

[COMPANY NAME]

DRUGS AND ALCOHOL POLICY

PURPOSES

[Company Name] (**Company**) is firmly committed to operating in the safest and most efficient manner in accordance with applicable law, and to promoting the safety and welfare of our Employees (as defined below), contractors and subcontractors and the general public.

We recognize that the use of illegal drugs and the misuse of alcohol and prescription and non-prescription drugs or substances may pose a significant threat to these commitments. They present significant and unacceptable risks to health, safety, job performance and the Company's business. To this end, the Company is committed to ensuring that Employees do not put themselves, others or Company property and equipment at risk due to the use of drugs and alcohol.

We have established this Drugs and Alcohol Policy (**Policy**) with the goal of balancing our respect for Employees with the need to maintain a safe work environment for all.

The purposes of this Policy are to support workplace health and safety; establish the Company's expectations for appropriate behaviour; describe the possible consequences for non-compliance with the Policy; and provide appropriate support Employees who are dealing with substance abuse or dependency problems.

DEFINITIONS

Alcohol means the intoxicating agent in beer, wine, distilled spirits, ethyl alcohol or other alcohols.

Bona Fide Occupational Requirement satisfies the following three-step test for justifying a discriminatory standard, factor, requirement or rule (as set out by the Supreme Court of Canada): (i) it was adopted for a general purpose or goal that is rationally connected to performing the job; (ii) it was adopted in good faith in the belief that is necessary in order to fulfill a legitimate work-related purpose; and (iii) it is reasonably necessary to accomplish the work-related purpose.

Collective Agreements means the Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and International Union of Operating Engineers Local 793; and the Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and LIUNA Local 183 and Teamsters Local Union 230.

Disability(ies), as defined in the Ontario *Human Rights Code* (**HR Code**) and the *Accessibility for Ontarians with Disabilities Act* (**AODA**) means:

- a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, lack of physical coordination, blindness or visual impairment, deafness of hearing impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device;
- b) a condition of mental impairment or a developmental disability;

- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
- d) a mental disorder; or
- e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Ontario *Workplace Safety and Insurance Act, 1997*.

Drug(s) means any Medication or other substance obtained legally, and Illicit Drugs, the use of which may adversely affect an Employee's Fitness for Duty.

Duty to Accommodate means the Company's obligation under the HR Code and AODA to take steps to eliminate the disadvantage caused by systemic, attitudinal or physical Barriers that unfairly exclude individuals with disabilities.

Employee(s) means any employee covered by either of the Collective Agreements or otherwise employed or engaged by the Company, including but not limited to senior management, managers, supervisors, full-time employees, part-time employees, casual employees, off-site employees, seasonal contract employees, students, interns and apprentices.

Fit for Duty/Fitness for Duty means an Employee is able to perform the duties of the job in a safe, effective and predictable manner. Fitness for Duty can be affected by intoxicants, illness, emotional/personal issues, and/or fatigue.

Illicit Drug(s) means any Drug, which is not legally obtainable, and any Drug whose use, sale, possession, purchase or transfer is restricted or prohibited by law.

Incident means any accident or incident, including a near miss, that resulted or could have resulted in an injury, death, permanent impairment or damage.

Medication(s) means any Drug obtained legally, either over-the-counter or through a doctor's prescription, including Medicinal Marijuana and other herbal remedies. Without limiting the foregoing, antihistamines and other anti-allergy remedies, medicated cold or flu syrups, analgesics, etc. are all examples of Medications.

Medicinal Marijuana means marijuana that is prescribed pursuant to *the Access to Cannabis for Medical Purposes Regulation (ACMPR)* or any successor legislation.

Reasonable Grounds must be informed by objective evidence, such as specific observed behaviours or other indicators, including: seeing the Employee using Drugs or Alcohol at work; the Employee appearing or acting in a way that is consistent with someone impaired by Drugs or Alcohol (such as the Employee smelling like Drugs or Alcohol; or the presence of Drugs or Alcohol paraphernalia in the vicinity of the employee or the area where the Employee works (e.g. empty bottles).

Safety-Sensitive Position(s) means any work-related activity that requires Employees to operate any vehicle, machinery or equipment, or that would reasonably be expected to put Employees and/or others at risk of serious injury or fatality should the mental or motor functions of the Employee(s) performing the activity be impaired in any manner.

SCOPE

This Policy applies to all Company operations within Ontario and should be read in accordance with the laws of Ontario and the Collective Agreements. Without limiting the foregoing, this Policy is not intended to conflict with the Collective Agreements, the Company's Fitness for Duty Policy, or any applicable law or

regulation including human rights and privacy/personal information protection laws, and this Policy will be applied in a manner that is consistent with such laws and the Collective Agreements.

With respect to individuals, this Policy applies to all Employees when they are at work, conducting business on behalf of or representing the Company, and/or attending Company-sponsored events, regardless of the location.

This Policy applies to any substance that may impair the ability of an Employee to carry out work functions safely, including but not limited to Alcohol, solvents, legal and Illegal Drugs (including marijuana), prescription and non-prescription Drugs and Medications, including Medicinal Marijuana and herbal remedies.

Every Employee is required to familiarize himself or herself with this Policy and strictly comply with its provisions. If you have any questions about this Policy please contact [specify – e.g., Human Resources at phone number or email].

DRUGS AND ALCOHOL IN THE WORKPLACE

All Company workplaces are to remain free of Drugs and Alcohol, except as permitted by this Policy. Employees must not report for or be at work under the influence of Drugs or Alcohol and must not, under any circumstances, operate any vehicle or equipment, while under the influence of Drugs or Alcohol. Employees also must not report for or be at work if the safe or effective performance of their work is potentially impaired by the effects, including the after-effects, of Drug or Alcohol ingestion or consumption.

For greater clarity, Employees in Safety-Sensitive Positions are prohibited from attending at work after consuming any Alcohol or Drugs with the exception of Medications, and then only on the conditions stated below under the “Exceptions” heading in this Policy. Employees in Safety-Sensitive Positions are also required to disclose any consumption of Alcohol or Drugs including Medications to their immediate supervisor before responding to on-call duties.

All Employees are expected to check with their personal physician or pharmacist to understand any potential side effect(s) or other impact(s) of a particular Medication or combination of Medications on their ability to perform their work safely and effectively.

EXCEPTIONS

The only exceptions to the prohibitions described in this Policy apply to prescribed Drugs and over-the-counter Medications, and to Alcohol that is served as part of a Company-approved event, on the conditions described below.

In the event that an Employee is taking Medication(s) that may have impairing effects, the Employee must immediately report this to his or her immediate supervisor. The Employee may be required to produce, and upon request by the Company must produce, information from his or her prescribing physician satisfactory to the Company confirming: (i) his or her need for the Medication; (ii) the expected timeline for consumption of the Medication; (iii) the effects that may potentially impact his or her work performance or the health and safety at any Company workplace; and (iv) the Employee’s fitness to carry out his or her duties safely (collectively, **Medical Information**). Employees must use prescribed Medication according to physician’s instructions and must not misuse over-the-counter Medication.

The Company may, from time to time, organize or participate in special events, or Employees may be engaged in authorized business-related functions with customers, suppliers or business partners, during which alcohol may be available for responsible consumption. Employees are advised to exercise good judgment, and adhere at all times to the requirements of this Policy and all applicable laws, including in particular, impaired driving laws. Regardless of whether the Employee is on duty or not, operating a

Company vehicle while impaired, or driving any vehicle to or from a business event while impaired, is strictly prohibited and a violation of this Policy.

The recreational use of marijuana is prohibited at all Company workplaces. If the Employee has been prescribed Medicinal Marijuana for use in any form at any time while employed by or performing work for the Company, the Employee must immediately disclose this to the **[specify: eg – Human Resources Manager at phone #]** and his or her immediate supervisor or manager. The Employee must provide the Company with proof that he or she is in legal possession of Medicinal Marijuana, in addition to the Medical Information described above. As part of this verification process, the Company may do any or all of the following:

- (a) require the Employee to provide the Company with the registration certificate from Health Canada, if marijuana is grown by the Employee or a designate;
- (b) if the marijuana is grown by a licensed producer, require the Employee to provide the Company with the package label from a licensed producer (which contains the Employee's client information), or to provide it with the separate document containing the Employee's client information which accompanied the shipment of Medicinal Marijuana;
- (c) require the Employee to provide the Company with a copy of the Medical Document (as defined in the ACMPR) provided to the Employee by his or her treating physician; and/or
- (d) restrict the Employee's work activities, as reasonable, until the Employee has provided Medical Information and other information required in the verification process sufficient for the Company to determine whether the Employee can perform his or her job duties safely and is Fit for Duty.

REPORTING AND INVESTIGATING INCIDENTS

Employees must report any Incident to their manager or supervisor immediately after the Incident occurs. Upon receiving a report of an Incident, the manager or supervisor must immediately notify **[specify – e.g., Human Resources manager at phone number or email]**.

The Company will investigate the circumstances surrounding any Incident to determine whether the use of Drugs and/or Alcohol caused the Incident or was a contributing factor to the Incident.

MEDICAL ASSESSMENTS

The Company reserves the right to require an Employee to be subject to a medical assessment, which may include Drug and/or Alcohol testing by an approved and accredited third party medical and testing authority.

Reasonable Grounds, post-Incident or near miss Drug and/or Alcohol testing is acceptable if upon consideration of the relevant circumstances it is reasonable to believe that:

- specific circumstances provide Reasonable Grounds for testing, such as where there has been a link established between impairment and performing safety-sensitive job duties; or
- the cause of any Incident or near miss may involve a violation of this Policy and the Employee's potential impairment could have been a contributing factor to the Incident.

Where an Incident or near miss appears to result from external factors such as mechanical or structural failure or environmental factors, post-Incident testing should not be conducted.

The focus of Drug and/or Alcohol testing should be on determining actual impairment of an Employee's ability to perform or fulfil the essential duties or requirements of the job at the time of the test. Testing will be justified as a Bona Fide Occupational Requirement if it is demonstrably connected to performing the job,

and as part of a larger process of assessing Drug and/or Alcohol addiction and the Employee's Fitness for Duty. Such larger process may include, but is not limited to: a broader medical assessment by a substance use disorder expert or under the care of a physician; employee assistance programs; supervisory reviews; and peer reviews.

Whether or not there have been Reasonable Grounds, an Incident or a near miss, if any medical assessment recommends that an Employee participate in a Drug and/or Alcohol rehabilitation or treatment program, the Company reserves the right to require Alcohol and/or Drug testing before the Employee is permitted to return to work, and random on-the-job testing periodically thereafter as part of any recommended monitoring or treatment program.

Unannounced random on-the-job Drug and/or Alcohol testing is acceptable only in limited circumstances, including in the following:

- in any Safety-Sensitive Position, where staff supervision is minimal or non-existent, there is evidence of risk in the particular workplace, and the Company meets its Duty to Accommodate the needs of Employees with addictions who test positive; and
- as part of any monitoring or treatment program recommended in a medical assessment conducted by a substance use disorder expert or physician.

Note that random testing is not automatically justified solely on the basis that the workplace is dangerous and the Employee is in a Safety-Sensitive Positions. However, where an Employee is returning to a Safety-Sensitive Position after treatment for Drug or Alcohol addiction, he or she may be expected to meet certain conditions when he or she returns to work, which may include unannounced random testing. Any such return-to work conditions should be tailored to the Employee's individual circumstances to meet the Duty to Accommodate. In such cases, the duration of the period over which unannounced random Drug or Alcohol testing will occur must be reasonable in the circumstances, and the frequency of random testing must not be overly onerous or intrusive.

Post-reinstatement testing may be part of a back-to-work agreement (including a "last-chance agreement"), where breaching the agreement could result in termination of the Employee's employment for just cause. However, similar to Employees with other chronic Disabilities, Employees with Drug or Alcohol addictions may experience relapse after treatment. A back-to-work agreement will not necessarily negate the Duty to Accommodate Employees if they have a relapse. (Refer to the Policy on Accommodating Disability for information on the Duty to Accommodate.)

CONFIDENTIALITY AND PRIVACY

Any information or documentation collected by the Company in connection with an investigation into an Employee's potential violation of this Policy, including medical reports and testing results (if any) received from a substance abuse professional, monitoring physician, or approved and accredited third party medical and testing authority, will be maintained pursuant with due regard to the privacy and sensitive personal information of the Employee concerned and in accordance with applicable privacy/personal information protection legislation and Company policy.

The Company will take reasonable steps to ensure that any approved and accredited third party medical and testing authority used to conduct Employee Drug and Alcohol tests complies with applicable federal and provincial privacy/personal information protection legislation and Company policy.

Unless otherwise limited by law, all information pertaining to Drug and/or Alcohol testing or other medical assessment of an Employee shall be kept confidential and maintained in medical files separate from the Employee's personnel file, in compliance with Company policy and applicable privacy legislation, and labeled "*Confidential Information – Access Restricted to Human Resources Staff Only*". This includes all information and records relating to testing, test results, Drug and/or Alcohol dependencies, medical restrictions, and legitimate medical explanations provided to any third party medical and testing

authorities/facilities or the designated Human Resources representative. Such information shall be the property of the Company and may only be disclosed on a need-to-know basis, including where relevant to a grievance, charge, claim, lawsuit, or other legal proceeding initiated by or on behalf of the Employee.

In accordance with the requirements of applicable provincial privacy/personal information protection legislation, and Company procedures and protocols for requesting access to personal information in the Company's custody and control, Employees shall be entitled to access any and all personal information maintained by the Company relating to an Incident, Drug and/or Alcohol testing/test results, Drug and/or Alcohol dependencies, medical restrictions, and legitimate medical explanations provided to any third party medical and testing authorities/facilities or the Company's designated Human Resources manager.

SEARCHES

The Company reserves the right to conduct a search of an Employee's personal effects for Alcohol and Drugs on Company premises, equipment or vehicles where there are Reasonable Grounds to believe the Employee is in violation of this Policy.

RESOURCES AND SELF-HELP

Employees who know or suspect they have a Drug or Alcohol abuse or dependence problem are encouraged to seek advice and to follow appropriate treatment promptly, before job performance is affected or violations of this Policy occur.

The Company is committed to assisting Employees with individualized treatment and rehabilitation in cases where they have Drug or Alcohol abuse or dependency problems, and encourages all Employees to seek assistance from its Human Resources department, a manager, and/or medical professionals.

The Company will support Employees who voluntarily request help to obtain a proper Drug or Alcohol abuse or dependency assessment and related treatment, including a structured after-care program to help them maintain their recovery. In addition, the Company provides access to a confidential employee assistance program through which Employees may access counselling, referral and aftercare services.

SELF-DISCLOSURE OF SUBSTANCE ABUSE / ADDICTION

Where an Employee self-declares that he or she has a Drug and/or Alcohol abuse problem or addiction, or where there are reasonable grounds to otherwise suspect an Employee of Drug and/or Alcohol abuse or addiction, the Company will arrange for a qualified third party medical assessor to conduct a thorough medical assessment of the Employee.

Employees with problems related to Drugs and/or Alcohol abuse or addiction who voluntarily disclose such to the Company will not be disciplined for voluntarily requesting help or seeking advice in overcoming their problem or for disclosing that they are involved in rehabilitation efforts.

However, voluntary self-disclosure and requesting assistance to overcome Drug and/or Alcohol abuse or addiction does not eliminate the need for the Employee to maintain satisfactory work performance or to comply with this Policy.

Further, self-disclosure, requesting help, seeking advice or involvement in a rehabilitation effort to overcome Drug and/or Alcohol abuse or addiction after the Employee has been involved in an Incident or near miss, or where there are Reasonable Grounds, will not prevent the Employee from being subject to appropriate corrective action, which may include disciplinary action, up to and including termination of employment.

An Employee will not be permitted to enter or remain in a Safety-Sensitive Position if an individualized medical assessment by a qualified third party medical assessor (or by the Employee's personal physician) indicates that the Employee has a current Drug and/or Alcohol abuse or addiction problem, or is currently not Fit for Duty because of a past problem. An Employee may not enter or re-enter a Safety-Sensitive Position until he or she has applied for and successfully completed an individualized return-to-work program, which may include a requirement to be subject to random Drug and/or Alcohol testing as a component of a monitoring or treatment program.

In cases where an Employee undergoing a treatment and rehabilitation program must be reassigned for medical reasons, the Company will make reasonable efforts to accommodate the Employee in accordance with the Company's Policy on Accommodating Disability and the Duty to Accommodate Disability pursuant to the HR Code.

COMMUNICATION

Communicating this Policy is critical to ensuring the safety of Employees. To ensure that all Employees are aware of and understand this Policy, it must be reviewed: (i) during orientation with all new Employees; and (ii) during safety meetings from time to time, as applicable, with all existing Employees.

Each Employee must sign the Acknowledgement form attached to this Policy. A copy of the signed Acknowledgement form must be placed and maintained in the Employee's personnel file. Employees may be required to sign additional Acknowledgement forms from time to time, including after attending any training sessions related to this Policy.

CONSEQUENCES OF NON-COMPLIANCE

Any violation of this Policy by an Employee will result in appropriate corrective action, which may include disciplinary action up to and including the termination of the Employee's employment.

Policy Date: [], 2018

Revised:

[COMPANY NAME]

DRUGS AND ALCOHOL POLICY

Employee Acknowledgement

By my signature below, I acknowledge that I have read and understand this Drugs and Alcohol Policy (**Policy**), and agree to abide by its terms and conditions. I also understand that any violation of this Policy will result in appropriate corrective action, which may include disciplinary action up to and including the termination of my employment.

Employee's Signature: _____

Date: _____

[COMPANY NAME]

POLICY ON ACCOMMODATING DISABILITY

PURPOSES

[Company Name] (**Company**) is firmly committed to meeting the obligations of the Ontario *Human Rights Code* (**HR Code**) and the *Accessibility for Ontarians with Disabilities Act* (**AODA**) with respect to appropriate accommodation for persons with disabilities. The purposes of this Policy on Accommodating Disability (**Policy**) are to:

- Ensure that workplace accommodation requirements are determined on a case-by-case basis for Job Applicants and/or Employees with a Disability (all as defined below);
- Achieve a work environment that promotes dignity, integration and equal opportunity and is supportive of Job Applicants and Employees;
- Comply with all applicable legislation and the requirements of the applicable Collective Bargaining Agreements (defined below); and
- Establish an efficient process for accommodating Disability that is consistent with the principles of confidentiality and shared responsibility.

Accommodating Disability in the workplace is a shared responsibility that includes C, Job Applicants and Employees, along with any other relevant parties as needed (e.g., the union and health care professionals).

DEFINITIONS

Accommodation means any accommodation to the work or the workplace – for example, reduced hours, reduced productivity requirements, Alternative Work (defined below), and the provision of assistive devices – or to the job application process, that is consistent with a worker's Functional Abilities and the Duty to Accommodate (defined below) under the HR Code and the AODA.

Alternative Work means different work or work that does not necessarily involve similar skills, responsibilities and compensation, and may be either temporary or permanent.

Barrier is defined by the AODA as anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communication barrier, an attitudinal barrier, a technological barrier, a policy or a practice.

Bona Fide Occupational Requirement satisfies the following three-step test for justifying a discriminatory standard, factor, requirement or rule (as set out by the Supreme Court of Canada): (i) it was adopted for a general purpose or goal that is rationally connected to performing the job; (ii) it was adopted in good faith in the belief that is necessary in order to fulfill a legitimate work-related purpose; and (iii) it is reasonably necessary to accomplish the work-related purpose.

Collective Agreements means the Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and International Union of Operating Engineers Local 793; and the Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and LIUNA Local 183 and Teamsters Local Union 230.

Disability(ies), as defined in the HR Code and the AODA means:

- a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, lack of physical co-ordination, blindness or visual impairment, deafness of hearing impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device;
- b) a condition of mental impairment or a developmental disability;
- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language;
- d) a mental disorder; or
- e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Ontario *Workplace Safety and Insurance Act*, 1997.

Duty to Accommodate means C's obligation under the HR Code and AODA to take steps to eliminate the disadvantage caused by systemic, attitudinal or physical Barriers that unfairly exclude individuals with a Disability.

Employee(s) means any employee covered by either of the Collective Bargaining Agreements or otherwise employed or engaged by the Company, including but not limited to senior management, managers, supervisors, full-time employees, part-time employees, casual employees, off-site employees, seasonal contract employees, students, interns and apprentices.

Functional Abilities means the collection of activities and tasks an Employee or Job Applicant is capable of performing at work or that a Job Applicant is capable of performing during the application process.

Job Applicant(s) means any individual who has applied for employment with the Company through its customary application/hiring process.

Undue Hardship means the point at which the Company is not legally required to accommodate the particular needs of an Employee or Job Applicant with a Disability, and is assessed considering cost, outside sources of funding and health and safety risks, as follows:

Cost: Undue Hardship because of cost occurs when the cost of providing the Accommodation significantly affects the ability to conduct business, or the capacity to deliver services or programs.

Outside Sources of Funding: The HR Code requires that outside sources of funding that offset the cost of accommodation must be considered before an employer claims Undue Hardship based on cost. Outside sources of funding include available grants and government subsidies.

Health and Safety Risks: Situations may exist where health or safety requirements, whether legislated or not, effectively exclude a Employee or Job Applicant, from employment. In some cases, even with alternative precautions in place, an actual or potential health and safety risk to the individual with a Disability, co-workers or others (including members of the public) may remain. If the remaining health and safety risk affects only the individual with a Disability and is relatively minimal (such that the benefits of equality outweigh the risk), the Company may be required to explain the potential risk to the individual with a Disability to allow him or her to decide whether to assume the risk. However, Undue Hardship is established under the HR

Code if the remaining risk affects co-workers or others, and the seriousness of such risk outweighs the benefits of equality.

SCOPE

This Policy applies to all Company operations within Ontario and should be read in accordance with the laws of Ontario, the Collective Agreements, and the Company Fitness for Duty Policy. Without limiting the foregoing, this Policy is not intended to conflict with the Collective Agreements, any federal or provincial law or regulation including the HR Code, the AODA and privacy/personal information protection laws, and this Policy will be applied in a manner that is consistent with the such laws and the Collective Agreements.

With respect to individuals, this Policy applies to all Job Applicants and Employees at all phases of the employment/work cycle including, as applicable: recruitment, selection, orientation, training, promotion, transfers, work arrangements, compensation of benefits, performance management, and termination of employment.

All Employees are required to familiarize themselves with this Policy and strictly comply with its provisions.

All Job Applicants will be advised of this Policy and provided a copy upon request.

Any questions about this Policy should be directed to [**specify – e.g., Human Resources phone number or email**].

RESPONSIBILITIES AND EXPECTATIONS

The Company will:

- Foster an inclusive work environment by treating all Job Applicants and Employees with dignity and respect.
- Identify and eliminate Barriers that prevent Job Applicants and Employees as the case may be, from accessing Company workplaces or being involved in work-related activities.
- Regularly review its rules, policies and practices to ensure that they do not directly or indirectly discriminatory against Job Applicants or Employees with Disabilities and to identify any Bona Fide Occupational Requirement(s).
- Ensure that all Job Applicants and Employees are advised of their right to be accommodated on the basis of a Disability to the point of Undue Hardship.
- Deal with requests to accommodate Disability in a timely, sensitive and confidential manner.
- Inform Job Applicants and Employees requesting an Accommodation what information they will be required to provide in support of their request.
- Where there is a need for Accommodation, involve Job Applicants, Employees and their supervisors and/or managers in identifying appropriate Accommodation options.
- Record, implement and monitor Accommodation plans for individual Job Applicants and Employees.
- Track and maintain reports and statistics on the types and cost of Accommodations made (without identifying individuals).

- Ensure that this Policy is effectively implemented.

Job Applicants and Employees are responsible for:

- Treating all other Job Applicants and Employees with dignity and respect.
- Communicating their need to be accommodated on the basis of Disability by filling out a “Request for Accommodation Form” (see Attachment “A”).
- Providing relevant and appropriate information and documentation, including information about any restrictions or limitations, to support their request for Accommodation.
- Where there is a need for Accommodation, working with the supervisor/manager and Human Resources personnel to find identify potential Accommodation options.
- Accepting an offer of reasonable Accommodation that meets their needs, even if it is not their preferred option.

Job Applicants and Employees can expect to:

- Be treated with respect and dignity.
- Have their needs met to the point of Undue Hardship.
- Be informed of the reasons, if their Accommodation request is denied.

ACCOMMODATION PROCEDURES

Job Applicants

During the application process the Company will advise Job Applicants that it has a Policy on Accommodating Disability, and asked whether they require accommodation to participate in the hiring and selection process. If so, the Job Applicant will fill out a “Request for Accommodation Form” (see Attachment “A”).

The hiring manager and Human Resources will consider the Job Applicant's Accommodation request and may request more information from the Job Applicant to facilitate meeting the Duty to Accommodate. In some cases information may be required from medical practitioners and other third parties with specialized expertise. This must be done in consultation with Human Resources.

C will ensure that all Accommodation options short of undue hardship have been considered prior to refusing a request.

If a request is denied, the reason(s) will be clearly communicated to the Job Applicant.

Human Resources shall ensure that procedure followed for each Job Applicant requesting an Accommodation is clearly documented.

Employees

Employees may request an Accommodation by completing and submitting the Request for Accommodation Form (see Attachment "A") to their immediate supervisor/manager, who will forward the form to Human Resources.

The supervisor/manager and Human Resources will discuss reasonable Accommodation options with the Employee. The Employee's preferences will be taken into account. However, the Company may proceed with implementing an option that is less costly or easier to provide when it meets the Employee's needs.

C will ensure that all Accommodation options short of undue hardship have been considered prior to refusing a request.

If a request is denied, the reason(s) will be clearly communicated to the Employee. Human Resources shall ensure that procedure followed and reason(s) for the denial are clearly documented.

INDIVIDUAL ACCOMMODATION PLAN (IAP)

In determining how to accommodate an Employee with a disability, the first step is to determine the essential duties of the job. Flexibility in considering the way functions can be performed may be necessary in order that the Employee being accommodated can achieve job requirements in a way that may be different from traditional methods. Accommodation of non-essential duties may be accomplished by using an alternate method for fulfilling these functions. An Accommodation plan involving a workload reduction may have significant implications for the project or operations involved, and this needs to be addressed in the individual Accommodation process.

Recording an IAP

The manager, in conjunction with Human Resources and with input from the Employee, will prepare an IAP that outlines the nature of the Accommodation to be provided. It is important for all parties to work together to establish objectives for the IAP, explore the range of accommodation options available, and develop criteria that will be used to select among the various options.

Key Components of the IAP Development Process

The following key components of the IAP development process are intended to help ensure timely and effective outcomes. The components should be interpreted with flexibility and modified according to the specific needs of individual Employee, as the case may be:

1. Identify individual's needs.
2. Identify and analyse barriers to performance and/or participation.
3. Define Accommodation objectives.
4. Provide interim Accommodation.
5. Investigate, test and select Accommodation options.
6. Implement Accommodation.
7. Provide Accommodation training, if required.
8. Follow-up and evaluate.

Employees may request a representative of their choosing to participate in developing the IAP. The representative may be a union representative or, if the Employee is not represented by a union, another representative from the workplace. Employees should make this request to Human Resources at the outset

of the IAP development process. The Company will make all reasonable efforts to accommodate such requests.

The manager and Human Resources, with input from the Employee, will prepare the IAP outlining the nature of the Accommodation to be provided. It is important for all parties to work together to establish objectives for the IAP, explore the range of accommodation options available, and develop criteria that will be used to select among the various options.

In some cases it may be reasonable to accommodate the Employee in another position. Human Resources, working with the appropriate manager(s) and the Employee, will attempt to accommodate him/her in another available position. This may require the assistance and involvement of a third party(ies) with specialized expertise. The factors that will be considered in determining whether the Employee can be accommodated in an alternate position include:

- a) Whether the Employee can perform the essential duties of the alternate position with or without Accommodation;
- b) Whether the Employee is currently qualified for the alternate position or can be trained to perform it (and obtain any necessary qualifications) within a reasonable time; and
- c) Whether placing the Employee in the alternate position would result in Undue Hardship.

Human Resources shall ensure that the IAP development process and the IAP are clearly documented.

Accessibility Formats

The IAP will be provided to the Employee in a format that takes into account the individual's needs due to disability. The Employee may contact Human Resources to request that the IAP be provided in an accessible format, or to discuss steps that may be necessary to accommodate his or her individual needs.

Review of IAPs

IAPs will be reviewed by Human Resources at least every two years, or upon the provision of new and objective medical information that necessitates an earlier review to ensure the continued suitability of the IAP. Human Resources will consult with the Employee and his or her supervisor/manager throughout the review process to discuss the ongoing suitability of the IAP, and to consider any additional supporting medical information that the Employee has provided.

PRIVACY AND CONFIDENTIALITY

Information collected in the course of considering an Accommodation request includes information that is private and confidential in nature. Therefore, completed Request for Accommodation Forms, IAPs and all other records associated with Accommodation requests that contain personal or confidential information will be maintained by the Company in a secure location, separate from the individual's personnel file, and will only be shared: (i) with persons who need the information in order to implement the IAP; (ii) with the consent of the affected Job Applicant or Employee; or (iii) in accordance with applicable law.

The Company and all individuals involved in the accommodation process will comply with the requirements of applicable provincial and federal privacy and personal information protection legislation.

POLICY REVIEW

The Company will review this Policy and related procedures every five (5) years, or more frequently should legislative changes necessitate further review, and will make adjustments necessary to ensure that it continues to meet its Duty to Accommodate Disability.

Policy Date: [], 2018

Revised: []

ATTACHMENT "A"

Request for Workplace Accommodation Form (Disability)

Employee Name:	Position:
Department:	Supervisor/Manger:

PART I: To be completed by Employee

1. Please confirm that your accommodation request relates to:

Physical or mental disability

Human Resources will contact you about what supporting medical documentation will be required.

2. Please explain in detail why you need an accommodation.

3. What accommodation(s) you are requesting, if known.

4. What is the time period / duration you expect will be needed for this accommodation?

Employee Signature:	Date:
----------------------------	--------------

Forward the completed form to Human Resources. Retain a copy for your records.

PART 2: To be completed by Human Resources:

Supporting medical information received? Yes No

Accommodation provided? Yes No

Date accommodation plan was implemented: _____

Expected duration of accommodation: _____

Date updated medical to be provided (if applicable): _____

Comments:

Human Resources Signature:

Date:

Privileged & Confidential

**WORKPLACE POLICIES ROLL-OUT GUIDE
for GTSWCA Contractor Member Companies**

A. Reasonable Rules in a Unionized Environment

Canadian labour arbitrators will apply well-established criteria when considering whether workplace policies and rules unilaterally imposed by an employer are reasonable. These criteria, generally known as the KVP¹ criteria, will guide the roll-out of a Fitness for Duty Policy, Policy on Accommodating Disability, and Drugs and Alcohol Policy (collectively, **Policies**) for Member Companies and other Employers on.

The KVP criteria require that any policy or rule unilaterally imposed by an employer and not subsequently agreed to by the union must:

- (1) be consistent with the collective agreement;
- (2) be reasonable;
- (3) be clear and unequivocal;
- (4) be brought to the attention of an affected employee before it is acted upon;
- (5) provide prior notice to affected employees that a breach creates a potential for discharge if that is the case; and
- (6) be consistently enforced since its introduction.

While KVP provides the test for determining whether a policy or rule imposed by an employer is reasonable in a unionized environment, the same criteria are relevant in a non-union environment (except of course those criteria dealing expressly with the collective agreement). Specifically, if an employer wants to rely upon a policy or rule as a basis for dismissing a non-union employee, courts will consider similar factors to determine whether discharge was the appropriate discipline in all the circumstances. There may be other reasons that a court ultimately disagrees with an employer's decision to dismiss – complying with the KVP criteria does not guarantee that a court will find dismissal was the appropriate discipline - but complying with the KVP criteria will assist in demonstrating that dismissal was appropriate.

This Guide sets a process for rolling out the Policies with the KVP criteria in mind.

Management Rights under Collective Agreements

The Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and International Union of Operating Engineers Local 793 (**Local 793 Agreement**); and the Collective Agreement between Greater Toronto Sewer and Watermain Contractors Association and LIUNA Local 183 and Teamsters Local Union 230 (**Locals 183/230 Agreement**) contain management rights provisions that, *inter alia*, give Contractor Member Companies and all other employers covered by these collective agreements (“**Employers**”) the right “to maintain order, discipline and efficiency”, and “to make, alter from time to time, and enforce reasonable rules of conduct and procedure to be observed by the employees”,

¹ *Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co. (1965)*, 16 LAC 73.

subject to these functions not being exercised in a manner inconsistent with the express provisions of the respective collective agreement.² These management rights clauses support the right of the Employers to implement the Policies unilaterally.

The Local 793 Agreement also contains a provision which could arguably affect the right of Employers covered under it to unilaterally implement the Drugs and Alcohol Policy. The Local 793 Agreement, which is in effect until April 30, 2019, states the following at Article 18.15:

The parties jointly acknowledge the importance of health and safety on jobsites, which includes that all employees report to work fit to perform their duties and free of impairment for any reason including from drugs and alcohol for the duration of the entire shift. The Employer and Union express their joint determination to deal cooperatively and constructively with the problem of substance abuse and misuse having regard to human rights considerations and Employer safety concerns. This includes but is not limited to making referral to the DeNovo Treatment Centre and/or other employee assistance programs. The Parties further agree to establish a standing joint labour-management committee composed of an equal number of representatives of the Employer and an equal number of representatives from the Union to review, on an ongoing basis and without limitation, the current state of the law, developments in technology relating to drug and alcohol testing and implementing a joint drug and alcohol policy.

The language in Article 18.15 does not expressly prohibit the Employers from unilaterally developing and rolling out a drug and alcohol policy, and the roll-out process set out in this Guide assumes that it is within the Employers' management rights to do so.

However, it is possible that Local 793 would take the position that: (a) Article 18.15 requires Employers to establish and work cooperatively and constructively with a joint labour-management committee as a pre-condition to implementing any drug and alcohol policy for employees in this bargaining unit; and (b) any such policy must be a joint policy. While there may be a chance that an arbitrator might accept this interpretation of Article 18.15, it is by no means a foregone conclusion. In any event, even if this were to be the case, nothing would prevent the GTSWCA/Employers from presenting a discussion draft of the Drugs and Alcohol Policy to Local 793 and, unless it voices a valid objection, the Employers could proceed with rolling it out in the manner described below.

B. Rolling out the Policies

We recommend following the seven-step roll-out process described below.

1. Identify and Train Policy Leaders

The Employer should identify owners and experts for each of the Policies (**Leaders**).

The Head of the Employer's health and safety group and the Employer Chair of Joint Health and Safety Committee should be included among the Leaders, given that the Policies must be viewed as important elements in the Employer's overall health and safety program.

The Employer can expect to receive confidential and personal information from employees who are covered by the Policies, which will need to be appropriately safeguarded from unauthorized use and disclosure. Accordingly, a senior Human Resources manager should be included among the Leaders, as HR will be receiving personal and confidential information from employees once the Policies are in effect.

² Local 793 Agreement at Article 4.1; Locals 183/320 Agreement at Article 4.1.

Finally, the Leaders for each Policy should include a member of the Employer's executive team, as this will set the tone from the top.

Leaders should receive sufficient training from an outside source so that they can answer questions about the applicable Policy(ies). Obviously, comprehensive training is particularly important for Leaders from Health and Safety. Comprehensive training is also crucial for Leaders from Human Resources, as they will have an ongoing role in training other managers and supervisors over time (set out in more detail below).

Training modules should show that the Employer's approach to fitness for duty is multi-faceted and not merely focussed only on alcohol and drug testing, as some organization's fit for duty policies tend to be.

Leaders should be given a copy of the FAQ sheet prepared for each Policy (see Step 3 below).

2. Train Managers and Supervisors

All managers and supervisors must be trained on the Policies. This should be conducted by an outside source initially, and later by Leaders from Human Resources/Health and Safety, in conjunction (with assistance from outside sources, as applicable).

3. Roll Out the Policy to Employees

Trained managers and supervisors, in conjunction with Leaders from Human Resources/Health and Safety, should be responsible for reviewing each Policy with their employees. The training presentation(s) must include the key points of each Policy. All employees should receive a copy of each Policy and/or be given instructions on how they can access electronic copies of the Policies on the Employer's computer system. To emphasize that the Policies are essential elements of the Employer's overall health and safety program, it would be preferable to incorporate the training into a safety meeting.

Although employees will have been trained on each Policy, it is possible that they will have questions later. In applicable circumstances, managers and supervisors should consult with Human Resources or Health and Safety Leaders to ensure that employees receive thorough, accurate answers and consistent answers to their questions. To further assure consistency, it would be useful to prepare a one-page FAQ sheet for each Policy, which managers and supervisors could consult and provide to employees when questions arise.

A copy of the presentation for each Policy should be retained to show exactly what was covered in detail with the employees. A copy of each FAQ sheet should also be retained.

4. Get Employee Acknowledgement for Each Policy

At the end of each training session (including sessions for Leaders, managers and supervisors), have all employees in attendance sign off that they:

- (1) have been provided a copy of the relevant Policy;
- (2) have been provided training on the Policy;
 - o Leaders, managers and supervisors should also sign off that they have been given a copy of the Policy FAQ sheet.
- (3) undertake to read, understand and abide by the Policy;

- Leaders, managers and supervisors should also undertake to read and understand the related FAQ sheet.

(4) will ask questions if there is anything they do not understand about the Policy; and

(5) understand and acknowledge that Policy violation is serious and will lead to appropriate disciplinary action, up to an including termination of their employment for cause.

In this step it is important to ensure that employees who are not present are covered in a separate meeting(s) so that the Employer has a sign-off from every employee.

Retain the employee's signed completed Acknowledgement in his or her personnel file.

5. Implement and Enforce the Policies

Each Policy can be put in force once scheduled training sessions have been completed and the Policy has been rolled out to employees in accordance with Step 4 above.

From this point forward, the Policy must be consistently enforced.

Inevitably, some employees will not yet have yet received the training or attended the roll-out (for example, due to absence or a recent hire date). It is important to recognize that it will be more difficult to enforce the Policy for those employees who have not yet received the training or signed off on the Acknowledgement.

6. Three-Month Review

Approximately three months after a Policy is implemented, managers/supervisors should review the Policy again (this can be at a regularly scheduled safety meeting) and ask employees if they have any questions about the Policy. Have employees sign off that they have attended this follow-up sessions.

7. Ongoing Processes in Place

Leaders should ensure that a process is put in place whereby:

- (1) Managers and supervisors review the Policies at least once a year and obtain employee sign-off. Again, to establish the linkage of the Policy as one element of the Employer's health and safety program, this could be done at regularly scheduled safety meetings;
- (2) The Policies are reviewed with new employees as part of the on-boarding process. Use the same or a similar presentation as was used for existing employees at the time of the roll-out, and have the new employees sign-off their acknowledgement of the training as described in Step 4 above; and
- (3) The Policies are reviewed again with any employee returning to work after an extended leave of absence, with the employee acknowledge receipt of this refresher training.

All employee acknowledgements obtained at Step 7 should be maintained in the employee file.

Date: [], 2018

Revised:

OCCUPATIONAL HEALTH AND SAFETY

DUE DILIGENCE GUIDE

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DETERMINING WHETHER DUE DILIGENCE TAKEN

IS SUFFICIENT

1. **The Ontario *Occupational Health and Safety Act***

The overarching purpose of the Ontario *Occupational Health and Safety Act* (OHSA) is to protect workers from health and safety hazards on the job. The OHSA establishes procedures for dealing with workplace hazards and provides for enforcement and penalties where compliance has not been achieved. It applies to almost every worker, supervisor, employer and workplace in Ontario.

Employers, supervisors and workers all have responsibilities under the OHSA.

Employer Responsibilities

An employer's duties under the OHSA include:

- taking every precaution reasonable in the circumstances for the protection of a worker;
- providing workers with personal protective equipment (PPE)
- identifying and managing hazards;
- preparing policies and procedures to carry out those policies (for example, with respect to workplace violence and harassment) and reviewing those policies and procedures annually;
- providing "information, instruction and supervision" to a worker to protect the health safety of the worker;
- providing appropriate training as prescribed under the OHSA, or as part of due diligence;
- appointing "competent" supervisors; and
- notifying the Ministry of Labour in cases of a critical workplace injury or fatality in the workplace.

Supervisor Responsibilities

For purposes of the OHSA, a "supervisor" is a person who has charge of a workplace or authority over a worker by, for example, assigning tasks, scheduling work or enforcing discipline. Supervisors can include: lead hands, forepersons, department managers, and even a company's General Manager, Vice-President and President.

Supervisors must:

- take every precaution reasonable in the circumstances for the protection of the worker;
- ensure worker works in manner and with protective devices, measures and procedures required by OHSA;
- ensure that workers use/wear the required PPE;
- advise workers of any potential hazards or dangers to their health and safety, of which the supervisor is aware;

- where prescribed in the OHSA, provide a worker with written instructions as to the measures and procedures to be taken for worker's protection.

Under the OHSA, a supervisor's conduct, including overt violations and negligent non-compliance with health and safety requirements, may be imputed to employer. Section 66(4) OHSA states:

"In a prosecution of an offence under any provision of this Act, any act or neglect on the part of any manager, agent, representative, officer, director or supervisor of the accused, whether a corporation or not, shall be the act or neglect of the accused."

Worker Responsibilities

The OHSA also imposes duties and responsibilities on workers, including:

- working in a safe manner in compliance with OHSA;
- wearing and using PPE;
- reporting defects in equipment;
- reporting contraventions of OHSA; and
- refraining from rough-housing or boisterous conduct.

Workers also have rights under the OHSA, including: the right to refuse unsafe work and the right to protection from employer reprisals related to occupational health and safety matters.

2. What is Due Diligence?

Due diligence is a proactive approach that fosters systematic identification, analysis, evaluation and mitigation of hazards and risks to prevent occupational injuries and illnesses. In the context of occupational health and safety (OH&S), due diligence means that employers must take all reasonable care to prevent injuries or accidents in the workplace. To exercise due diligence, an employer must implement a plan to identify possible workplace hazards and carry out appropriate corrective action to protect workers.

Taking "all reasonable care", as required under the OHSA, can be proven if the employer can show that: (i) it has a comprehensive system in place to prevent health and safety violations; and (ii) steps are in place and were taken to ensure the effective operation of that system. Successfully proving due diligence depends on the efforts the employer has made and is determined based on the available documentation and evidence of those efforts.

Due diligence efforts and documentation of those efforts begin well before any inspection, investigation of an incident, or prosecution commences. Documentation may include:

- E-mails
- Notes
- Logbooks
- Health and safety policies and procedures to implement them
- Records showing when policies and procedures were reviewed
- Training records and worker signoffs

- Statement (or testimony in the case of a hearing) of witnesses

Finally, a due diligence defence can fail even when a comprehensive system is in place, but workers and supervisors do not understand or follow it. This can occur, for example, where there is inadequate worker training or a failure on the part of the employer to implement all aspects of the system.

3. Ensuring Due Diligence at Every Step

What constitutes “reasonable precautions” varies with each specific circumstance. It involves the analysis of risk and potential harm - the higher the risk and greater the harm, the more precautions are required.

Essential elements of due diligence include the following:

- Know your obligations under the OHSA and comply with them.
 - *Ignorance of the law is not a defence.*
- Plan jobs carefully with consideration for health and safety risks.
 - *Identify risks and hazards.*
 - *Perform risk assessments and hazard assessments whenever necessary*
 - *Mitigate identified risks and hazards with safeguards to eliminate or lower them to an acceptable level*
- Ensure that workers have proper training, instructions and the PPE they need to carry out their work.
 - *Saying “just do it” is insufficient.*
 - *The more unusual the task the more detailed the instructions required.*
 - *Workers must know how to use/wear and do use/wear the required PPE.*
 - *Make sure all PPE is in good condition and meets OHSA requirements.*
 - *Train enough workers to cover vacations, leaves and other absences.*
- Implement a comprehensive system to prevent hazards from harming workers.
 - *Ensure that everyone has been adequately trained and signs off on policies/procedures*
 - *Take steps to ensure the system is working properly (monitor, update and enforce).*
 - *Keep training and proof that training has been completed up to date.*
- Develop and implement workplace health and safety policies and procedures to implement the policies.
 - *These must include workplace violence prevention and harassment prevention policies and procedures.*

- *Ensure that everyone complies with all policies and procedures.*
- *Take corrective action (e.g., coaching, further training) or appropriate disciplinary action to address non-compliance.*
- Engage in ongoing and meaningful communications with unions, workers, joint health and safety committees, health and safety representatives.
- Investigate all occupational health and safety incidents and “near misses” thoroughly.
- Document, document, document!

4. Violations and Offences under the OHS

Health and safety violations and offences under the OHS are “strict liability” offences. Strict liability refers to a type of legal offence that requires only proof beyond a reasonable doubt of an *actus reus* and not proof of intention, otherwise referred to as *mens rea*. Both are explained further below.

The main defence to a strict liability offence is that the accused demonstrated “due diligence”. In the health and safety context this requires that the accused prove that they have taken every reasonable precaution in the circumstances for the protection of the worker.

Actus reus, sometimes called the external element or the objective element of a crime, is the Latin term for the “guilty act” which, when proved beyond a reasonable doubt in combination with the *mens rea*, “guilty mind”, produces criminal liability.

The OHS is enforced by Ministry of Labour inspectors and Crown prosecutors. Inspectors’ duties include investigating workplace incidents, work refusals and alleged breaches of the OHS; conducting health and safety inspections and audits; and issuing notices of contraventions when there has been a violation. Crown prosecutors determine whether an organization or person should be charged with committing an “offence” under the OHS and whether the corporation and/or any of its directors, officers, or employees should be charged with committing a health and safety offence so serious that would be a crime under the *Criminal Code*.

When prosecuting an offence under the OHS, the Crown does not need to prove that the accused had “knowledge”, “intent” to breach the OHS (i.e., the *mens rea* which would be required under the criminal standard). Rather, the accused must prove that he or she “used all reasonable care to prevent the occurrence of the offence”. This is the due diligence defence. Having a proper health and safety management system in place is an important element of a due diligence defence.

Fines and Penalties

The Ministry of Labour and Ontario Courts are serious about enforcing obligations under the OHS. In 2016-17, Ministry health and safety inspectors conducted more than 79,800 visits to more than 34,700 workplaces, and issued more than 118,000 orders because of non-compliance.

In 2016, the courts imposed more than \$11 million in fines and entered more than 2,200 convictions against workplace parties for contraventions of the OHSA and its regulations.³

On December 14, 2017, the maximum fines and penalties for an offence under the OHSA increased to:

- \$100,000 for individuals (e.g. directors, officers, supervisors, workers) and/or 12 months in jail
- \$1,500,000 for corporations.

In addition to these fines, a surcharge of 25% is required under the *Provincial Offences Act*.

The time limit to allow for prosecution for offences under the OHSA, has also recently increased from one year from the date of the offence, to one year from the date an inspector becomes aware of an alleged offence.

5. OH&S Offences under the *Criminal Code*

The *Criminal Code* imposes serious penalties for occupational health and safety violations that result in injuries or death. Criminal liability can be attributed to organizations, including corporations their representatives and anyone who directs the work of others.

Section 217.1 of the *Criminal Code* states:

“Everyone who undertakes, or has authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”

The *Criminal Code* also imposes criminal liability on organizations and their representatives for negligence [section 22.1] and other offences [section 22.2], which can include circumstances in which senior officers do not take all reasonable measures to stop a representative of the organization from being a party to an occupational health and safety offence.

Charges for occupational health and safety offences under the *Criminal Code* are reserved for the most serious offences, involving grave moral faults.

Due diligence is the only available defence to a *Criminal Code* charge related to occupational health and safety. Once the Crown prosecutor proves the criminal offence, defendants must prove beyond a reasonable doubt that they did everything possible to prevent the offence from happening. It is not enough that they took the normal standard of care in their industry; they must show that they took “every reasonable precaution”.

6. Charges under Both the OHSA and the *Criminal Code*

³ Ontario Ministry of Labour News Release, December 20, 2017, <https://news.ontario.ca/mol/en/2017/12/ontario-enhancing-workplace-health-and-safety.html>.

A fatal incident involving Metron Construction and one of its supervisors demonstrates that is possible for companies and employees to be charged with offences under the OHSA and the Criminal in connection with the same occupational health and safety incident.

The Incident

On Christmas Eve 2009, six Metron employees, including the site foreman, boarded a swing stage they had been using to scale and repair the balconies of a high-rise apartment building. Arriving later than the others, the Supervisor handed tools to his crew as they rushed to complete the project. The crew was behind schedule, and Metron would receive a \$50,000 bonus if the project was completed by the end of the year.

The stage collapsed from the 13th floor, killing four of the employees and leaving a fifth with serious injuries. A sixth employee was saved, left suspended by a safety harness. All four of the workers who died in the collapse were recent immigrants from Eastern Europe. It was the worst construction accident in Toronto in over 50 years, and triggered a review and eventual amendment of the OHSA aimed at increasing protections for workers and reducing accidents.

Charges and Sentencing

The Ministry of Labour laid 61 charges under the OHSA. The Supervisor and Metron were both charged with criminal negligence under the *Criminal Code*.

Metron was fined \$200,000 after it pleaded guilty in 2012 to one count of criminal negligence, becoming the first company to be convicted in Ontario under the sections of the *Criminal Code* relating to workplace health and safety duties. The Ontario Court of Appeal later increased the fine to \$750,000, the highest fine for criminal corporate liability at the time. Metron's owner was ordered to pay an additional \$112,500 after pleading guilty to four violations of the OHSA.

For his role in the scaffolding collapse, the Ontario Superior Court of Justice found the Supervisor guilty of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm, and sentenced him to 3.5 years in prison.⁴

The evidence before the Court was that the Supervisor had asked the foreman about the adequacy of the safety harnesses. Although only two harnesses were available, the foreman told the Supervisor not to worry, and the Supervisor paid no further attention to the issue. It was later determined that the swing's faulty welding was responsible for the collapse.

The judge found that the Supervisor had shown a "wanton and reckless disregard" for the lives and safety of his crew members when he became aware that protections against falls were not in place, yet allowed his crew to continue working. While it was reasonable for the Supervisor to have delegated the daily inspection of the swing stage and harnesses to his foreman, once the Supervisor raised the fact that harnesses were missing, he had an obligation to take reasonable steps to remedy that deficiency. His failure in this regard was found to constitute a marked and substantial departure from what a reasonable supervisor ought to have done.

The judge concluded that the Supervisor had recognized the risk and, weighing the risk against Metron's interest in continuing the work, decided to take it. In finding that this decision constituted

⁴ *R. v Vadim Kazenelson*, 2016 ONSC 25 (Can LII).

more than a momentary lapse of judgment, the judge noted that he had an obligation to issue a sentence capable of deterring others from making similar mistakes.

KEY DUE DILIGENCE EXPECTATIONS OF THE ONTARIO MINISTRY OF LABOUR AND COURTS

While occupational health and safety due diligence requirements depend on individual circumstances, with relevant considerations including the nature of the workplace; the work activity; the frequency with which the worker performs the activity; and the degree of hazard involved, the following are key expectations that the Ministry of Labour and Ontario Courts that would apply broadly to all employers and workplaces in the province.

1. Knowledge of Legal Obligations

- Up-to-date knowledge by supervisors and others who direct work of relevant, applicable Occupational Health and Safety Act (OHSA) and regulatory requirements, codes, standards, guidelines.
- Knowledge of these obligations incorporated in both policies and procedures.

2. Knowledge of Hazards

- Ongoing assessment of workplace for potential physical and procedural hazard by all reasonably available means.
- Audits performed by competent Company representatives or external consultant on a regular basis.
- Use of "what could foreseeably go wrong" approach.
- Using information from Joint Health and Safety Committee audits, workplace incident investigations, near-miss and accident reports, WSIB claims analysis to assess hazards.
- Supervisor's assessment of complexity and risks of tasks before a particular work activity is performed.

3. Ongoing Action to Correct Hazards

- Corrective workplace measures, changes, repairs based on audits, assessments.
- Development of ongoing improvements to safe work procedures, policies, practices based on assessments.

4. Written Health and Safety Policies and Procedures

- Written, up-to-date, understandable policies and procedures for all hazardous activities at workplace, which meet or exceed OHSA requirements, standards and guidelines, developed with expert assistance, as appropriate.
- Policies and procedures updated regularly as equipment, workplace practices, OHSA requirements or standards evolve.
- All OH&S policies and procedures readily available to employees in a manual and posted as necessary.

5. Orientation and Training

- Supervisor/management training and knowledge of OHSA and applicable Regulations, company policies, procedures, expectations for safe work in circumstances.
- Thorough training of workers.
- Ongoing training as supervisors/workers as equipment, work and OH&S law and policy evolves.
- Supervisory follow-up with workers to confirm training is understood and applied.
- Retraining as necessary for hazard, and reminder meetings (safety meetings, pre-job meetings) to reinforce training and expectations.

6. Supervision and Monitoring

- Ongoing supervision and monitoring for risk.
- Increased monitoring for high-risk, complex task, or where there is indication of compliance problem at workplace.
- Monitoring policies and procedures, safe work practices for compliance with evolving OHSA requirements.

7. Communication and Coordination

- Ongoing communication and coordination of job tasks.
- Timely communications about changes to equipment/work conditions.
- Reminders of identified risks.
- Communicating and coordinating risk identification and process issues on job sites where multiple parties are present or workers are unfamiliar with new areas or risks.

8. Enforcement, Corrective Action and Discipline

- Enforcing policies, procedures and safe work practices with appropriate corrective action and discipline.
- Consistent, significant discipline for significant safety contraventions.

9. Essential Documentation

- Support all the above steps with notes, records, documents (including training records with agendas, materials, checklists, tests retained; forms for supervisory monitoring; written records of discipline).
- Maintain detailed pre-job and safety meeting records.
- Maintain written audits and assessments of hazards and recorded follow-up.