IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. McCarthy's Roofing Limited, 2016 NSPC 52

Date: September 13, 2016

Docket: 2854099, 2854100, 2854101, 2854102

Registry: Halifax

Between:

Her Majesty the Queen

v.

McCarthy's Roofing Limited

TRIAL DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	June 7, 8, 9, 13, 14, 15 and 16, July 5, 8 and 22, 2016
Decision:	September 13, 2016
Charges:	section 74(1)(a) of the *Occupational Health and Safety Act, R.S.N.S. 1996, C. 7* x 4
Counsel:	Alex Keaveny, for the Crown
	Brad Proctor and Michael Murphy, for the Defendant

By the Court:

Introduction

[1] McCarthy's Roofing Ltd. ("McCarthy's") is charged, pursuant to the *Occupational Health and Safety Act*, with four offences. The company is alleged to have contributed to an accident on September 9, 2013 at a building project, the LeMarchant Street project, on the Dalhousie University campus. Early on the morning of September 9 an outrigger beam fell from the penthouse roof on to Chris Conrod, an employee of one of the construction trades. Mr. Conrod was seriously injured.

[2] The LeMarchant Street project was a multi-purpose building commissioned by Dalhousie University. McCarthy's had the roofing contract for the project. Aecon Construction Ltd. was the project construction manager. Aecon has also been charged under the *Occupational Health and Safety Act* and is being tried separately.

[3] A number of contractors worked on the project including Economy Glass ("Economy") installing windows and Flynn Canada ("Flynn") installing metal cladding. Aecon employees worked at the site in various capacities.

[4] Evidence at this trial focused on construction work in three main areas of the building: a third floor terrace where windows and metal cladding were being installed, a "main" roof on the seventh floor, and two penthouses that rose above the main roof. Chris Conrod, an employee with Economy Glass, had been standing on the third floor terrace when he was injured.

[5] Vertical work on the building, such as window and cladding installation, was done using swing stages which were suspended from outriggers secured above them. The swing stages and their outriggers could be disassembled and moved as required. Economy was doing work on the third floor terrace using swing stages as was Flynn.

[6] As I will be discussing in more detail later in these reasons, the focus of the trial evidence has been on dates just before the accident – Thursday, September 5, Friday, September 6 and Saturday, September 7, all dates when McCarthy's was working at the site.

The Charges against McCarthy's Roofing

[7] The Crown alleges that McCarthy's Roofing and Aecon are responsible for Mr. Conrod getting injured. The basis of the charges is the dis-assembly of an outrigger on the penthouse roof on Saturday, September 7. The charges against McCarthy's allege that between September 6 and 9, 2013 McCarthy's failed as "a constructor",

> **Count 1**
>
> …to take every reasonable precaution to ensure the health and safety of a person at a workplace pursuant to section 15(a) of the *Occupational Health and Safety Act*, thereby committing an offence contrary to subsection 74(1)(a) of the *Occupational Health and Safety Act,* R.S.N.S. 1996 C.7 as amended;
>
> and,
>
> **Count 2**
>
> …to ensure communication between the employers and self-employed persons at the project of information necessary to the health and safety of persons at the project pursuant to section 15 (c) of the Occupational Health and Safety Act, thereby committing an offence contrary to subsection 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996 C.7 as amended.

[8] McCarthy's is also charged with having failed as an "employer",

> **Count 3**
>
> …to ensure that falling object protection precautions were taken in accordance with the latest version of Canadian Standards Association Standard Z271-10 "Safety Code for Suspended Platforms", pursuant to section 23.11(b) of the Workplace Health and Safety Regulations, thereby committing an offence contrary to subsection 74(1)(a) of the Occupational Health and Safety Act, R.S.N.S. 1996 c.7 as amended;

and,

Count 4

> …to ensure that a machine that may be a hazard to the health and safety of a person at a workplace is handled, stored, or disassembled in accordance with the manufacturer's specifications pursuant to section 84(1) of the Occupational Safety Regulations, thereby committing an offence contrary to subsection 74(1)(a) of the Occupational Health and Safety Act, R.S.N.S. 1996 c. 7 as amended.

[9] McCarthy's has raised various challenges to the charges and denies any failure of its obligations under the *Occupational Health and Safety Act*. It also seeks a stay of the charges, claiming a violation by the Crown of its duty to disclose, that is, a violation of section 7 of the *Charter*, because some evidence obtained during the initial investigation of the accident is not available.

[10] The Crown submits it has proven the charges beyond a reasonable doubt and that McCarthy's "lost evidence" application establishes no *Charter* breach.

[11] In my reasons I will be discussing the merits of each Count in the Information, McCarthy's defence of due diligence, and its "lost evidence" *Charter* application.

An Introduction to the Facts and Issues

[12] Chris Conrod was injured on the morning of September 9, 2013 because the outrigger beam that fell on him was no longer weighted down and anchored. It had been disassembled. Neither Mr. Conrod nor his co-workers were aware of the unsecured condition of the outrigger. Their combined actions, which I will be describing, pulled it off the roof.

[13] The outrigger's counterbalancing weights and anchoring tether were removed on Saturday, September 7, 2013 by Paul Fancy, the McCarthy's foreperson. The Crown submits that McCarthy's then failed to tell anyone the outrigger had been dismantled with the effect that the Economy Glass employees did not know it was no longer secured.

[14] The Crown alleges that McCarthy's violated the *Occupational Health and Safety Act* by leaving the dismantled outrigger in an unsafe condition (Count 1), not communicating to anyone that it had been dismantled (Count 2), failing to ensure compliance with section 23.11(1)(b) the *Workplace Health and Safety Regulations* (Count 3), and failing to disassemble the outrigger in accordance with the manufacturer's specifications (Count 4).

[15] McCarthy's, charged as a "constructor" in relation to Counts 1 and 2, disputes this characterization and says the Crown has failed to prove beyond a reasonable doubt that it qualifies as "a constructor" under the *Occupational Health and Safety Act*.

[16] McCarthy's also submits the Crown has failed to prove beyond a reasonable doubt that section 23.11(1)(b) of the *Workplace Health and Safety Regulations* applies (Count 3) and argues in relation to Count 4 that the Crown has failed to tender into evidence the manufacturer's specifications for the outrigger.

[17] In due course, I will be discussing these issues fully. Now I am going to set out the facts of Mr. Conrod's accident and what led to it happening.

The Accident

[18] There were a number of eye witnesses to Mr. Conrod's accident. Employees of Economy Glass also described what they did just before the outrigger fell. There are some differences in this evidence but I have concluded these differences are not material. The essential facts of what happened are consistent and provide the basis for determining that Mr. Conrod was injured because an untethered outrigger fell on him.

[19] Jamie Cox was employed at the LeMarchant Street site by Flynn Canada as a sheet-metal worker. At the start of work on the morning of September 9 he was on the third floor terrace area inspecting one of the three swing stages located there. He had just been speaking to Mr. Conrod and was about thirty feet from him when he heard a noise. He turned to see Mr. Conrod putting his hands over his head. He then saw the outrigger falling. It hit Mr. Conrod instantly. Mr. Cox ran over to Mr. Conrod who was lying on his back and unconscious, pinned by the outrigger. Mr. Cox pushed the beam away and stabilized Mr. Conrod's head. He

yelled for help. Douglas Pyke, a carpenter with Maritime Drywall, ran over and started to provide first aid. He and Mr. Cox made sure Mr. Conrod didn't move.

[20] Mr. Pyke had been installing drywall in an area overlooking the terrace. He had heard a "really loud bang" and saw Mr. Conrod lying on the terrace with the cables from the outrigger down around him. EHS was called and Mr. Conrod was taken away by ambulance.

The Events Leading up to the Outrigger Falling from the Penthouse

[21] Work started around 7 a.m. for the Economy Glass glaziers on the morning of September 9. They were working on the third floor terrace where there were three swing stages, all resting on the terrace and not suspended. Economy Glass needed to shift one slightly.

[22] Derrek Kelsie, the Economy Glass foreperson, told his crew to inspect the stage they needed to move and the outrigger attached to it. He instructed them to check the motor and pins and make sure the cables were not frayed.

[23] Jamie Traynor went to the terrace with his co-workers who included Mr. Conrod and Callum Cook. He testified that the swing stage was partially set up and one motor looked operational. The cable that threaded through the motor was in place and connected to the outrigger on the penthouse. Moving the stage required operating the motor to pull the cable out so the stage could be repositioned. However the men quickly determined there was no power. Mr. Cook headed for the main roof to check the power source. After that he needed to inspect the outrigger on the penthouse roof.

[24] Mr. Traynor testified that while Mr. Cook was on the main roof checking to see if the power was connected, Mr. Conrod hit the "down" button on the motor. Nothing happened. This was explained by what Mr. Cook noticed on the main roof: there was an unplugged cord, which he believed belonged to the swing stage they were trying to move. He plugged it in. He figured someone had been using the power cords on the weekend and had not plugged them back in, which was not unusual.

[25] Mr. Cook says he had intended to advise his colleagues below on the terrace that power had been restored and then check to make sure the outrigger was secure.

He noted that to do so he would have needed to get the extension ladder in place to access the penthouse roof. He never got the chance.

[26] Mr. Cook recalls walking to the edge of the roof to tell Mr. Conrod and Mr. Traynor there was now power and seeing the outrigger fall from the penthouse. Apparently Mr. Conrod had pressed the "up" button on the motor creating a load on the untethered outrigger and bringing it down.

[27] Mr. Traynor witnessed the terrible events unfold. The swing stage started to lift off the terrace and crashed down, the cables coiling around Mr. Conrod who couldn't get out of the way of the falling outrigger in time.

[28] None of the Economy Glass workers had any training on swing stages before September 9. They saw nothing about the penthouse outrigger that concerned them that morning as they readied themselves to shift the swing stage. Mr. Cook testified that the outrigger looked as though "it was all hooked up." They had received no communication that anything about the outrigger had changed since they had last worked at the site on the Friday before.

The Dismantling of the Penthouse Outrigger

[29] On Thursday, September 5 McCarthy's foreperson, Paul "PJ" Fancy had told Justin Matheson, Aecon's assistant construction superintendent, that McCarthy's was being pulled off the LeMarchant Street site for another job. McCarthy's imminent departure meant the roofing work had to be completed on Friday, September 6 and Saturday, September 7. Aecon wanted the roofs done before the McCarthy's crew was re-assigned. This required that the outriggers on the main roof and the penthouse roof be moved so the roofing work could be finished.

[30] Mr. Fancy wanted Mr. Matheson to arrange for Flynn to move the penthouse outrigger so McCarthy's could get its work done. The swing stages attached to the outriggers were used interchangeably by Flynn and Economy Glass but it was Flynn that knew how to assemble and disassemble them.

[31] Following their conversation on Thursday and while Mr. Fancy was still present, Mr. Matheson called Flynn and the main roof outrigger got moved that day. When McCarthy's arrived on Friday to work on the main roof, the penthouse

outrigger was still set up. Mr. Fancy spoke to Mr. Matheson again and another call was made to Flynn. Mr. Fancy understood from Mr. Matheson that Flynn would move the outrigger by the end of the day on Friday.

[32] Justin Matheson's memory of the contact with Flynn is a little different from Mr. Fancy's: he recalls speaking in person to the Flynn foreperson, Robert MacKinnon on Thursday after Mr. Fancy's request and another Flynn foreperson on Friday.

[33] Although Mr. MacKinnon testified to having no recall of being asked by Aecon to move the outrigger, I accept the evidence of Mr. Matheson and Mr. Fancy that such a request was made of Flynn. And I have concluded that the differences between Mr. Fancy's and Mr. Matheson's recollections of what happened are inconsequential. The fact remains that the penthouse outrigger did not get moved by the end of the day on Friday and as a consequence, Mr. Fancy moved it on Saturday.

[34] When Mr. Fancy and his crew arrived at the LeMarchant Street site early on Saturday morning, the penthouse outrigger was still in place. Mr. Fancy went to check the swing stage platform and saw it was "flat" on the terrace. By 7:45 a.m. no Flynn workers had arrived so Mr. Fancy set to work to disassemble the penthouse outrigger himself. He acknowledged in his evidence that he had received no training on the disassembling of outriggers and read no manuals about them.

[35] After erecting the McCarthy's ladder and getting on to the penthouse roof, Mr. Fancy removed the 55 pound weights off the outrigger and took a rachet and disassembled the tie-back cable going through the weights. He put the weights on the back wall of the penthouse, the footing brackets that was used with the weights on the side wall and lifted the outrigger onto the wall in front of the ladder. He coiled the tie-back cable and placed it on the main roof where the tie-back anchor was located.

[36] What remained was a cable that was still hooked to the front end of the swing stage on the terrace. This was the cable that threaded through the swing stage motor. It attached to the end of the outrigger. Mr. Fancy did not know how to disconnect that cable and left it alone.

[37] Mr. Fancy also unplugged the swing stage's heavy-duty power cable on the main roof. He checked it again after he had disassembled the outrigger to make sure the power was still disconnected.

[38] After McCarthy's finished its roofing work on the penthouse, Mr. Fancy took one end of the outrigger beam off the wall and laid it on the roof. The outrigger was too long to be fully accommodated on the penthouse roof and Mr. Fancy did not want to leave it on the wall. Unlike the weights and the footing brackets, the outrigger was light enough to blow off.

Who Knew the Outrigger Had Been Dismantled?

[39] When McCarthy's roofing crew finished the penthouse roof on Saturday, September 7, they did not communicate with anyone about the disassembled outrigger. Economy Glass did not work on that Saturday and I accept the evidence of Derrek Kelsie, foreperson for Flynn, and his crew member, Jamie Traynor, that neither did Flynn. Justin Matheson was not at work but Aecon was represented at the construction site by Patrick Boudreau, the Aecon project coordinator.

[40] There was an interaction between Paul Fancy and Mr. Boudreau at the penthouse roof that Saturday but no mention was made of the outrigger. Mr. Boudreau had brought the hot work permit (*Exhibit 22*) up to Mr. Fancy, a check-list Mr. Fancy was required to complete before the roofers could operate their torches to melt the seams of the roofing membrane and bond them together. Mr. Fancy completed the hot work permit checklist in Mr. Boudreau's presence while Mr. Boudreau stood on the ladder, the only access to the penthouse. Mr. Fancy says the disassembled outrigger, which he had placed on the penthouse wall by the ladder, was five to six inches from Mr. Boudreau's face. Mr. Fancy testified that he had no discussion with Mr. Boudreau about the weights or the outrigger.

[41] It was Mr. Boudreau's evidence that he didn't notice the weights or the outrigger on the penthouse walls when he was speaking with Mr. Fancy.

[42] At the completion of Saturday's roofing work, Mr. Fancy filled out an Aecon Job Assessment Risk Review (*Exhibit 20*, known as a JARR card) in which under "Job Completion", he indicated "no" in response to the question: "Are there any hazards remaining?" According to Patrick Boudreau, JARR cards were

completed by the contractors working on the LeMarchant Street building and dropped off at the Aecon site trailer. The evidence establishes they were not reviewed on a daily basis. Justin Matheson testified that the JARR cards and other paperwork contractors were required to complete were examined by Aecon once a week.

[43] Mr. Boudreau did not know about McCarthy's request to have the outrigger moved. Justin Matheson acknowledged in his evidence that he did not advise Mr. Boudreau about this. When Mr. Boudreau conducted his end-of-day site inspection on Saturday, September 7 he was focused on checking for loose construction material that might be in danger of blowing off the building. This had been identified as a concern in March. (*Exhibit 18, March 25, 2013 Email from Andrew Merrick - Aecon End of Day Securement Policy*)

[44] When conducting his end-of-day inspection on Saturday, September 7, Mr. Boudreau was not looking for anything in relation to an outrigger. He did not go up to the penthouse roof because he saw that McCarthy's roofing materials and equipment had all been secured on the main roof. The ladder to the penthouse had been taken down and was tied to the solar panel framework. Mr. Boudreau acknowledged in cross-examination that having seen the secured items he made the assumption he did not need to conduct an inspection on the penthouse roof.

[45] On the morning of Monday, September 9, Paul Fancy and his father, Ferrell Fancy, who also worked for McCarthy's, returned to the LeMarchant Street site. They did not speak to any of the other contractors or Aecon about the disassembled outrigger. Paul Fancy explained they were only there to collect their gear as they were headed to their next job. Paul Fancy handed in the JARR card he had filled out on Saturday. (*Exhibit 20*)

[46] The Fancys had not been at the site long when Mr. Conrod was injured.

Analysis – Count 4

[47] In my analysis of the facts and law I will be dealing with the charges against McCarthy's out of order. I am going to start with an analysis of Count 4, the charge that alleges McCarthy's failed to ensure that the outrigger was disassembled

"in accordance with the manufacturer's specifications pursuant to section 84(1) of the Occupational Safety Regulations…"

Section 84(1) of the Occupational Safety General Regulations

[48] Section 84(1) of the *Occupational Safety General Regulations,* found in Part 8 under a heading "Mechanical Safety" reads as follows:

> 84 (1) An employer shall ensure that a machine that may be a hazard to the health or safety of a person at the workplace is erected, installed, assembled, started, operated, used, handled, stored, stopped, inspected, serviced, tested, cleaned, adjusted, maintained, repaired and dismantled in accordance with the manufacturer's specifications, or, where there are no manufacturer's specifications, the specifications certified by an engineer.

[49] The *Occupational Safety General Regulations* contains a definition for what constitutes "manufacturer's specifications". They are described in Clause 2(u) as:

> (i) The written instructions of a manufacturer of a machine, material, tool or equipment that outline the manner in which the machine, material, tool or equipment is to be erected, installed, assembled, started, operated, used, handled, stored, stopped, adjusted, carried, maintained, repaired, inspected, serviced, tested, cleaned or dismantled, and
>
> (ii) A manufacturer's instruction, operating or maintenance manual and drawings respecting a machine, tool or equipment.

[50] The Crown submits that various Exhibits I will be describing qualify as the manufacturer's specifications. These Exhibits are produced by Safway Services, Inc. ("Safway") Safway supplied the outrigger beam that fell on Mr. Conrod. It was one of the suspended platform components that Safway supplied and that

Flynn and Economy Glass used for the vertical work on the building, installing the metal cladding and the windows. As I will be explaining, the Crown says Safway can be characterized as the "manufacturer" of the outrigger. The *Occupational Safety General Regulations* do not define "manufacturer" and in the Crown's submission, Safway has to be included in "any common sense" meaning of the word.

The Penthouse Outrigger

[51] On September 9, 2013 there were three swing stages on the terrace where Mr. Conrod was injured. When in operation, the platforms, suspended from outriggers on the roofs, were raised up and down using cables and hoists, that is, electric motors. The outriggers were made secure by weights and tie-back anchors. As I previously described, to get the penthouse outrigger out of the way for the roofing work, Mr. Fancy removed the weights and the cabling connected to the tie-back anchor on the main roof.

[52] Paul Fancy testified that he had dismantled outriggers at other job sites prior to working on the LeMarchant Street building. He had done so without receiving any training on the disassembling of outriggers. He had never seen the Safway documentation for swing stages: Exhibit 23 - the Operating and Maintenance Manual for the scaffolding hoist, single wire rope system and Exhibit 32 - the World-Class Suspended Scaffold Solutions catalogue. He had never read any manuals about outriggers before he disassembled the penthouse one. He was also not familiar with Exhibit 8 - the Z271-10 Safety Code for suspended platforms.

[53] Exhibits 23 and 32 were introduced into evidence by the Crown as the manufacturer's specifications for the penthouse outrigger. It is necessary to discuss these documents in some detail.

Exhibit 23

[54] Exhibit 23 is entitled: Tirak™ Scaffolding Hoist for Single Wire Rope System Operating and Maintenance Manual. The first portion of Exhibit 23 - pages 1 to 28 - is a manual for the swing stage motor that Mr. Conrod pushed the buttons on just before he was injured on September 9. I will call this the TIRAK™

Manual. The second portion - pages 1 to 27 – is entitled "Suspended Scaffold Product Selection Guide." I will call this the Guide.

[55] The TIRAK™ Manual contains several pages of general safety instructions relating to suspended platforms. For example, at page 4, which is entitled "General Warning", there are a variety of warnings under the following headings: Your Duty to Understand and Comply; Your Duty to Inspect and Maintain; Your Duty to Train and Control People; Your Duty of Safety Beyond the TIRAK™; Your Duty To Avoid Taking Chances; and An Ultimate Recommendation.

[56] The TIRAK™ is the motor for the swing stage. So where the Manual portion of Exhibit 23 gives the following direction at page 4: "Never disassemble the TIRAK™ by yourself or by your staff. People's life (sic) may be at risk" and goes on to talk about the requirement that "the maintenance of the TIRAK™ hoists, as well as disassembly and repair, must be exclusively done by qualified repairers authorized in writing by the supplier…" I find the Manual to be referring to the swing stage motor and not the outrigger.

[57] At the end of the two-page General Warning section, the Manual states:

> This manual is neither a regulations compliance manual nor a general training guide on suspended scaffold operations. You must refer to proper instructions delivered by manufacturers of the other pieces of equipment included in your suspended scaffold installation. Whenever calculations and specific rigging and handling are involved, the operator should be professionally trained to that end and secure relevant information prior to commencing such work. (*Exhibit 23, page 5*)

[58] The relevance in this passage is its reference to "proper instructions delivered by manufacturers of the other pieces of equipment included in your suspended scaffold installation." An outrigger is "another piece of equipment" in a suspended scaffold installation. It is "another piece of equipment" that is separate and distinct from the motor and the swing stage platform.

[59] The application of the Manual to the TIRAK™ motor is confirmed at page 8 of Exhibit 23 where it is stated under "Scope":

> Instructions and advice in this manual exclusively refer to the following items - TIRAK™ scaffold hoist…special TIRAK™ wire rope, Power supply cord. This manual does not deal with support equipment and tie-backs nor with support rigging and anchoring operations…

[60] In the illustration accompanying this statement, the support equipment and tie-backs depicted are the outriggers and their anchoring tethers. (*Exhibit 23, page 8, Fig. 5*)

[61] The Manual is clear. There is no ambiguity. It is not "manufacturer's specifications" in relation to an outrigger. In almost all respects, it does not relate to the outrigger component of a swing stage at all.

[62] Pages 26 and 27 of the Manual set out a "Code of Safe Practices for Suspended Powered Scaffolds" and its provisions encompass the broad range of suspended platform components, not merely the hoists. Under "General Guidelines" on page 26, the following statement is found: "DO NOT ERECT, DISMANTLE, OR ALTER SUSPENDED POWERED SCAFFOLD SYSTEMS unless under the supervision of a competent person." (*Exhibit 23, page 26, 1(F)*) On page 27 the Code concludes with the following:

> These safety guidelines set forth some common sense procedures for safely erecting, dismantling and using suspended powered scaffolding equipment. However, equipment and scaffolding systems differ, and accordingly, reference must always be made to the instructions and procedures of the supplier and/or manufacturer of the equipment. (*Exhibit 23, page 27*)

[63] The Suspended Scaffold Product Selection Guide is the second portion of Exhibit 23. Scott Himmelman, an estimator with Safway, was asked about the Guide. He identified it as a components catalogue for 2011. I infer this to have probably been the components catalogue that was in use in 2013.

[64] The Guide touts Safway's broad range of suspended platform products. At page 3, for example, the Guide states:

> Suspended platforms are the best variety of adaptable, easy-to-use products in the industry. Safway Services can provide a complete line of components, accessories and safety equipment for your specific application.

[65] The Guide describes hoists – "All hoists weigh less than 125 pounds and have a 1000-pound lifting capacity…" and platforms – "Our suspended line offers a wide variety of stage lengths and angled corner sections…" (*Exhibit 23, page 3*) At pages 4 to 7 it describes and depicts various types and models of hoists. From pages 8 to 17 the Guide focuses on platforms and platform components. Outriggers and rigging components are described and depicted in pages 18 to 24.

[66] It is only on the last page of a two-page "Suspended Scaffold Safety Guidelines" at the end of the Guide that any reference to dismantling swing stages is found. This small section at page 28 says the following:

> III. Dismantling Suspended Scaffolds
>
> The following additional precautions apply when dismantling suspended scaffolds.
>
> 1. Prior to removal or loosening of any component, consider the effect of the removal of the component, or the loosening of a joint, will have on the strength of the remaining assembly.
> 2. Check to see if scaffold or rigging has been altered in any way which would make it unsafe, if so, reconstruct where necessary before beginning the dismantling process.
> 3. Disassemble the platform prior to removing any counterweights or tiebacks.
> 4. Lower components in a safe manner. Do not throw components off roof.
> 5. Stockpile dismantled equipment in an orderly manner.

[67] On the prior page - page 27 - there is this statement: “Scaffold safety is everyone’s responsibility. Everyone’s safety depends on the design, erection, use, and dismantling of scaffold by Competent Persons only.”

Exhibit 32

[68] Exhibit 32 - the World-Class Suspended Scaffold Solutions catalogue - is also produced by Safway. It is a catalogue featuring hoists, suspended platforms, outriggers, and rigging accessories. It promotes the virtues of Safway products. The text on page 2, which I am reproducing in part, illustrates this:

> Suspended Scaffolds Capable of Meeting Your Unique Needs
>
> Thank you for considering Safway’s Suspended Scaffold Products. Safway carries some of the finest equipment in the scaffold industry. Our extensive branch network combined with an ongoing commitment to provide clean and reliable equipment means you’ll get the equipment you need when and where you want it…

[69] Safway goes on to describe the quality of its products and the services it offers to go with them such as delivery and erection (“Need equipment delivered or erected? Safway can do it!), design (“Safway can design suspended platforms and speciality rigging devices to meet your specific needs.”) and safety training. (“Contact Safway’s Training University for an up-to-date listing of training dates and training products available today.”) (*Exhibit 32, page 2*)

[70] In Exhibit 32, Safway indicates its “Design and Engineering” capabilities and states that its “In-house staff of professional engineers and designers have solved some of the most complex problems imaginable…” It describes a “full service engineering department, combined with Safway’s nationwide network of regional engineers and experienced scaffold builders [that] can provide cost-effective solutions to access your work area and materials.” (*Exhibit 32, page 19*)

[71] The only reference in Exhibit 32 to dismantling suspended scaffolds is found on page 23 and employs the exact language found at page 28 of the Guide portion of Exhibit 23 which I recited in paragraph 66 above.

Do Exhibits 23 and 32 Contain Outrigger-Dismantling Specifications?

[72] Boiled down to the issue of specifications relating to the dismantling of an outrigger, Exhibits 23 and 32 specify that dismantling is to be done by or under the supervision of a competent person and the platform is to be disassembled prior to the removal of any counterweights or tiebacks. These safety measures were not followed by McCarthy's. But, having said that, for a conviction on Count 4, the Crown is required to prove that Exhibits 23 and 32 are the specifications of the outrigger's "manufacturer". This requires me to determine who the manufacturer of the outrigger is and whether Exhibits 23 and 32 are its specifications.

Who is the Outrigger's Manufacturer?

[73] Neither the *Occupational Safety General Regulations* nor the *OHSA* defines "manufacturer." The Crown submits that Safway is a manufacturer of the outrigger because it "builds" the beam from components.

[74] The component parts of the outrigger were identified by Scott Himmelman in Exhibit 32: MRBF: Modular Beam Front and MRBR: Modular Beam Rear. (*Exhibit 32, page 13*) Scott Himmelman testified that the MRBF and the MRBR each weighed 45 pounds and were coupled together to form a single beam. They are manufactured by Tractel under the brand name, SKYBEAM. In Exhibit 32, MRBF and MRBR are listed under the heading "SKYBEAM® MODULAR RIGGING COMPONENTS".

[75] On page 29 of the Guide portion of Exhibit 23 the corporate name "Tractel, Ltd." appears. It is also found on page 2 of the Manual portion of Exhibit 23 in the website address (www.tractel.com) that is shown below the corporate name (GREIFZUG Hebezeugbau GmbH). The Tractel web address and the corporation GREIFZUG are listed in a box headed "'Manufacturer' definition". Safway Services, LLC is listed in a separate box on the page with the heading "Supplier definition regarding contact advice in this manual".

[76] As I noted earlier, Safway supplied the swing stages and their component parts for use on the LeMarchant Street project. Both Flynn and Economy Glass would have leased swing stages. Not that it matters but there was no clear evidence whether it was a Flynn or an Economy Glass swing stage that used the penthouse outrigger. I note that a Safway invoice dated September 13, 2013 for the damaged swing stage components, including a "2 pc Aluminum Outrigger", was addressed to Economy Glass. (*Exhibit 49*)

[77] No witnesses characterized Safway as the "manufacturer" of the outrigger beam. Mr. Himmelman says Safway is a supplier. That is also how Patrick Boudreau described Safway. I am not satisfied Safway can be turned into a "manufacturer" simply because its services include assembling swing stages for contractors on job sites. Indeed I do not even know if Safway erected the outrigger on the penthouse roof; all I know is that the company supplied the component parts. It may have been Flynn who did the actual assembly and installation.

[78] I find that Tractel is the manufacturer of the outrigger not Safway. This takes me to the next question that must be answered in my analysis of Count 4: whose specifications are Exhibits 23 and 32?

Are Exhibits 23 and 32 the Manufacturer's Specifications?

[79] The Crown says that Exhibits 23 and 32 are the "specifications" that apply to the outrigger and that it is not necessary to produce specifications from Tractel. The Crown also notes a warning label on the outrigger, depicted in the photographs, that specifies what precautions must be taken to use the swing stage safely and properly. (*Exhibit 4, photograph 21*) These specifications do not refer to dismantling and are plainly identified as Safway specifications.

[80] I find that neither Exhibit 23 nor Exhibit 32 are specifications of Tractel. Their limited specifications are the specifications of Safway. Safway's specifications for dismantling outrigger beams are not "manufacturer's specifications", they are the specifications of the supplier of the equipment.

[81] There are no Tractel specifications in evidence. This means there are no "manufacturer's specifications" before me.

[82] In the absence of manufacturer's specifications, what is required under section 84(1) of the *Occupational Safety General Regulations* are "specifications certified by an engineer." My review of Exhibit 32 in particular and its references to Safway's "in-house staff of professional engineers…" leads me to conclude that a Safway engineer could have certified specifications for the swing stage and its components, including the outrigger. But no engineer-certified specifications were tendered into evidence.

[83] To obtain a conviction on Count 4, the Crown had to prove beyond a reasonable doubt that McCarthy's failed to dismantle the outrigger according to the specifications of Tractel, or where Tractel's specifications do not exist, specifications certified by an engineer. As there are neither manufacturer's specifications nor engineer-certified specifications before me, I find that the Crown has not proven Count 4. I am acquitting McCarthy's on Count 4.

Analysis – Count 3

[84] McCarthy's is alleged in Count 3 to have failed to ensure that falling object protection precautions were taken in accordance with CSA Standard Z271-10 "Safety Code for Suspended Platforms" as required by section 23.11(1)(b) of the *Workplace Health and Safety Regulations* ("*WHSR*").

[85] Section 23.11(1)(b) of the *WHSR* is specific about what it deals with. It requires an employer to ensure that a suspended work-platform is "designed, constructed, installed, maintained, and inspected" in accordance with CSA Standard Z271, "Safety Code for Suspended Platforms."

[86] Count 3 alleges that McCarthy's failed to comply with the requirements in section 23.11(1)(b) of the *WHSR*. Those safety requirements relate to the designing, construction, installation, maintenance or inspection of the outrigger. Had McCarthy's designed, constructed, installed, maintained, or inspected the penthouse outrigger in a manner that was not in accordance with CSA Z271 it would be guilty of violating the *Workplace Health and Safety Regulations* and thereby of an offence contrary to the *Occupational Health and Safety Act*. But none of these activities describe what McCarthy's did. All the charges against McCarthy's arise from the *dismantling* of the outrigger.

[87] Section 23.11(1)(b) of the *WHSR* makes no mention of dismantling. However, it is not as though the *WHSR* is silent on the subject of dismantling: it is included in section 23.3(1) of the regulations which requires an employer to ensure that a scaffold is "erected, installed, assembled, used, handled, stored, adjusted, maintained, repaired, inspected or dismantled" in accordance with the applicable CSA standard, Z797 "Code of Practice for Access Scaffold."

[88] What Paul Fancy did on September 7 is not in issue. He dismantled the outrigger. He didn't design, construct, install, maintain or inspect anything. And none of these descriptors can be reasonably interpreted to include "dismantling." The regulations could have included "dismantled" in section 23.11(1)(b). They do not. I cannot simply read it in. A conviction cannot register against McCarthy's on Count 3 and I am entering an acquittal.

Counts 1 and 2 – Charged as a "Constructor"

[89] The principal battleground in relation to Counts 1 and 2 is whether McCarthy's was a "constructor" under the *OHSA*. The Crown is alleging in Count 1 that in dismantling the outrigger, McCarthy's as a "constructor" failed to take "every reasonable precaution" to ensure no one was injured. Count 2 alleges a failure by McCarthy's, as a "constructor", to communicate the hazard created by the disassembled outrigger. McCarthy's status as a "constructor" must be proven beyond a reasonable doubt for convictions on Counts 1 and 2.

[90] McCarthy's disputes the "constructor" characterization. Determining the issue of whether McCarthy's was a "constructor" on the LeMarchant Street project requires me to consider the relevant statutory provisions, the evidence and the case law.

The Internal Responsibility System of the OHSA

[91] The foundational principle of the *Occupational Health and Safety Act* is the "Internal Responsibility System" which mandates shared responsibility by employers, contractors, constructors, employees, owners and others for the health and safety of "persons at the workplace." (*section 2(a), Occupational Health and Safety Act, S.N.S. 1996, c. 7*) The Internal Responsibility System recognizes that "the primary responsibility for creating and maintaining a safe and healthy

workplace" rests on the "extent of each party's authority and ability to do so." (*section 2(b), OHSA*)

[92] In its reference to "the extent of each party's authority", the *OHSA* acknowledges that the parties undertaking work at a workplace do not necessarily all wield the same authority. As I will be discussing, constructors are parties with a broader scope of authority in the workplace than contractors or employers. This broader scope of authority is reflected in the *OHSA*, the case law and the evidence, all of which has informed my analysis of McCarthy's status at the LeMarchant Street site.

Relevant Definitions under the Occupational Health and Safety Act

[93] The sites where worker health and safety is implicated include "projects" and "workplaces" both of which are defined by the *Act*. As the definitions indicate, all projects are workplaces but not all workplaces are projects. The LeMarchant Street project was both.

[94] The *Act* defines "project" as meaning:

> …a construction project, and includes the construction, erection, excavation, renovation, repair, alteration or demolition of any structure, building, tunnel or work and the preparatory work of land clearing or earth moving…(*section 3(aa), OHSA*)

[95] A "workplace" is "any place where an employee or a self-employed person is or is likely to be engaged in any occupation…"(*section 3(ah), OHSA*)

[96] A project can host all the parties who share responsibility for health and safety at the site. The *OHSA* defines a constructor as "a person who contracts for work on a project or who undertakes work on a project himself or herself." (*section 3(f)*) A "contractor" has a separate definition under the legislation and is described as: "a person who contracts for work to be performed at the premises of the person contracting to have the work performed, but does not include a dependent contractor or a constructor." (*section 3(g)*) "Employer" is also defined. (*section*

3(p)) "Contracts for work" are also defined and include "contracting to perform work and contracting to have work performed." (*section 3(h)*)

[97] The Crown submits that both Aecon and McCarthy's can be captured under the definition for a "constructor" in the *OHSA*. Assigning responsibility for workplace health and safety on a project to multiple parties was not possible under the precursor legislation, the *Construction Safety Act*, R.S.N.S. 1967, c. 52. That *Act* defined a "constructor" as "a person who contracts with any person to undertake all the work on a project." The word "all" was dispositive. The legislature was found to have intended "to attribute responsibility for the safety of those working at the site to one person or party only." Undertaking anything less than "everything relating to the project" was insufficient to attract liability as a "constructor". (*R. v. Westgate Construction Ltd., [1986] N.S.J. No. 328 (Co. Ct.), paragraphs 14 and 16*) In the Crown's submission, the re-tooling in the *OHSA* of the definition of "constructor" has expanded the scope of responsibility for workplace safety. A party can qualify as a "constructor" without having been responsible for doing "all the work on a project." The *OHSA* establishes the potential for there to be more than one "constructor" at a project.

[98] That being said, every party at a construction site cannot reasonably be categorized as a "constructor" under the *OHSA*. Separate definitions for "contractor" and "employer" would be unnecessary if, for example, every contractor or employer on a project was also automatically a "constructor." And there would be no need for any distinctions in the responsibilities assigned to contractors, employers and constructors. Had the legislature intended that all contractors in a workplace should be categorized also as constructors, the language of the *OHSA* would reflect that and it doesn't.

[99] In keeping with the shared responsibility system of the *OHSA*, contractors and constructors have had specific responsibilities assigned to them by the legislature. The Crown submits that these responsibilities are identical. As I will be discussing, despite the language of the relevant provisions being identical in four of five subsections, the communication responsibilities of constructors under section 15 (c) is broader. That, in my view, has significance.

The Responsibilities of Contractors and Constructors – Sections 14 and 15 of the OHSA

[100] Sections 14 and 15 of the *OHSA* set out the respective responsibilities of contractors and constructors. For constructors, these responsibilities apply "at or near a project." For contractors, they apply "at or near a workplace." For example, both contractors and constructors are responsible for taking reasonable "precautions" to ensure the health and safety of persons, in the case of contractors, "at or near a workplace" and, in the case of constructors, "at or near a project." (*sections 14(a) and 15(a), OHSA*) The workplace/project distinction is repeated throughout the rest of the contractor/constructor obligations under sections 14 and 15.

[101] The Crown submits that the workplace/project distinction is all that distinguishes a contractor and a constructor. It is an important distinction I will be returning to later in these reasons. But, continuing for now with my discussion of sections 14 and 15, I note the significant demarcation in sections 14(c) and 15(c) of the responsibilities of contractors and constructors that goes beyond the workplace/project distinction. Contractors, under section 14(c) are required to ensure "communication between employers and self-employed persons at the workplace of information necessary to the health and safety of persons at the workplace." Constructors, under section 15(c) are required to ensure the same communication "at the project" but are also responsible to "facilitate communication with any committee or representative required for the project pursuant to" the *OHSA* or the regulations. This, I find, is an example of broader authority and responsibility accorded by the legislature to constructors.

[102] The "any committee" referred to in section 15(c) finds its definition under section 3(d) of the *OHSA* where "committee" means "a joint occupational health and safety committee established pursuant to this *Act*." At the LeMarchant Street project, it was Aecon that, as part of its project safety coordination, administered the Joint Occupational Health and Safety (JOSH) Committee on site.

[103] As the definitions indicate, a contractor has a narrower ambit than a constructor: the definition of a contractor expressly excludes a constructor. A contractor's occupational health and safety obligations are confined to "the workplace." A contractor does not have health and safety responsibilities "at the project". The project is a constructor's responsibility. This is further illustrated by the broader communication responsibilities of a constructor and its obligation to

"facilitate communication" with any joint occupational health and safety committee "required for the project".

[104] For McCarthy's to have been a "constructor" on the LeMarchant Street project, it would have had to come within the definition under the *OHSA* and the section 15 responsibilities imposed by the legislation on constructors. It is necessary to examine the evidence to determine if it did.

Aecon's Role at the LeMarchant Street Project

[105] Divining McCarthy's status at the LeMarchant Street project is assisted by an understanding of the role and authority of Aecon. As I am about to discuss, my understanding of Aecon's role and authority is informed by the testimony of Aecon representatives and other witnesses and the documentary evidence, notably the contracts for Aecon, McCarthy's, Flynn and Economy Glass.

[106] The LeMarchant Street building was a project. And it had a project manager, Andrew Merrick, an employee of Aecon. Mr. Merrick's testimony about Aecon's responsibilities on the project are confirmed by the Aecon contract with Dalhousie University, which I will be discussing shortly.

[107] Mr. Merrick described his role on behalf of Aecon: "Overall coordination of the work, discussions with the consultants, the owner, team and my people as well." He explained what was involved in "overall coordination of the work", stating: "Basically it's making sure the work's done to plan and specs, coordinating the changes, that sort of thing." Mr. Merrick testified he "oversaw the whole site for Aecon".

[108] According to Justin Matheson, Aecon's assistant superintendent at the project, the LeMarchant Street project was so large that it was Mr. Merrick's only project. While it was often the case "that a project manager would run multiple [projects]", as Mr. Matheson explained, "not on this size of project."

[109] As the project manager, Andrew Merrick was "the key contact on health and safety on the site for Aecon." Health and safety was the primary focus of Aecon's "site orientation". Justin Matheson explained that every worker that came onto the site would do a "site specific orientation" conducted by Aecon which included a 45

minute Aecon video and a checklist. Aecon was exclusively responsible for conducting these orientations.

[110] Aecon had authority over the scheduling and work of the contractors who worked on the project and coordinated them. The contractors were expected to conform to Aecon's schedule for the project.

[111] Aecon also policed the start times for work at the project and had personnel present on the site every day for the start of the daily shift. Mr. Merrick indicated that Aecon was acutely aware of its responsibility to ensure the city's noise by-laws were respected.

[112] Aecon was authorized to discipline workers who were observed to be in violation of Aecon's safety manual, the Aecon "Red Book." (*Exhibit 9*) Justin Matheson testified that he and other Aecon managerial employees regularly monitored the trades on the project for compliance with Aecon's safety protocols. Patrick Boudreau testified that Aecon wrote trade contractors up for safety violations. Aecon also required various forms of safety documentation to be completed and submitted by the trades, including daily Job Assessment Risk Review forms ("JARR cards") such as the one Paul Fancy filled out on September 7, 2013. (*Exhibit 20*) Contractors were expected to deliver the JARR cards and similar documentation to the on-site Aecon trailer. Mr. Matheson testified that Aecon would at least organize the documents once a week and "be on the phone calling the guys if there was no paperwork in there."

[113] On March 25, 2013, in his project manager role, Mr. Merrick addressed a safety issue in an email to all the "trade contractors that were on the site at the time" directing them to be more vigilant about securing materials against wind. In the email Mr. Merrick was unequivocal: "Failure of any Trade Contractor to address housekeeping and securing materials on site will not be tolerated. Please communicate the importance of this activity to your crew on site." (*Exhibit 18*)

[114] Mr. Merrick's email indicated that a variety of measures were being immediately implemented by Aecon, including "a separate orientation for all foremen…that will define Aecon's expectations on site as it pertains to safety." The email also advised that Aecon would be undertaking a daily end-of-day inspection to ensure that materials had been secured. Monthly "site toolbox" talks

would be held by Aecon "with all workers on site on that day which will replace your toolbox talk for that week." (*Exhibit 18*)

[115] Mr. Merrick's email stated that the measures being undertaken were "to get the engagement of all parties on site as we focus to complete this project safely." Trade contractors were reminded of "the importance of reporting accidents/incidents/near misses immediately" and following up "with reports within 24 hours of the occurrence." (*Exhibit 18*)

[116] McCarthy's was one of the recipients of Mr. Merrick's email.

The Contracts for the LeMarchant Street Project

[117] McCarthy's roofing contract was one of a number of trades contracts for the LeMarchant Street project. Paul Fancy testified that while working on the site he saw drywallers, plumbers, concrete workers, structural steel workers, carpenters, and sprinkler installers. And as I indicated earlier, work was also being done by Flynn Canada and Economy Glass. McCarthy's, Flynn and Economy all signed contracts with Dalhousie University that contained terms describing their obligations and Aecon's role on the project. (*Exhibit 6 – McCarthy's; Exhibit 16 – Economy; Exhibits 34 and 25 – Flynn*)

[118] As Mr. Merrick explained, Aecon had a "start-up meeting" with McCarthy's "to go over the owner's and our expectations, to review the scope of work, that sort of thing." Exhibit 24 are the Minutes for that meeting which was held on May 30, 2013. Amongst other things, the Minutes indicate that McCarthy's contract price was $555,900. Hours of work were to be 7 a.m. to 5 p.m. Monday to Friday. The Minutes provide that McCarthy's was advised: "Work outside these hours to be coordinated with the Construction Manager." The Construction Manager was Aecon.

[119] McCarthy's contract, like the contracts of Economy Glass and Flynn, established that all communications between McCarthy's and Dalhousie were to be forwarded through Aecon. (*Exhibit 6, page 3, Article 6.1*)

[120] The language in the McCarthy's contract is consistent with Andrew Merrick's and Justin Matheson's description of Aecon's exercise of authority at the LeMarchant Street project. For example, in Part 3, Aecon was responsible for the provision of the project schedule to McCarthy's. (*Exhibit 6, page 13, Article 3.5.1*) In Part 9, "Protection of Persons and Property", Aecon is described as "responsible for construction health and safety" at the LeMarchant Street project "in compliance with the rules, regulations and practices required by the applicable construction health and safety legislation." (*Exhibit 6, page 26, Article 9.4.2*)

[121] Aecon's authority of oversight and quality control in relation to McCarthy's roofing work is established throughout the contract. For example, Article 2.2.3 in Part 2 provides that Aecon (and the "Consultant") "will have authority to reject work which in their opinion does not conform to the requirements of the Contract Documents and whenever it is considered necessary or advisable, require inspection or testing of work, whether or not such work is fabricated, installed or completed…" The Article goes on to state that Aecon's "authority or any decision to exercise or not exercise its authority" will not give rise to any "duty or responsibility" to McCarthy's. (*Exhibit 6, page 10*) Article 2.3.1 provides that Dalhousie, Aecon and the Consultant "shall have access to "the *Work* at all times." (*Exhibit 6, page 11*) (The Work is defined in the contract as "the total construction and related services required by the *Contract Documents*" which in McCarthy's case was "TP7D-Roofing." *Exhibit 6, pages 8 and 1*) McCarthy's was required by Article 2.4.1 to "promptly correct defective work" that had been rejected by Aecon. (*Exhibit 6, page 11*)

[122] The identical language I have extracted from the McCarthy's contract is found in the contracts of Economy Glass (*Exhibit 16*) and Flynn Canada (*Exhibit 34 – TP7B-Cementitious Panels* and *Exhibit 35 – TP7C-Metal Siding*)

[123] Aecon's contract with Dalhousie University (*Exhibit 5*) is very different from the McCarthy's, Economy and Flynn contracts. Aecon was to earn a large Construction Management fee of $1,067,000 for services to be discharged during the "preconstruction" and "construction" phases of the project. It was contracted to perform "General Services" that included:

- Facilitating all communications among the Owner, the Consultant, the Payment Certifier, and Trade Contractors that relate to the Project;
- Receiving all questions in writing by the Owner or Trade Contractors for interpretations and findings relating to the performance of the Work or the interpretation of the trade contract documents…;
- Providing interpretations and making findings on matters in question relating to the performance of any Work or the requirements of the trade contract documents…;
- Issuing supplemental instructions to trade contractors during the progress of the Work…;
- Giving instructions necessary for the proper performance of Work of each trade contractor during any dispute so as to prevent delays pending the settlement of such disputes. (*Exhibit 5, page 9*)

[124] And, in relation to "Project Control and Scheduling", Aecon was expected to:

- Establish and implement organization and procedures with respect to all aspects of the Project;
- Provide the Project schedule to trade contractors indicating in sufficient detail the timing of major activities of the Project to enable the trade contractors to schedule their Work;
- Provide coordination and general direction for the progress of the Project;
- Monitor the work of each trade contractor;
- Coordinate all trade contractors in the performance of their respective Work, with one another and with the activities and responsibilities of the Owner and the Consultant. (*Exhibit 5, page 9*)

[125] As Mr. Merrick testified, health and safety at the LeMarchant Street project was Aecon's responsibility. Under the terms of its contract with Dalhousie, Aecon was required to undertake responsibility for "…establishing, initiating, maintaining, and overseeing the health and safety precautions and programs" for the project and "review with the Owner all safety programs for adequacy." (*Exhibit 5, page 10, Article 2.8 "Health and Construction Safety"*) Article 3.1.2 of the contract established that, as provided for in the contracts with McCarthy's, Flynn

and Economy, Aecon was responsible "for construction health and safety" at the LeMarchant Street project "in compliance with the rules, regulations and practices required by the applicable health and construction safety legislation." (*Exhibit 5, page 20*)

[126] Supplementary conditions in the Aecon contract provide further confirmation of Aecon's authority in relation to the project. A sampling of clauses from this section of the contract illustrate the nature of Aecon's role. For example, Aecon was required to:

- Maintain a competent full-time Site Superintendent and such other staff at the project "as required to coordinate and provide general direction of the Project and progress of the Trade Contractors on the Project." (*Exhibit 5, Article 2.1.4*)
- Monitor the implementation and practice of all trade contractors' safety plans. (*Exhibit 5, Article 2.8.1(3)*)
- Act immediately where unacceptable safe work practices are used. (*Exhibit 5, Article 2.8.1(4)*)
- Notify Dalhousie immediately if a trade contractor was not able to maintain an acceptable safety performance on the project. (*Exhibit 5, Article 2.8.1(5)*)

[127] The evidence of various witnesses confirms that Aecon's role on the project was well understood. For example, Doug Pyke, the carpenter with Maritime Drywall, testified to his understanding that "Aecon was in charge of the site." He spoke to how communications operated on the project: issues with other trades would normally be taken up with Aecon; safety issues would be taken to his foreperson who would then go to Aecon; and, in relation to the job itself, Aecon would "direct [the Maritime Drywall] foreman what to do." Jamie Cox, the sheet-metal worker with Flynn Canada, testified that Aecon was in charge of the project and responsible "for communicating with the trades." Robert MacKinnon, the Flynn foreman, explained that a request by another trade contractor to have a swing stage moved would go to Aecon and "Aecon would come to us." And McCarthy's foreperson, Paul Fancy, explained that McCarthy's required Aecon's permission to work on Saturdays.

[128] The hierarchy at the project is vividly illustrated by Exhibit 7, an organizational chart for the project. Dalhousie University tops the chart with Aecon just below it. The "Trades Contractors" including Economy Glass, Flynn, and McCarthy's appear below Aecon in a lateral line. And below the trade contractors are "subcontractors and suppliers." Aecon's overall authority to direct the work of the trades is explicitly represented by the chart.

[129] Exhibit 7, the contracts, and the testimony of Andrew Merrick and Justin Matheson and the tradesmen I just mentioned all establish that Aecon exercised authority over the LeMarchant Street project, authority wielded by none of the trade contractors, including McCarthy's.

Constructors Identified in Nova Scotia Occupational Health and Safety Cases

[130] A party's authority at a construction site has been an important factor other courts have taken into account in determining how to categorize that party's status under the *OHSA*. The cases confirm what I find explicit in the legislation: role and authority are central features of what defines a "constructor".

[131] In *R. v. Barrington Lane Developments*, [1994] N.S.J. No. 667 (P.C.), the defendant's overall authority and control for the project informed the Court's categorization of it as a "constructor". The Court noted the nature of the defendant's role: "Barrington is a developer involved in the construction and management of multi-unit residential properties." (*paragraph 4*) Barrington subcontracted for work on the project, an 83 unit apartment building. It was found to have known what the contractor "was undertaking, the manner in which it carried out its work as well as the conditions in which it did so." (*paragraph 78*)

[132] What was noted by the Court about Barrington's responsibilities as a "constructor" echo the responsibilities which Aecon had in relation to the LeMarchant Street project. Barrington was found to have had a responsibility to inspect the work being done. It had a responsibility as a "constructor" "to examine the practices of, both employers and employees, indeed of all persons present…" and "a duty to address…the question of safety and health" at the project. (*paragraphs 80 and 81*) The Court held that Barrington, as a constructor, bore "a greater duty" under the *OHSA* as a party that "causes employers and employees to

be present at the work site…" (*paragraph 81*) The Court found that a "constructor" was required "to avoid unreasonable risks by following and applying its dictates and those of the regulations to all those present." (*paragraph 82*) This is an explicit recognition that a "constructor" is the party with authority over the project, the party with the authority to apply "its dictates and those of the regulations" to everyone working on the project.

[133] These findings in *Barrington* confirm the relevance of a party's role and authority on a project to the determination of who qualifies as a "constructor" within the meaning of the *Act*.

[134] Responsibility and resources were identified as characteristics of the "constructor" in *R. v. Nova Scotia (Minister of Transportation and Public Works*, [2002] N.S.J. No. 436 (P.C.) TPW's status as a "constructor" was admitted. (*paragraph 7*) The Court found that it had the "responsibility and the resources to ensure that the occupational health and safety system on a sub-contracted job was "implemented and monitored." (*paragraph 24*)

[135] In *R. v. Roscoe Construction Ltd.*, 1992 CarswellNS 673 (P.C.), both the general contractor ("Roscoe") and the subcontractor ("Findeks") were found to be "constructors". The basis for that determination is implied in the Court's factual findings that both Roscoe and Findeks were controlling the movements of the pump truck operator whose boom touched an energized power line with lethal results.

[136] The authority to wield control featured in the categorization in *R. v. McPhee*, [2013] N.S.J. No. 442 (P.C.) of a "project supervisor" as a "constructor". Mr. McPhee described himself as the "project manager" (*paragraph 87*) and was found to be a "constructor" under the *OHSA*. (*paragraph 103*) The Court identified the scope of Mr. McPhee's project control in the following terms: "…carried out the duties as the project supervisor, being responsible for sub-contracting jobs, hiring personnel and assigning daily tasks…"(*paragraph 101*) Trades persons were hired by Mr. McPhee and took their direction from him. (*see, for example, paragraphs 20, 37, 40*) Occupational health and safety issues were directed to Mr. McPhee. (*paragraph 39*) Mr. McPhee had responsibility for daily supervision on the site,

hiring and firing employees, providing daily work assignments/tasks, and "also had authority regarding suppliers and contractors on the site…" (*paragraph 56*)

[137] All the "constructors" in the cases I have reviewed exercised authority and discharged responsibilities that were markedly different from the role occupied by McCarthy's on the LeMarchant Street project. It is Aecon these constructors resemble, not McCarthy's.

> *Does McCarthy's Fit within the Definition of a "Constructor" under the OHSA?*

[138] As I indicated earlier in these reasons, determining the issue of whether McCarthy's was a "constructor" on the LeMarchant Street project requires an examination of the definition of "constructor" under the *OHSA*, the responsibilities assigned to "constructors" by the legislature pursuant to section 15 of the *OHSA*, and an analysis of the role and authority of Aecon and McCarthy's.

[139] I accept the Crown's submission that the *OHSA* contemplates the potential for there being more than one "constructor" on a project. The legislature in enacting the *OHSA* moved away from the one-constructor model of the earlier *Construction Safety Act*. But I do not have to determine what a more-than-one constructor project would look like. I am simply required to determine whether on the LeMarchant Street project McCarthy's was a "constructor" within the *Act.*

[140] It is readily apparent that Aecon easily comes within the definition of "constructor" in the *OHSA* and the section 15 responsibilities that inform the definition. The indicia of its authority over the project include:

- Control of the project site;
- Communications hub for all trade contractors;
- Conduct of the site orientations for all workers;
- Oversight, control and management of the trade contractors;
- Chairing of the JOSH Committee for the project;
- Exhibit 18, the March 25, 2013 email, directing compliance by the trade contractors with the new and enhanced safety measures;

- Central coordination for safety documentation required of all trade contractors – JARR cards such as Exhibit 20, hot work permits such as Exhibit 22;
- Reviewing/auditing of completed JARR cards.

[141] McCarthy's had none of the authority wielded by Aecon at the project. McCarthy's did not even have a key to access the site. According to Paul Fancy, when he and his roofing crew arrived on Saturday, September 7, they had to wait for an Aecon representative to let them through the gate.

[142] What the evidence establishes is that McCarthy's authority at the LeMarchant Street site did not extend beyond "the workplace". And under the *OHSA*, it is employers and contractors whose responsibilities are confined to "the workplace." (*sections 13 and 14, OHSA*) The section 15 responsibilities associated with "a project" are the responsibilities of "a constructor." (*section 15, OHSA*)

[143] The section 15 responsibilities for a "constructor" taken as a whole are the responsibilities with which Aecon was charged at the LeMarchant Street project. The contractor/constructor language of responsibilities under sections 14 and 15 of the *OHSA* is not identical: McCarthy's cannot be said to have had any responsibility to "facilitate communication" with the JOSH Committee "or representative required for the project" pursuant to the *OHSA* or its regulations. (*section 15(c), OHSA*)

[144] I conclude that McCarthy's cannot be characterized as a "constructor". It did not have any of the authority at the LeMarchant Street project that a "constructor" is contemplated by the legislation to have. I agree with the submission made by Mr. Proctor that a definition for "constructor" was created in the *OHSA*, distinct from the definitions for such parties as contractors and employers, in order to assign responsibility to one or more entities who have authority for the project. McCarthy's had no authority over the project. Only Aecon had that authority.

[145] The *OHSA* does not designate every party on a construction project as a "constructor." The contracts for McCarthy's, Flynn and Economy make it clear, as did the testimony of witnesses from those trades, that these trade contractors all sat on the same rung of the ladder of authority for the LeMarchant Street project. They were trade contractors and employers, not "constructors." They joined the project

with Aecon already established as the Construction Manager, that is, the "constructor" at the project.

[146] Categorizing McCarthy's as a "constructor" would necessarily mean that Flynn and Economy Glass were also "constructors" and, based on the evidence, such a proposition would be absurd. On the LeMarchant Street project only Aecon can be said to have had the attributes that characterize a "constructor" within the meaning of the *OHSA*.

Conclusion on Counts 1 and 2

[147] Based on the reasons I have just given, I am entering acquittals on Counts 1 and 2. McCarthy's cannot be found guilty of offences charged against it as "a constructor." The "constructor" designation of McCarthy's in Counts 1 and 2 is an essential element of those charges and the Crown is required to prove all the essential elements of the charges beyond a reasonable doubt. The Crown needed to prove not only what McCarthy's did or did not do but also that McCarthy's was, as alleged, "a constructor." I have found the evidence establishes that McCarthy's was *not* "a constructor" on the LeMarchant Street project. The failure by the Crown to prove this essential element of Counts 1 and 2 leads to the acquittals on those charges.

Due Diligence

[148] As I heard evidence and submissions on the issue of due diligence, I have decided to address this issue. Had the Crown proven McCarthy's was "a constructor" as charged in Counts 1 and 2, as the following reasons explain, I would have found there was no defence of due diligence .

[149] The due diligence defence, established by *R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299,* is available to the defendant who (1) held a reasonable belief in a mistaken set of facts, or (2) took all reasonable steps to avoid the offending event. (*R. v. London Excavators & Trucking Ltd., [1998] O.J. No. 6437(C.A.)*)

[150] McCarthy's submitted that both branches of the due diligence defence apply. I have concluded neither would on the facts of this case.

[151] I find that it is not objectively reasonable for Paul Fancy to have believed the swing stage was not operational or that no contractor would try to use it without doing a thorough inspection to confirm its integrity. He should not have made assumptions about the swing stage in the absence of careful inquiries about whether it was in an operating condition. He should not have assumed that a proper inspection would be conducted before anyone would try to activate the motor which was still cabled to the outrigger.

[152] Paul Fancy had no training on swing stages. This is relevant to both branches of the due diligence defence. He could not make an objectively reasonable assessment about the swing stage without any training nor could he take "all reasonable steps" to dismantle the outrigger safely when he had no training on disassembly.

[153] The evidence of Flynn employees Jamie Cox and Robert MacKinnon about being trained to assemble, operate and disassemble swing stages confirms that such training is essential. McCarthy's own Safety Manual (*Exhibit 54*) tells workers: "Be sure you are trained for the tasks you perform." This is recited in a section of the Safety Manual entitled "Due Diligence – Worker" which states: "There are specific Steps workers can take to protect themselves from prosecution. These are measures you can take to build a defense of due diligence." Mr. Fancy was not trained for the task he performed of disassembling the outrigger.

[154] Mr. Fancy did not take "all reasonable steps" to ensure the dismantled outrigger was not a hazard. He did not remove the motor cable. He did not remove the power cable from the main roof where it could be plugged in, re-energizing the swing stage motor. He testified that he unplugged the power cord for the swing stage on the main roof so he "would have known if someone was using it." This has to indicate that he assumed he would have become aware if the cord was plugged back in on that Saturday, September 7 when McCarthy's was completing its roofing work. This ensured the safety of other workers to a very limited extent. It did not account for what might happen once McCarthy's was off the main roof.

It did not account for what might happen when the swing stage users returned to the terrace on Monday.

[155] Paul Fancy impressed me as an honest witness. I accept the evidence he gave. It included him indicating that he said nothing to Patrick Boudreau about the dismantled outrigger when Mr. Boudreau brought the hot work permit up to the penthouse roof. Mr. Fancy's failure to communicate the state of the outrigger is another reason why I would reject McCarthy's assertion that "all reasonable steps" were taken in the disassembly of the outrigger to avoid creating a hazard.

[156] McCarthy's cannot construct a due diligence defence on the basis of what others might or should have done. It does not create a due diligence defence for McCarthy's that, as I noted in paragraph 44 of these reasons, Patrick Boudreau assumed he did not need to inspect the penthouse roof at the end of the day on Saturday, September 7. And McCarthy's cannot rely on what it said Patrick Boudreau should have seen on September 7 when he went up to the penthouse roof to give Paul Fancy the hot work permit. Due diligence is not made out on the basis of what may have been visible on the penthouse roof when Mr. Boudreau climbed up there for an unrelated purpose.

[157] I note that Patrick Boudreau's testimony indicated he would have viewed the dismantled outrigger with the cable connected to the swing stage motor as a hazard if he had noticed it. It was his evidence that had he seen what Mr. Fancy had done with the outrigger on September 7, 2013 he would not have left it there overnight.

[158] There is good reason to believe on the evidence that Mr. Fancy was a capable and safety-conscious foreperson. I do not find he was indifferent to safety considerations when he dismantled the outrigger. No doubt on September 7, 2013 with the imminence of McCarthy's next contract, he was focused on finishing the roofing job. It appears he believed, as indicated by his September 7 JARR card (*Exhibit 20*), that he had accounted for any hazard associated with the dismantled outrigger. For example, before leaving the penthouse roof on September 7, he re-positioned the outrigger beam so it would not blow off. But Mr. Fancy did not do enough to satisfy the requirements for a defence of due diligence.

[159] Mr. Fancy did not foresee the events of September 9 that conspired to bring the outrigger down on Mr. Conrod. He did not foresee that Economy Glass would

not conduct a thorough inspection before trying to move the swing stage or that Mr. Conrod would not wait before activating the motor and would go on to press the wrong button. Whether these precise events were reasonably foreseeable or not, it was reasonably foreseeable that trades that had been using the swing stage would need to know about any changes to its set-up. The changed condition of the outrigger would have been made obvious if Mr. Fancy had removed the motor cable and relocated the power cable to the penthouse roof. That would have reduced the hazard created by the outrigger. Telling Aecon what he had done with the outrigger would also have likely ensured the safety of other workers. And as Patrick Boudreau's evidence illustrates, it was reasonably foreseeable that the dismantled outrigger posed a hazard.

[160] Mr. Fancy's actions on September 7 in dismantling the outrigger and failing to communicate that he had done so created a serious hazard. I find McCarthy's cannot be said to have been duly diligent in ensuring the safety of workers who were unaware that the outrigger was untethered.

The "Lost Evidence" Issue

[161] There is one remaining issue for me to address, McCarthy's *Charter* application relating to what it alleges is lost evidence. And although the remedy sought by McCarthy's, a full or partial stay of the charges, has no traction now that I have acquitted it of all charges, I am nonetheless going to deal with the application, having heard all the evidence relating to it. The conclusion I reached on the application is that McCarthy's failed to establish any prejudice as a result of evidence that was unavailable at trial.

The "Lost Evidence" Application

[162] In its "lost evidence" application McCarthy's claimed to have been deprived of three pieces of evidence: photographs, a statement by an Aecon employee and nine statements obtained by the police on the morning of September 9, 2013. The nine statements have definitely gone missing; whether the photographs and Aecon employee statement ever existed in the first place is something I have had to determine. It was McCarthy's submission that other evidence established their existence. The Crown disputed this.

[163] McCarthy's *Charter* claim could only succeed if it proved that the evidence actually existed, that it was lost due to unacceptable negligence and that its loss was prejudicial to McCarthy's ability to make full answer and defence to the charges.

The Relevant Legal Principles

[164] The relevant legal principles governing McCarthy's "lost evidence" application can be mined from *R. v. F.C.B.*, [2000] N.S.J. No. 53, a decision of our Court of Appeal:

- The Crown has an obligation to disclose all relevant information in its possession;
- The Crown's duty to disclose gives rise to a duty to preserve relevant evidence;
- The Crown's duty to disclose is not breached if its explanation for the unavailable evidence establishes the evidence was not lost because of unacceptable negligence;
- The Crown's explanation is to be assessed with regard to "the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it." (*F.C.B., paragraph 10*)
- A breach of an accused's section 7 *Charter* rights is made out if the Crown fails to establish that the loss of the evidence was not due to unacceptable negligence;
- A section 7 Charter breach can be made out if the loss of the evidence "can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial." (*F.C.B., paragraph 10*)
- A stay of proceedings is only appropriate in "the clearest of cases" where it is the only remedy for the prejudice to the accused's right to make full answer and defence or "where irreparable prejudice would be occasioned to the integrity of the judicial system if the prosecution was permitted to continue." (*F.C.B., paragraph 11*)

[165] McCarthy's submitted that its cross-examination of witnesses at trial was prejudiced by the unavailability of the "lost evidence". In *F.C.B.*, the Court of Appeal noted that it is "usually preferable" to assess the degree of prejudice flowing from the "lost evidence" "after hearing all of the evidence." (*paragraph 10*) That is the approach I took in this case.

Additional Elaine Marshall Photographs – Lost or Never Taken?

[166] McCarthy's says that Elaine Marshall, an Occupational Health and Safety officer with the Department of Labour ("DOL") took photographs on September 9, 2013 that were never disclosed to them. The Crown said there was no evidence of such photographs being taken. The Crown said the only photographs taken by Ms. Marshall on September 9 are the five photographs that comprise Exhibit 3. Elaine Marshall, who is now resident in Britain, did not testify at the trial. McCarthy's said I should infer from the evidence of other witnesses who were present on September 9 that Ms. Marshall took additional photographs that were never produced.

[167] Elaine Marshall was dispatched to the LeMarchant Street site on the morning of September 9, 2013. She was assisted by Andrew Teal, another Occupational Health and Safety officer for DOL, who arrived at the site around 9:30 a.m., after Ms. Marshall. Mr. Teal was present for eight of the nine interviews conducted by Ms. Marshall with workers who had already provided statements to the police. After the interviews, Mr. Teal toured the construction site with Ms. Marshall and two employees of Aecon, Newton Matheson and Colby Clough. The interviews occurred between 9:45 a.m. and 11:41 a.m. and the tour was conducted between 11:55 a.m. and 12:34 p.m.

[168] The five photographs taken by Ms. Marshall (*Exhibit 3*) that are in evidence were all taken on the third floor terrace where Mr. Conrod had been struck by the falling outrigger. Although Mr. Teal testified to being present when Ms. Marshall took the terrace photographs, he is mistaken about this. The timestamps on the photographs indicate they were taken between 9:02 a.m. and 9:20 a.m. This was before Mr. Teal's arrival.

[169] Mr. Teal acknowledged on cross-examination that he could not have been with Ms. Marshall when she took the terrace photographs. Notwithstanding being

wrong about the terrace photographs, Mr. Teal said in cross-examination: "I am positive in my head that Elaine was photographing when we were doing the scene." His certainty that he was present when Ms. Marshall was taking photographs was one of the pillars of McCarthy's argument that she took additional photographs.

[170] McCarthy's pointed to Mr. Teal's notes and the evidence of Andrew Merrick, the project manager for Aecon, as evidence in support of an inference that Ms. Marshall took additional photographs. McCarthy's directed me to the fact that Mr. Teal made notes (*Exhibit VD-22*) of observing a disassembled outrigger on the main roof. Mr. Merrick's testimony indicated he and Ms. Marshall visited the terrace and the main roof together and were discussing where the outrigger that fell had come from. McCarthy's has said this interest would have compelled further photographs being taken.

[171] Mr. Merrick was asked on cross-examination if he recalled Ms. Marshall taking photographs when they were on the main roof. He did not.

[172] The evidence that McCarthy's offered in support of an inference that Ms. Marshall must have taken additional photographs after the terrace was thin and unconvincing. It invited nothing better than speculation. If Ms. Marshall had been inclined to take photographs on the main roof she was most likely to have done so when she was there with Mr. Merrick. However the isolated fact of a mutual interest in a disassembled outrigger does not establish that she did.

[173] I find Mr. Teal was simply mistaken in his recollection that he was present when Ms. Marshall was taking photographs. There is no evidence of her having taken any photographs other than the ones in Exhibit 3.

The Patrick Boudreau Statement – Lost or Never Taken?

[174] McCarthy's asked me to find that a statement was taken by another Department of Labour investigator and not produced, to its detriment. John Chant assumed the role of lead DOL investigator for this case on his arrival at the LeMarchant Street site between 10 and 10:30 a.m. on September 9. He tasked Ms. Marshall and Mr. Teal with taking statements. They took the nine statements I

mentioned earlier. None of these statements were from any Aecon employees. Mr. Chant testified that he took no witness statements on September 9.

[175] Patrick Boudreau had a different recollection. He said he gave an audio-taped statement to Mr. Chant on September 9. He recalled Mr. Chant with an audio-recording device.

[176] The only Patrick Boudreau statement disclosed to McCarthy's was one he gave on May 30, 2014 to William Chase, the DOL investigator who took over the file when Mr. Chant retired in October 2013. It was not tendered at trial. Mr. Boudreau was asked on cross-examination about the Chase interview. He said the interview with Mr. Chant had been more thorough. Mr. Chase questioned him about an interaction he had had on September 7 at the penthouse roof with Paul Fancy, the McCarthy's foreperson. Mr. Boudreau said he would have had a better recollection of that interaction when he spoke to Mr. Chant on September 9 than he did almost nine months later on May 30, 2014.

[177] Mr. Boudreau confirmed that when he was interviewed by Mr. Chase he commented to Mr. Chase that Mr. Chant had been pretty thorough in the earlier interview.

[178] Mr. Chant was asked whether he took a statement from Mr. Boudreau on September 9. He said he did not recall speaking to Mr. Boudreau that day. He testified that had he done so he would have taken notes and recorded the interview.

[179] Mr. Chant's notes (*Exhibit VD-24*) do not contain any reference to conducting an interview of Patrick Boudreau. However he made a notation on September 16, 2013 of attending Drake Recording to deliver "Chet Boudreau for transcription and check on status of other previously delivered files." As I asked Crown and Defence about this note, I will discuss their responses. Our email exchanges on the issue were entered at my suggestion by consent as an Exhibit. (*Exhibit VD-25*)

[180] When he testified, Mr. Chant was not asked about his September 16 note. The Crown, in response to my inquiry about the note, advised that the reference to delivering a "Chet Boudreau" statement related to an actual statement that Mr.

Chant took from a person named Chet Boudreau in an unrelated matter. (*Exhibit VD-25, Email from Alex Keaveny dated July 12, 2016*)

[181] The Defence had the following to say about Mr. Chant's note of September 16, 2013:

> First, we note that it is unusual that Mr. Chant would include a notation regarding a different Dept. of Labour matter in notes that are otherwise solely concerned with the accident at 1230 LeMarchant. For instance, the two preceding notes indicate that he had visited Chris Conrod that day, and had also issued a compliance order to Alex Walker at Dalhousie. Respectfully, we say that Mr. Chant attended Drake Recording Services in order to deliver the audio recording of his interview with Patrick Boudreau for transcription. While he may have interviewed someone named "Chet Boudreau" prior to the accident at 1230 LeMarchant, he could have easily mixed up the two names. We would ask the Court to draw an inference that Mr. Chant did not deliver the audio recording of his interview with Patrick Boudreau to Drake Recording Services as intended, and instead delivered the Chet Boudreau recording. The recorded interview with Patrick Boudreau was subsequently lost.
>
> At the very least, this misplaced notation provides further evidence of a lack of due diligence in the circumstances, and a possible explanation as to the circumstances leading to the loss of the interview. (*Exhibit VD-25, Email from Michael Murphy dated July 12, 2016*)

[182] In McCarthy's submission the problem with relying on Mr. Chant's evidence that he did not interview Patrick Boudreau is his lack of recall about a September 9 interview he participated in but has forgotten. Chris Dechamp, a Flynn employee, gave a statement to Ms. Marshall and Mr. Teal on September 9, 2013 at 11:34 a.m. (*Exhibit VD-13*) It was the last of the nine statements they took that morning. The interview lasted seven minutes and towards the end, Mr. Chant

asked Mr. Dechamp some specific questions about what he had seen. Mr. Chant has no recollection now of talking to Mr. Dechamp.

[183] McCarthy's said Mr. Chant could just as easily have forgotten that he spoke to Patrick Boudreau. McCarthy's argued that Mr. Chant's memory is unreliable and Mr. Boudreau's is to be preferred. It was submitted by McCarthy's that I should find that Mr. Boudreau was interviewed by John Chant, an interview I was invited to conclude would have contained more and better recollected details from Mr. Boudreau about his interaction on September 7 with Paul Fancy.

[184] The Crown suggested in submissions that it may have been Aecon that took an audiotaped statement from Mr. Boudreau on September 9 which would account for Mr. Boudreau having a clear recall of giving a recorded interview.

[185] I think it is highly unlikely that Mr. Boudreau would confuse a statement taken by his employer with a statement taken by a DOL investigator. Mr. Boudreau had had a clear and consistent memory of being interviewed by John Chant on September 9. He mentioned it to William Chase on May 30, 2014 and had no difficulty recalling it when he testified here. I find it is probable he was interviewed by Mr. Chant. I cannot say I am certain the interview happened but it is, I think, more probable than not that it did. I don't understand why Mr. Chant would include in the midst of his notes about the LeMarchant Street project investigation a reference to a statement taken for a completely unrelated matter. It is reasonable to infer that he may have mixed up the names and delivered a different Boudreau interview to be transcribed than he intended. What may have happened to the Patrick Boudreau statement, I do not know. No explanation was offered of course because it was the Crown's position the statement does not exist.

The Nine Police Statements

[186] The first statements collected from workers after Mr. Conrod's accident were police statements. They cannot now be located. These facts were not in dispute.

[187] These statements were obtained by Cst. Adam Cole who arrived at the scene at 7:37 a.m. on September 9. Cst. Alan Jazic, who arrived at 7:40 a.m., identified witnesses from the third floor terrace area and brought them to the Aecon site

trailer. There he and Cst. Cole separated the men as best they could in the small trailer. Cst. Cole provided them with statement forms to fill out as there were not enough police officers on site to take statements. He instructed the workers to "go from memory" when writing out their statements and not to talk to anyone else. Cst. Cole testified that he "was then able to learn more about what had happened."

[188] Although Cst. Cole can no longer remember how many statements were taken, the General Occurrence report ("GO" report) (*Exhibit VD-18*) he prepared and his notes (*Exhibit VD-21*) list nine witnesses. We therefore know that the workers who provided police statements on the morning of September 9 were: Jamie Cox, Jamie Traynor, Calam Cook, Derrek Kelsie, Tristan Pattison, Doug Pyke, Chris Dechamp, Paul Fancy and Ferrell Fancy.

[189] Elaine Marshall arrived at 8:40 a.m. and was briefed by Cst. Cole. At approximately 9 a.m. the DOL took over the investigation and control of the scene. Cst. Cole collected the nine statements and returned to the police station. He did not provide the statements to the DOL officers. Sometime before the 6:30 p.m. end of his shift on September 9. Cst. Cole delivered the nine statements to the duty sergeant's desk at the police station. The statements have since gone missing.

[190] Cst. Cole had no further involvement with the case until June 2015 when he was asked to locate the statements. He made inquiries and searched, fruitlessly, for them at the police file storage site in Dartmouth. He was unable to say when the statements may have been sent from the police station to the Dartmouth storage facility or even if that happened. There is simply no record of what happened to the statements after Cst. Cole set them on the sergeant's desk at the police station. The Crown conceded that they have been lost.

Unacceptable Negligence

[191] Having determined what constitutes "lost evidence" in this application, I examined whether the loss of the evidence was due to unacceptable negligence.

[192] The Supreme Court of Canada held in *R. v. La*, [1997] S.C.J. No. 30 that, as I noted earlier, assessing whether the Crown's explanation for the loss of the evidence is satisfactory, the court

> … should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police. (*La, paragraph 21*)

[193] In McCarthy's submission it was unacceptable negligence that the Patrick Boudreau statement and the nine police statements went missing. McCarthy's said these statements should have been preserved and there is no satisfactory explanation for why they weren't. McCarthy's argued the negligence associated with the missing nine police statements is aggravated by the fact that the DOL did not initiate any inquiry about their whereabouts until May 2015. A more timely inquiry could perhaps have located them. By the time Cst. Cole was tasked with trying to find the statements 20 months had passed since he left them on the duty sergeant's desk.

[194] As I have noted, because the Crown said there was no statement taken from Patrick Boudreau by John Chant, it addressed the unacceptable negligence issue only in relation to the nine police statements. As I found that the Chant/Boudreau statement probably did exist, its disappearance has to be viewed as unacceptably negligent. Patrick Boudreau worked for the company that had the contract to oversee the LeMarchant Street project and the construction site. He interacted with Paul Fancy on Saturday, September 7. His was a statement that should have been preserved, yet it wasn't. I am satisfied this constituted unacceptable negligence.

[195] The Crown acknowledged the existence of the nine police statements but says the issue of responsibility for preserving these statements had to be considered in relation to the fact that the involvement of the police started and stopped early

on September 9, 2013. The evidence indicated that the police concluded their involvement when the DOL assumed conduct of the investigation. In the Crown's submission this distinguished this case from ones where the police are the primary or exclusive investigators and evidence goes missing. The Crown said it would be unreasonable to make a finding of unacceptable negligence in this case where the police had such a limited investigatory role. The Crown submitted that whatever then happened to Cst. Cole's statements did not amount to unacceptable negligence.

[196] I was not persuaded that the limited police involvement in the investigation absolved them of unacceptable negligence. It was not an adequate response to the loss of these statements to say that the police had less responsibility for them because they were no longer involved in the investigation. Cst. Cole took the first statements from witnesses at the scene and kept them. The procedures he was expected to follow obviously did not involve him turning the statements over to the DOL because he did not do so. With the knowledge that the DOL had taken over the investigation, Cst. Cole turned the statements in at police headquarters and expected them to be maintained in police custody. They were evidence. They should have been preserved. There was no evidence of any reasonable steps being taken to ensure they were. They appear to have vanished off the duty sergeant's desk without a trace. It may be that the statements were seen by the police as of little significance as the DOL had assumed conduct of the investigation but nonetheless, I find it was unacceptably negligent to have lost them.

[197] McCarthy's also argued that the unacceptable negligence that led to the loss of the nine statements was compounded by the failure of the Crown or the DOL to start looking for them until approximately a year ago, about twenty months after Mr. Conrod was injured. I agree it would have been better if the search had been initiated sooner. Having said that, the DOL did not lay the charges against McCarthy's until April 15, 2015. Not long after that, Cst. Cole was tasked to try and find the statements. There is no evidence that an earlier search could have located the statements and it is not a situation of there being a significant delay after charges were laid and the Crown's disclosure obligation was triggered.

[198] Had the nine Cst. Cole statements not been lost, they would have been provided to the Crown for disclosure to the Defence, in accordance with its

Stinchcombe obligations, (*R. v. Stinchcombe, [1991] S.C.J. No. 83, paragraph 29*) as potentially relevant evidence. While the Defence was deprived of what would have been a routine part of the disclosure for this case, I do not find that the failure by the police to have preserved the nine statements amounts to an abuse of process, particularly considering that after the morning of September 9 this was not a police investigation. In short, I find the loss of the statements amounts to unacceptable negligence that does not extend to an abuse of process.

[199] As for the Patrick Boudreau statement, assuming it was taken, it too has gone missing, with no explanation about what happened to it and why. This also amounts to unacceptable negligence.

A Finding of Unacceptable Negligence and McCarthy's Section 7 Charter Rights

[200] A failure by the Crown to establish that unacceptable negligence played no role in the loss of the evidence means its disclosure obligations were not met and "there has accordingly been a breach of s. 7 of the Charter." (*La, paragraph 20*) McCarthy's submitted that if I found unacceptable negligence in this case there should be a stay of proceedings entered. However, even where a section 7 breach is made out, a stay is the appropriate remedy only "if it is one of those rarest of cases in which a stay may be imposed…" (*La, paragraph 23*) As the Supreme Court of Canada has held, even where the Crown has met its disclosure obligations,

> …in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy…(*La, paragraph 24*)

[201] There having been a breach of McCarthy's section 7 rights, I have addressed whether this would have been an appropriate case for a stay of proceedings. This required me to examine the issue of prejudice: was McCarthy's right to full answer and defence compromised by not having the statements.

Assessing the Prejudice Issue

[202] McCarthy's said its ability to make full answer and defence was impaired by not having the nine police statements and the Patrick Boudreau statement.

[203] An accused's right to make full answer and defence is not automatically breached where relevant evidence has not been disclosed. (*R. v. Bradford, [2001] O.J. No. 107 (C.A.), paragraph 7*) An accused must do more than simply claim to have been prejudiced:

> The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer and defence. Actual prejudice occurs when the accused is unable to put forward his or her defence due to the lost evidence and not simply that the loss of the evidence makes putting forward the position more difficult. To determine whether actual prejudice has occurred, consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration. (*Bradford, paragraph 8*)

[204] Our Court of Appeal in *F.C.B.* held that assessing the likelihood of prejudice occasioned by lost evidence should generally be undertaken once the case has been heard and the court has been able "to discover the context" in which the lost evidence is said to be relevant. (*F.C.B., paragraph 39*)

[205] With these principles in mind I examined whether McCarthy's ability to make full answer and defence was prejudiced by the loss of the nine police statements and the Patrick Boudreau statement.

The Issue of Prejudice and the Nine Police Statements

[206] The workers who gave statements to Cst. Cole on September 9 all provided subsequent statements that morning to Ms. Marshall and Mr. Teal, and all but two of them wrote out statements at the request of Aecon. How that came about was described by Andrew Merrick, who, as I have mentioned, was Aecon's project manager for the LeMarchant Street project.

[207] Andrew Merrick testified that while the police statements were being filled out in the Aecon trailer he asked for copies but was told they could not be provided to him. As a consequence, Mr. Merrick provided the workers with Aecon statement forms and asked them to fill them out. He explained the process as follows:

> …so I gave them a copy of our witness statement and asked each individual to replicate what they had put on the police statement…they were still – the person was still in the same room. They did one and then they did the other one right away.

[208] It was Mr. Merrick's evidence that he handed out the Aecon statement forms

> Because I knew that's something that we had to do, so I was just – I was going to take a copy so that we had the same information.

[209] These Aecon statements were completed by seven of the nine workers who were in the Aecon trailer to provide police statements: Jamie Cox, Chris Dechamp, Tristan Pattison, Doug Pyke, Jamie Traynor, Calam Cook and Paul Fancy. (*Exhibit VD-20*) Only Ferrell Fancy and Derrek Kelsie did not complete Aecon statements.

[210] The Aecon statements were very short and, with the exception of Paul Fancy, constitute eye witness accounts of Mr. Conrod's accident. Paul Fancy's Aecon statement was a short description of what led to the penthouse outrigger being dismantled on Saturday, September 7.

[211] The nine workers who gave police statements were also interviewed on the morning of September 9 by Ms. Marshall and Mr. Teal, the DOL officers. These interviews were quite short. The statements were taken in the following order between 9:45 a.m. and 11:41 a.m. From start to finish they lasted between 5 and 9 minutes each:

1)	Paul Fancy	(McCarthy's)	7 minutes
2)	Ferrell Fancy	(McCarthy's)	5 minutes
3)	Jamie Traynor	(Economy Glass)	7 minutes
4)	Calam Cook	(Economy Glass)	7 minutes
5)	Doug Pyke	(Maritime Drywall)	6 minutes
6)	Derrek Kelsie	(Economy Glass)	8 minutes

7) Jamie Cox (Flynn) 7 minutes
8) Tristan Pattison (Flynn) 9 minutes
9) Chris Dechamp (Flynn) 7 minutes

[212] McCarthy's submitted that the statements provided to Aecon and DOL were no substitute for the police statements. The police statements were the first ones given and were provided under the direction that the workers were to go from memory and not talk to anyone else. They were, in Mr. Murphy's submissions, "the earliest record."

[213] McCarthy's submitted that the prejudice to its ability to make full answer and defence lay in the lost opportunity to have used these earliest recollections to challenge witness credibility and underscore inconsistencies in what witnesses said had happened. In making these points, Mr. Murphy pointed to the internally inconsistent statements of several witnesses, for example: Tristan Pattison, Jamie Traynor and Calam Cook. He also noted that the evidence of some witnesses conflicted with the evidence of others.

[214] A key focus of the September 9 DOL interviews and the questioning at trial was on why the accident happened. The DOL interviews and the trial examinations of the witnesses were ever-widening inquiries. What we know from the content of the Aecon statements is that the authors focused on what they had seen and what they did in the immediate aftermath of Mr. Conrod being hit by the outrigger. That represents what Jamie Cox, Chris Dechamp, Tristan Pattison, and Doug Pyke described on the Aecon statement forms. (*Exhibit VD-20*)

[215] The Aecon statements of Jamie Traynor and Calam Cook provided some sparse additional detail about what they were doing just before the outrigger fell. McCarthy's has said that the greater detail in the Traynor and Cook DOL interviews throws the significance of the police statements into sharper relief. In McCarthy's submission, what details may have been provided in those lost statements? McCarthy's submitted that it had been prejudiced because there was no evidence to replace what was lost by the disappearance of the police statements.

[216] In assessing the prejudice question in relation to the lost police statements, I examined the several threads of McCarthy's submissions:

- The Aecon statements are no substitute. There is no guarantee that they replicate what was provided in the police statements.
- The Aecon statements may have been influenced by the fact that it was the project manager who asked the workers to provide them. This, said McCarthy's, is a "dynamic" I should consider.
- Two workers, Ferrell Fancy and Derrek Kelsie, did not provide Aecon statements.
- Jamie Traynor and Calam Cook provided some additional "what they were doing just before the outrigger fell" details in their Aecon statements.
- The DOL interviews used leading questions and did not produce "pure form" statements.

[217] I was not persuaded there was any likely prejudice to McCarthy's ability to make full answer and defence caused by the loss of the police statements. I say this for the following reasons:

- I accept Mr. Merrick's evidence that he asked the nine workers writing out their police statements to "replicate" on the Aecon forms what they were putting in their police statements. I found no basis for inferring that the workers would have been influenced to say anything different in the Aecon statements because it was an Aecon representative making the request. The fact there is now finger-pointing does not persuade me that in the immediate aftermath of a shocking accident the witnesses would have been tailoring what they wrote on the Aecon statement forms. It is highly probable that the brief Aecon statements very closely resemble what was provided to the police. Indeed that is what Mr. Merrick requested, a replication of what the police had been told. He did not ask the witnesses to recite what they had seen happen, he asked them to write down what they had written down in their police statements. It is not reasonable to infer that the police and Aecon statements would have been inconsistent.

- The most reasonable inference on the evidence is that the police statements were "what happened" statements. Witnessing the accident or its immediate aftermath was what Jamie Cox, Chris Dechamp, Tristan Pattison, and Doug Pyke described in their Aecon statements. It is highly probable that is all

they described in the police statements they were writing out at the same time.

- The "what they were doing just before the outrigger fell" details provided by Jamie Traynor and Calam Cook in their Aecon statements is no indication there was different or even more detail in their police statements. As with the Cox, Dechamp, Pattison, and Pyke "what happened" statements, I find it is highly probable the content of the Traynor and Cook Aecon statements matched the content of what they said in their police statements. And I am satisfied this is also the only reasonable inference to be made about Paul Fancy's Aecon statement. I find the suggestion by McCarthy's that the police statements may have been inconsistent with what the witnesses said elsewhere to be nothing better than speculation.

- The most reasonable inference is that whatever may have been relevant in the police statements to McCarthy's full answer and defence can be found in the Aecon statements. This was not a situation where the accused "has no knowledge of what was contained in [the lost evidence]". (*R. v. Chabot Sand and Gravel Ltd., [1995] M.J. No. 652 (P.C.), paragraph 32*)

- The fact that Ferrell Fancy and Derrek Kelsie did not provide Aecon statements did not disadvantage McCarthy's in its defence. They were both interviewed by DOL that morning, Mr. Fancy at 9:45 a.m. and Mr. Kelsie at 10:48 a.m. Judging by the brevity of the Aecon statements that were provided, the likely content of the Fancy and Kelsie police statements would have been sparse. I further note that McCarthy's did not cross-examine Ferrell Fancy at trial.

- All nine workers who provided police statements were interviewed by the DOL that same morning. Those DOL interviews clearly assisted McCarthy's in its cross-examination of witnesses. McCarthy's was able to establish internal inconsistencies and conflict between witnesses using the DOL statements and the testimony obtained at trial. There is nothing to suggest the police statements contained any evidence beyond what McCarthy's had

> at its disposal for exposing inconsistencies in the evidence. There is no basis for a finding that McCarthy's experienced any impairment in its ability to test and challenge the evidence of the witnesses at trial.

[218] This case was very different from sexual assault cases, relied on by McCarthy's, where the complainant's statement to police could not be produced in its entirety due to a malfunction in the audio recording equipment. (*R. v. R.C.S., [2004] N.S.J. No. 445(S.C.); R. v. Hill, [2002] N.S.J. No. 379 (S.C.)*) The conclusion in *R. v. S.* that the lost material could not be "adequately replaced by other statements or evidence" was based on different circumstances than existed here. (*paragraph 42*)

[219] In conclusion on the issue of prejudice, I find McCarthy's failed to establish that the loss of the nine police statements caused any actual or likely prejudice to its right to make full answer and defence. McCarthy's conducted fulsome and fruitful cross-examinations of the witnesses who testified. McCarthy's trial was fair and its ability to respond to the charges was unimpeded. McCarthy's failed to establish that the lost statements "would have assisted its defence in a material way (causing an unfair trial), or that the absence of the evidence irreparably prejudiced [it] (justifying a stay of the charges." (*R. v. Lee Valley Tools Ltd., [2009] O.J. No. 1882 (C.A.), paragraph 20*)

[220] I would not have granted McCarthy's a stay of any charges based on the nine lost police statements.

The Issue of Prejudice and the Patrick Boudreau Statement

[221] The aspect of Patrick Boudreau's statement that was the focus of McCarthy's *Charter* motion is the interaction he had on Saturday, September 7, 2013 at the penthouse roof with Paul Fancy. This interaction was relevant to the issue of due diligence. It was McCarthy's submission that a statement by Patrick Boudreau closer in time to September 7, that is, the John Chant statement, could have assisted McCarthy's due diligence defence, especially due diligence in relation to communications about the dismantled outrigger.

[222] Mr. Boudreau testified that in his May 30, 2014 interview with William Chase, the Department of Labour investigator who inherited the file from Mr.

Chant, Mr. Chase asked him about the interaction with Mr. Fancy. Mr. Boudreau told Mr. Chase, that in May 2014 nine months after the September 2013 events, he was not "100 percent sure" of what may have been said between Mr. Fancy and him on September 7, 2013. Mr. Boudreau agreed with Mr. Proctor's proposition on cross-examination that he would have been more certain about that interaction when he was interviewed by John Chant on September 9, 2013.

[223] I find in light of Paul Fancy's evidence, which I have accepted, that he never spoke to Patrick Boudreau about having dismantled the outrigger, Mr. Boudreau's better memory more proximate to September 7 doesn't matter. The statement he may have given to John Chant that was not produced could not change the fact that during his interaction with Mr. Fancy at the penthouse roof, Mr. Fancy did not tell him he had disassembled the outrigger.

Conclusion on the Charter Motion

[224] As my reasons have explained I find there was no prejudice to McCarthy's as a result of lost evidence.

Conclusion on the Charges against McCarthy's

[225] To reiterate, I am, for the reasons detailed earlier, entering acquittals on all four Counts in the Information.