LRB File No. 206-16

IN THE MATTER OF:

An appeal with respect to the decision of Occupational Health and Safety Officers dated August 12, 2016, pursuant to Section 3-53 of *The Saskatchewan Employment Act.*

BETWEEN:

OIL CITY ENERGY SERVICES LTD.

Appellant
(Employer)

-and-

ZEYAD FADHEL AND TREVOR McGOWAN

Respondents

Director of Occupational Health and Safety
Ministry of Labour Relations and Workplace Safety
Respondent

For the Appellant, Employer:	Self-Represented, Dylan Cousineau appearing
For the Respondent, Zeyad Fadhel:	Self-Represented
For the Respondent, Trevor McGowan:	Self-Represented

DECISION

I. Introduction

1. The Appellant, Oil City Energy Services Ltd. ("Oil City"), has appealed the decision of Occupational Health and Safety Officers, Kent Rhodes and Mike Luciak, dated August 12, 2016, which found that the termination of employment of both the Respondent, Zeyad Fadhel, and the

Respondent, Trevor McGowan, was an unlawful discriminatory action contrary to section 3-53 of *The Saskatchewan Employment Act.*

2. Following my appointment as Adjudicator, with the agreement of the parties, a pre-hearing case management teleconference was arranged for November 4, 2016. At that time, the parties agreed that I had jurisdiction to hear the appeal and that mediation was not a viable option. Hearing dates were discussed for January 2017, with January 16, 2017 subsequently being set.

3. By teleconference on January 4, 2017, the Appellant requested an adjournment of the hearing. After hearing from the parties, an adjournment to January 30, 2017 was granted. While the parties had previously been provided with the Occupational Health & Safety ("OHS") file, they had indicated additional information would be used in the hearing. Thus, exchange of documents was agreed to be completed by January 16, 2017.

4. At the outset of the hearing on January 30, 2017, the parties again confirmed they had no objections to me hearing the appeal. With respect to preliminary matters, an order for exclusion of witnesses was made, such that witnesses other than the Respondents, Zeyad Fadhel and Trevor McGowan, and Dylan Cousineau on behalf of the Appellant, Oil City, were required to remain outside the hearing room until called to testify. I then heard sworn testimony from seven witnesses:

i) Joshua Johnson, a Hydro Vac operator with Oil City;
ii) Ronald Cousineau, Safety Officer and owner/director of Oil City;
iii) Dylan Cousineau, owner/director of Oil City;
iv) Olivia Anne Bluin, sales manager at Hampton Inn, called by the Respondents;
v) Mitchell Istey, employee of Oil City, called by the Respondents;
vi) Zeyad Fadhel; and
vii) Trevor McGowan.

5. In addition, the following exhibits were filed:

BH-1:	August 12, 2016 decision of Kent Rhodes and Mike Luciak, consisting of 5 pages;
BH-2:	Notice of Appeal dated August 29, 2016, signed by Dylan Cousineau (pages 1 -2 of OHS file);
BH-3:	Notice of Hearing;
A-1:	Saskatchewan Construction Safety Association ("SCSA") Certificate of Recognition dated September 28, 2016;
A-2:	Alberta Government Parnerships In Injury Reduction Certificate of Recognition , with expiry date of August 17, 2019;
A-3:	Resumé for Zead Fadhel;
A-4:	OCS Group Cell Phone Procedure;
A-5:	Twenty-six pages, one entitled "Pre-Job Hazard Assessment" and 25 entitled "Specific Task Hazard Assessment/Daily Tailgate Meeting";
A-6:	New Hire—Employee Information for Trevor McGowan;
A-7:	New Hire—Employee Information for Zeyad Fadhel;
A-8:	Employee Warning Report regarding Trevor McGowan dated May 9, 2016;
A-9:	Employee Warning Report regarding Zead Fadhel dated May 9, 2016;
A-10:	Letter to Mr. Dylan Cousineau from Kent Rhodes, Occupational Health and Safety Officer, dated June 7, 2016;
A-11:	Equipment Damage/Loss/Theft Report Form regarding Trevor McGowan bearing incident date 6/05/16;
A-12:	Equipment Damage/Loss/Theft Report Form regarding Zead Fadhel bearing incident date 6/05/16;
A-13:	a) Statement of Trevor McGowan to Kent Rhodes, OHS Officer, and b) Statement of Zeyad Fadhel to Kent Rhodes, OHS Officer;
A-14:	(For identification only) Printout of pages on "Layoffs and Terminations" from Saskatchewan.ca/work;
A-15:	Twenty one pages excerpted from Oil City Energy Services Ltd. Manual;
A-16:	Resumé for Trevor McGowan;
A-17:	Three pages of pay stubs and one page Record of Employment ("ROE") for Trevor McGowan;
A-18:	Two pages of pay stubs and three pages of ROE for Zeyad Fadhel;
A-19:	Copy of cheque and Canada Trust deposit confirmation, both dated May 17, 2016, payable to Zead Fadhel from Oil City Energy Services Ltd.;
A-20:	Binder of 115 pages relating to utility locates;
RF-1:	Copy of email and attached letter, both dated July 4, 2016, from Ron Cousineau to Kent Rhodes;
RF-2:	Recording of phone conversation between Mr. Fadhel and Mr. Trembley, provided to Officer Rhodes on May 19, 2016;
RF-3:	Copy of signature page from Zeyad Fadhel's TD1SK tax form dated 2016/05/06;
RM-1:	Copy of page 21 of OHS file, with notes of Kent Rhodes for June 20, 2016;
RM-2:	Printout of screen shots from Trevor McGowan's cell phone showing communications with Ryan Rabbitskin;

RM-3:	Copy of Trevor McGowan's Driver's Licence and Passport, with signatures;
RM-4:	Five pages, one being Oil City Energy Services Ltd. Employee Information and four being the 2016 Saskatchewan Personal Tax Credits Return for Trevor McGowan;
RM-5:	Eight pages commencing with Employee New Hire Completion Form for AFL signed by Trevor McGowan May 12, 2014;
RM-6:	Printout of the Detail of Airtime Charges for Trevor McGowan's cell phone for the period May 9, 2016 through May 24, 2016;
RM-7:	Screen shots of Contacts from Trevor McGowan's cell phone;
RM-8:	Records of Employment for Trevor McGowan;
RM-9:	Copy of email dated June 22, 2016 from Kent Rhodes to the Respondents, with attached letter dated letter dated July 4, 2016 from Ron Cousineau to Kent Rhodes;
RM-10:	Photos of job locations in the Westview area from Trevor McGowan's cell phone; and
RM-11:	Saskatoon Police Service Witness Statement dated January 12, 2017.

II. Factual Background

6. The Respondents, Zeyad Fadhel and Trevor McGowan, both filed complaints with OHS on May 18, 2016, alleging discriminatory action on the part of Oil City. They had been instructed on May 15, 2016 to dig a trench of 8 to 12 inches in depth in the backyards of multiple properties. The intent was to bury a conduit for SaskTel telecommunications/internet service.

7. When the Respondents, along with Mitchell Isley, checked several of the backyards, they noted an absence of red flags marking the locations of underground power utilities ("locates"). They raised the safety concern with Ryan Rabbitskin, who they believed was the foreman, although unbeknownst to them he had been recently demoted to lead hand. In any event, he was their immediate supervisor.

8. Mr. Rabbitskin initially gave direction to proceed with the digging regardless of the absence of the locates, with the comment that this would "look good for the company." He then left the work site, saying he would return with hand shovels. Concerned about this, the group decided to call Roger Trembley, Mr. Rabbitskin's superior. Trevor McGowan made the call, inquiring of Mr. Trembley whether it was permissible to dig a trench without the locates having been done. The response was that Mr. Trembley would speak with Mr. Rabbitskin.

9. Shortly thereafter, Ryan Rabbitskin returned and advised the group that they could not work on the houses due to the absence of locates. He instructed the Respondents to return home as there was no other work for them that day, although they had requested other available assignments. They departed as they both had their vehicles at the work site. Mr. Isley remained, as he needed to catch a ride with Mr. Rabbitskin.

10. Later that day, each of the Respondents received a telephone call from Dylan Cousineau, owner of Oil City. In both conversations--according to the testimony of the Respondents and Ms. Bluin, who overheard the conversation between Zeyad Fadhel and Dylan Cousineau--Dylan Cousineau said he had heard they had refused work and he would have to terminate their employment. When each asked the reason for the termination, they were told to contact Roger Trembley.

11. Dylan Cousineau's testimony regarding these telephone conversations is inconsistent. He initially testified that he phoned each of the Respondents and fired them saying "I'm sorry, it's just not working out." He further testified, under cross-examination by Trevor McGowan, that he does not give details or specifics when he is firing someone. He said, "It's cold. I try to be brief. You guys are not the first I've fired." When asked about the details of the phone call, he responded that his recollection was "just that I called and let you go," adding that "as an owner, I don't get into those things."

12. Dylan Cousineau further denied making any reference in the conversations to contacting Mr. Trembley. Then, his testimony changed and he indicated that he gave the reason for the terminations as the Respondents' cell phone use.

13. Given this inconsistency as well as the circumstances, including the subsequent conversations between each of the Respondents and Mr. Trembley, along with my observations of the witnesses during the hearing, I do not accept Dylan Cousineau's allegation that he raised any issue regarding cell phone use on May 15, 2016.

14. Indeed, the matter of cell phone use seems only to have arisen on July 4, 2016, when Mr. Ronald Cousineau, Dylan's father and another owner/director of Oil City, responded to OHS Officer Rhodes. Previously, on June 7, 2016, a registered letter had been sent to Dylan Cousineau from the OHS Officers requesting written documentation identifying the reasons for

the discriminatory action. On June 22, 2016, Officer Rhodes spoke with Dylan Cousineau by telephone, asking if he had received the letter. Dylan Cousineau responded that he had received a notification from Canada Post, but had not picked up the letter. The letter was re-sent by email, and Dylan Cousineau requested an extension of the time in which to respond.

15. The response of July 4, 2016 (Exhibit RF-1) has no enclosures, nor is there reference to any company policy regarding cell phone use.

16. On May 15, 2016, following their respective telephone conversations with Dylan Cousineau, each of the Respondents was in contact with Roger Trembley. Trevor McGowan testified that Mr. Trembley referred to Trevor McGowan's technical skills, but that the job required people to "dig, dig, dig." He therefore understood that the termination was due to having expressed concerns about digging in the absence of locates.

17. This is consistent with what Zeyad Fadhel and Olivia Bluin heard and recorded. In Exhibit RF-1, Mr. Trembley is heard to say:

> I need guys that are going to dig, dig, dig, dig, dig and that's the bottom line. . . .
>
> The conflict between you guys and Ryan Rabbitskin isn't working and I can't have that conflict . . .
>
> Bottom line, like I said there is a conflict between you guys and Rabbitskin so I gotta do what I gotta do . . .
>
> Ryan said you guys refused to dig in the backyard because the one locate ain't done. That's the words I got. So I said ok, then send them home and pay them their 3 hours and I'll talk to Dylan and then that's where we're at. So that's the story I got. That's what I'm on. That's why you're gone.

18. While Dylan Cousineau objected to use of this recording in evidence, as will be discussed further herein, I have determined it is admissible.

19. Having investigated these matters, the OHS Officers, Kent Rhodes and Mike Luciak, concluded, as outlined in their August 12, 2016 decision (Exhibit BH-1) that the termination of employment of both the Respondent, Zeyad Fadhel, and the Respondent, Trevor McGowan, was an unlawful discriminatory action contrary to section 3-53 of *The Saskatchewan Employment Act*. They further directed that:

As a result the employer is to comply with section 3-36(2) of the Act and pay Mr. Fadhel and Mr. McGowan any wages that they would have earned if they had not been wrongfully discriminated against, cease the discriminatory action, and reinstate Mr. Fadhel and Mr. McGowan to their former employment on the same terms and conditions under which Mr. Fadhel and Mr. McGowan [were] formerly employed, and remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to these workers.

20. From this decision, Oil City launched an appeal. However, it remains in breach of the order made by the Officers. Although section 3-57(1) of *The Saskatchewan Employment Act* provides that commencement of an appeal does not stay the effect of a decision, Dylan Cousineau at the hearing noted that the Respondents have not been paid any back wages, nor have any other steps been taken in compliance with the order.

III. The Legislation and the Issues

21. Section 3-35 of *The Saskatchewan Employment Act* prohibits an employer from taking discriminatory action against a worker. It states:

> **No employer shall take discriminatory action against a worker because the worker:**
> (a) acts or has acted in compliance with:
> (i) this Part or the regulations made pursuant to this Part;
> (ii) Part V or the regulations made pursuant to that Part;
> (iii) a code of practice issued pursuant to section 3-84; or
> (iv) a notice of contravention or a requirement or prohibition contained in a notice of contravention;
> (b) seeks or has sought the enforcement of:
> (i) this Part or the regulations made pursuant to this Part; or
> (ii) Part V or the regulations made pursuant to that Part;
> (c) assists or has assisted with the activities of an occupational health committee or occupational health and safety representative;
> (d) seeks or has sought the establishment of an occupational health committee or the designation of an occupational health and safety representative;
> (e) performs or has performed the function of an occupational health committee member or occupational health and safety representative;
> **(f) refuses or has refused to perform an act or series of acts pursuant to section 3-31;**
> (g) is about to testify or has testified in any proceeding or inquiry pursuant to:
> (i) this Part or the regulations made pursuant to this Part; or
> (ii) Part V or the regulations made pursuant to that Part;
> (h) gives or has given information to an occupational health committee, an occupational health and safety representative, an occupational health officer or other person

responsible for the administration of this Part or the regulations made pursuant to this Part with respect to the health and safety of workers at a place of employment;
(i) gives or has given information to a radiation health officer within the meaning of Part V or to any other person responsible for the administration of that Part or the regulations made pursuant to that Part;
(j) is or has been prevented from working because a notice of contravention with respect to the worker's work has been served on the employer; or
(k) has been prevented from working because an order has been served pursuant to Part V or the regulations made pursuant to that Part on an owner, vendor or operator within the meaning of that Part.

(emphasis added)

22. Section 3-1(1)(i) defines "discriminatory action" as follows:

"**discriminatory action**" means any action or threat of action by an employer that does or would adversely affect a worker with respect to any terms or conditions of employment or opportunity for promotion, and **includes termination**, layoff, suspension, demotion or transfer of a worker, discontinuation or elimination of a job, change of a job location, reduction in wages, change in hours of work, reprimand, coercion, intimidation or the imposition of any discipline or other penalty, but does not include:

(i) the temporary assignment of a worker to alternative work, pursuant to section 3-44, without loss of pay to the worker; or

(ii) the temporary assignment of a worker to alternative work, without loss of pay to the worker, while:

(A) steps are being taken for the purposes of clause 3-31(a) to satisfy the worker that any particular act or series of acts that the worker refused to perform pursuant to that clause is not unusually dangerous to the health or safety of the worker or any other person at the place of employment;
(B) the occupational health committee is conducting an investigation pursuant to clause 3-31(b) in relation to the worker's refusal to perform any particular act or series of acts; or
(C) an occupational health officer is conducting an investigation requested by a worker or an employer pursuant to clause 3-32(a).

(emphasis added)

23. Section 3-31 of the Act references the refusal to perform dangerous work:

A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:
(a) sufficient steps have been taken to satisfy the worker otherwise; or
(b) the occupational health committee has investigated the matter and advised the worker otherwise.

24. Where workers believe that discriminatory action has been taken against them, section 3-36 of the Act permits them to refer a claim to an OHS Officer:

> (1) A worker who, on reasonable grounds, believes that the employer has taken discriminatory action against him or her for a reason mentioned in section 3-35 may refer the matter to an occupational health officer.
> (2) If an occupational health officer decides that an employer has taken discriminatory action against a worker for a reason mentioned in section 3-35, the occupational health officer shall serve a notice of contravention requiring the employer to:
>
> (a) cease the discriminatory action;
> (b) reinstate the worker to his or her former employment on the same terms and conditions under which the worker was formerly employed;
> (c) subject to subsection (5), pay to the worker any wages that the worker would have earned if the worker had not been wrongfully discriminated against; and
> (d) remove any reprimand or other reference to the matter from any employment records maintained by the employer with respect to that worker.
>
> (3) If an occupational health officer decides that no discriminatory action has been taken against a worker for any of the reasons set out in section 3-35, the occupational health officer shall advise the worker of the reasons for that decision in writing.
> (4) **If discriminatory action has been taken against a worker who has acted or participated in an activity described in section 3-35:**
>
> **(a) in any prosecution or other proceeding taken pursuant to this Part, there is a presumption in favour of the worker that the discriminatory action was taken against the worker because the worker acted or participated in an activity described in section 3-35; and**
> **(b) the onus is on the employer to establish that the discriminatory action was taken against the worker for good and sufficient other reason.**
>
> (5) The amount of money that an occupational health officer may require to be paid pursuant to clause (2)(c) is to be reduced by an amount that the officer is satisfied that the worker earned or should have earned during the period when the employer was required to pay the worker the wages.
> (6) The employer has the onus of establishing the amount of the reduction mentioned in subsection (5).
>
> (emphasis added)

25. Against this background, the following issues arise:

a) Did the employer, Oil City, take discriminatory action against the Respondents?

b) Did the Respondents act or participate in an activity described in section 3-35?

c) If the first two questions are answered in the affirmative, has Oil City met the onus in section 36(4) and established that the discriminatory action was taken against the Respondents for good and sufficient reason?

Admissibility of Recording

26. In addition, during the hearing, two issues were raised on behalf of Oil City. The first was in relation to the admissibility of Exhibit RF-2, the recording of the phone conversation between Mr. Fadhel and Mr. Trembley made May 15, 2016 and provided to Officer Rhodes on May 19, 2016. Dylan Cousineau argued that an expert would be required to identify Mr. Trembley's voice on the recording and to confirm that the recording had not been edited. He further suggested that the recording was illegal and contrary to the provisions of the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ("*PIPEDA*") as Mr. Trembley had not consented to being recorded.

27. Both Zeyad Fadhel and Olivia Bluin testified in detail as to how the recording came to be. After having heard from Dylan Cousineau that he was fired, and having been instructed to contact Roger Trembley if he had questions about it, Zeyad wanted to record the conversation to ensure that he understood. He placed the call from his cell phone, using the speaker, and requested Ms. Bluin to assist with recording the conversation on her cell phone. Ms. Bluin was present through the entire conversation and heard what was said. She was able to recount the gist of the conversation prior to the recording being played in evidence. She also confirmed that she had heard Roger Trembley's voice previously, so recognized it. He also had identified himself as "Roger" when answering the call.

28. Zeyad Fadhel likewise knew Roger Trembley's voice, having spoken with him on many occasions. The identify of the voice was further confirmed by Mitchell Isley and Trevor McGowan.

29. Had Oil City considered there to be serious grounds for challenging the identity of the individual in the recording, or the details of the conversation, it could have called Roger Trembley as a witness. But it did not do so.

30. Further, *PIPEDA* does not assist Oil City's allegation of illegality. That Act outlines the requirements for how private-sector organizations collect, use or disclose personal information. There was nothing about Mr. Trembley's personal information in issue.

31. The Saskatchewan *Privacy Act*, RSS 1978, c. P-24 does not support Oil City's position either. Section 3 provides examples of where there is a violation of privacy. It does include the recording of a conversation without consent, but only if one is doing so "otherwise than as a lawful party thereto." Zeyad Fadhel made the recording, but was a lawful party to the conversation.

32. Thus, Oil City's objections to the recording are not well-founded and it is admissible in evidence.

Rebuttal Evidence

33. The second issue raised by Oil City was in relation to rebuttal evidence. Oil City alleged that it had not known of the location where the Respondents were working on May 15, 2016 prior to mid-way through the hearing. Why it could not, or did not, obtain this information from the foreman/lead hand, Ryan Rabbitskin, is unclear. Further, the location was disclosed in the materials provided by Trevor McGowan in advance of the hearing. The screen shots in Exhibit RM-2 reveal where he, along with Mitchell Isley and Zeyad Fadhel, had been instructed to check for locates.

34. Nonetheless, Oil City asserted that its binder of materials, Exhibit A-20 was the "complete answer" in that within it were indications that the locates had been done. The suggestion, albeit indirect, was that the locates were done, therefore the Respondents had refused to work without grounds. Given the latitude afforded to an Adjudicator by section 4-4(3) of *The Saskatchewan Employment Act,* in not being strictly bound by the rules of evidence, I permitted Oil City to recall Ronald Cousineau and enter the binder through him. I, however, cautioned that without a proper foundation the materials may well have little weight.

35. Very little explanation of the source and accuracy of the materials was provided. Ronald Cousineau indicated that Oil City contracts out the work in obtaining the locates to Shermco Industries. While Ronald Cousineau indicated that Oil City had paid for this work to be done, there was no supporting documentation regarding this.

36. Further, on the page relating to the houses on Wentworth Crescent, where the Respondents were working on May 15, 2016, I note that there are handwritten phone numbers and an illegible name written by the typed instructions regarding whether there are "concerns or questions regarding this locate." Such entries are not present on many other pages within the binder. Although there was no testimony provided regarding this, the document itself raises questions as to whether there were indeed concerns about the locates.

37. Far better evidence is the testimony of the three individuals who were present at the time and checked the backyards for the locates. Each of the Respondents, as well as Mitchell Isley, testified that there were locates missing. I accept this evidence over that proffered by photocopies in a binder, for which a sufficient evidentiary foundation has not been established.

IV. Analysis and Findings

38. Turning to the substantive issues in the case, the first question is readily addressed by the legislation itself.

Did the employer, Oil City, take discriminatory action against the Respondents?

39. That the employment of the Respondents with Oil City was terminated on May 15, 2016 is uncontroverted. Termination clearly falls within the definition of discriminatory action in section 3-1(1)(i) of the Act, quoted above. Therefore, I find that the Respondents were subjected to discriminatory action.

Did the Respondents act or participate in an activity described in section 3-35?

40. Section 3-35(f) provides that "no employer shall take discriminatory action against a worker because the worker refuses or has refused to perform an act or series of acts pursuant to section 3-31. Section 3-31, as noted previously, states:

> A worker may refuse to perform any particular act or series of acts at a place of employment if the worker has reasonable grounds to believe that the act or series of acts is unusually dangerous to the worker's health or safety or the health or safety of any other person at the place of employment until:
>
> (a) sufficient steps have been taken to satisfy the worker otherwise; or
> (b) the occupational health committee has investigated the matter and advised the worker otherwise.

41. In the instant case, the evidence is clear that the Respondents and Mitchell Isley were concerned that not all of the locates had been done. They understood that it was not permissible to commence a dig without them because of the danger. Further, Trevor McGowan testified that in safety meetings Roger Trembley had said that if there were any problems or concerns, including those related to locates, to call him. "Roger had noted digging manually had put him in hospital."

42. The Respondents and Mitchell Isley all confirmed that they were not refusing to work, but wanted to ensure that it was safe and permissible to proceed with digging in the absence of locates. A brief delay such as this, while checking with supervisors, falls within the purview of section 3-31.

43. At one point in the hearing, Dylan Cousineau, in questioning the Respondents, noted that they had "done the right thing" in checking the safety concern. However, the evidence is clear, through the witnesses, and through the recording of the conversation with Mr. Trembley, that the termination was due to the refusal to dig as they had been directed to do by Ryan Rabbitskin.

44. In light of this, I find that the Respondents had participated in an activity described in section 3-35 of the Act.

If the first two questions are answered in the affirmative, has Oil City met the onus in section 36(4) and established that the discriminatory action was taken against the Respondents for good and sufficient reason?

45. At the hearing, Oil City repeatedly asserted that the Respondents were fired because of their improper cell phone usage. Dylan Cousineau suggested that he had noted this in each of the telephone conversations with the Respondents on the day their employment was terminated.

46. For the reasons noted above, I do not accept the version of the May 15, 2016 telephone calls to the Respondents proffered by Dylan Cousineau. Thus, the matter of cell phone use seems only to have arisen on July 4, 2016, when Mr. Ronald Cousineau responded to OHS Officer Rhodes. Again, no supporting documentation was provided to the OHS Officers at that time.

47. Somewhat mysteriously, in January of 2017, just days before the initial hearing date, the Cell Phone Procedure (Exhibit A-4) was produced, along with Exhibits A-8 and A-9, allegedly provided to Trevor McGowan and Zeyad Fadhel, respectively. The "Company Statement" section on both Exhibits A-8 and A-9 was completed and signed by a Brad Nagy, according to both Ron and Dylan Cousineau. Yet, Mr. Nagy did not testify.

48. The statements by Mr. Nagy are not specific and do not indicate any dates on which he allegedly observed the Respondents using their cell phones. For example, with respect Trevor McGowan, Mr. Nagy's statement on the form is that he "noticed Trevor McGowan on his cell phone for personal use taking calls." Even if Mr. Nagy had seen the Respondent on his phone, how would he know whether it was for personal use? In this regard, even Joshua Johnson, called on behalf of Oil City, acknowledged that when you see someone on the phone you "can't speak to who he's talking to."

49. Similarly, with respect to Zeyad Fadhel, the written statements made by Mr. Nagy are non-specific and based on behaviour he "noticed while driving around site."

50. Both Zeyad Fadhel and Trevor McGowan testified that they had never received any warning regarding cell phone use, either verbal or written. Mitchell Isley, who worked closely with the Respondents, also testified that he was not aware of any warnings, verbal or written, being given to any employees, including the Respondents, regarding cell phone use.

51. In contrast, Joshua Johnson testified "I think we all know you guys were warned." He, however, acknowledged under cross-examination by Trevor McGowan that he was "not in management, so not privy to written warnings."

52. On behalf of Oil City, the strongest assertions that the Respondents had been warned not to use their cell phones during work hours came through the testimony of Ronald Cousineau. Yet he did not complete either of the Employee Warning Reports. Further, the reliance he and Dylan Cousineau place on section 3.4 of the Cell Phone Procedure (Exhibit A-4), supposedly justifying immediate termination for cell phone use, seems misplaced in light of the actual wording of the Procedure and the accepted practice of Oil City employees.

53. For example, contrary to the suggestions of witnesses on behalf of Oil City, the "Cell Phone Procedure" (Exhibit A-4) does not absolutely prohibit use of an employee's personal cell phone. Nor does it require employees to keep their cell phones in their trucks, as suggested by Joshua Johnson and Ronald Cousineau. Regarding the Procedure document, Oil City, as noted, relies heavily on the wording of Section 3.4, which states:

> All communications using personal cell phones during work hours, or conducted on company associated property, or while on company business—verbal or written warnings could be administered or immediate termination from the company.

However, this section does not have the same sentence structure as the balance of the policy and is thus somewhat unclear. It is also inconsistent with other provisions of Exhibit A-4.

54. Section 3.1, for instance, states that "The use of personal cell phones for business purposes should be limited to absolute necessity." Further, although section 3.2 restricts use of personal cell phones for personal reasons during work hours other than break times, section 3.3 says:

> Employees may use personal cell phones during work hours for any legitimate safety, security or emergency purposes.

55. The alleged requirement of no personal cell phone use is also inconsistent with the practice described in evidence. For instance, although Ronald Cousineau testified that Oil City provides radios "for our key communicators," Mitchell Isley was not aware of anyone being assigned radios. Thus, cell phones were used if, for instance, the labourers need to communicate with Ryan Rabbitskin, their foreman/lead hand.

56. Mitchell Isley also noted that the camera on his cell phone was better than the camera provided to him by Roger Tremblay, for use on the job site. That camera "didn't work" so Mitchell Isley and the Respondents, with Roger Trembley's knowledge and consent, used their cell phones to take any required photos. Other use of their cell phones was also supported by Roger Trembley. Mitchell Isley testified that Mr. Trembley had said the employees could call and ask him about anything, such as needles or other anything else unsafe they found on the job site. "He wasn't opposed to us using our phones."

57. Further support for the view that personal cell phone use was known, tolerated and even encouraged by Oil City is shown in Exhibit RM-2, screen shots from Trevor McGowan's cell phone. They demonstrate how instructions and questions were relayed between the team of Trevor McGowan, Zeyad Fadhel, and Mitchell Isley, to their immediate supervisor, Ryan Rabbitskin. Indeed, Trevor McGowan stated, "I was told to use my phone on occasion."

58. Exhibits RM-6 and RM-7 also support the conclusion, as Trevor McGowan testified, that although he used his personal cell phone while on the job, during work hours, such was not for personal use. The printout of the Detail of Airtime Charges for his cell phone for the period May 9, 2016 through May 15, 2016 (RM-6) shows calls to Oil City personnel, most frequently his superiors, including Roger Trembley. This evidence was unchallenged.

59. Further, Trevor McGowan, using his personal cell phone, took photos of the job locations (see Exhibit RM-10, for example) which were posted on the wall in the Oil City office site. These assisted him in knowing the work locations, and the drillers from Oil City would ask to see them as the pictures were of help to them as well. His testimony on this point was unchallenged.

60. The testimony of Olivia Bluin supports the finding that Zeyad Fadhel likewise did not use his personal cell phone during work hours for personal reasons. Under an aggressive and often disrespectful cross-examination by Dylan Cousineau, Ms. Bluin testified that her boyfriend, "Zeyad, never called me from work. He wouldn't pick up my calls" while at work.

61. Ms. Bluin had also heard the telephone conversations that Zeyad Fadhel had with both Dylan Cousineau and Roger Trembley after being notified that he was fired. Both in direct and cross-examination, she testified that neither Dylan Cousineau nor Roger Trembley said anything about cell-phone use being the reason for the termination.

62. In light of all of the above, I find that the Appellant has not met the onus of establishing that the termination of the Respondents' employment with Oil City was due to any improper cell phone usage.

63. While the late reliance and production of documentation on the part of Oil City regarding alleged wrongful cell-phone use are troubling enough, additional concerns were raised by both of the Respondents regarding the veracity of the documents.

64. In neither Exhibit A-8 nor Exhibit A-9, the Employee Warning Reports, is the Employee statement section completed. Given the evidence noted above, both Respondents would have had ample grounds to complete the section indicating "[disagreement] with the company's statement for the following reasons." Yet it is left blank. Further, "No" is indicated as the answer to the question of whether either of the Respondents would like a copy of the statement for his personal record. Such a response is not consistent with the type of record-keeping both Respondents exhibited in preparation for this hearing.

65. Most disturbing, however, is the allegation that the Employee signatures on each of Exhibit A-8 and A-9 are not those of either Trevor McGowan or Zeyad Fadhel. They further dispute having received and signed the "New Hire—Employee Information" packets marked as Exhibits A-6 and A-7.

66. The testimony of Mitchell Isley supports this. He states that he did not receive any such package, and had not known that anything like this existed prior to the hearing.

67. Mr. Isley presented his evidence in a very forthright manner and was not shaken under cross examination. Significantly, Dylan Cousineau, while cross-examining Mr. Isley, noted that he had offered Mitchell Isley a job for the next season, thereby indirectly supporting the validity of his testimony.

68. With respect to the signatures, both Respondents provided exhibits showing their signatures for purposes of comparison. They also both testified that their concern about the alleged forging of their signatures was reported to the police. Exhibit RM-11 is a copy of the Witness Statement Trevor McGowan completed January 12, 2017 and submitted to the Saskatoon Police Service on January 13, 2017.

69. In light of my finding that the Appellant, Oil City, has not met the onus of establishing that the termination was due to any improper cell phone usage, it is unnecessary for me to make a determination on whether the signatures were forged. Although there appear to be some inconsistences--which are most evident when comparing Trevor McGowan's initials on Exhibit RM-5 with those allegedly made by him on Exhibit A-6—this issue is better determined by another forum, such as in the context of a police investigation.

70. Although not directly asserted as a reason for termination, Oil City did file two "Equipment Damage/Loss/Theft Report Forms" (Exhibits A-11 and A-12) in evidence. However, the validity of these was also challenged. Most significantly, Exhibit A-12 is in relation to Zeyad Fadhel. Mitchell Isley confirmed in his testimony that "Zeyad was not a part of this incident. Zeyad was not working" that day.

71. Mitchell Isley and Trevor McGowan both testified that, regarding the damage to the pedestal, they had followed the example provided to them by their immediate supervisor Ryan Rabbitskin. Mr. Isley further explained that Mr. Rabbitskin had tried to blame Trevor McGowan for the incident, suggesting that he would be fired. The incident, though, resulted in Mr. Rabbitskin being demoted from foreman to lead hand, according to Dylan Cousineau, although this was not communicated to the employees working under Mr. Rabbitskin.

72. Why Oil City sought to rely on a document so inaccurate as Exhibit A-12 is not clear. However, such does cast even further doubt on the reliability of other documents, including

Exhibits A-8 and A-9 and certainly negates Dylan Cousineau's assertion that his company's records are "impeccable".

73. In light of all of the above, I find that the Appellant, Oil City, has failed to meet the onus in establishing that the discriminatory action taken against the Respondents was for any good and sufficient other reason. The termination of their employment was a direct result of them having raised concerns about whether it was safe and permissible to proceed with a dig in the absence of locates.

V. Conclusion

74. For all of the reasons set out above, the appeal is denied. Termination of the employment of the Respondents with Oil City in the circumstances of this case constitutes discriminatory action against workers as prohibited by section 3-35 of *The Saskatchewan Employment Act*. The Appellant, Oil City, has failed to meet the onus in establishing that the terminations of employment were for any good and sufficient other reason.

75. As noted, Oil City remains in breach of the order made by the OHS Officers August 12, 2016. Although section 3-57(1) of *The Saskatchewan Employment Act* provides that commencement of an appeal does not stay the effect of a decision, toward the close of the hearing Dylan Cousineau acknowledged that the Respondents have not been paid any back wages, nor have any other steps been taken in compliance with the order.

76. While the Respondents may be assisted by the enforcement provisions of the Act, should there be issues arising regarding the substance of the OHS Officers' order of August 12, 2016, not unlike those contemplated by section 4-6(2) of the Act pertaining to quantum of payment due, I will maintain seized of the matter pending submissions regarding finalization of such issues.

Dated at Saskatoon, Saskatchewan this 30th day of March, 2017.

Brenda Hildebrandt, Q.C., Adjudicator

Right to appeal adjudicator's decision to board

s. 4-8

(2) A person who is directly affected by a decision of an adjudicator on an appeal pursuant to Part III may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) File a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
(b) Serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.