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OHS Caselaw Highlights from 2015: Top Picks from Dentons' OHS Blog

Presentation to CSSE Toronto

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Metron update

- Swing N Scaff Inc.: $350,000 (OHSA)
- Patrick Deschamps, Director of Swing N Scaff: $50,000 (OHSA)
- Metron Construction Corporation: $750,000 (Criminal Code – Bill C-45)
- Joel Swartz, Director of Metron: $90,000 (OHSA)
- Vadim Kazenelson (Project Manager): 3 ½ years in prison for criminal negligence (sentenced on January 11, 2016)

Too much compassion? *FacilicorpNB*

- Alcoholic employee dismissed - under influence of alcohol at work
- Employer had given employee “leeway”, shown “compassion”
- Employee reinstated: 30 day suspension substituted

Lawyer's harassment investigation report not privileged: *Durham Regional Police Association*

- Law firm retained by employer to conduct harassment investigation
- Retainer letter
- Not retained to provide legal advice
- Union entitled to investigation report

Beware contents of safety policy - accident investigation file may not be litigation privileged: *Talisman Energy Inc.*

- Is anticipated litigation main reason for investigation – or is safety policy?
- Should there be two-stage accident investigation?
- Reviewing investigation provisions of safety policy

Officially induced error defence wins: *D. Crupi & Sons Ltd.*

- *Highway Traffic Act* charge: driving snowplow on highway without permit
- Visit MTO office counter, spoke with MTO official
- Erroneous advice
- Defence of officially induced error

Employee properly fired for workplace violence threats, despite mental disability: *Bellehumeur v. Windsor Factory Supply Ltd.*

- Employee made violent threats against coworkers
- Employer was unaware of his “mental disability”
- Court: mental disability played no role in dismissal
- No discrimination

“I guess I’d have to kill you” remark could not reasonably have been interpreted as a “viable threat”: *Harriott*

- Worker had confrontation with coworker
- Coworker: if you hit me, you will be “put away for the rest of your life”.
- Worker chuckled and said, ”I guess I’d have to kill you”.
- Not “wilful misconduct” under *Employment Standards Act*

Employee properly fired for discussing inappropriate personal matters at work: *Overwaitea Food Group*

- 28-year employee on last-chance agreement
- Negative comments about women including his wife, swearing, uncomfortable for coworkers
- Also talking about the United States and his political views
- Properly dismissed

Provincial OHS legislation applied across borders: *Escudero v. Diversified Transportation Ltd.*

- Employee hired in Ontario
- Worked for 3 weeks in B.C., where he raised safety complaints
- Fired when returned to Ontario
- Permitted to bring retaliation claim under Ontario OHSA

Two superintendents fined in fatality: *Matheson Constructors Ltd.*

- Garage door knocked over scissor lift, worker died
- Superintendents failed to ensure that TTC's lockout procedure followed, contrary to contact with the TTC.
- Convicted, fined $4,000.00 each personally

Judge chides employer that countersued against employee for making allegedly "false" safety complaint to Ministry of Labour: *Leverton*

- Wrongful dismissal suit
- Employer countersued for filing allegedly false safety complaint with MOL
- Judge chides employer

"Zero tolerance" for employee who smoked marijuana on the job: *French v. Selkin Logging*

- Employee operated machine for logging contractor
- Smoked marijuana on the job
- No "marijuana card"
- Employer not required to permit him to smoke marijuana in the workplace without legal and medical authorization

MOL engineer not qualified to give expert evidence: *Advanced Construction Techniques Ltd.*

- Drill rig tipped over, causing one death
- MOL engineer prepared report in which he concluded with his own opinion as to root cause
- Judge: MOL engineer “inextricably bound up with the investigation of this case”.
- Enthusiastic identification with the prosecution during the trial
- Could not be unbiased

OHSA did not require employer to issue public response to "smear campaign": *Ontario (Community Safety and Correctional Services)*

- Jail employee and lawyer made public statements: "white supremacists"
- Union filed grievance: claimed OHSA "general duty" required employer to issue public statement supporting "non-racialized" employees
- Arbitrator: employer acted reasonably. No violation of OHSA

Post-accident safety fix used against employer in OHSA charges: *Precision Drilling Canada Limited*

- Employee died from blunt force blow to the head on drilling rig
- Employer installed interlock / warning device after accident
- Judge permitted prosecutor to call evidence regarding that interlock / warning device – could reasonably have been implemented before accident
- Company found guilty of charges

“No overtime” note from doctor was obtained due to labour tensions: *Rio Tinto Alcan*

- Employees protested employer policy change by reducing overtime
- B.C. Labour Relations Board ordered end to overtime ban: unlawful strike
- Employee obtained “no overtime” doctor’s note
- Three-day suspension imposed

Sexual joke was "worse than the usual sexual humour of the workplace" - employee fired for cause: *Hydro One Networks Inc.*

- Employee upset because female co-worker might be promoted over him
- Made offensive sexual joke with female employee present, likely directed at her
- Also made disparaging, objectifying comment about his wife
- Decision: fired for cause

"Industry standard" is not always appropriate safety precaution, and MOL inspector's "gut instinct" is not enough to ground compliance order: *Glencore*

- MOL argued Industry standard is to refrain from skipping while inspecting
- Company showed industry standard should not apply in this case
- OLRB: OHSA requires balance between risk of harm and ability to carry out a business enterprise. While OHSA is heavily slanted in favour of eliminating risk, that objective was not absolute. Standard is not perfection or the complete absence of risk, but rather a standard of ensuring all reasonable precautions in the circumstances

Operator's manual's requirement could not be read into charge: *Ash Rapids Camps*

- Boating fatality at tourist resort
- Charge: "engine shut-off lanyard" not "used as prescribed"
- Court rejected MOL position that "as prescribed" meant as required in operator's manual

Refusing to provide a written statement was not obstruction, but grabbing safety officer and pushing him out the door was: *Prodromidis*

- Accused charged under NWT *Safety Act* with obstructing safety officer
- First meeting: loud and aggressive, "vented" but responded to questions. Refused to give written statement and drawing, but did not impede or delay investigation
- Second meeting: confronted investigator, grabbed him by arms, pushed him out the door, and slammed the door behind him

Safety contractor wins appeal of administrative penalty: *Safety First Contracting (1995) Limited*

- Providing traffic control services on TCH
- N.S. Safety Officer caught in traffic jam, wrote compliance orders
- Later issued $1,000.00 administrative penalty alleging traffic control staff were not given appropriate training, facilities and equipment
- Appeal allowed: vague allegations, expert company

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"Industry standard" is not always appropriate safety precaution, and MOL inspector's "gut instinct" is not enough to ground compliance order: OLRB

Posted on Jan 7th, 2016 By **Adrian Miedema**
Categories: **Caselaw Developments**, **Government Safety Investigations**

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A mining company has won a lengthy dispute with the Ontario Ministry of Labour after satisfying the Ontario Labour Relations Board that the applicable "industry standard" was not appropriate in the case at hand.

The issue in the case was whether the Ontario *Occupational Health and Safety Act* prohibited the employer from "skipping" (bringing mined ore or muck to the surface using a hoist – like an elevator system – after it has been mined) while shaft inspections were being performed. A Ministry of Labour inspector had written compliance orders requiring the company to refrain from skipping while inspecting the shaft.

The Ministry argued that the industry standard is to refrain from skipping while inspecting the shaft. The company showed, however, that this standard should not apply because, in particular, the loading pocket (where material is loaded for transportation to the surface) is at the base of the shaft, below the bottom point at which shaft inspectors would travel when on the inspection deck of the main cage. Thus, even if the loading pocket malfunctioned, it would not present a hazard to the shaft inspectors because they would be above it. Also, the risk of a falling object injuring the shaft inspectors was very remote, given the precautions already in place.

Interestingly, the Ministry of Labour argued that if the OLRB allowed the appeal and set aside the inspector's orders, the OLRB would be "playing Russian roulette with worker's lives". The OLRB answered that assertion as follows:

"The Board takes the health and safety of the workers of this province, and the miners at NRS, extremely seriously. However, on the facts of this case the evidence establishes that skipping does not create any reasonably foreseeable increased risk of harm to the inspection crew. It is not enough for the Director to rely on gut instinct to establish the need for an order; the basis for an order must be grounded in evidence and law, and here those grounds are not made out."

As such, the company's appeals were allowed and the inspector's orders were set aside.

Glencore Canada Corporation v. Sudbury Mine, 2015 CanLII 85298 (ON LRB)

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Dentons is a leader in Canadian occupational health and safety law. We advise employers in occupational health and safety matters, including strategic guidance throughout the Ministry of Labour investigation process and defence of OHS charges.

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