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2015 OHSA Caselaw Update

Privilege, Metron, violence, marijuana, experts, post-accident fixes, and more

Adrian Miedema

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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): convicted criminally

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

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

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

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

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

“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

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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Post-accident remedial measures were a "small bit of common-sense engineering", relevant evidence in finding company guilty of OHSA offences

Posted on Oct 22nd, 2015 By **Adrian Miedema**
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An employer's post-accident efforts to fix a safety issue were relevant to the issue of whether it had violated the *Occupational Health and Safety Act* at the time of the accident, an Alberta judge has held.

An employee died after sustaining a blunt force blow to his head while working as a "floorhand" on the floor of a drilling rig. The company was charged with two offences under the Alberta *Occupational Health and Safety Act:* failing to ensure the safety of the worker, and failing to eliminate an identified hazard.

Over the company's objections, the judge permitted the prosecutor to call evidence about an interlock/warning device that the company had designed and installed after the accident that would prevent, or at least reduce the risk of, similar accidents. The judge stated:

"The Defence also argued that public policy favoured not admitting such evidence. In my view, at least for a strict liability regulatory offence the public policy arguments favour admission. The whole tone of the Act is to encourage proactive safe practices designed to prevent rather than react. This requires employers to provide wide efforts at compliance."

The court rejected the company's argument that post-accident evidence should not be admitted because it would discourage "innovation and repair" – that is, discourage companies from fixing safety hazards after accidents for fear that the prosecutor could argue that that fix should have been implemented before the accident.

Interestingly, the court also stated, "In not having heard of, let alone used this safety interlock the Defendant may have fallen victim to their own size and expertise in assuming that they defined industry standards . . . It is nothing more than applying a small bit of common-sense engineering to a known problem." The court noted that there were "other even simpler technical solutions which would have helped avoid this situation." The company had led no credible evidence that the engineering solution was an "unproven innovation" or an "incomplete engineering solution" that they could not reasonably have identified before the accident.

The court considered the evidence about the post-accident fix to be relevant, admissible and important. The court found the company guilty on both charges.

R. v. Precision Drilling Canada Limited, 2015 ABPC 115 (CanLII)

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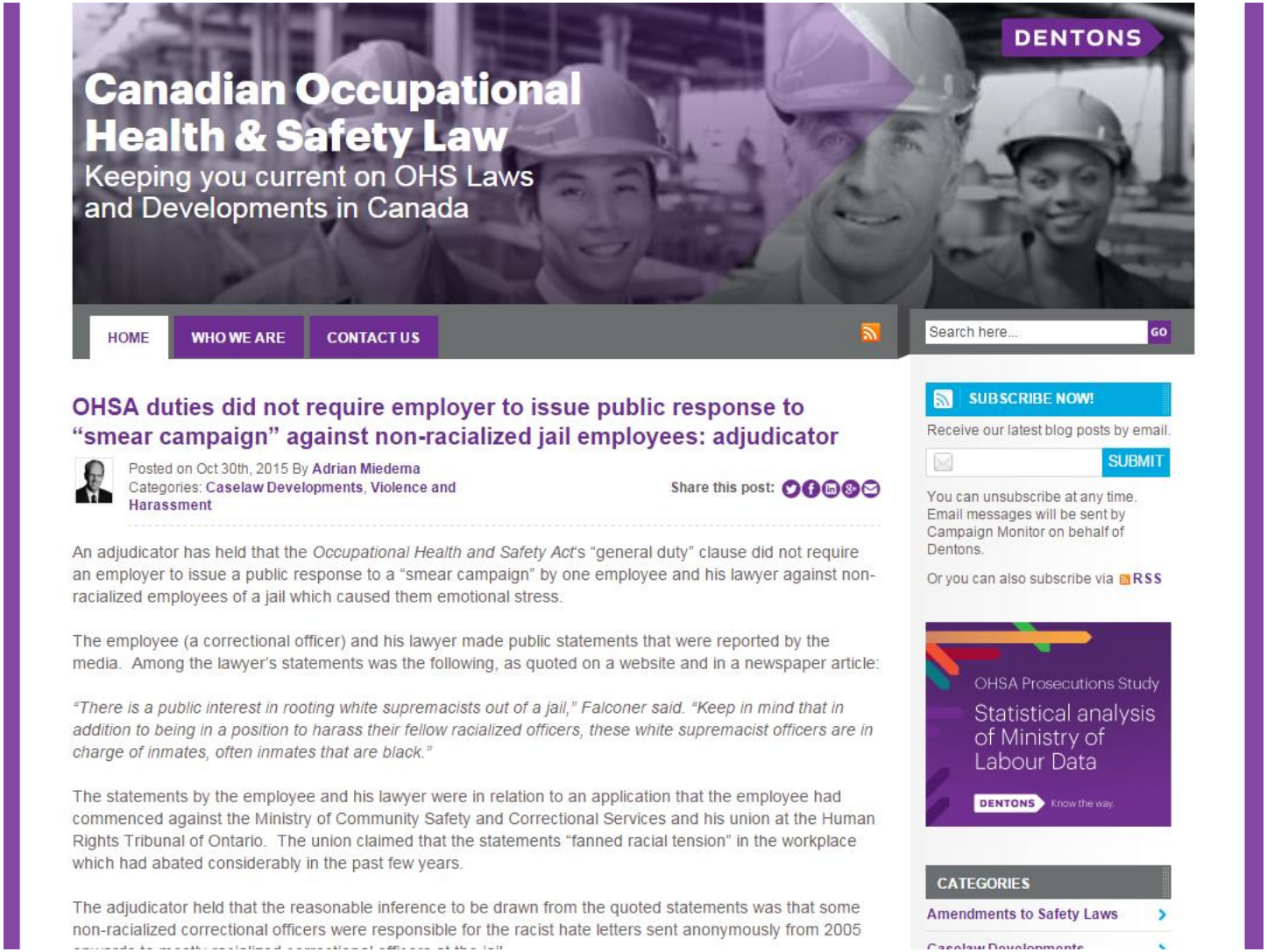

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