[redacted]

From: The Workers Compensation Act [redacted]
Sent: Saturday, 14 February, 2026 2:53 PM
To: Legislative Review
Subject: New message from "The Workers Compensation Act Legislative Review"

Name: Ken Grysiuk
Organization: Injured Worker
Email: [redacted]
Phone: [redacted]
Message: So you know... The site has closed while I have been entering my name and organization more than once.

PLEASE DO NOT DISMISS THIS RESPONSE

I have not received an email stating that my request has been accepted by the WCB reviewing panel.

One policy that should be created and followed by WcB administration & wcb decision makers is that an Injured Worker should be aprt of this annual review process.

An injured worker should be apart of the review process and on the review committee. Not having an injured worker on the review panel provides a bias outcome and leaves the impression that WCB doesn't fully support injured workers. How could this committee that represents the injured worker community provide a satisfactory response or explanation unless they have experienced in real time an injury that has required WCB intervention.

It is without a doubt that the current system has made and continues to make, "unfair and bias decisions" that negatively impact injured workers, their families and their communities all across the province & country.

The frustration so many injured worker's face is because of a combination of policies and how they are delivered. The results of decisions being made by case workers & the appeal officers are often vaguely explained and more often offer no emphasis what matters to the injured worker and their lives moving forward.

There needs to be better advocacy for injured workers who appeal decisions and the time period must be reduced to not put injured workers in financial jeopardy. Or the benefits need to remain constant until the appeal process is complete.

There has been numerous bad faith decisions made by wcb case worker's that have negatively impacted injured workers for life.

The return to work plans need to be more appropriate and flexible and more training to up grade workers also needs to be implemented to fill in growing demands of more versatile workers within the workforce.

My goal is to see these WCB policies that have negatively impacted so many good people for life because they became injured, either rewritten or removed.

One more policy, that needs to be rewritten is when WCB stops providing benefits to injured workers when they reach age 65 yrs old. This cut off of wcb benefits at age 65 needs to be changed so that injured workers with long term disabilities as a result of a work place injury or disease do not become burdens on their families, friends or the Canadian tax payer.

The policy, Section 39(2) of The Workers Compensation Act where workers are cut off benefits at the age-65 is not reasonable or appropriate. The WCB needs to provide benefits for the life of the workplace injures “that created workers-disability”. To cut off an injured worker’s benefits when they’re most vulnerable to further injury & disease is immoral & unethical.

This is a legal requirement, not just internal policy that needs to be changed.

I also have left a number of attachments within another application that began, and added the attachments, but I never received an email confirmation that my email or information entered has been received by the WCB review team...

Can someone please confirm my messages have been received before the expiry date and hopefully within the 5 day window that this website states it will have a response by a WCB representative.
Thanks
.

Date: February 14, 2026
Time: 2:52 pm

[redacted]

APPLICATION 7: CHRONIC PAIN/CHRONIC PAIN SYNDROME

1. ***When does WCB apply the provisions of this application?***

This application applies only to chronic pain and chronic pain syndrome when pain and pain behaviour is inconsistent with organic findings (see Questions 2 and 3). It does not apply to cases of persistent, lingering pain due to discernible organic diagnosis or a psychiatric condition. Such cases are considered for entitlement under WCB's policies relevant to the specific diagnosis or condition.

2. ***When does WCB consider sponsoring treatment for chronic pain?***

WCB may consider treatment for chronic pain when the chronic pain has the following characteristics:

- pain and related symptoms develop as a consequence of a compensable injury or condition,
- the pain persists beyond the usual healing time for the injury,
- complaints of pain and pain behaviour are inconsistent with organic findings, and
- pain impairs earning capacity.

3. ***When does WCB consider chronic pain syndrome a compensable condition?***

This policy question is effective January 1, 1992 and applies to all claims regardless of date of accident

BoD Resolution 2001/05/28

Chronic pain syndrome may be compensable when the following conditions are met:

- all physical medical investigation and rehabilitation treatment have been concluded,
- pain results in marked life disruption,
- pain and related symptoms develop as a consequence of a compensable injury or condition,
- the pain persists for six months or more beyond the usual healing time for the injury,
- complaints of pain and pain behaviour are inconsistent with organic findings, and
- pain impairs earning capacity.

APPLICATION 7: CHRONIC PAIN/CHRONIC PAIN SYNDROME

4. *How does WCB determine marked life disruption?*

Marked life disruption is determined by psychological assessment, interviews, and standardized testing; and refers to difficulty or dysfunction in the following areas:

- physical/vegetative functioning
- affective state
- cognitive aspects
- vocational aspects
- family relationships
- social/recreational activities
- behaviour/daily activities

5. *Are cases of somatoform pain disorder entitled to compensation under this policy?*

Pain disorders are categorized under a number of different labels, e.g., somatoform pain disorder, fibromyalgia, etc. Individuals diagnosed with such disorders may be compensated under this policy, but only if they meet the requirements for chronic pain or chronic pain syndrome.

6. *How does WCB calculate benefits for chronic pain syndrome?*

This policy question is effective January 1, 1992 and applies to all claims regardless of date of accident

BoD Resolution 2001/05/28

When a worker has a loss of earning capacity due to compensable chronic pain syndrome, WCB calculates benefits according to the percentage of the earnings loss which, in WCB's opinion, is attributable to the compensable disability.

7. *When is this policy application effective?*

This policy application (Application 7 – Chronic Pain/Chronic Pain Syndrome) is effective February 15, 1997, except when noted otherwise in a specific policy section(s).

Alberta WCB Policies & Information	Chapter: **INJURIES**	
	Subject: **GENERAL**	
	Authorization **BoD Resolution 96/10/53**	Date: **November 26, 1996**

APPLICATION 7: CHRONIC PAIN/CHRONIC PAIN SYNDROME

Previous versions

- Policy 0301 Part II - August 2015
- Policy 0301 Part II - January 2004
- Policy 0301 Part II - June 2002
- Policy 0301 Part II - June 2001
- Policy 0301 Part II - December 2000
- Policy 0301 Part II - September 1999
- Policy 0301 Part II (consolidated manual 1st Issue) - February 1997

For-Profit Financialization of Government Services in Canada:
A Case Study of Ontario's Workplace Safety and Insurance Fund

Summary

Provincial governments began establishing workplace insurance boards over a century ago. These institutions were intended to indemnify injured workers for job related injuries and were funded by employer contributions. Ontario's Workers Compensation Board was founded in 1914, and, like other provincial programs, required workers to surrender their rights to sue employers in exchange for guaranteed compensation in the event of job related injury, disability or death.

Under the founding legislation, the Workers Compensation Board (WCB) was legislated to incorporate a "historic compromise" based on the Meredith Principles, which proposed a system that was fair to injured workers, employers and the public. A formula also adopted by the other provinces.

In subsequent decades, the Meredith Principles were gradually eroded. As trade barriers fell, competitive forces led employers to demand lower costs and a "reshaping of workers compensation". This culminated in Ontario's 1997 re-legislation of worker's compensation under "The Workplace Safety and Insurance Act", clearly signaling the shift to a private sector insurance model, and the abandonment of a public sector compensation board framework.

Under the 1997 legislation, all future expenses related to workplace injury compensation are deemed to be "unfunded liabilities". As a result, the WSIB has chronically paid out less to claimants than it receives from employers' remittances. This, in order to accumulate what would be appropriately called, "retained earnings", if framed in a private sector model.

More recently, the Fund's two principal sources of revenue; insurance payments (from employers) and net investment income (derived from its fund of accumulated surpluses), individually surpassed the total expenses attributable to claimant indemnifications. The following line items which summarize the WSIB's 2023 annual report, tells the whole story in simple terms;

WSIB Year-End 2023	CDN$ billions
Insurance Revenue	$3.46
Net Investment Income	$2.46
Total Income	$5.93
Total Insurance Expenses	-$2.33
Net Insurance income	$3.59

As we can see, Ontario's WSIB now operates as an extremely profitable insurance company. However, the growth of WSIB's fund assets was principally achieved by chronically overcharging employers and systematically under compensating claimants, often by breaching its contractual undertakings to entitled beneficiaries. This is how it accumulated a CDN$36.7bil portfolio of fund assets, which represents over 15 years of annual liability payouts, at the current run-rate.

This behaviour parallels similar patterns observed in the US's (private sector) Healthcare Insurance market, but with some key differences; 1) the WSIB Fund was not capitalized by stockholders, it was capitalized by employers who paid too much in premiums and claimants who were wrongfully denied benefits, 2) Ontario WSIB is a government entity that enjoys monopoly pricing power, 3) The Ontario WSIB pays no income tax, and 4) The Ontario WSIB is owned by the same "government" that controls its dispute resolution processes.

WSIB's policies of overcharging employers and under compensating injured employees, plus the four factors described above, largely explain WSIB's disproportionately large operating fund, and its outsized annual operating returns. Any, and all of these five elements are repugnant to free-market principles.

<u>Conclusions</u>

The evolution and current operating form of Ontario's WSIB have resulted in dramatic inequities, suffered by Ontario workers, their employers and Canada's USMCA counterparties.

At a minimum, an entire generation of Ontario workers have been under-compensated, or not compensated at all, for workplace injuries while their employers overpaid. These inequities served to “capitalize” WSIB’s insurance fund.

For Canada’s USMCA trade partners seeking entry into Canada’s workplace insurance market, the Ontario WSIB’s zero cost of capital, its ownership structure and the fact that it pays no income tax pose insurmountable trade barriers to potential competitors.

The iniquities of building the WSIB’s capital base by unlawfully under-compensating employees and overcharging employers bode very badly for its future evolution. This is because the moral hazard of using these funds for political purposes has already been realized. The provincial government approved the fund's first ever insurance rebates to selected employers in 2022, which was an election year. With provincial elections fast approaching once again, the government has once more signaled forthcoming rebates to selected employers.

There are other serious concerns about private sector business models adopted by government fund managers. The WSIB's accumulated (2023) CDN$36.7bil fund is centrally directed by Ontario’s Investment Management Corporation which now acts as the principal portfolio manager on CDN$77.4bil of public sector clients' fund assets. Collectively, provincial and federal fund managers control over a trillion dollars in portfolio assets, and their voting rights.

These appropriated voting rights are actively being used to advance political agendas such as the "Green Economy" and ESG. There is no reason to believe that this same leverage is not, or would not, be used to pressure private corporations on any number of government political objectives.

Perhaps the greatest and most likely injustice to come, would be the privatization of Ontario’s WSIB which would likely fetch CDN$20-25bil., if fully divested. This windfall to the Ontario government’s coffers, would have been realized on the backs of overcharged employers and suffering of workers’ denied compensation claims.

The role of healthcare providers in the workers' compensation system and RTW – the challenge of complex conditions

Agnieszka Kosny, Marni Lifshen, Sabrina Tonima, Basak Yanar, Elizabeth Russell, Ellen MacEachen, Barbara Neis, Mieke Koehoorn, Dorcas Beaton, Andrea Furlan, Juliette Cooper

February 7, 2017

Study overview

Two year study, in four provinces, examining the role of healthcare providers (HCPs) in workers' compensation systems and RTW after injury

Funded by the Workers' Compensation Board of Manitoba

The study sought to address three broad questions:

1. What is the role of HCPs in the workers' compensation system and in the RTW process?
2. What challenges do HCPs face?
3. What can help engage HCPs in the workers' compensation and RTW process?

Study methodology

The study consisted of three parts:

1. A document analysis of materials developed for HCPs about their role in RTW and in the compensation process
2. Interviews with HCPs examining their experiences with the WC system and RTW of compensation patients
3. Interviews with case managers (CMs) about how they interact with HCPs and view their role in RTW (Manitoba and BC)

Resource scan

Goal of the document analysis:

- Identify resources created for physicians (General Practitioners, Specialists, etc) about their role in RTW and in the compensation system more broadly
  - Resources: pamphlets, websites, workshops, guidelines
- Focus on physicians - typically the primary treating clinician during WC claims
- What are physicians being told about RTW? What are the key messages about their role? Are there gaps or contradictions?
- Searched for resources in each Canadian province and territory
- Key sources: WCBs; relevant provincial or federal government ministries or agencies; medical regulatory and oversight bodies; post-secondary institutions providing medical training; union and worker organizations; community and non-governmental organizations

Caveats!

- Focus on directed not general resources
  - e.g. Information on the “HCP section” of the WCB website, not information on the website in general
- Grey literature – a constantly shifting landscape
  - materials constantly added, modified, moved, removed
- Missed materials – found references to workshops or programs but not able to locate further information; no access to certain content
- No resources included after October 2014
- 187 resources identified that met our search criteria

Resource scan – a snapshot of key findings

- Materials encourage physicians to support RTW – but details regarding mechanisms are often lacking

e.g. Contact with employer – Who? When? How often? What info?

e.g. Use of vague language – “early” RTW, “prompt” reporting

- Focus on *RTW* but not *staying at work*. Little focus on problems the physician may encounter while treating IWs and dealing with the compensation system or during the RTW process

“*Physicians should always assume that employers can and will accommodate, even if workers think otherwise*” (Saskatchewan)

- Limited guidance on “invisible” or complex conditions (chronic pain or episodic disability)
- Mental health issues typically discussed (only) as “red flags”
- Resources tend not to provide physicians with “the big picture” of how compensation systems operate

Study methodology - Interviews

- 131 interviews conducted with HCPs and CMs
- Of the 97 HCPs interviewed, 34% (n=33) were from Ontario, 29% (n=28) from British Columbia, 21% (n=20) from Manitoba, and 16% (n=16) from Newfoundland/Labrador.
- High and low volume of WC patients – at least one in the last year
- Almost half of the HCPs had over 15 years of tenure, 20% were in practice less than 5 years
- Many participants had more than one role/worked in different settings (currently or in the past)
  - Diverse group - different levels of experience with WC and RTW
- Of the 34 CMs, none were from Newfoundland and those from Ontario were employed by private organizations (some former WCB)

Type and number of healthcare providers and case managers

Type of healthcare providers	Number
Total*	***131***
General practitioners (Internal HCPs to WC boards, family doctors, walk-in clinic practitioners)	59
Allied healthcare providers (Occupational therapists, physiotherapists, chiropractor, psychologists, registered nurses)	19
Specialists (Surgeons, physiatrists, anaesthesiologists, oncologists, practitioners working in occupational health and safety, rehabilitation, industrial and sports medicine)	19
Case Managers *(*Short/long term claims, mental health, vocational rehabilitation)	34

*Some participants had more than one role.

Procedure and Analysis

- HCPs recruited through professional networks, medical associations, message boards, social media, WCBs (BC/MB only)
- Interviews conducted in person or telephone, recorded and transcribed
- Transcripts entered into Nvivo (qualitative data analysis software) for data storage and organization
- Transcripts reviewed by researchers and code list developed
- Data coded, then organized thematically – inductive approach, but with an aim to address key research questions
- Attention paid to contradictions, provincial differences, and differences between HCP and CM views

Findings

When injuries are straightforward – things seem to go well

- When patients have a visible, acute, physical injury that is clearly work-related and supported by definitive, "objective" evidence – things usually go well
- Forms, contact with WCB (via forms), remuneration, system knowledge is adequate; RTW process is straightforward

So, I mean, mostly it's just a simple injury. Like, someone burned themselves at work, or someone, you know, hurts themselves, and they get better, and they go back. Those things go smoothly – P#29, HCP, ON

- Challenges arose when HCPs treated patients with multiple injuries, gradual onset or complex conditions (e.g. concussions, certain MSK injuries), chronic pain and mental health conditions

Findings

Misaligned perspectives on the timing and appropriateness of RTW

- CMs tended to view RTW as a good thing, in virtually all circumstances
  - Push for early RTW
  - Work viewed as extension of rehabilitation

I always want to know, what is the next step? So, we are at four hours. Can we go to six after two weeks? Are we at eight after two weeks? Can I go five pounds to fifteen to thirty pounds? So, there is that natural progression of improvement and they are also maximizing their return to work. I look at a return to work as not as much an employment program, but an extension of your rehab program. So, basically, you're going to work to exercise. – P#66, CM, MB

Findings

- HCPs supported RTW but many felt that early RTW was not always appropriate, may delay recovery

And there's a real mismatch between the clinical picture from the standpoint of the treating physician to what the board deems acceptable, and I feel that they remove themselves from the realities of many workers that do not recover well from their injury. Many workers who don't receive timely treatment or their treatment outcomes are confounded by a return to work program that runs in counter-purposes....So, many cases where the return to work is premature and doesn't allow for adequate recovery, and that's usually around the lack of acceptance of ongoing musculoskeletal pain and limitations, that the board feels is no longer their responsibility. – P#62, HCP specialist, MB

Findings

- Premature RTW may delay recovery particularly for IWs with chronic pain and MH issues – but sometimes the WCB made a decision and the HCP's "hands were tied" – this led to frustration

I think she's going to fail. I think she's going to have a setback, but I feel that my hands are tied because a WSIB specialist said that this should be done. In the end, this person who recommended this has no plans on ever seeing this person again or reassessing them [...] each time you put someone back and it's unsuccessful, then that actually complicates things and makes it even less likely that they'll return to work successfully down the road. - P#8, HCP specialist, ON

- Different perspectives on RTW - suspicion that each party pursuing their own agenda (cost containment; advocacy)
- Lack of collaborative action to resolve problems and increase in adversarial relations

Findings

Not understanding the workers' compensation system

Many HCPs did not have a clear understanding of the WC system, how it functioned, or their role in it – problematic when claims became complicated

- How does the system work?
- Who makes decisions?
- How should functional limitations be determined? Work-relatedness?
- What is done with the information provided?
- What is the HCP role beyond treatment?
- What does the patient do at work? What will the RTW plan look like? HCP role in monitoring that plan?
- What to do when things go wrong?

Findings

- Some exceptions – OTs, Occupational health physicians/nurses, chronic pain specialists
- For GPs, view that there was a lack of system understanding (this was shared by CM and HCPs)

Consequences:

- Confusion about policies, procedures and decision making processes led to frustration on the part of both HCPs and CMs
- Some HCPs unsure about how to best help their WC patients
- CMs reported mistakes and omissions on forms or reports – HCPs not realizing potential impact on IW claim?
- Collaboration and joint decision-making more difficult

Findings

System rigidity

- Rules and procedures may sometimes be applied too rigidly to accommodate circumstances of workers with complex injuries and conditions

Recovery guidelines for certain conditions/injuries

If someone fractures their elbow, yes we understand the healing time is six to eight weeks. The cast is removed, and they should be progressing. That's a benchmark. That doesn't necessarily mean everybody is going to heal the same way, but they'd rather make determinations on entitlement using those independent guidelines versus the doctor's specific medical opinion. – P#12, (former CM), ON

- Rigid adherence to recovery guidelines was particularly problematic with MH and chronic pain claims – led to interruptions in treatment, patient distress

Findings

Requirement for “objective evidence”

- Many conditions have a significant subjective component – pain, psychological distress, fatigue, etc. – no test, no “objective evidence”
- Frustration when these conditions were treated like physical injuries

  Throw the physical rulebook out the window, it's not applicable to mental health. Start from scratch. Train your people, if there's mental a health issue on the file and the physical issue, go on the mental health side because the physical person (CM) does not get it. That's just for me, I feel really strongly about it...I keep on saying, a bone doesn't heal the same as the mind. – P#111, HCP, BC
- No objective evidence = IW not believed, development of adversarial relationships
- IW stigma became an additional barrier to healing and RTW

Findings

Forms

- Forms seemed to work well when injuries were straightforward
- Form-related problems identified when HCPs tried to convey information to the WCB about complex injuries and RTW problems

  e.g. Newfoundland/Labrador – injury/symptom codes

  e.g. British Columbia – electronic word limits

If someone has been in a major accident, or major work injury and has had lots of treatment, or been admitted to hospital with surgery...it's really hard to get all that in there... you're only allowed 250 characters. So if you want to start really trying to give WCB, you know, I want to do a good job for them, and tell them that this guy has done this...he's having pain here now and seems to be getting depressed...and it'll say "out of characters" – P#120, HCP, BC

- Challenges of conveying a complete picture of a complex situation

Findings

Communication challenges

- Communication challenges were identified as a barrier to effective collaboration – problems went both ways!

- HCPs not returning calls, not filling out forms properly, not providing enough or right kind of information

- CMs not returning calls, not keeping HCP "in the loop" about decision making, RTW planning, referrals to other HCPs

Findings

- Frustrations arise when HCPs had to communicate with non-medically trained personnel

In the past, when I've talked to a case manager ... they just don't really seem to understand what I'm talking about. I actually had a situation where a patient had a cervical, like a neck, cervical spine problem. And for some reason they had requested records, and there was something in the patient's chart about cervical dysplasia, like, of your cervix, the female genital organ. And they said that she wasn't covered because she had a pre-existing condition, which is completely ridiculous. And then I had to spend hours sorting this out. – P#29, HCP, ON

- Communication difficulties led to delays in decision making and treatment
- Use of IW as a go-between – not always appropriate or ideal

Findings

Exclusion from the workers' compensation system

The communication is very, very important. The physicians who are treating the patients, I think that lack of engagement is a big problem...There should be a note sent to the physician and to the specialist of the patient, saying we are sending this patient to the [speciality] Clinic. I don't think that happens and I think that creates distrust. Interviewer: Distrust on whose part? *On the physician's part. If your patient is going places that you have no control of where they're going, it feels very bad. You feel like a bad doctor. You feel like you're not treating your patient well. And then it encourages a lack of responsibility and engaging of the physician. So, think about it. You get your patient and he comes to you and he says oh, I have this appointment to go here and the physician doesn't know anything about it and it's just arranged for him.... The physician will just throw up his arms and say okay, well, if that's what they're doing, okay I guess. And then you can imagine that he sort of feels like well, I guess I'm not involved. (PP#9 HCP-Specialist, ON)*

Exclusion from the Workers' Compensation System

What contributes to exclusion?

- Repeated failed communication attempts
- Lack of understanding of HCPs' role in the WC system
- Different views on RTW (timing, appropriateness)
- Perceptions of systemic rigidity
- Feelings that WC decision makers are predominately concerned with cost containment
- Funding structures (particularly for AHCPs) that make treating IWs financially unsustainable
- Use of internal medical consultants
  - Medical guidance to help with decision making
  - Quick access
  - Bridge gap between external HCPs (sometimes)

Findings

- In BC and MB – some HCPs reported using IMC as a resource
- Many did not know about IMCs or their role
- In all provinces some HCPs critical of the use of IMC – specifically their use in overturning external HCP recommendations

The bottom line is it's the medical advisor's opinion that counts, not necessarily the treating physician or the specialist that may know the patient better. But the internal decision within the WCB trumps, even, multiple care providers sharing the same concern. That's been my experience. – P#62, HCP-Specialist, MB

- Literature on RTW has a focus on collaboration and HCP involvement in RTW, yet we found a number of factors that alienated HCPs from the WC process

Findings

The broader, macro-level context is important

- Patients' access to health care services affects the RTW process
- Many IWs, particularly in northern and remote communities, do not have family doctors
- Reliance on walk-in clinics or emergency rooms – especially problematic for workers with complex conditions

  ...Depression and chronic back pain... I'm seeing them for 10 to 15 minutes out of their life and so, me, doing a WSIB form is probably not appropriate except for those patients when someone breaks their arm or some major trauma... We deal with a lot of long term issues, but they're not appropriate in the Emergency Department, that's my frustration. – P#28, HCP, ON
- Lack of follow up and continuity of care, little time to fill in forms, no background knowledge of the patient, no time for RTW planning

Take home messages, opportunities for change & improvement

- Clarity, discussion and consistency needed regarding role of HCPs

Based on the study findings the following are possibilities:

- Ongoing treatment of injury/condition
- Being generally supportive of RTW and communicating why RTW is *often* good for physical and mental health
- Flagging and addressing issues which may complicate recovery and RTW
- Identifying chronic pain or deterioration in mental health
- Communicating with the WC board about further treatment needs (e.g. counselling; occupational therapy, etc)
- Certain allied HCPs and occupational medicine specialists well positioned to provide detailed information about functional abilities, readiness for RTW or the appropriateness of certain accommodated work tasks in the context of specific work situations.

Take home messages, opportunities for change & improvement

- More information about the WC system
  - Medical schools, HCP section of website, courses for CME credits, apps

- RTW...but not at all costs – focus on safety, appropriateness, staying at work, problem solving

- Specific to complex conditions:
  - CM training in area of MH and chronic pain - steps to decrease IW stigma
  - Flexibility, not procedural rigidity (Seeing & MacEachen 2011)
  - Form flexibility
  - Reconsider “objective evidence”
  - When healing extends beyond recovery timelines – offer greater support, not punitive measures
  - Option on forms for HCPs to get support or opt out of RTW planning

Take home messages, opportunities for change & improvement

- IMCs can be a resource for CMs...and potentially HCPs? – should be used to communicate and work collaboratively with treating HCPs, not overturn medical recommendations

- The treating HCP (typically GP) is in a good position to understand factors that will complicate recovery and RTW

- This insight should be integrated into treatment and RTW planning

For more information, including full study report contact:

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Institute for Work & Health

Research Excellence Advancing Employee Health

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To: Mr. Tim Peterson via email

CC: Susan Holt, Premier of New Brunswick
CC: Mel Norton, Board of Directors
Cc: Ombud NB

My name is [redacted] and I am a former Senior Investigator at WorkSafeNB, New Brunswick's workers' compensation agency.

I am writing as a whistleblower with direct knowledge of illegal and unethical conduct that was allowed to flourish due to a lack of oversight and systemic failures within the organization.

During my time with WorkSafeNB, I formally reported multiple serious violations, including:

- The destruction of evidence
- FOIP (Freedom of Information and Protection of Privacy) violations
- Conflicts of interest involving both internal personnel and external actors
- Obstruction of investigations and failures in due process

I followed proper channels and reported these issues to the New Brunswick Ombudsman, which led to an investigation involving former Premier Blaine Higgs. I have audio evidence and documentation to support my allegations and am prepared to share, under a deposition with acknowledgement of penalties of perjury.

However, when Premier Susan Holt came into office, the investigation was abruptly halted. I was told to contact the President of WorkSafeNB—the very body responsible for the misconduct. This move raises serious concerns about transparency, independence, and accountability.

Although I have since moved on and now work as a Fraud Investigator in another province, I am haunted by the injustice, corruption, and complicity I witnessed in New Brunswick. I did not become a public servant to stay silent while laws are broken and workers suffer. The weight of this knowledge has not left me—and it never will until something is done.

WorkSafeNB has long been criticized for its lack of accountability. Reports from both the Auditor General and Attorney General have documented systemic failures, lack of oversight, and governance breakdowns. And yet, when insiders try to speak up, we are sidelined, ignored, or pressured into silence.

This is bigger than one agency.

It is about restoring public trust, and ensuring that government institutions serve the people—not their own self-interest.

I am appealing to you——to investigate this story and help bring it into the light. I can provide recorded evidence, internal communications, and written responses from provincial authorities. The people of New Brunswick—and all Canadians—deserve to know what is happening behind closed doors.

Summary of Allegations

A. Bias in Decision-Making & Conflict of Interest

- The **Director of Claims,** [redacted], directed surveillance on a claimant, including tracking medical appointments. The surveillance team was provided an address for an **Occupational Therapist's office**, which was later discovered to be [redacted] **personal residence**.
- Upon inquiry, I discovered that [redacted], owned [redacted], the company conducting the "independent" medical review.
- This violates the **Perception of Bias** principle under **Administrative Law**, as the injured worker was entitled to an impartial review. My concerns were dismissed, and I was told, *"That's the process."*

B. Destruction of Evidence (Surveillance Records)

- While closing WorkSafeNB's Moncton office, the surveillance team discovered that a claimant had been under surveillance for **nearly 10 years** without any findings.
- I raised concerns with my supervisor, [redacted], regarding the **legal implications** of prolonged surveillance.
- In a subsequent meeting, we were **ordered to destroy the surveillance evidence**, as WorkSafeNB had no legal justification for surveilling a claimant for nearly a decade.
- I objected, stating that **claim files are live documents** and that evidence cannot be destroyed, as a claimant's estate can claim benefits even after death.
- Despite my objections, [redacted] **ordered another investigator to destroy the surveillance footage**, which was carried out.
- This violates **Section 137 of the Criminal Code of Canada** (Obstruction of Justice) and **spoliation of evidence principles** recognized in Canadian law.

C. FOIP Violations & Manipulation of Records

- I was directed by [redacted] to **never include a claimant's claim number in emails** and instead use **nicknames** or send **two separate emails**:
    1. A blank email with just the claim number.
    2. A second email with all relevant information.
- When I questioned this practice, I was informed that if a **Freedom of Information and Protection of Privacy (FOIP) request** was made, the system would only capture the blank email, **hiding critical information from claimants**.
- I reported this violation to [redacted], stating that clients have the **absolute right** to obtain all communications about their claim file. I was told, *"That's the process."*
- When the **NB Ombud** requested a file, I clarified that they required **all information**, not the censored version. I was advised that WorkSafeNB **would not send the full file**, violating FOIP laws.
- This constitutes a **deliberate obstruction of access to information**, violating **New Brunswick's Right to Information and Protection of Privacy Act (RTIPPA)**.

D. Manipulation of Claim Files to Reduce Benefits

- A claim was reviewed at the **Workers' Compensation Appeals Tribunal (WCAT)**, where it was determined that the **job deeming position was not suitable** because the claimant **lacked a required designation**.
- A **Case Manager (CM)** admitted to me, *"Yeah, I knew that but was hoping it'd stick."*
- I responded, *"What do you mean? I didn't see anything on the claim file indicating that this designation was required."*
- I was informed that this **critical information was intentionally withheld from the claim file** to push through an unsuitable job deeming decision.
- I reported this to [redacted], stating that **withholding evidence in judicial proceedings violates Section 137 of the Criminal Code of Canada**.
- This practice is **maliciously designed to reduce benefits inappropriately**, wasting judicial resources and harming injured workers.

E. Breach of Medical Privacy Laws

- **Canadian Health Solutions** was **pulling entire medical histories** of claimants, **not just the relevant body part** related to their claim.
- This constitutes a **breach of medical privacy laws**, violating the **Personal Health Information Privacy and Access Act (PHIPAA)** in New Brunswick.

F, May 2022 – WorkSafeNB Disbanded the Decision Review Office

WorkSafeNB's decision to disband the **Decision Review Office (DRO)** raises serious concerns about transparency and fairness in worker appeals.

Previously, the DRO operated independently to review claim decisions, ensuring they were consistent with legislation and policy. However, with its removal, worker appeals are now being sent to **McInnes Cooper**, a law firm known for representing employer interests, without disclosure to the affected workers.

These appeal decisions are then returned to WorkSafeNB, which **copies and pastes them onto its own letterhead**, presenting them as if they were internally authored. This practice undermines the integrity of the appeals process and raises significant legal and ethical concerns.

This issue has serious implications for injured workers who rely on fair adjudication. The lack of transparency in outsourcing appeals to McInnes Cooper without disclosure undermines trust in the system and raises questions about whether workers are receiving impartial decisions. A formal review of WorkSafeNB's practices is necessary to ensure compliance with legal and ethical standards.

I have compiled cases and training materials that confirm the conflict of interest within WorkSafeNB's appeals process.

These examples illustrate how McInnes Cooper has consistently represented employers in legal disputes and provided employer-focused training, reinforcing concerns about impartiality in worker appeals.

- **Miller v. Convergys CMG Canada Limited Partnership** – McInnes Cooper successfully represented the employer in a wrongful dismissal lawsuit. The court upheld the employment contract's termination clause, limiting the payout to seven weeks instead of the 12 months the employee sought.

- **Industrial Alliance Insurance & Financial Services Inc. v. Brine** – The firm defended an insurer in a punitive damages appeal, successfully reducing the award from $500K to $60K.

- **Dornan v. New Brunswick (Health)** – McInnes Cooper advised provincial health authorities on structuring CEO contracts to limit liability. Despite their efforts, the claimant overturned the termination clause and secured nearly $2M in damages.

- **Employment Contract Enforcement Case** – McInnes Cooper successfully defended an employer in a case where the court confirmed the enforceability of an employment contract, reinforcing the importance of properly drafted termination clauses.

McInnes Cooper is widely recognized for its employer-focused legal strategies, particularly in labor and employment law. Here is relevant information on McInnes Cooper's training programs and legal strategies that focus on employer control and workplace management:

- **MC Training** – McInnes Cooper offers legal training workshops designed to help employers understand and enforce workplace policies. Their sessions cover labor relations, occupational health and safety, and strategies for maintaining compliance.
- **Workplace Surveillance & Privacy** – The firm has advised employers on handling workplace privacy concerns, including secret employee recordings and how they can impact legal disputes.
- **Occupational Health & Safety Compliance** – McInnes Cooper has provided legal updates on employer liability in workplace accidents, reinforcing the importance of strict oversight and adherence to safety regulations.

These examples highlight the firm's focus on helping employers maintain control over workplace policies and employee behavior.

The legal conflict in McInnes Cooper handling worker appeals without transparency primarily revolves around **conflict of interest, due process violations, and lack of impartiality**. Here's why this could be problematic:

1. **Conflict of Interest** – McInnes Cooper is known for representing employers and insurers in legal disputes, often defending against worker claims. If the same firm is involved in drafting appeal decisions for WorkSafeNB, it raises concerns about **bias** in favor of employers rather than injured workers.

2. **Due Process Violations** – Workers appealing decisions may unknowingly have their cases reviewed by a firm that has previously defended employers in similar disputes. Without disclosure, this **denies workers the right to challenge potential bias** in the adjudication process.
3. **Transparency Issues** – If appeal decisions are drafted by McInnes Cooper but presented on WorkSafeNB letterhead, it **misrepresents the source of the ruling**. Injured workers may believe they are receiving an independent decision when, in reality, it was shaped by a firm with employer-aligned interests.
4. **Judicial Fairness Concerns** – Courts generally expect administrative bodies like WorkSafeNB to maintain **neutrality** in adjudicating claims. If a private law firm with a history of employer defense is embedded in the appeals process, it could **undermine the legitimacy of worker compensation rulings**.

3. Legal Violations & Applicable Laws

The following laws and regulations have been violated:

- **Administrative Law – Perception of Bias** (Conflict of Interest in medical assessments)
- **Criminal Code of Canada, Section 137** (Obstruction of Justice – destruction of surveillance evidence)
- **New Brunswick Right to Information and Protection of Privacy Act (RTIPPA)** (FOIP violations and manipulation of records)
- **Personal Health Information Privacy and Access Act (PHIPAA)** (Unauthorized access to full medical histories)
- **Workers' Compensation Appeals Tribunal (WCAT) Regulations** (Withholding evidence in claim adjudication)

Legal Violations in New Brunswick

- **Conflict of Interest Act** – New Brunswick's **Conflict of Interest Act** prohibits public officials from making decisions that financially benefit private entities without transparency. If WorkSafeNB is outsourcing appeals to a firm with employer-aligned interests, it could violate ethical standards requiring impartial adjudication.
- **Workers' Compensation Appeals Tribunal (WCAT) Regulations** – The **WCAT** is an independent tribunal designed to hear appeals from WorkSafeNB decisions. If WorkSafeNB is bypassing independent review and allowing McInnes Cooper to draft

appeal decisions without worker knowledge, it may violate procedural fairness principles.

- **Administrative Fairness & Transparency** – Government agencies are required to ensure **due process** in decision-making. By presenting externally drafted decisions as internal rulings, WorkSafeNB may be **misrepresenting** the source of these decisions, violating transparency obligations.
- **Public Sector Ethics & Accountability** – The **Workers' Advocates Office** provides free legal assistance to injured workers. If WorkSafeNB is failing to disclose that appeal decisions are being drafted externally, it could deprive workers of their right to challenge potential bias in the process.

Sincerely,

[redacted]

Former Senior Investigator, WorkSafeNB
Current Fraud Investigator, Alberta
June 7, 2025

Attached: Evidence to Support Claims:

1. Letter from Premier Blaine Higgs
2. Email From Premier Susan Holt
3. Email from WorkSafeNB HR
4. Audio – Ombudsman New Brunswick (in body of email)
5. Screenshot: My Statement Opposing the Deeming of Permanently Disabled Clients in Unsuitable Positions (same client that was surveilled for 9 years)
6. WorkSafeNB – DRO website

1.

April 25, 2024

[redacted]

[redacted]

Thank you for your correspondence dated April 6, 2024, concerning your privacy concerns related to the destruction of WorkSafeNB claim evidence.

Our role as government is to focus on the legislation that governs WorkSafeNB. The day-to-day operations and administration of the workers' compensation system itself falls within WorkSafeNB's purview.

I understand that you have reached out to the Ombud's Office and confirm that this is the appropriate avenue to address this matter. Ombud NB receives and investigates complaints from individuals who are not satisfied with how a public body or health care provider responded to certain types of requests for information or if they think a public body or health care provider breached their privacy by mishandling their personal information and/or personal health information.

I would like to thank you for submitting your email expressing your concerns and wish you well.

Sincerely,

Blaine M. Higgs

2.

RE: HPRM: FW: WSNB and NBANH -Government of New Brunswick Abuse of Process

HS Holt, Susan Premier (PO/CPM) <Susan.Holt@gnb.ca>

To [redacted]

Cc

Reply | Reply All | Forward | ...

Fri 2/28/2025 7:37 AM

Follow up.

This message has been replied to or forwarded.

[redacted]

Thank you for taking the time to share your concerns about the abuse of process at WorkSafeNB and alleged abuse by nursing home staff with me.

I will begin by addressing the WorkSafeNB matter. As you are aware, WorkSafeNB operates at arm's length from the government and is responsible for its day-to-day operations and administration. This includes the management of claims. Where your allegations deal with issues related to the processing of claims, I recommend that you contact Tim Petersen, the President, and Chief Executive Officer of WorkSafeNB, regarding your concerns. He can be reached at the following email: [redacted]

With respect to the matter of alleged abuse by nursing home staff, the Association of New Brunswick Licensed Practical Nurses (ANBLPN) is the regulatory authority for Licensed Practical Nurses (LPNs) in New Brunswick. It sets, monitors, and enforces standards for entry into the profession, practical nurse education, registration, and professional conduct. Its mandate is protection of the public by promoting the provision of safe, competent, ethical, and compassionate care.

Allegations regarding the conduct, competence, or health of a Licensed Practical Nurse (LPN) may be made to the Registrar of the Association of New Brunswick Licensed Practical Nurses. For your ease of reference, I have included a link to information on the filing of a complaint should you wish to do so: https://www.anblpn.ca/submit-a-complaint/.

Thank you again for writing to me on this important topic. I trust you will find the above-noted information of use.

With gratitude,
Susan Holt
Premier

3. WorkSafeNB - HR Response Following My Written Report of Illegal Activities

11:04

11 Messages

pay

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On Thu, May 4, 2023, 4:08 p.m.
[redacted]> wrote:

Good afternoon [redacted]

I write further to your email(s) where you detail concerns about unethical conduct, such as illegal activities, and hiding evidence from claim files.

11:04

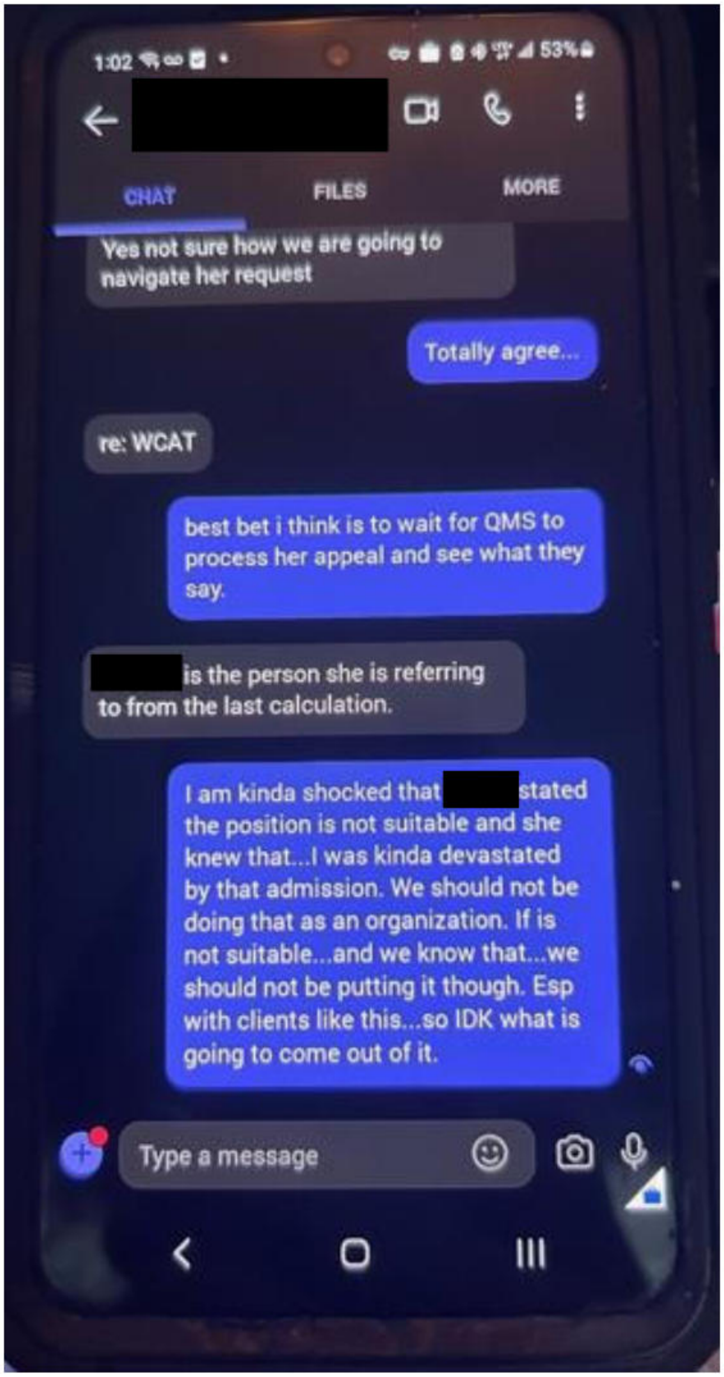
11 Messages

pay

55

Your disclosure, or allegations against WorkSafeNB, to a third party (including the ombud, political officials, media or otherwise) about the practices of WorkSafeNB may constitute a breach of the terms of your Release, Settlement and Confidentiality Agreement.

4, Screenshot: My Statement Opposing the Deeming of Permanently Disabled Clients in Unsuitable Positions



5. Audio – attached in email
6. DRO – no mention of McInnis Cooper

Review and appeal

There may be times when you disagree with a claim decision and an objective review of the decision can be helpful. Reporting to WorkSafeNB's General Counsel, the Decision Review Office (DRO) operates independently of WorkSafeNB's case management, adjudication and benefit payment services. The team is committed to reviewing your decision to determine that it was made consistent with legislation, policy and the merits of the case.

Exploring Workers Experiences with Workplace Injury & Illness

OHC Facilitated Focus Group (Report)

Virtual Session Held October 27, 2022, 6:30 – 8:30 pm

Introduction

More than one million workplace injuries occur every year in Canada (CIWA). On an average working day in Canada, three Canadian workers will be killed or die because of occupational disease, hundreds will be seriously injured or made ill because of work and thousands of families, communities and workplaces will be affected (Threads of Life). Occupational Health Centre (OHC) is committed to developing a more comprehensive response to assist injured and ill workers and their families. A core value in everything we do is to remain “worker centered” so it is vitally important that we commit to listening to injured workers and incorporate their valuable feedback into our program planning.

In late October 2022, OHC conducted a virtual focus group with Manitoba workers who have experienced a workplace injury/illness. The purpose of this focus group was to listen to these shared experiences, understand the impacts of injury or illness on workers’ lives and identify themes, needs and gaps that will inform our planning. This summary report documents our findings and provides recommendations regarding next steps. During the focus group we kept the following learning outcomes (or goals) in mind:

- Understand experiences of injured workers (within the workers compensation system or otherwise), including newcomers and workers employed in precarious settings.
- Capture injured and ill worker experiences using other community-based supports.
- Understand mental health considerations/needs and where the OHC can best successfully support injured and ill workers and their families.
- Document lessons learned from the focus group process to improve quality and effectiveness of future OHC program planning.

Focus Group Planning Process

The following table summarizes the focus group planning process:

Activity	Timeframe	Notes
Confirmed focus group date and adequate resourcing	8-10 weeks ahead of the event	Example criteria: staff availability, adequate IT resources & prep time.
Created a promotional poster	6 weeks ahead of the event	Poster clearly stated each participant would receive a $25 honorarium. Poster found HERE.
Determined participant eligibility criteria	6 weeks ahead of the event	Identified which worker voices might be harder to hear & how to elevate.
Wrote eligibility questions	6 weeks ahead of the event	Kept short; ensured that demographics, backgrounds captured desired criteria.
Constructed a rubric to assist with scoring survey questions	5 weeks ahead of the event	Scoring mechanism was built into the rubric to boost desired worker voices. Eligibility questions, rubric and rationale found HERE.
Fine-tuned eligibility questions then converted to an online survey	5 weeks ahead of the event	Rewrote some questions, dropped others. Used Survey Monkey.
Sent out promotional poster and survey link	5, 4 & 3 weeks ahead of the event	The registration/eligibility survey was closed 2 weeks ahead of the event.
Began brainstorming focus group facilitator questions	5 weeks ahead of the event	Left open-ended for re-interpretation once survey results were analyzed.
Analyzed survey responses using the rubric, confirmed participant numbers	2 weeks ahead of the event	Applied scoring method to exported spreadsheet (see evaluation section).
Sent follow-up email confirmation to participants	10, 7 & 3 days before the event	10 participants selected after rubric evaluation, 7 were able attend.
Pre-session checks & logistics	5 & 2 days before the event	Met with notetaker (social work student) to confirm process. Wrote scripts and rehearsed as needed.
Held the virtual focus group		The 2-hour event was recorded for later review.
Evaluated focus group	2 - 6 weeks post event	Focus group evaluation survey found HERE. Focus group evaluation summary found HERE.

Participant Eligibility & Demographics

Approximately 5 weeks ahead of the focus group session, the OHC team established important participant eligibility criteria that we felt would fairly capture a variety of voices from injured workers. In the spirit of equity and fairness, we felt it was important to elevate voices that are often overlooked. Two demographic criteria that were particularly important to us were *immigrant/newcomer status* and *gender expression* (man, woman, non-binary or other). Participants who identified as a newcomer and/or did not identify as a man were scored higher. Other rubric criteria automatically excluded some individuals:

- No workplace injury or illness status
- Self-disclosing as unable to speak English well enough to participate in the discussion

Participant Demographics

- Seven participants: 5 women, 2 men
- Age Ranges:
  - 31 - 45 (3 persons)
  - 46 - 59 (2 persons)
  - 60+ (2 persons)
- Employment:
  - Fully employed (3 persons)
  - Unemployed (2 persons)
  - Employed but on medical leave (2 persons)
- Industries Represented:
  - Transportation, trucking (1 person)
  - Cleaning, janitorial (1 person)
  - Healthcare (2 persons)
  - Social services (1 person)
  - Trades - welding (1 person)
- WCB Claims:
  - One claim (2 persons)
  - Two or more claims (5 persons)
- Immigrant or Newcomer Status:
  - Yes (3 persons)
  - No (4 persons)
- Geography (residency):
  - Southern and Southeastern MB (2 persons)
  - Winnipeg & Vicinity (5 persons)
- Previously been a client of the OHC?
  - Yes (4 persons)
  - No (2 persons)
  - Not sure (1 person)

Focus Group Discussion Topics

Discussion topics covered:

- Identifying important issues affecting injured and ill workers today.
- Injuries/illnesses that were sustained by the workers.
- Injured and ill worker experiences with the Workers Compensation Board (WCB).
- Worker experiences with Return to Work (RTW).
- What helped/hindered injured and ill workers recovery as it related to their mental health.
- Where injured and ill workers found emotional and practical support.

Question #1: What are some of the important issues facing injured and ill workers today?

Participants shared their ideas on what they felt were some of the important issues facing ill and injured workers.

"The simple fact of not knowing your four rights. You have the right to make a claim if you get injured at work. Lots don't know this"

"Accommodation when returning to work after an injury"

"Fear of losing your job"

"Scared to report an injury because they fear that the employer will not believe that they injured themselves in the workplace"

"Not getting time to do this at work, reporting an injury, the complexities of using a computer to complete forms online"

"Employers have incident reports that you have to fill out online. Most people don't know what they are doing"

"The burden of proof lies on the worker. How many witnesses do you have? There are so many barriers."

"Sometimes workers themselves are not reporting an injury. They think oh it is just a fall or a slip"

Several participants spoke to the challenges of navigating a claim with the WCB including challenges with reporting a claim online. One participant also described the challenges with completing the employer incident report online. One participant mentioned the importance of union advocates who can be a source of information and support for workers navigating the claims process. They mentioned this support is of utmost importance to newcomer workers who are often scared and don't understand the process. One participant stated that injured and ill workers need to understand the importance of reporting an illness/injury no matter how minor it might seem.

Question #2: Please tell us about the injury or illness that you sustained.

Workers spoke about the following injuries that they sustained:

- Trip and fall from a height which resulted in a rotator cuff injury
- Hand crush injury to the dominant hand
- Multiple wrist injuries after getting hand caught in a grinder
- Repetitive strain injuries to the hand/wrist
- Brain injury from an accident

"Mental injuries don't get mentioned as much. Our transit workers get denied left, right and center regarding stress claims. Someone pulls a gun on them; someone pulls a knife on them"

One participant spoke about the specific challenge they encountered when reporting a claim related to a repetitive strain injury and the push back, they felt they received from WCB in having to convince them that this injury was work related. The participant spoke about the frequent questioning from WCB such as *"do you do other things in your life that would have impacted this?"* The participant did not feel believed. *"It was a fight."*

Question #3: Can you tell us a little bit about your experience with the WCB?

Participants described challenging experiences with the WCB as demonstrated by the quotes below. Other sections of this document also capture worker experiences with the WCB.

"I have to speak negatively, although I have had good experiences in the past, it was traumatic. You already have an injury, you are afraid in some cases, there is a tonne of paperwork, and the worst part is that my adjudicator constantly changed. It never felt personal, and you had to explain your story again"

Another participant agreed with the experience of multiple case managers/adjudicators and feeling like they were trying to get disqualified by them.

"It felt like when you call a company and they put you on hold for an hour, they want you to just give up."

One participant spoke about a positive experience with the WCB but felt like they were getting the most pressure from the employer to return to work. The WCB was able to advocate on the workers behalf regarding return-to-work accommodations.

"The most pressure to return to work is from the employer. Despite the medical note they still made me go back to work."

Unfortunately, due to technical difficulties several additional responses to this question were not clearly understood.

Question #4: When you think of your mental health during the time of your injury, what has helped or hindered your recovery?

An important aim of the focus group was to better understand the ways in which injured workers' (IW's) mental health was being impacted by their interactions with the WCB. Below is a summary of key observations supported by participant quotes and paraphrases.

A theme reiterated by many participants was feeling isolated.

"I felt very alone."

Participants described how when they were dealing with their physical injuries, they didn't have time to consider or even talk about their mental health with others. Several participants expressed how they went through a long journey before realizing they needed to protect their mental health.

As an advocate for other injured workers, a participant said, *"I could see people just dropping [their mental health] off"*. They continued saying that a physical injury creates a "mentality" that leads you to believe there's no one else out there for you and that this can have traumatic consequences.

Several participants expressed how sharing their needs and concerns with health professionals was very important.

"They [health professionals] believed me versus WCB whose reps were gas-lighting me and made me question 'should I have done that?'. The healthcare providers made me realize I really wasn't going crazy."

One participant was not injured herself but was a mother and caregiver for her injured son. She expressed concern over how her mental health and the mental health of her other daughter was being negatively impacted by her son's recovery.

The issue of privilege and accessibility also arose.

"Privilege shapes your access to resources and so you're less likely to complain. Speaking up is important so that it benefits other people. As a vehicle of change, it raises awareness." Talking about advocacy and building community is helpful knowing that you're not alone in this.

Question #5: Where did you go to be heard or validated?

Participants identified the following as important sources for support/validation:

- Their union
- Medical providers
- Friends and family support

- WCB case manager
- Worker Advisor Office (WAO)

A participant, who identified as a worker advocate, said that her mental health was enhanced whenever she could tell her story to other workers on the shop floor and share ideas: *"Did you know you could do this?"*. She continued, *"It feels good to talk it out, we just don't do it enough."*

More noteworthy quotes about where participants felt heard and validated:

"My doctor has been incredible. Validation through a medical standpoint makes me feel better."

"I work for a community outreach agency so sharing my story with other organizers mattered. They were also outraged [by how I was being treated by the WCB system]. What helped is realizing I'm not alone in it. In precarious situations when the stakes are so high it's hard to speak out."

"It sucks that we're finding camaraderie in being let down by a system that's supposed to help you, but it does make me feel better to know that I'm not alone in it."

"Medical providers [especially specialists] were feeling outraged by WCB's findings, that their professional judgment was being questioned. It empowered me more to witness that."

Question #6: Does anyone have other ideas about what education we [the OHC] could provide for injured workers?

The conversation shifted a bit to other forms of outreach and advocacy.

One participant noted that they were once involved in a District Worker Advocacy Centre in Brandon, funded by a local union board. It was active between 2012 - 2018 but had to close due to a lack of provincial funding.

A resonating, and powerful quote from this participant: *"[This advocacy work in Brandon] was tantamount to people not killing themselves."*

Discussion

This focus group was an important opportunity to hear directly from injured and ill workers. It allowed the participants to feel less isolated and alone by coming together to share their experiences. The focus group also provided an opportunity for the group to discuss common issues and ways to build solidarity and community to support one another. This focus group attracted a strong group of injured workers who were eager to share. Their quotes emphasize how vocal and energized they were to talk about several key issues important to the injured worker community. It was clear that many individuals in the group were adept at self-advocating based on the quotes and language used by participants. Toward the end of the session one participant exclaimed: *"I had to get rid of those people [i.e., unhelpful WCB case manager(s)] who were making it so hard for me to get my claim through. These people caused me stress attacks."* This same participant, a woman of color, exclaimed how grateful she was that eventually WCB pulled through and assigned her a more helpful case manager. There's more than one way to interpret this anecdote. Two come to mind:

- As a powerful example of resiliency. It demonstrates how one informed, committed injured worker can muster the confidence and self-efficacy to surmount a tremendous challenge.
- Although, from an anti-oppressive perspective, this anecdote also demonstrates a true failing of the system in this instance where neither the worker nor employer were well served. The injured worker should not have to advocate so fiercely on their own behalf.

Throughout the focus group, the participants remained intently engaged sharing their stories about reporting their injury to the WCB. They spoke about psychosocial barriers such as fear and anxiety that occurred with reporting an injury to their employer and the WCB. They spoke about communication barriers and the frustration and resulting trauma from re-telling their story to multiple adjudicators/case managers. They also spoke about employer barriers and the lack of support and direction received when a workplace injury was sustained.

The vibrant mental health discussion revealed many valuable insights including the importance of speaking truth to power through self-advocacy, the healing properties of talking to others who will actively listen and validate their lived experiences, and how that validation enhances mental health especially when it comes from authority figures (e.g., the WCB and community healthcare providers).

Recommendations & Next Steps

Given these focus group findings OHC should consider the following program recommendations (numbered below, but not prioritized):

1. Conduct additional focus groups in 2023 with intent to capture more nuanced input especially from injured workers who are BIPOC, newcomer, and/or who come from less-represented sectors or other unique backgrounds. (e.g., neurodiversity, ability). We may also want to consider follow-up key-informant interviews. Further work needs to be done in understanding the specific barriers to care in workers compensation including psychosocial, employer, access, and communication barriers.
2. We should remain vigilant regarding digital inequities and lack of accessibility when we consider planning another focus group. Consider adding an in-person opportunity for some workers. English as a language barrier is another factor. There might be an opportunity to conduct a translated focus group with community members served by the Immigration, Refugees, and Citizenship Canada (IRCC) cross cultural program.
3. Based on the participant survey results, and the qualitative data summarized in this report, holding a 2-hour focus group may bring significant added value in terms of promoting mental health, personal growth, and validation. In other words, OHC may want to consider a program model that recognizes how community-based focus groups could also serve as a form of IW support. Such a model would need to be carefully framed and expectations/goals clarified.

4. Aim to standardize annual or semi-quarterly focus group sessions with injured and ill workers. Use a cyclical quality improvement model (e.g., Plan, Do, Study, Act, [PDSA]) to optimize effectiveness and documentation of lessons learned.

5. Input from this focus group and the participant survey confirms the importance of including group-level discussions as part of OHC educational offerings targeting IWs moving forward.

6. Strategize with partners (e.g., experts at the WCB specializing in return-to-work, Safe Work MB & WAO,) to ensure the availability of high quality, evidence-based information, and educational opportunities for community primary care providers. Priority topics important to injured and ill workers would include RTW processes, disability management, counselling, and advocacy. This recommendation correlates with the stories shared by many of the participants about how healthcare providers were critically important to their healing journeys.

7. Collaborate with the Manitoba Federation of Labour (MFL) and other union leaders to discuss innovative ways OHC could tailor their current programs to support injured workers emphasizing the importance of promoting equity, worker-centeredness, and protecting human rights.

8. OHC recommends that the Manitoba provincial government expand WCB coverage to address workplace related mental health injuries.

9. Promote and strengthen existing support systems for injured workers, such as unions. Further work needs to be done to understand current union support that is available for injured and ill workers who are off work for an extended period. Promote existing valuable resources for worker advocates such as the MFL WCB Resource Guide for Worker Advocates.

10. Explore innovative ways to provide educational information on topics of importance to injured and ill workers. Create a section on the OHC website that contains valuable resources of importance to injured and ill workers which are easy to access and simple and straightforward to navigate. Consider organizing a speaker series focused on issues of interest to injured workers. Explore ways in which the OHC can provide peer support and opportunities for knowledge sharing amongst injured and ill workers.

Acknowledgements

Lorem ipsum dolor sit amet, consectetur adipiscing elit….

Appendix 2

Information Letter and Consent Form

Study: Identifying and understanding the stigma experienced by injured workers through a systematic review and stakeholder focus group engagement

Investigators: Dr. Amanda Maranzan (Lakehead University), Lynn Cooper (Canadian Injured Workers Alliance), Lauren Reynolds (Lakehead University) and Dr. Lynn Shaw (The University of Western Ontario).

November 1, 2022

Dear Potential Participant:

You are invited to participate in a study being conducted through the Department of Psychology at Lakehead University in partnership with the Canadian Injured Workers Alliance and The University of Western Ontario. The overall goal of our project is to build knowledge and understanding about the scope and impact of injured worker stigma on workplace accessibility. This project will accomplish a systematic literature review, and a stakeholder consultation team focus group.

What will I be asked to do? Are there any technology requirements?
You are being invited to participate on a Stakeholder Consultation Team. This will involve attending a series of meetings, across the course of a year, to provide input on the systematic review methods and results, and to attend a focus group where we seek your feedback on the systematic review findings, key themes, and next steps for our research team. There may also be some email review of study protocols and information. In total, this will take approximately 10 hours of time.

To fully capture the important information shared by the stakeholder consultation team we are including information shared by team members in a research study. This means that we are asking permission to record all stakeholder meetings and analyse the information shared.

We are inviting 10-12 people to participate on the Stakeholder Consultation Team, from across Canada, and including representation from injured workers, advocates, health care and helping professionals, partners in the disability field, employers, and insurance/legal sectors. All Stakeholder Consultation Team meetings will take place online (via Zoom); so, to participate, you should have access to a device with audio and video conference capabilities. We will also ask participants to use headphones and connect in a private space, so as to protect other group members' privacy too.

To thank you for your time, you will receive a $200 honorarium at the conclusion of the study. If unforeseen circumstances arise that impact your ability to participate, this amount will be prorated based on time spent.

Do I have to participate?
No, you don't have to participate in this study. If you choose to participate, it is your own voluntary decision. You don't have to answer any questions that you don't want to. You can refuse to participate in any or all parts of the study. You can withdraw from the study at any time by contacting the researcher (email Dr. Maranzan: kamaranz@lakeheadu.ca). Please note that should you withdraw from the Stakeholder Consultation Team, your information will still be used in the study unless you specifically request it to be withdrawn (notify Dr. Maranzan: kamaranz@lakeheadu.ca).

What are the risks and benefits?
Risks are minimal for involvement in this study. Confidentiality cannot be guaranteed in group meetings – even though we will ask participants to keep the information shared confidential. This study will benefit society through identification of ways to increase awareness of and manage stigma associated with occupational injury, including associated negative outcomes.

How will my information be handled?
All Stakeholder Consultation Team meetings will be held on Zoom. We will password-protect the Zoom meeting, and use the "waiting room" feature to ensure only authorized people can access the meeting. Please note that we will be recording the meetings; the researchers will record the workshop and store it locally (on their computer) with password-protected access. Only the research team will have access to this recording. All of the information you provide to the research team will be kept confidential. All data will be stored securely by Amanda Maranzan at Lakehead University for a minimum of 7 years. Secure storage will consist of the information being kept on a password-protected USB, in a locked filing cabinet, in a locked room, and accessible only by the PI.

How will the research findings be shared?
We will work with our Stakeholder Consultation Team to share key learnings via an integrated knowledge translation strategy (iKT - i.e., sharing knowledge as the project unfolds). We will share project findings through the CIWA website, www.ciwa.ca, and on social media. We will also use our existing networks to share information with the injured worker and chronic pain community (for example, through CIWA newsletters, and newsletter submission to provincial and local injured worker groups). To share overall project findings, we will prepare a project summary report describing the project implementation process and project outcomes. We will create a presentation for CIWA to use for awareness building purposes and postings on www.ciwa.ca and social media. We will also share knowledge through academic publications and presentations (e.g., Canadian Journal of Pain; Journal of Work; Disability and Rehabilitation; Journal of Occupational Rehabilitation).

What if I want further information?
If you want further information about this study, you can contact the Principal Investigator, Dr. Amanda Maranzan (Email: kamaranz@lakeheadu.ca)

This research study is funded by the Social Sciences and Humanities Council of Canada. It has been reviewed and approved by the Lakehead University Research Ethics Board. If you have any questions related to the ethics of the research and would like to speak to someone outside of the research team please contact Sue Wright, Lakehead University Research Ethics Board, at (807) 343-8283 or research@lakeheadu.ca.

Thank you for considering participating in this study.

On behalf of the research team,

Dr. Amanda Maranzan, Ph.D., C. Psych.
Associate Professor; Director of Clinical Programs
Department of Psychology, Lakehead University

Ms. Lynn Cooper
Research Coordinator
Canadian Injured Workers Alliance

Ms. Lauren Reynolds
Graduate Student
Department of Psychology, Lakehead University

Dr. Lynn Shaw
Incoming Director, School of Occupational Therapy
Faculty of Health Sciences, The University of Western Ontario

Consent Statements

By signing below, I agree that:

- I have read and understood the information provided to me about this study.
- I agree to participate.
- I am a volunteer and can withdraw from the study at any time and may choose not to answer any question in the focus group or in any Stakeholder Consultation Team meetings.
- I am aware that any information I share in Stakeholder Consultation Team meetings will be heard by other team members.
- I acknowledge that confidentiality by other members of the Stakeholder Consultation Team cannot be guaranteed; however, I agree to keep the information provided by other members confidential.
- I agree to be recorded (Stakeholder Consultation Team meetings will be recorded)
- The data I provide will be securely stored at Lakehead University for a minimum of five years.
- I will remain anonymous in any publication/public presentation of the research findings, unless otherwise indicated.

Signed: ___________________________________

Name: ____________________________________

Date: ______________________________________

I give consent to be publicly identified as a member of the Stakeholder Consultation Team in any study acknowledgements (e.g., presentations; article publications): □ Yes / □ No

[redacted]

From: The Workers Compensation Act [redacted]
Sent: Tuesday, 03 March, 2026 12:12 PM
To: Legislative Review
Subject: New message from "The Workers Compensation Act Legislative Review"

Name: Ken Grysiuk
Organization: An injured worker
Email: [redacted]
Phone: [redacted]
Message: I have a couple more attachments and necessary information that I need to include as part of this WCB 10 year review process... please I apologize if this duplicated information but rather duplicate than missing... thanks and please again i if possible would like to share my story with the review panel giving a straight forward feedback of what it feels like to be severely injured at work and then the system itself creating further injuries... it isn't an isolated incident but any injury that is not on a six -twelve week recovery cycle... ends generally with the injured worker losing out on benefits vs. Injuries... employer vs employee and the WCB medical & administration vs the injured worker... HOW THERE IS NO LEGAL SUPPORT OR CONTROL given to the injured worker... the injured worker is meant to feel like he is just product/ case with NO EMPATHY OR EMOTIONAL SUBSTANCE.. Yet the WCB can send money for advertisements and return rebates to employers who have been on the record of having multiple injured workers while on the pay roll and in their employment environments

---

Date: March 3, 2026
Time: 12:10 pm

[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, 25 February, 2026 10:35 AM
To: Legislative Review
Subject: Re: Your Submission to the Legislative Review of The Workers Compensation Act

Thanks for your responses. I do look forward to having the opportunity to share my experiences or at least having my thoughts shared and reviewed. I am open for some returned responses describing how the committee is approaching the review process.

My point of my submission is to be a positive part of the process. If at any point my passion in my approach is captured by the review committee as being "very forward" my desire is only to see a better outcome for all that are involved.

Thank-you and have a wonderful day.

Ken Grysiuk
Sent from Ken's IPhone

> On Feb 25, 2026, at 9:51 AM, Legislative Review <[redacted]> wrote:
>
> Hi Ken,
>
> Sorry you experienced technical difficulties with the site and for the delayed response.
>
> We want to confirm that your submission was received and will be reviewed by the Legislative Review Committee (LRC). Specifically, we received the following: the message below along with your other messages, plus 6 attachments (4 PDFs and 2 Word documents). If we have missed anything, please resubmit.
>
> If the Committee has any follow-up questions, we will contact you by email.
>
> Sincerely,
>
> LRC Secretariat
>
> ---
>
> **From:** The Workers Compensation Act <[redacted]>
> **Sent:** Saturday, 14 February, 2026 2:53 PM
> **To:** Legislative Review <[redacted]>
> **Subject:** New message from "The Workers Compensation Act Legislative Review"
>
> Name: Ken Grysiuk
> Organization: Injured Worker

Email: [redacted]
Phone: [redacted]
Message: So you know... The site has closed while I have been entering my name and organization more than once.

PLEASE DO NOT DISMISS THIS RESPONSE

I have not received an email stating that my request has been accepted by the WCB reviewing panel.

One policy that should be created and followed by WcB administration & wcb decision makers is that an Injured Worker should be aprt of this annual review process.

An injured worker should be apart of the review process and on the review committee. Not having an injured worker on the review panel provides a bias outcome and leaves the impression that WCB doesn't fully support injured workers. How could this committee that represents the injured worker community provide a satisfactory response or explanation unless they have experienced in real time an injury that has required WCB intervention.

It is without a doubt that the current system has made and continues to make, "unfair and bias decisions" that negatively impact injured workers, their families and their communities all across the province & country.

The frustration so many injured worker's face is because of a combination of policies and how they are delivered. The results of decisions being made by case workers & the appeal officers are often vaguely explained and more often offer no emphasis what matters to the injured worker and their lives moving forward.

There needs to be better advocacy for injured workers who appeal decisions and the time period must be reduced to not put injured workers in financial jeopardy. Or the benefits need to remain constant until the appeal process is complete.

There has been numerous bad faith decisions made by wcb case worker's that have negatively impacted injured workers for life.

The return to work plans need to be more appropriate and flexible and more training to up grade workers also needs to be implemented to fill in growing demands of more versatile workers within the workforce.

My goal is to see these WCB policies that have negatively impacted so many good people for life because they became injured, either rewritten or removed.

One more policy, that needs to be rewritten is when WCB stops providing benefits to injured workers when they reach age 65 yrs old. This cut off of wcb benefits at age 65 needs to be changed so that injured workers with long term disabilities as a result of a work place injury or disease do not become burdens on their families, friends or the Canadian tax payer.

The policy, Section 39(2) of The Workers Compensation Act where workers are cut off benefits at the age-65 is not reasonable or appropriate. The WCB needs to provide benefits for the life of the workplace injures “that created workers-disability”. To cut off an injured worker’s benefits when they’re most vulnerable to further injury & disease is immoral & unethical.

This is a legal requirement, not just internal policy that needs to be changed.

I also have left a number of attachments within another application that began, and added the attachments, but I never received an email confirmation that my email or information entered has been received by the WCB review team...

Can someone please confirm my messages have been received before the expiry date and hopefully within the 5 day window that this website states it will have a response by a WCB representative.
Thanks
.

Date: February 14, 2026
Time: 2:52 pm
[redacted]

[redacted]

From: The Workers Compensation Act <[redacted]>
Sent: Wednesday, 11 March, 2026 8:58 AM
To: Legislative Review
Subject: New message from "The Workers Compensation Act Legislative Review"

Name: Ken Grysiuk
Organization: Injured worker
Email: [redacted]
Phone: [redacted]
Message: On the explanation page OF THIS SITE (or the pages that describe "HOW WCB POLICIES ARE WRITTEN; THE MORALS AND ETHICS THAT ARE REFLECTED ON"; (when policies are written by WCB policy makers). The administrators of this site provided a "version of a summary" of the what is considered "the Meredith Principles"...

Other injured worker advocates & myself submitted an accurate reflection of a modern version of how the Meredith Principles should be applied and constructed to provide adequate clarity & substance of what the Merideth Principles should be applied and viewed. I tried to attach the revised versions here but could not.

I & other advocates submitted/ presented a statement/ to Legislators with a full outline of the PRINCIPLES, "bill 86 The Meredith Act". I HAVE ALSO SUBMITTED A REQUEST TO HAVE CURRENT POLICIES "reviewed" . Policies that "ACTUALLY INFRINGE ON THE HUMAN RIGHTS OF INJURED WORKERS" MY HOPE IS THAT THESE POLICIES THAT NEGATIVELY IMPACT ME AND THOUSANDS OF OTHER INJURED WORKERS ARE CHANGED. Bill 86 THE MEREDITH PRINCIPLES ACT is a moral & ethical guide of what respect & dignity are founded upon.

Date: March 11, 2026
Time: 7:57 am

[redacted]

[redacted]

From: [redacted]
Sent: Thursday, 26 March, 2026 10:59 AM
To: [redacted]
Subject: CBC News : Coke Canada Bottling terminates worker injured on the job, says keeping him would be too hard on the company
Attachments: wrong dismisal [redacted] April 30, 2020 (doctrine of frustration).pdf; 2018-02-20 GRYSIUK, Ken, [redacted]s, Update report for [redacted] WCB, PDF.pdf; Aldergrove Duty Free Shop Ltd. v. MacCallum, 2024 BCCA 28.pdf; Human Rights Final Copy March 5th.pages; Human rights delay letter response jan312024.pdf

[redacted]

[redacted]

A lawyers assessment & legal court issued examples found through researching other similar cases that supports why my employer shouldn't have terminated my employment.

I believe without a doubt I was put in a terrible position and my family and I have suffered in multiple areas of our lives because of it.

I have much more information as this is a
Real matter that I do hope to share but more so it needs to be recognized that these multi million dollar companies should NOT BE ABLE
TO BE FOUND responsible or accountable for a work place accident that leaves a person/ employee who was a good employee but after the injury be victimized as useless and disposable!

I have much more I could say and if you have any questions I would appreciate your time to share my story with you... if it can help this person in the story and or any other person than it is worth my time to share with you and the public.

Please contact me by phone [redacted] or email [redacted]
at your convenience and I would happy to speak further on this matter!

Currently, my case is in front of the Human RIGHTS COMMISSION. It is currently being INVESTIGATED.

My HUMAN RIGHTS COMPLAINT WAS found ACCEPTABLE and my complaint was forwarded to an investigator for their assistance at resolving my issue .

The process with the investigator began June 2025 and I am still waiting for the response.

[redacted]

[redacted]

[redacted]

[redacted]

April 30, 2020

[redacted]

Via email only

Attention: [redacted]

Re: [redacted] **– Doctrine of frustration**

You had asked me to research case law regarding the employer's suggested defence of the doctrine of frustration.

Short answer: I was unable to find a reported case Canada-wide where an employer was convicted of/pled guilty to OHS violations which violations resulted in an employee's disability, then claimed frustration of contract when terminating that employee. If the doctrine of frustration remains a viable argument with those facts, see summary at the end of this memo which also incorporates the duty to accommodate.

A. Background

[redacted]

[redacted]

- February 26, 2020: Ken receives termination notice from [redacted]. [redacted]s position is that Ken's contract of employment has been frustrated, and as such no payments or benefits are warranted.

B. Frustration

Was Ken's employment contract with [redacted] frustrated due to his ongoing disability? Frustration of an employment contract occurs when a contractual obligation cannot be fulfilled without being the fault of either party: *Dragone v. Riva Plumbing Ltd.,* 2007 CarswellOnt 6177 (ONSCJ) at para. 15; or put another way, by circumstances beyond the control of either party: CED Employment Law II.1.(e).(ix)(Western) at §424.

If the contract is frustrated, [redacted] is not liable for any common law damages (just statutory damages). The illness/disability cannot be of a temporary nature, and must be permanent. As noted in *Senyk v. WFG Agency Network (B.C.) Inc.,* 2008 BCHRT 376 at paras. 304-305:

> The proper approach, the Court said, "requires an examination of the contract in order to determine whether its terms are wide enough to accommodate [the employee's] permanent disability without termination": para. 28. The Court therefore placed significant emphasis on the distinction between permanent and temporary disability. **The longer the disability persists, the more likely that the contract is frustrated**: para. 43.
>
> **It is clear, however, that a disability may, depending on all of the other relevant circumstances, have to go on for a lengthy period of time in order to be considered "permanent".** Thus, for example, in *Yeager*, Wood J. held that the plaintiff's disability, which had rendered him incapable of discharging his employment duties for two years, was not sufficient to render the contract frustrated. **"Permanent", in this context, means an illness which would put an end, in the business sense, to the parties' employment contract**: p. 240, cited in *Wightman* at para. 40.

(bold added)

Of interest, I was unable to find a reported case Canada-wide where an employer was convicted of/pled guilty to OHS violations that resulted in an employee's disability, then claimed frustration of contract when terminating that employee. Surely [redacted]s proven negligence, i.e. a reasonably foreseeable consequence of its actions/inactions, negates any application of the doctrine of frustration. Ken's contractual obligation cannot be fulfilled due to [redacted]s actions which were certainly within their control. More broadly, one cannot breach a contract then suggest the contract is frustrated due to events beyond anyone's control. Add this to the fact that [redacted] refused to accommodate Ken in any fashion and likely caused him further injury, and application of the frustration doctrine becomes more remote.

If this does not end the matter, I continue with more of the doctrine of frustration below, as well as the duty to accommodate.

The Court in *Lippa v. Can-Cell Industries Inc*., 2009 ABQB 684 (affirmed in 2010 ABCA 409) discussed the doctrine of frustration, focussing on the date of assessment of the employee's medical prognosis. In that case, the employee started with the company in 1990, and encountered health problems in 1999. She had possible MS and her return date was unknown. Her replacement came to the plaintiff's home a number of times in November and December 1999 for assistance. The plaintiff's application for short and long term disability through work benefits was dismissed, then settled and paid out a few years later. The plaintiff never returned to work, and was terminated effective April 20, 2000. During Questioning, the employee confirmed that as at May 12, 2006 (day of Questioning) she would still be unable to work. The Court found that the employee was entitled to 9 months notice plus her annual bonus, with no set-off against the amounts received from her insurer for disability.

The Court made the following general comments regarding frustration at paras. 75-76:

> In *Naylor Group Inc.*, *supra* Binnie J. stated at para 53:
>
> > 53 **Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract":** *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, per Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.
>
> In *Simpson*, *supra* the plaintiff was off work for a period of two years. She underwent surgery and was on disability for a period of 104 weeks which ended in January of 1988. Waite J. accepted the medical evidence of two

doctors that the plaintiff could not return to her previous employment. At para. 49 he stated:

> 49 The second case cited by the Credit Union is *Atlantic Provinces Special Education Authority v. Terrance Owen Parks* (1992) 39 C.C.E.L. 155 (N.S.C.A.). On pp. 177-8, the Court considered a variety of elements that should be taken into account in determining the application of the principles of frustration to a contract of employment. **The overall test is cited in these terms** on p. 178:
>
> > **The question is and remains: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment? Any other factors which bear on this issue must also be considered.**

The Nova Scotia Court of Appeal had adopted the above quote from *Marshall v. Harland & Wolff Ltd.*, [1972] 2 All E.R. 715 (N.I.R.C.).
(bold added)

The Court in *Dragone v. Riva Plumbing Ltd.* 2007 CarswellOnt 6177 (ONSCJ) was determining a case where the employee had been on long term benefits and off work for 14 months due to breast cancer, and brought an application for an order that her employer maintain her benefits. The Court made the following comments about frustration at paras. 16-22:

> **A permanent illness that disables the employee is a frustrating event that will end the employment contract. It has not been established that Ms. Dragone has no prospect of returning to work.** The evidence is that: she has not worked since July 2006; her doctor has recommended that she not work now; her treatments are continuing; she wants to return to work if possible; but Ms. Dragone does not know when she will get better. Based on that evidence, **there is at least hope that she will eventually be able return to work. A permanent incapacity to return to work has not been proven.**
>
> Riva Plumbing, however, argues that since the diagnosis of a metastasized cancer has not changed, an adverse inference that her disability is permanent should be made against Ms. Dragone because she did not provide medical evidence as to her ultimate prognosis. It is, however, not Ms. Dragone's onus to disprove Riva Plumbing's allegation that the contract has been frustrated. **The onus is on them to prove that the contract has been frustrated.**

That a permanent incapacity has not been shown by Riva Plumbing, however, does not end the discussion, because **a protracted temporary illness also may constitute a frustrating event and the current situation is that Ms. Dragone has not worked for approximately 14 months.**

Justice Sachs discussed the doctrine of frustration in the context of an employment contract and an ill employee in *Skopitz v. Intercorp Excelle Foods Inc.*, [1999] O.J. No. 1543 (Ont. Gen. Div.). She stated at para. 21:

> Whether a contract of employment has been frustrated by an employee illness or incapacity **depends on whether or not the illness or incapacity was of such a nature or likely to continue for such a period of time that either the employee would never be able to perform the duties contemplated by the original employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover. To determine if a contract has been frustrated, regard must be had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed**: *Lafreniere v. Leduc* (1990) 66 D.L.R. (4th) 577 (Ont. H.C.); *Yeager v. R.J. Hastings Agencies Ltd*. (1985), 5 C.C.E.L. 266 (B.C.S.C.).

As Justice Sachs indicates, the **determination of whether a temporary incapacity to work is a frustrating event is contextual and whether there is frustration will depend on the particular circumstances of the case**. See G. England, *Employment Law in Canada* (4th ed.) (Markham: LexisNexis Canada Ltd., loose leaf), paras. 18.15-18.18.

For example, when the absent employee is a senior executive whose absence cannot be long tolerated if the business enterprise is to succeed, then a relative short period of incapacity may frustrate a contract. However, a longer period of time before frustration occurs may be the case for employees with lesser roles in the business.

The presence of long-term sick leave and disability benefits indicates a greater tolerance for the duration of an employee's absence before frustration occurs. Indeed, it has been suggested that contracting for these benefits may postpone the time of frustration because it may be inferred that the contracting parties anticipated that the employee might take leave for illness. See: *Antonacci v. Great Atlantic & Pacific Co. of Canada*, [1998] O.J. No. 876 (Ont. Gen. Div.), affd. in part [2000] O.J. No. 280 (Ont. C.A.); E.E. Mole and M.J. Stendon, *Wrongful Dismissal Handbook* (3rd ed.) (Markham: LexisNexis Canada Ltd., 2004), chapter B-4.
(bold added)

In *Wightman Estate v.2774046 Canada Inc.*, 2006 BCCA 424, the Court of Appeal quoted with approval the comments of the Court in *Marshall v. Harland & Wolff Ltd.,* [1972] 2 All E.R. 715, [1972] 1 W.L.R. 899 (N.I.R.C.) at para. 17:

> ... In *Marshall*, an employee who became disabled due to illness after twenty-three years of service was terminated without notice after an eighteen-month absence. Sir John Donaldson (as he then was) concluded, for the court, that the termination was wrongful. In so doing, he set out the essential question and suggested the following guidelines for determining whether incapacity due to sickness brings an end to a contract of employment for an indefinite period terminable by notice, at 718-19:
>
>> In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. **The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?** In considering the answer to this question, the tribunal should take account of:
>>
>>> **(a)** ***The terms of the contract, including the provisions as to sickness pay*** - The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.
>>>
>>> **(b)** ***How long the employment was likely to last in the absence of sickness*** **-** The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.
>>>
>>> **(c)** ***The nature of the employment*** **-** Where the employee is one of many in the same category, the relationship is more

> likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.
>
> **(d)** ***The nature of the illness or injury and how long it has already continued and the prospects of recovery* -** The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.
>
> **(e)** ***The period of past employment*** **- A relationship which is of long standing is not so easily destroyed as one which has but a short history.** This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.

> **These factors are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account. . . Any other factors which bear on this issue must also be considered.**

(bold added)

In *Antonacci v. Great Atlantic & Pacific Co. of Canada Ltd*., 1998 CarswellOnt 834 (ONCJ GD) [reversed in part but determination on frustration affirmed in 2000 CarswellOnt 61 (ONCA)], the employee was injured on the job in April 1994 and had to reduce his hours. He was on WCB for 3 weeks, returning on modified duties in May 1994. He was pressured into returning to work full time when he had not fully recovered from his injury, and had not fully recovered from his injury when he was dismissed in October 1994 after 33 years of service. WCB found that the plaintiff was permanently, but not fully disabled. The employer claimed a frustration of contract, and the Court disagreed, relying on the fact that the plaintiff was not totally disabled, the employer had long-term benefits available, and the plaintiff’s job could be modified to accommodate a worker with a back injury.

The Court noted at para. 37:

> The doctrine of frustration applies when a contract becomes incapable of performance because, in the circumstances, performance would be radically different from that contemplated by the parties at the time they made the contract. Many cases have emphasized that the frustrating event must be beyond the contemplation of the parties. **With respect to employee illness or incapacity, modern courts have not treated illness**

> ***per se* as a frustrating event; rather, they have looked at the length of the illness in relation to both the terms and duration of the employment contract**....
> (bold added)

The Court also noted the employer's duty to accommodate under the WCB legislation, then finding at para. 57:

> By informing the Board that Mr. Antonacci had been dismissed for cause and by never changing that story, the employer misled the Board and **deprived Mr. Antonacci of the opportunity to avail himself of the re-employment rights under the Act**. Ms. Weall testified that the Store Manager's job lent itself to accommodation, but even if Mr. Antonacci would not have been able to continue full time in his former position, there might have been other suitable jobs available, given the size of the employer. The effect of the information provided to the Board was to avoid the need for a systematic examination of these other possibilities. While Mr. Fry testified that there were no suitable jobs available, that opinion can not be determinative. **The Act requires a systematic examination, in good faith, of this question, and this was prevented here by the employer's conduct.**
> (bold added)

Alberta's similar legislation can be found in the *Workers Compensation Act* at s.88.1(3) requiring the employer to accommodate the work or workplace to the needs of the worker to the extent that the accommodation does not cause the employer undue hardship. Manitoba's *Workers Compensation Act* has identical wording at s.49.3(4). Alberta's Human Rights Commission website notes that the Supreme Court of Canada has ruled that the employer's hardship must be "substantial in nature" and:

> **Undue hardship occurs if accommodation would create onerous conditions for an employer such as intolerable financial costs or serious disruption to business**. An employer or service provider must make **considerable effort** to find an appropriate accommodation for an employee. Some hardship may be necessary in making an accommodation; only when there is 'undue' hardship can the employer or service provider claim that they have tried all the accommodations available.
> (bold added)

https://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/bulletins/Pages/duty_to_accommodate.aspx#whatisundue

C. Summary

Based on [redacted]s OHS violations and the absence of cases discussing OHS violations and the doctrine of frustration, it would appear such an argument is not a strong one. The cases above indicate the following:

1. The primary question is whether further performance of Ken's obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by [redacted] under the agreed terms of his employment: *Lippa; Dragone*;

2. There needs to be no reasonable prospect that Ken can return to work at least in the near future and likely for a lengthy period of time, i.e. permanent. There can be no hope of return to work: *Senyk; Dragone;*

3. While the absence usually has to be considered lengthy in order for the doctrine to apply, there is no rule as to what "lengthy" is; and

4. Factors to consider include Ken's seniority, length of service, and responsibility within the [redacted] organization: *Dragone*; *Marshall*; and

5. If Ken can return to work with accommodation, his employment cannot be considered frustrated unless [redacted] shows that it made every reasonable effort to accommodate his disability to the point of undue hardship: *Workers Compensation Act*; *Alberta Human Rights Commission* and its reference to *Hydro-Quebec v.* Syndicat *des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000,* 2008 SCC 43.

If you would like anything further, please let me know.

Kind regards,

[redacted]

[redacted]

Practice in Clinical Psychology & Forensic Psychology

February 20, 2018

[redacted]
Workers' Compensation Board
Winnipeg, Manitoba, R3C
[Sent by email]

Dear [redacted]

Re: [redacted]
Accident of [redacted]

Thank you for your letter of January 2, 2018. Mr. Grysiuk and I have met subsequent to your [redacted]

[redacted]

Registration in Manitoba and Ontario

[redacted]

I hope that this note is of assistance to you in your work on Mr. Grysiuk's behalf. I would be pleased to discuss any aspect of my involvement with him at your request.

Respectfully submitted,

[redacted]

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aldergrove Duty Free Shop Ltd. v. MacCallum,* 2024 BCCA 28

Date: 20240126
Docket: CA48717

Between:

Aldergrove Duty Free Shop Ltd.

Appellant
(Defendant)

And

Barbara May MacCallum

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 2, 2022 (*MacCallum v. Aldergrove Duty Free Shop Ltd.*, Vancouver Docket S2110081).

Counsel for the Appellant: A.L. Burchart

Counsel for the Respondent: L. Moody
A. Wensel

Place and Date of Hearing: Vancouver, British Columbia
December 12, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 26, 2024

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Justice Skolrood

Summary:

The appellant employer appealed a finding of wrongful dismissal involving a failure to pay severance. The appellant runs a duty-free shop in Aldergrove and argued that its employment contract with the respondent had been frustrated by the federal government's decision to close the Canada–USA border for non-essential travel during the COVID-19 pandemic. This argument was rejected by a summary trial judge. On appeal, the appellant alleges the judge failed to appreciate the fundamental purpose of the employment contract. It also says the judge failed to give meaningful effect to evidence showing that the border closure frustrated the contract within the meaning of the common law.

Held: Appeal dismissed. While the changed circumstances substantially reduced the appellant's customer base, it did not radically alter the nature of the parties' obligations under the employment bargain, such that continued performance of the contract would have forced them to do something they did not promise to do. In the circumstances of this case, the appellant failed to establish reversible error in the judge's determination that the defence of frustration was not available.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] In March 2020, the land border between Canada and the United States was closed to all non-essential travellers because of the COVID-19 pandemic. The appellant, Aldergrove Duty Free Shop Ltd., operates a duty-free shop on the Canadian side of the border.

[2] The shop is a small, family-owned business that relies on border travel for its business. Ninety-nine percent of the shop's customers are holiday and vacation travelers.

[3] On receiving word of the border closure, the appellant temporarily closed its doors and laid off its employees. The respondent, Barbara MacCallum, was one of those employees. She was then 78 years old and had worked for the appellant as a retail sales clerk since 2010. She also assisted with janitorial work as needed. The respondent was paid an hourly wage.

[4] According to the appellant's president, the shop was closed because "there was essentially no work for employees to do". The appellant notified the Canadian Border Services Agency of the closure. The shop remained closed until November 2021, at which point the land border re-opened to fully vaccinated Canadians travelling to the United States for non-essential purposes.

[5] By operation of s. 63(5) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and s. 45.01 of the *Employment Standards Regulation*, B.C. Reg. 396/95, the respondent's layoff became permanent effective August 30, 2020. It was statutorily deemed to have taken effect on March 17, 2020, the date of the original layoff.

[6] The appellant declined to pay the respondent severance. In November 2021, the respondent filed a notice of civil claim seeking damages for wrongful dismissal. In response, the appellant alleged that the employment contract had been frustrated by the border closure and the appellant was thereby relieved of any obligation to provide the respondent with reasonable notice of termination or payment in lieu.

[7] After a summary trial, a Supreme Court judge rejected the appellant's position. He found that the defence of frustration was not available. The respondent was held to be wrongfully dismissed and the judge awarded her the equivalent of ten months' salary.

[8] The appellant seeks to overturn the wrongful dismissal ruling.

Summary Trial Judgment

[9] The judge found as a fact that the respondent was unilaterally laid off effective March 17, 2020, with no right of recall. This finding is not challenged on appeal.

[10] The judge also found that the employment contract was not frustrated by the border closure. His reasons on this issue were brief:

> [15] Nor do I find that the employment contract was frustrated. In *Verigen v. Ensemble Travel Ltd*., 2021 BCSC 1934, on substantially similar facts, Justice Milman considered and rejected an argument that the contract was frustrated. The critical paragraph is para. 60:
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> > … the collapse in the travel market goes to ETL's "ability to perform", rather than "the nature of the obligation itself." This case is unlike the CRT decisions relied upon by ETL, where the very subject matter of the contract had been lost due to discrete, pandemic-related events. Although much of the consumer demand driving the business on which ETL and its members depend has abated, at least for the time being, not all of it has, and then not permanently. Moreover, although ETL chose to terminate a large part of its work force in the summer of 2020, at least some positions have been preserved and a recently-opened vacancy has been filled. ETL chose to relinquish Ms. Verigen's branch of the business with a view to cutting operating costs so that it could better weather an ongoing storm. The fact that the pandemic had admittedly not brought about a frustration of the contract as of July 2020 makes it implausible for ETL to maintain that the contract had become frustrated only a few weeks later.
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> [16] I agree that there are some factual dissimilarities noted there, but legally they are not significant. It is true that the pandemic had a greater impact on this defendant's business than that of the defendant in *Verigen*, a travel agency. Equally, it appears that the defendant in that case had more varied options than this defendant.
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> [17] However, the fundamental point that the collapse of the travel business goes more to the defendant's ability to perform than to the nature of the contractual obligation itself is applicable here. For that reason, I do not find that the employment contract was frustrated.

[11] Given the refusal to pay severance, the judge concluded that the respondent had been wrongfully dismissed. As noted, he held that the appellant owed the respondent the equivalent of ten months' salary. The quantification of damages is not challenged on appeal.

[12] The judge also ordered that the damages be reduced by any benefits received under the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8 ["*CERB*"].

<u>Issues on Appeal</u>

[13] The appellant alleges two errors on appeal. It says:

a) the judge erred in principle by not analyzing the purpose of the employment contract before determining the availability of the defence of frustration; and,

b) because of this error, the judge failed to give effect to evidence showing that performance of the contract during the border closure would have radically changed the parties' obligations.

[14] There is a cross-appeal. The respondent alleges the judge erred in deducting *CERB* benefits from the damages award.

Standard of Review

[15] The first ground of appeal, as framed by the appellant, raises a question of law. The appellant says the judge's analysis of the frustration defence was fundamentally flawed because he failed to ask a question mandated of him and as a result, he applied an incorrect legal test. The standard of review for a question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[16] The second ground of appeal attracts a different and more stringent standard of review. A failure to give effect to evidence can amount to a misapprehension of the record. However, it will only justify appellate intervention if the misapprehension was central to the judge's reasoning process: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 218, 221, 1995 CanLII 3498 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at paras. 1–2; *Bayford v. Boese*, 2021 ONCA 442 at para. 28.

[17] The cross-appeal involves a pure question of law. Consequently, a correctness standard applies.

Discussion

A. Appeal from the finding of wrongful dismissal

[18] The appellant says the judge's frustration analysis was irreparably tainted by a failure to determine the fundamental purpose of the parties' employment contract. He was duty-bound to make this inquiry as a first step to the analysis. Only once

he decided this issue could he then properly assess whether closing the border rendered performance of the contract something radically different from what the parties had contemplated. The reasons for judgment reveal no inquiry into purpose.

[19] The appellant contends that had the judge properly turned his mind to purpose, he would have appreciated that the employment bargain involved the payment of a wage for a particular kind of work in a particular context, namely: retail sales in a tightly regulated duty-free shop exclusive to non-essential travellers and highly dependent on the ability of those travellers to cross the land border.

[20] The appellant says appreciating this feature of the contract was essential to the judge's assessment of the evidence and to his ability to properly determine the impact of the border closure on the contract. With a properly informed appreciation of purpose, he would have understood from the evidence that the unprecedented and unanticipated border closure radically changed the nature of the work performed under the contract and the obligations underpinning the parties' relationship. With the border closure, the unique type of work the respondent agreed to provide in exchange for a wage—retail sales exclusive to a specific segment of international travellers who met the regulated criteria for duty-free shopping—had become impossible to perform. Plus, the strict regulation of duty-free shopping, which formed an integral part of the context in which the contract was performed, left the appellant with limited business options after the border closed and no realistic ability to provide an alternative form of work for its employees.

[21] The respondent disagrees that the judge applied an incorrect legal test, or that he failed to give proper effect to the evidence.

[22] Instead, she says this appeal is more appropriately framed as a challenge to the judge's application of the frustration defence to his factual findings. This is a question of mixed fact and law and the judge's ruling should not be set aside in the absence of palpable and overriding error: *Housen* at para. 26; *Kong v. Song*, 2019 BCCA 84 at para. 50; *Simpson v. Zaste*, 2022 BCCA 208 at para. 67. No palpable and overriding error has been established.

[23] The respondent argues there was a sound basis for the frustration ruling. The duty-free shop was not permanently shut down. The closure was intended to be temporary and in fact, the shop re-opened 20 months later. Furthermore, even at the height of the border restrictions, essential travellers were permitted to cross. In other words, there was some traffic moving from Canada into the United States and *vice versa.* The respondent accepts that because of the border closure, it was more difficult or expensive for the appellant to keep the respondent working; however, it was not impossible for the parties to perform their obligations under the employment bargain as contemplated by them when they entered into their agreement. Employer difficulty, hardship, or reduced profitability arising from a supervening event do not, standing alone, frustrate a contract.

Defence of frustration – legal principles

[24] Simply stated, a contract will be frustrated at common law when a situation arises through no fault of the parties that is not provided for in the contract and renders performance of the parties' obligations under the contract something "radically different" from what they undertook: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 53 [*Ellis-Don*], internal references omitted.

[25] When this occurs, a court may relieve the parties of their bargain because to compel performance in the new and changed circumstances would require that they do something "radically different" from what they agreed to: *Ellis-Don* at para. 55, internal references omitted.

[26] Over time, the frustration defence has been articulated in different ways, although, as will be seen, the essential elements of the defence have remained fundamentally the same.

[27] For example, in *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, 1960 CanLII 37 [*Kiewit*], the defence was stated to apply when "… without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the

contract”: at 368, quoting from *Davis Contractors Ltd. v. Fareham Urban District Council,* [1956] A.C. 696 at 729 [*Fareham*].

[28] In *KBK No. 138 Ventures Ltd. v. Canada Safeway Ltd.,* 2000 BCCA 295 [*KBK*], this Court held that a contract will be frustrated when changed circumstances have the effect of “… transform[ing] the contract into something totally different than what the parties intended”: at para. 28.

[29] Specific to the employment context, it was held in *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424, that the frustration defence requires a court to ask “… whether the contract is broad enough to apply to the changed circumstances or whether the change is such that performance of the contractual obligations in the new circumstances would be something radically different from what the parties had agreed upon”: at para. 26.

[30] The defence was framed this way by the Ontario Court of Appeal in *Perkins v. Sheikhtavi,* 2019 ONCA 925*:*

> [15] Frustration applies to contracts … when a supervening event alters the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agree to under their contract …
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> [Internal references omitted.]

See also *Nagpal v. IBM Canada Ltd.*, 2021 ONCA 274 at para. 33.

[31] Despite differences in articulation, there is a consistent theme: it is the impact of the change on the nature of the contractual obligations themselves that matters.

[32] The frustration defence is only available where new and changed circumstances caused by a supervening event that was neither contemplated by the parties, nor induced by one of them, would require that one or more of the parties do something fundamentally (“radically”) different from what was originally intended in order to perform their contractual obligations. It is for this

reason that the legal test for frustration is often referred to as a “radical change in the obligation test”: *KBK* at para. 13, citing *Fareham* at 728–29, emphasis added.

[33] Consequently, it is not enough for a party claiming frustration to show that complying with their contractual obligations will result in “… hardship, onerousness, inconvenience, or material loss …”: *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 60. Instead, to avail themselves of this defence, the claimant must prove that “… the thing undertaken would, if performed [in the new and changed circumstances], be a different thing from that contracted for”: *Kiewit* at 368, quoting from *Fareham* at 729. The alleged frustration “… must go to the root of the agreement and be entirely beyond what was contemplated by the parties …”: *Blackmore Management Inc.* at para. 60, citing *KBK* at para. 21.

[34] In *Folia v. Trelinski* (1997), 14 R.P.R. (3d) 5, 1997 CanLII 469 (B.C.S.C.), the court noted that in assessing whether performance under a contract would require something radically different, a judge must account for:

> [18] … the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties.
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> [Emphasis added.]

[35] This approach to the defence was cited with approval in *KBK* at para. 14. It is also consistent with Professor Fridman’s discussion of the issue in *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 619–620:

> … The distinction is made and drawn between complete fruitlessness and mere inconvenience, hardship, loss of advantage, or the like. It is also necessary to differentiate a disruption that is permanent, *vis-à-vis* the contract (albeit that it may not be permanent in other respects) and one that is temporary or transient. The latter might add to the difficulties of performance. It might make performance less desirable, economically valuable, or more expensive to undertake. But it will not constitute frustration. The courts require an utter and complete transformation of the contractual circumstances. Change, in itself, is insufficient. It must be change that totally alters the nature, meaning, purpose, effect, and consequences of the contract so far as concerns either or both parties.

[Internal references omitted; emphasis added.]

[36] In light of the above-cited authorities, this Court has held that to prove frustration, a party must establish each of the following elements:

a) a qualifying supervening event that was not contemplated by the parties when they entered into the contract;

b) the supervening event is not the fault of either party; and,

c) the supervening event rendered performance of the contract something radically different from that which was undertaken.

See, for example, *Blackmore Management Inc.* at para. 59; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at paras. 65–66; *Rickards (Estate of) v. Diebold Election Systems Inc.*, 2007 BCCA 246 at paras. 37–38; and *Wightman Estate* at paras. 21–26.

[37] The party that asserts frustration bears the onus of proof: *Perkins* at para. 17. Determining whether the defence has been made out is fact dependent and requires an individualized assessment: *Blackmore Management Inc.* at para. 65.

Application of the defence during the COVID-19 pandemic

[38] To my understanding, there have been two other trial-level decisions in the British Columbia Supreme Court that have considered the defence of frustration in the employment context, specific to the COVID-19 pandemic. This is, of course, the factual context of the appeal before us.

[39] The parties referred us to *Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934 and *Fanzone v. 516400 B.C. Ltd.*, 2022 BCSC 2089. In both cases, the frustration defence was held not to apply. The judge cited the first of these cases in his reasons.

[40] In *Verigen*, the plaintiff employee sought damages for an alleged failure to provide reasonable notice of termination or payment in lieu. The defendant employer

asked that the claim be dismissed on the basis that the employment contract had been frustrated by the COVID-19 pandemic. The employer operated an international travel agency cooperative. In support of the frustration defence, it relied on "… the global collapse in consumer demand for travel and the associated loss of the market for the kind of work [the plaintiff] was hired to do": at para. 53. The employer also adduced evidence that at the height of the pandemic in 2020, it held no retained earnings and "its survival was in question": at para. 54.

[41] The judge in *Verigen* rejected the frustration defence. He found that the collapse of the travel market detrimentally impacted the employer's ability to meet its obligations under the contract, but it did not change the nature of those obligations: *Verigen* at para. 60. Consumer demand for the employer's services had significantly reduced. However, it was not completely diminished and the reduction was not permanent: at para. 60. This was borne out by the fact that the employer did not lay off or terminate all of its employees. There was also evidence that the specific branch of the employer's business in which the plaintiff worked had been relinquished "… with a view to cutting operating costs so that [the employer] could better weather an ongoing storm": at para. 60. In other words, the plaintiff's work was eliminated by choice for the company's overall benefit during the pandemic.

[42] As I read *Verigen*, the judge found that the employer <u>was</u> able to perform its obligations under the employment contract in the new and changed circumstances without having to do something radically different from what it had promised to do. In other words, the supervening event, collapse of the travel market, did not transform the nature of the employer's obligations as originally contemplated by the parties into something else. Instead, it was the need to preserve economic viability during a market collapse that drove the termination of the plaintiff's employment.

[43] *Fanzone* also involved a claim for wrongful dismissal. The plaintiff worked in a Squamish pub. In March 2020, British Columbia's Provincial Health Officer ordered that all pubs and restaurants close in response to the COVID-19 pandemic, unless

able to offer take-out or delivery service. The plaintiff was told he was being laid off. He was paid his outstanding wages and accumulated vacation pay. However, the pub did not pay severance.

[44] In May 2020, the Provincial Health Officer issued two replacement orders for pubs and restaurants which permitted inside standing and sit-down service, subject to various requirements. At least 14 pubs and restaurants re-opened in Squamish on the basis of the replacement orders. The pub that employed Mr. Fanzone was not one of them. It took the position that re-opening was impossible because the physical dimensions of the kitchen prevented staff from maintaining a safe distance from each other.

[45] Mr. Fanzone sued the pub for wrongful dismissal. In response, the pub advanced a frustration defence. Similar to *Verigen*, the defence was rejected and the pub was held liable for wrongful dismissal: *Fanzone* at para. 29. The judge found that the owner of the pub “chose” to close the business and not re-open, rather than attempt to work within provincial requirements: at para. 26. This was a “personal choice” made by the owner because he thought it was the “… most prudent thing for him and his wife in difficult circumstances”: at para. 28.

[46] As I read *Fanzone*, the judge found that the pub was able to perform its obligations under the employment contract in the new and changed circumstances without having to do something radically different from what it had promised to do. In other words, the supervening event, restrictions imposed by the Provincial Health Officer, did not transform the nature of the pub’s obligations as originally contemplated by the parties into something else. Instead, it was the owner’s personal choice to close the pub that drove the plaintiff’s termination.

Application of legal principles to the facts of the case

[47] The appellant says this case is distinguishable from *Verigen* and *Fanzone* and warrants a different outcome. I turn now to that issue.

[48] The first two elements of the frustration defence are not in dispute here. The respondent has not suggested in her factum that closure of the land border to non-essential travel was an event or risk contemplated by the parties when they entered into their employment contract. Instead, she accepts that the closure was unanticipated.

[49] It is also obvious that neither party is at fault for the supervening event. The border closure was a government response to the COVID-19 pandemic that had nothing to do with the parties.

[50] As such, this appeal turns on the third element of the defence and whether the appellant has established reversible error in the judge's conclusion that the border closure did not render one or both parties' performance under the employment contract "… a thing radically different from that which was undertaken …": *Ellis-Don* at para. 53.

[51] As I interpret paras. 15–17 of the reasons for judgment, this is the effect of the judge's ruling. Similar to the approach in *Verigen*, the judge accepted that the collapse of the travel business serviced by the duty-free shop detrimentally impacted the appellant's ability to meet its responsibilities under the employment contract; however, the new and changed circumstances resulting from the border closure did not radically alter the nature of the contractual obligations between the parties, such that performance of the contract after the closure would require them to do something they had not promised to do.

[52] I appreciate that para. 17, in particular, could have been more clearly stated. However, "[w]here ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error …": *R. v. G.F.*, 2021 SCC 20 at para. 79, citing *R. v. C.L.Y.*, 2008 SCC 2 at paras. 10–12.

[53] It is clear that in deciding the frustration claim, the judge reviewed and relied upon *Verigen.* The latter decision contained a lengthy excerpt from *Wilkie v. Jeong*, 2017 BCSC 2131, which, in turn, canvassed the leading Canadian authorities on the availability of the defence. This included *Ellis-Don* and *KBK*, both of which emphasize that to successfully advance the defence, a party must establish that after the supervening event, performing the contract would require something radically different from what was contemplated when the parties entered into their agreement.

[54] It is also readily apparent from para. 15 of the judge's reasons that he considered para. 60 of *Verigen* to be the "critical paragraph" for the purpose of his analysis. In that paragraph, impact to the nature of the contractual obligation was recognized to lie at the centre of the frustration analysis, rather than hardship to a party in meeting its obligations because of new and changed circumstances. The judge recognized there were "some factual dissimilarities" between *Verigen* and the case at bar; however, he did not consider those distinctions to be legally significant: at para. 16. I take this to mean that similar to the judge in *Verigen*, he was not persuaded that the border closure rendered it impossible for the appellant or respondent to perform their obligations under the contract as originally contemplated. Instead, it was the economic viability of the appellant doing so that drove the layoff and termination of employees at the duty-free shop, including the respondent.

[55] It would have been preferable for the judge to provide greater explanation on this point. However, I am satisfied that on a fair reading of paras. 15–17 of his reasons, in the context of the record, the judge did ask the right questions in his consideration of the defence and properly focused his attention on whether the border closure transformed the nature of the parties' contractual obligations, such that compelling performance of the contract post-closure would require that they do something radically different from what they undertook.

[56] The appellant says there is no indication that in reaching this conclusion, the judge considered the unique context in which the appellant operated its duty-free shop and the extent to which that context appropriately informed the true purpose or object of the employment bargain. From the appellant's perspective, this was an error in principle that not only tainted the frustration analysis, but the judge's consideration of the evidence and his factual findings.

[57] I disagree. I am satisfied the judge did apply the correct legal framework to his analysis of the frustration defence. Moreover, it is evident that he was alive to the evidentiary features of the case the appellant says were integral to a proper application of that defence.

[58] The judge was conscious of the fact that the appellant operates a duty-free shop and that its customers are "predominantly" Canadians crossing into the United States: at para. 4. He understood that the border was closed to "all but essential travellers" (at para. 5), and that this rendered the appellant's business "virtually non-existent" between March 2020 and November 2021: at para. 6, emphasis added. He understood that because of the nature of its business, the appellant had limited options in responding to the impacts of the border closure: at para. 16.

[59] Ultimately, however, the judge found that while these factual features affected the appellant's ability to live up to the contractual obligations contemplated by its employment agreement with the respondent, they did not affect the nature of those obligations.

[60] In my view, this conclusion was open to the judge on the record.

[61] To compel performance of the parties' contractual obligations between March 2020 and November 2021 would have no doubt placed significant financial pressure on the appellant because of the extraordinary reduction in its customer base. Indeed, the appellant's president deposed at the summary trial that the shop "suffered and continues to suffer significant loss" because of the border closure.

This evidence was not challenged. The respondent acknowledged in her examination for discovery that without traffic moving across the land border, there were no customers to serve.

[62] Nonetheless, the border closure did not alter the nature of the obligations under the contract and render those obligations radically different from what the parties contemplated when the respondent was hired as an employee. The appellant's primary obligation under the employment contract was to provide an hourly wage in exchange for the respondent attending the duty-free shop and performing retail sales and janitorial work, as required. That is how the appellant's president described the employment relationship:

> Ms. MacCallum started her employment with the Company on March 24, 2010, as a Buyer for the Duty Free Shop. However, her skills set was better suited for the position of Retail Salesclerk and she was employed in that capacity and performed duties and responsibilities consistent with that position for about the last 8 years of her employment, and she also provided janitorial services.
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> …
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> Ms. MacCallum was paid an hourly wage for the hours she worked as a retail salesclerk and providing janitorial services at the Duty Free Shop.

[63] As I understand it, neither party tendered an employment contract for review at the summary trial. There was no evidence the parties structured their employment agreement in a manner explicitly dependent upon the existence of certain market conditions, a specific level of customers accessing the duty-free shop, a particular volume of sales, or the appellant's profitability. Unique features of the appellant's business context, as canvassed in the evidence, were not built into the employment contract such that the parties' obligations under their agreement could not reasonably be said to be "… broad enough to apply to the changed circumstances …": *Wightman Estate* at para. 26.

[64] In this sense, I consider the case to be profoundly different from *KBK*, a decision cited by the parties in which the terms and conditions of the contract laid the groundwork for a successful argument that compelling performance under new

and changed circumstances resulting from a supervening event would require the parties to do something radically different from what they had promised.

[65] In *KBK*, the parties contracted to sell a piece of land in Vancouver. When they entered into the contract, they were both aware that KBK, the purchaser, intended to use the property to develop a mixed commercial and residential project. The property carried a particular zoning designation. The form of development that “both parties expected” under the contract was “dependent” on the maximum allowable floor space specific to that zoning designation: at para. 3. Indeed, the contract’s purchase price was calculated with explicit reference to allowable floor space.

[66] Between a first installment payment under the contract and the closing date, the City of Vancouver rezoned the land, significantly reducing the allowable floor space. The evidence established that with the rezoning, it would be impossible for KBK to develop its project as contemplated by the parties. The “… allowable buildable square footage [had gone] from 231,800 square feet to 30,230 square feet …”: *KBK* at para. 28. This represented an 87% reduction in room to build.

[67] KBK informed the vendor that it viewed the contract as having been frustrated by the rezoning and demanded return of the first installment. The vendor refused and the matter went to court.

[68] The trial judge found in favour of frustration. That finding was upheld on appeal. The parties’ contract had been structured “… with an eye on KBK’s … goal of redeveloping the property as a condominium development for mixed commercial and/or residential use”: *KBK* at para. 24. The purchase price was calculated “on the basis” of the allowable floor space associated with the original zoning designation: at para. 24. The contract contained a non-competition clause that placed restrictions on the build and limited KBK’s development options: at para. 25.

[69] Given the terms of the contract and importantly, the extent to which the mutually anticipated use of the property was bound up with allowable floor space, the rezoning resulted in a change of circumstances that was "so fundamental", it "radically altered" the agreement between the parties: *KBK* at para. 28. The mixed commercial and residential development that the agreement was intended to facilitate was no longer possible and the now-available use of the property was "… entirely beyond what was contemplated by the parties when they entered into the agreement": at para. 28.

[70] The appellant says that similar to *KBK*, its contract with the respondent was also radically altered by the border closure. The appellant articulates it this way in its factum: "… to continue to bind the appellant to [the] employment contract, when there could be no productive work to be performed … would be to impose something radically different from what the parties originally agreed to". It would modify the employment contract to one in which the appellant continued to pay a wage for the respondent to report to work, but with nothing to do.

[71] Respectfully, this argument erroneously presupposes that it was a term of the employment contract that the shop would maintain a certain level of customers, or that the respondent would perform a certain volume of work or maintain a certain level of busyness. It is also an argument that, taken to its logical conclusion, would arguably render the frustration defence available each time a retail operation experiences a substantial, non-fleeting reduction in its customer base due to an event beyond its control, on the basis that its employees had been left with less or, at times, nothing to do.

[72] This is not a proper application of the frustration defence, which, for good reason, entails a stringent standard. This is especially so in the employment context. The Supreme Court of Canada has recognized that:

> … [w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of [their] sense of identity, self-worth and emotional well-being.
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> [Reference re *Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368.]

[73] A generous application of the frustration defence in the employment context has significant implications for employees, potentially depriving them of critical entitlements through no fault of their own.

[74] The appellant's president deposed that "it made absolutely no sense" to pay wages or apply for a wage subsidy, only to have employees of the shop "sit around … and do nothing".

[75] I appreciate the perspective and have sympathy for the difficult circumstances small business owners found themselves in during the COVID-19 pandemic. However, this is an economic rationale for non-performance of the appellant's contractual obligations, not evidence of a radical change to the contract itself that would have forced the parties to do something they had not promised to do.

[76] Presumably, before the pandemic, there would have been ebbs and flows in customer traffic at the duty-free shop. As a matter of logic and common sense, some days would have been busier than others. The respondent would have reported to work, available to serve whatever number of customers may have entered the store on a given day, and to clean the store as required. The appellant paid a wage in exchange for the respondent's availability and work at the shop. Practically, I do not see how the border closure radically altered these obligations.

[77] In my view, consistent with the results in *Verigen* and *Fanzone*, it was open to the judge in the circumstances of this case to hold that the appellant did not prove the defence.

[78] As I interpret his reasons, the judge found that the appellant was able to perform its obligations under the employment contract after the border closure without having to do something radically different from what it had promised to do. The supervening event did not transform the nature of the contractual obligations as originally contemplated by the parties. Instead, it was the reduction in non-essential travelers and associated business that drove the appellant's decision to temporarily close the duty-free shop, the respondent's lay off, and her termination.

[79] As explained, I do not consider the judge to have erred in principle. As such, I agree with the respondent that the judge's conclusion on the defence of frustration is properly characterized as a matter of mixed fact and law. To justify intervention with that conclusion, the appellant bore the onus of establishing palpable and overriding error: *Gustafson v. Future Four Agro Inc.*, 2019 SKCA 68 at para. 15. It has not done so.

B. Cross-appeal from the deduction of *CERB* benefits

[80] This means the cross-appeal remains a live issue. The appellant has taken no position on the issue raised by the respondent.

[81] In light of *Yates v. Langley Motor Sport Centre Ltd.,* 2023 BCCA 281, a decision of this Court that was released after the summary trial, the cross-appeal must succeed.

[82] The law is clear that in this jurisdiction, *CERB* benefits are not deductible from a damages award for wrongful dismissal.

<u>Disposition</u>

[83] For the aforementioned reasons, I would dismiss the appeal.

[84] I would allow the cross-appeal and order that the damages award be paid in full, without reduction for the respondent's *CERB* benefits.

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Mr. Justice Fitch”

I AGREE:

“The Honourable Justice Skolrood”

THE MANITOBA HUMAN RIGHTS COMMISSION
LA COMMISSION DES DROITS DE LA PERSONNE DU MANITOBA

January 31, 2024

CONFIDENTIAL

Ken Grysiuk
[redacted]

BY EMAIL

Dear Ken Grysiuk:

RE: Grysiuk, Ken v. [redacted]

We have received your request for an update on the status of this file. The file is active and awaiting assignment.

We had anticipated that the investigation team would be assessing your complaint by now, but due to the volume of complaints in our investigations area, our process is not proceeding as quickly as we expected.

Based on the current number of opened files, we expect to be in touch with you in approximately **4 – 6 months**. At this time we will let you know if we wish to interview you or if we require further documentary evidence to make a decision about whether or not to refer the complaint to the Human Rights Adjudication Panel for a hearing and final decision.

If you have further questions about the status of your complaint, please email us at hrc@gov.mb.ca or contact us by phone at (204) 945-3007 or 1-888-884-8681 (toll free) and reference your file number.

Thank you for your patience.

Sincerely,

[redacted]

Administrative Assistant

Encl.

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