

Just Released: OHS Lessons For Employers From *King v. R.*, 2025 NBCA 12



On January 23, 2025, the New Brunswick Court of Appeal released its decision in *King v R.* This tragic case highlights critical lessons for employers, emphasizing the importance of leadership accountability, adherence to safety protocols and a proactive approach to managing high-risk activities. This decision arose from the drowning of 18-year-old Michael Henderson in a confined space on a construction site in Fredericton, leading to the conviction of Jason King, his supervisor, for criminal negligence causing death.

The appeal decision affirmed King's conviction while granting leave to appeal his sentence. However, the Court upheld the three-year prison term imposed by the trial judge, underscoring the seriousness of King's negligence. This decision reinforces the courts' increasing willingness to hold supervisors and employers accountable for workplace fatalities under criminal law.

Key Facts and the Role of the Supervisor

At the center of this case was the failure of Jason King, an experienced journeyman carpenter but untrained supervisor, to implement necessary safety measures. Henderson drowned during a leak test in an 8-foot-deep confined space after a pneumatic plug failed under the pressure of 32,000 liters of water.

Despite knowing the confined space posed significant risks, King failed to take basic precautions, including:

- **Lack of Hazard Assessment:** No formal hazard assessment was conducted, despite the known dangers of confined spaces.
- **Improper Equipment Use:** The pneumatic plug, a critical safety device, was installed improperly and without reference to the manufacturer's guidelines.
- **Failure to Inform Workers:** Henderson was not warned of the leak test or the increased risks it posed.
- **Neglect of Regulatory Requirements:** Confined space entry protocols, as mandated by safety regulations, were entirely ignored.

King's negligence was not limited to these specific failures but reflected a broader disregard for safety standards, which directly contributed to the fatal outcome.

Accountability and Risk Management

The decision emphasized the heightened responsibilities of supervisors in high-risk environments. The court underscored that supervisors must meet a "reasonable site supervisor" standard, requiring them to:

1. **Understand Their Duties:** Supervisors must be fully trained in safety protocols, particularly when managing confined spaces or hazardous tasks.
2. **Recognize and Mitigate Risks:** Supervisors are expected to proactively identify potential hazards and implement appropriate controls.
3. **Ensure Worker Safety:** Supervisors must enforce safety measures and communicate risks effectively to all team members.

The court's application of the "modified objective standard" highlights that a supervisor's conduct is measured against what a reasonable professional with similar responsibilities

would do. King's actions fell far short of this standard, demonstrating a "marked and substantial" departure that directly endangered workers' lives.

The Role of Training and Protocols

The court analyzed the systemic failures that contributed to the incident, drawing attention to the interplay between organizational culture, training, and individual accountability. Key takeaways include:

- **Training Is Non-Negotiable:** King's lack of formal supervisory training was a major factor in the court's assessment. Employers must ensure that all supervisors are adequately trained to handle their responsibilities, particularly in safety-critical roles.
- **Safety Protocols Must Be Followed:** The court noted that the manufacturer's instructions for the pneumatic plug were clear, yet they were ignored. Proper adherence to equipment guidelines is crucial for workplace safety.
- **Confined Space Safety:** Confined spaces require rigorous planning, including air monitoring, communication protocols, and rescue plans. King's failure to implement any of these measures highlighted a blatant disregard for safety regulations.
- **Supervisory Oversight:** Supervisors must be vigilant and directly oversee high-risk tasks. King's decision to proceed with the leak test without confirming that workers had exited the confined space demonstrated gross negligence.

What Employers Need to Know

The King v R decision is a stark reminder of the serious consequences of neglecting workplace safety. Employers should view this decision as a clear warning about the potential legal and financial consequences of failing to prioritize workplace safety. Key takeaways include:

1. **Invest in Supervisor Training:** Supervisors must understand their legal and moral obligations to ensure worker safety. Comprehensive training on hazard identification, risk management, and safety regulations is essential. King, while experienced as a journeyman carpenter, had no formal supervisory training. Employers must ensure that supervisors are fully trained to recognize hazards, follow safety protocols, and manage risks on-site.
2. **Develop and Enforce Safety Plans:** High-risk tasks, such as confined space entry, require detailed safety plans that address all potential hazards. These plans must be regularly reviewed and strictly enforced. Employers must implement and enforce detailed safety plans for high-risk tasks, especially confined space work, and provide workers with the necessary training and resources to follow these plans.
3. **Prioritize Communication:** Workers must be informed of all risks associated with their tasks, especially when conditions change (e.g., during a leak test).
4. **Adopt a Proactive Safety Culture:** Organizations must foster a culture where safety is a priority, encouraging workers to report hazards and supervisors to act decisively to address risks. Employers are expected to identify risks, address them proactively, and document every step taken. A lack of due diligence in this area can have fatal consequences.
5. **Document Everything:** Thorough documentation of safety measures, training, and incident responses can demonstrate compliance with regulations and support accountability.
6. **Accountability Is Critical:** The decision emphasizes that supervisors are personally responsible for the safety of their workers. Employers must clearly define roles and responsibilities and ensure supervisors are prepared to meet these obligations.

Voluntariness of WorkSafe Statements: Implications Across Canada

One of the key issues raised on appeal was the voluntariness of King's statement to WorkSafeNB investigators. King argued that he was unaware of his legal jeopardy during the interview and did not fully understand the potential consequences of his statement. However, the trial court found—and the Court of Appeal affirmed—that King voluntarily provided his statement after receiving an adequate caution.

This decision highlights the variability in how statements to workplace safety investigators are treated across Canada. In Alberta, for example, statements made to occupational health and safety (OHS) officers are generally compelled under the Alberta *Occupational Health and Safety Act* (OHS Act) and such statements are not admissible in evidence for any purpose in a trial, public inquiry under the Alberta *Fatality Inquiries Act*, or other proceeding, except in statutorily-defined circumstances pursuant to section 34(6) of the OHS Act. This difference underscores the importance of employers and workers understanding jurisdictional nuances over their work sites and obtaining legal advice if involved in a workplace safety investigation.

Appeal Rights and Next Steps

The Court of Appeal granted King leave to appeal his sentence but ultimately upheld the three-year prison term, finding it to be proportionate to the severity of his negligence. While this marked the end of King's provincial appeal rights, he could seek leave to appeal to the Supreme Court of Canada. However, such appeals require a demonstration that the case raises a question of public or national importance.

For employers, this decision signals that courts are prepared to impose substantial sentences for safety violations that

result in worker fatalities, reinforcing the need for a diligent, safety-first approach in all workplaces.

Conclusion

The tragic death of Michael Henderson serves as a powerful reminder of the critical role supervisors play in workplace safety. The *King v R* decision underscores that neglecting safety protocols and training can have devastating consequences—not only for workers but also for those in leadership positions who bear responsibility for their well-being. For employers, this case reinforces the importance of rigorous safety management, proactive risk mitigation, and a commitment to protecting workers from preventable harm.

If your organization is concerned about its workplace safety practices or compliance with occupational health and safety regulations, consider seeking guidance from experienced legal counsel and OHS professionals. Understanding your obligations and taking proactive steps to address risks can make the difference between a safe workplace and a preventable tragedy.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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