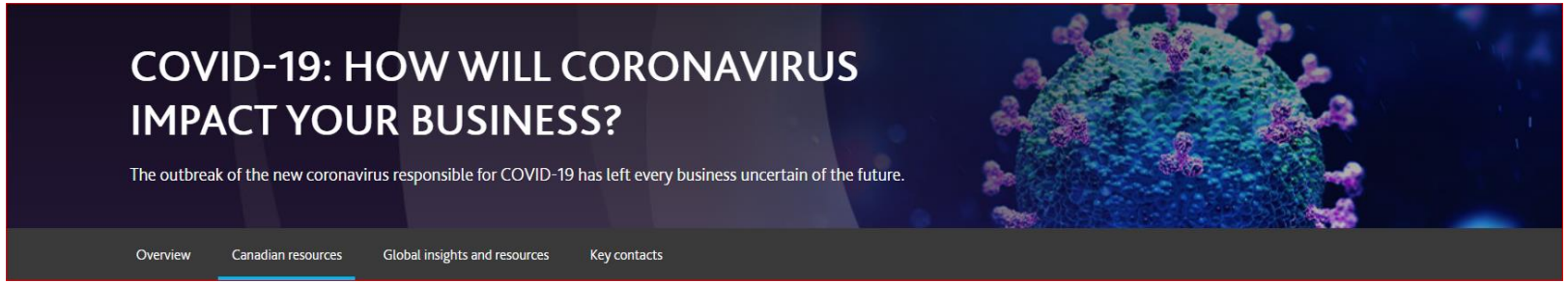
USEFUL RESOURCES

Gowling WLG – COVID-19 Insights

https://gowlingwlg.com/en/topics/covid-19-how-will-coronavirus-impact-your-busines/canadian-resources/



Insights:
Mandatory Vaccinations

https://gowlingwlg.com/en/insights-resources/articles/2020/workplaces-vaccination-policies-to-mandate-or-not/

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BREAKOUT ROOM DISCUSSIONS

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