

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Aecon Construction Group Inc.*, 2018 NSPC 22

**Date:** 20180625  
**Docket:** 2854093  
**Registry:** Halifax

**Between:**

R.

v.

Aecon Construction Group Inc.

<b>Decision</b>
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<b>Judge:</b>	The Honourable Judge Greg Lenehan
<b>Heard:</b>	January 12, 13, 19, 20, 2017 May 31, 31, 2017 September 11, 2017, November 14, 2017 December 18, 2017 in Halifax, Nova Scotia
<b>Decision</b>	June 25, 2018
<b>Charge:</b>	74(1)(a) <i>Occupational Health and Safety Act</i>
<b>Counsel:</b>	Norm Keith, for the Defendant Alex Keaveny, for the Crown

**By the Court:**

[1] This matter began in September 2013 with an injury incident at a construction project in Halifax. This is the trial decision on the sole count under the *Occupational Health and Safety Act* (the *Act*) remaining on the information laid that charged the construction manager with a failure to comply with obligations imposed on a constructor. I have organized the decision by beginning with a description of the incident, the actions that were taken prior to the injury occurring that led to the harm experienced, and a synopsis of the investigation. I then give a history of these proceedings. I follow by identifying the issues I was to decide, my ruling on each, and reasons for each of those findings.

[2] I have reviewed my notes and the trial transcript for each witness' testimony, the exhibits tendered by Crown and defence, the written submissions by counsel, the case law submitted for my consideration, and, of course, the *Act*. I have, also, refreshed my memory for the proceedings and my rulings on earlier motions and applications by reading those decisions again. If at any time my notes for the evidence heard were not consistent with the trial transcript, I have listened to the recording for that part of the trial testimony for purposes of obtaining clarification and correctness.

[3] I have carefully considered the testimony of each witness and I have assessed individual testimonies for truthfulness and reliability. I am satisfied that every witness in this trial gave evidence in an honest attempt to provide information to the best of his or her recollection. Witnesses were providing testimony from memories that were at the time of trial three and half to four years old. Those memories were created for individual experiences and perceptions specific to each person and the vantage point from which observations were made. Where I found conflict between the recalls of witnesses, I have accepted as more reliable the recall I have found is most in harmony with the preponderance of probabilities in the circumstances surrounding the observations recounted.

[4] The summaries of the injury incident and the actions that led up to the incident are based on the collective testimonies of the persons who had been present at the material times.

[5] The witness statements filed with the court in Exhibit #1 have not been considered in assessing the factual circumstances in this case. Those statements were only considered for purposes of addressing the impact of lost evidence on Aecon's ability to make full answer and defence. Trial testimony and exhibits referenced during that testimony have been used to determine the facts.

[6] I have read and considered the briefs that have been filed in this matter and have reviewed and considered each and every case report attached to those briefs. I have read additional cases discovered through my own research. The cases I have referenced in this decision are those that I found to be particularly helpful in addressing the issues before me.

### The Incident

[7] On the morning of September 9, 2013, employees of Northfield Glass Group Ltd., (also referred to as Economy Glass (Economy)) arrived at the site of the Lemarchant Street multi-use project (the project) on the campus of Dalhousie University (Dal) intending to work on part of the façade of the building under construction. They required L-shaped swing stage configuration to enable them to complete their planned tasks that day. That apparatus was located on a lower roof. In order to set up, Economy had to move other staging on that lower roof (leased by Flynn Canada Ltd. (Flynn)) out of the way.

[8] At the direction of Mr. Kelsie, foreman for Economy, three Economy workers, Chris Conrod, Calam Cook, and Jamie Traynor, were tasked with preparing the L-shaped staging for use after ensuring the swing stage equipment was safe to use. As those workers approached staging apparatus that needed to be

moved out of the way, they realized there was no power going to that swing stage motor. Mr. Cook was sent to discover the problem. He found the power cord was unplugged. He chose to plug it into the power supply. It gave power to the motor for the swing stage that needed to be moved out of Economy's way. Mr. Cook continued to the upper roof to check on the rest of the swing stage apparatus for safety as he had been instructed to do by his foreman, Mr. Kelsie.

[9] Before Mr. Cook could make his way to the penthouse roof where one of the outriggers for the swing stage that needed to be moved was located, Mr. Conrod powered up the motor on that swing stage and began to raise it from the lower roof. When that happened, the wire leading from the swing stage to the outrigger on the upper roof was observed to slacken and begin to coil on the lower roof. The outrigger to which it was attached was falling from the penthouse roof four or more floors above. Mr. Conrod was unable to get out of the way. The metal outrigger struck him in the back causing catastrophic injury to Mr. Conrod's back.

#### Prior Actions Leading to the Harm Caused

[10] On September 7, 2013, employees of McCarthy's Roofing Ltd. (McCarthy's) attended the project first thing in the morning intending to lay roofing material on what has been called the penthouse roof. Positioned on that

roof before they arrived was the outrigger previously mentioned that fell on September 9, 2013, with its counter-balancing weights, tie-down cables, and power cord all in proper assembly. It was connected to the swing stage (the responsibility of Flynn), resting on the lower roof; the same swing stage Mr. Conrod attempted to move on September 9, 2013.

[11] McCarthy's required that outrigger and its component parts to be removed from the roof to enable them to complete their roofing task. McCarthy's had requested through Aecon Construction Group Inc. (Aecon) supervisors on September 5 and 6, 2013, that Flynn dismantle the outrigger to facilitate this roofing work. Aecon promptly contacted at least one, if not two, of Flynn's supervisors and delivered McCarthy's request. Despite assurances the removal of the outrigger would be attended to, it had not been dismantled prior to McCarthy's arrival on the morning of September 7, 2013.

[12] Without training in the proper disassembly, storing, or securing of swing stages and their components and without permission from Flynn to interfere with its equipment, Mr. Fancy, the foreman on site for McCarthy's chose to dismantle the outrigger. He unplugged the power supply, disconnected tie-back cables, removed counter-balancing weights and disassembled the outrigger. The various components were placed by Mr. Fancy on the parapet for the penthouse roof out of

the way of the roofing work. Upon completion of the roofing job that day, Mr. Fancy returned the outrigger to its original position on the roof, but did not reassemble the cradle, weights or tie-back cables. The weights remained on the parapet. Although the power cord remained unplugged, a cable from the outrigger to the swing stage below remained threaded through the swing stage motor.

[13] The outrigger as positioned by Mr. Fancy without counter-balancing weights posed a recognizable significant potential hazard.

[14] Patrick Boudreau was the Aecon supervisor on the Lemarchant Street project site for Saturday, September 7, 2013. He visited the penthouse roof while McCarthy's was working there for the purpose of confirming McCarthy's had a 'hot work' permit. Such a permit was required whenever contractors were applying direct heat to building material as in this instance with McCarthy's task of applying membrane to the penthouse roof.

[15] Mr. Boudreau engaged Mr. Fancy in conversation. Mr. Boudreau took no notice of the positioning of the outrigger and its components on the parapet at that time. He did not ask about the outrigger, who removed it, or how it was dismantled.

[16] Mr. Boudreau did not speak to anybody with Flynn about that outrigger.

[17] When McCarthy's had completed its work on the penthouse roof on September 7, 2013, its materials were removed from the roof and safely secured on a lower roof. The 40-foot extension ladder used to access the penthouse roof was taken down. Mr. Boudreau spoke to Mr. Fancy about the status of materials on the penthouse roof. Assurances were given by Mr. Fancy that there were no loose materials. Mr. Boudreau did not check the roof McCarthy's had been working on and he did not attend that roof at the end of day as part of any routine site safety inspection.

[18] Prior to leaving the project site on September 7, 2013, Mr. Fancy submitted a job assessment risk review (JARR) card on which he indicated that there were no potential hazards remaining at the location of the work McCarthy's performed that day. This was deposited at Aecon's site trailer.

### Investigation

[19] At 7:37 a.m. September 9, 2013 Cst. Cole with Halifax Regional Police (HRP) was dispatched to a reported industrial accident at the project on Lemarchant Street. He was the first police constable on scene. When he arrived, Mr. Conrod was being attended to by paramedics. Cst. Cole with the assistance of other attending police escorted persons who were present and witnessed the injury

incident involving Mr. Conrod to the Aecon site trailer and obtained nine written statements from each person.

[20] Aecon inquired at the time about the possibility of obtaining copies of those police statements. Cst. Cole advised he would not be providing such copies.

Aecon requested each witness to prepare contemporaneous statements for Aecon. Seven such statements were made.

[21] At approximately 8:40 a.m. September 9, 2013 Elaine Marshall, an inspector with the Department of Labour and Advanced Education (Labour) attended the scene. She surveyed the project site and the injury scene; recording her observations through her notes and a number of photographs. With the assistance of Mr. Teal, another Labour inspector who attended the project location, Ms. Marshall obtained written statements from nine persons including Mr. Fancy.

[22] At approximately 10:30 a.m. September 9, 2013, John Chant, a special investigator with Labour, arrived at the project site to take charge of the investigation into the cause of the injury incident. He surveyed the site with the assistance of Newton Matheson, site supervisor with Aecon, and took numerous photographs. Mr. Chant directed inspectors Marshall and Teal to take statements from witnesses. He issued a stop work order for the project.

[23] On September 10, 2013, Mr. Chant attended at the project and issued orders pursuant to Section 47 of the *Act* for employers to produce documents related to health and safety of employees or other persons at the workplace. Over the course of the following several days, Mr. Chant had a number of conversations with persons to clarify what was sought pursuant to the orders that had been issued and the format in which the materials sought could be produced to be in compliance.

[24] On October 11, 2013 Mr. Chant met with William Chase, another special investigator with Labour, to pass the investigation of this matter over to Mr. Chase. Mr. Chase completed the investigation thereafter. He reviewed the materials turned over by Mr. Chant, which amounted to a volume of three banker boxes of inspection and compliance reports, audio statements, and photographs. Mr. Chase re-interviewed those persons from whom statements had already been obtained by Labour and interviewed others he thought had information helpful to the investigation. He sought additional materials from the company that provided the swing stages used on the project. On April 7, 2015 Mr. Chase swore the original information charging Aecon with summary proceeding offences under provincial legislation.

#### History of Proceedings

[25] The first appearance in this matter was May 28, 2015. There were two informations before the court. An information sworn April 7, 2015 alleged two offences under the *Act*. There was, also, a four-count information sworn April 15, 2015 alleging offences under the *Act*. Matters were adjourned twice for purposes of allowing defence to seek further disclosure of materials and to seek particulars. On September 29, 2015, not guilty pleas were entered on behalf of Aecon on the four-count information. There was an estimation that trial would take five days, so the case was referred to our long-trial court for an appearance on November 10, 2015 to set trial dates.

[26] A companion prosecution was proceeding at the same time. It was against McCarthy's. The Crown wished to try that matter first. McCarthy's trial was scheduled to be heard June 7-16, 2016 in the long-trial court before Judge Derrick (as she was then). Aecon's trial was set for September 26-30, 2016 with the expectation another judge would be found to hear it. Aecon was still seeking particulars from the Crown.

[27] In late November 2015, I agreed to hear Aecon's trial. Through e-mail exchanges in December 2015, trial dates of August 8-12, 2016 were offered and accepted for my court. Pre-trial issues were discussed via e-mail in March 2016 and teleconference in April 2016. On June 20, 2016, I heard a motion for

particulars. My decision on that motion was rendered June 30, 2016 with me instructing particulars be provided for the first and second counts on the information, but not for counts three and four.

[28] The court and Crown were on notice that Aecon would be seeking relief under the *Charter* for lost evidence and unreasonable delay. Aecon was challenging the Crown's assertion that Aecon was a 'constructor' as defined under the *Act*. Furthermore, Aecon would be seeking costs from the Crown.

[29] On August 8, 2016, this trial was adjourned at the request of Crown and defence until January 12, 13, 19 and 20, 2017. Both parties wished to have the benefit of the McCarthy trial decision before proceeding with this prosecution. It was hoped that some trial economies could be achieved as many of the issues in the McCarthy matter were similar to issues expected to be addressed in this case against Aecon. The McCarthy decision was released September 13, 2017. On September 20, 2017, the Crown invited a dismissal of counts three and four against Aecon. The trial would proceed on only the first two counts on the information. Counsel would work toward an agreed statement of facts in the interim. The lost evidence motion would be argued at the conclusion of the trial evidence.

[30] The trial commenced as scheduled on January 12, 2017. The Crown conceded the police statements obtained September 9, 2013 were lost evidence. The Crown disputed there was any additional lost evidence. No factual agreements were provided to the court.

[31] I received testimony in support of the Crown's case January 12, 13, 19 and 20, 2017, May 30 and 31, 2017, and September 11, 2017. At the end of the Crown's case, Aecon argued for directed verdicts on the two charges before the court and sought permission to argue for relief under the *Charter* for unreasonable delay. I reserved my decision on directed verdict until November 14, 2017 and invited the parties to file briefs on the unreasonable delay issue. I would hear those arguments on November 14, 2017, if necessary.

[32] With notice to the court and Crown, Aecon expanded its unreasonable delay argument to include consideration of the detrimental effects of pre-charge delay on the fair trial rights of Aecon.

[33] On November 14, 2017, the second count on the information was dismissed by directed verdict. I, then, received argument and submissions on pre-charge delay and unreasonable delay. My written decision dismissing both motions was

provided to counsel for both parties in December 2017 in advance of the trial continuation December 18, 2017.

[34] Aecon called two witnesses to testify on December 18, 2017. The Crown elected not to call rebuttal evidence. The matter was adjourned and counsel were instructed to provide written closing arguments.

[35] Aecon's written submissions were received by the court on February 5, 2018. The Crown's submissions were received February 16, 2018. Aecon filed reply submissions March 9, 2018.

### Issues

[36] The sole count remaining for decision is: That the defendant did as a constructor, fail to take every precaution reasonable 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*; in particular, Aecon failed to ensure that the swing stage or its components were properly disassembled, secured or stored.

[37] From the evidence at trial and the submissions filed on behalf of Aecon and the Crown, I determined the issues to be addressed in this decision are as follows:

1. Has the Crown proved that Aecon was a constructor? If So,
2. What responsibility did Aecon have to ensure the swing stage or its components were properly disassembled, secured or stored?
3. Was the swing stage or its components disassembled, secured or stored?
4. Did Aecon fail to take every precaution reasonable to ensure the health and safety of a person at a workplace?
5. If the Crown has otherwise proved its case, has Aecon demonstrated due diligence so as to be excused from its failure to take every precaution reasonable?
6. Was there evidence lost by the Crown? If so,
7. Was the evidence lost due to unacceptable negligence on the part of the Crown so as to amount to a violation of the defendant's fair trial rights protected under section 7 of the *Charter*? If so,
8. Should the case be stayed pursuant to section 24(1) of the *Charter*?
9. Has Aecon established the grounds necessary for the Court to award costs against the Crown?

### Analysis

[38] Before addressing each of the identified issues, it is important that I remind everybody that merely charging a person does not mean the person is guilty. Quite to the contrary, a person accused of committing an offence under any statute is presumed to be innocent. That presumption remains with the accused throughout the proceedings. It can be rebutted by the Crown, but only if the Crown is able to marshal sufficient evidence to satisfy the trier of fact beyond a reasonable doubt on

each element of the charge that the accused was responsible for the alleged violation.

[39] This case involves the interpretation of provincial legislation designed to protect persons while at work. I view this as a piece of public welfare law. I instruct myself that I should interpret the *Act* generously in order to achieve the stated purpose of the legislation; **R. v. Eagles**, 2009 NSPC 49.

1. Has the Crown proved that Aecon was a constructor? Yes.

[40] The starting point in this analysis is to look at the *Act* and the foundation upon which it is based as set out in Section 2:

The foundation of this *Act* is the Internal Responsibility System which

(a) is based on the principle that

(i) employers, contractors, constructors, employees and self-employed persons at a workplace, and

(ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace, share the responsibility for the health and safety of persons at the workplace;

(b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;

(c) includes a framework for participation, transfer of information and refusal of unsafe work, all of which are necessary for the parties to carry out their responsibilities pursuant to this *Act* and the regulations; and

(d) is supplemented by the role of the *Occupational Health and Safety* Division of the Department of Labour and Advanced Education, which is not to assume responsibility for creating and maintaining safe and healthy workplaces, but to establish and clarify the responsibilities of the parties under the law, to support them in carrying out their responsibilities and to intervene appropriately when those responsibilities are not carried out.

[41] A ‘constructor’ is “a person who contracts for work on a project or who undertakes work on a project himself or herself”, subsection 3(f) of the *Act*.

‘Contracts for work’ according to subsection 3(h) of the *Act* “includes contracting to perform work or to have work performed.”

[42] Other definitions in section 3 of the *Act* that assist in the analysis of whether Aecon was a constructor are ‘project’ and ‘workplace’:

(aa) “project” means a construction project, and includes

(i) 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, and

(ii) work of any nature or kind designated by the Director as a project;

(ah) “workplace” means any place where an employee or a self-employed person is or is likely to be engaged in any occupation and includes any vehicle or mobile equipment used or likely to be used by an employee or a self-employed person in an occupation

[43] At section 15 of the *Act*, the precautions to be taken by constructors are set out:

Every constructor shall take every precaution that is reasonable in the circumstances to ensure

(a) the health and safety of persons at or near a project;

(b) that the activities of the employers and self-employed persons at the project are co-ordinated;

(c) communication between the employers and self-employed persons at the project of information necessary to the health and safety of persons at the project, and facilitate communication with any committee or representative required for the project pursuant to this *Act* or the regulations;

(d) that the measures and procedures prescribed under this *Act* and the regulations are carried out on the project; and

(e) that every employee, self-employed person and employer performing work in respect of the project complies with this *Act* and the regulations.

[44] Section 23 of the *Act* states the following:

(1) A specific duty or requirement imposed by this *Act* or the regulations does not limit the generality of any other duty or requirement imposed by this *Act* or the regulations.

(2) Where a provision of this *Act* or the regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.

(3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on

whom the duty or requirement lies shall, where possible, comply with the provision.

(4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only

(a) for the time during which the person with the greatest degree of control is in compliance with the provision;

(b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and

(c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

(5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses 4(a) to (c) with the necessary modifications.

[45] A constructor's responsibilities are defined in relation to a project. The building of the Lemarchant Street multi-use facility with Aecon as the construction manager was, indeed, a project. That is not disputed. What is in dispute is whether the role played by Aecon brought it within the definition of a constructor. For this reason, it is necessary that I examine this project and the actual duties imposed on Aecon for the project to determine whether it functioned as a constructor.

[46] A number of decisions from courts in Nova Scotia provide guidance on what factors I should examine when trying to determine this issue. Earlier cases suggest that I should be looking at the role of Aecon on the project, both individually and in contrast to other persons on the project and, in particular, with regard to issues of health and safety. I must also determine what, if any, authority Aecon had on the project to control the activities of employers and employees; see **R. v. Roscoe Construction Ltd.**, 1992 CarswellNS 673 (P.C.); **R. v. Barrington Lane Developments**, [1994] N.S.J. No. 667 (P.C.); **R. v. Nova Scotia (Minister of Transportation and Public Works)**, [2002] N.S.J. No. 436 (P.C.); **R. v. McPhee**, [2013] N.S.J. No. 442 (P.C.); and **R. v. McCarthy's Roofing Limited**, 2016 NSPC 52.

[47] I have also reviewed for guidance decisions from courts in Ontario that support the exercise of determining whether a person is a constructor by examining its responsibilities, role, and authority in relation to others on the project; see **R. v. J Stoller Construction Ltd.**, 1986 CarswellOnt 3654 (ONCJ); **R. v. Stelco Inc.**, [1989] O.J. No. 3122 (ONCJ); and **R. v. Reid and Deleye Contractors Ltd.**, 2009 ONCJ 776.

[48] The ultimate authority and control for the Lemarchant Street Multi-use Project remained with Dal, the owner. That is clearly evident in the contracts

entered into between Dal and each of the other parties hired to play a role in the construction of the facility. Those contracts were filed in this case in Exhibit 2: Tab 12 (Aecon), Tab 13 (Eastin Properties, (Eastin)), Tab 14 (McCarthy's), Tab 15 (Economy), Tab 16 (Flynn). Dal maintained control over the financial expenditures, any design changes, the ability to terminate a contract, the requirement of contractors to complete the Job or Project Hazard Assessment Worksheet, and the acknowledgement by contractors of Dal's own Contractor Safety Policy. Consequently, I am satisfied that Dal, as the owner, was, also a constructor as defined under the *Act* and interpreted by the decided cases. But Dal was not charged and it is not for me to question the discretion of the Crown in choosing who to charge following an investigation. I must limit myself to the case before me.

[49] Similarly, Eastin played a management function in the coordination of the project on behalf of Dal with the procurement of trade contractors, costing the project, responding to requests from user groups, meeting with engineers and architects, and conducting regular meetings at which Aecon would be present. Eastin might, also, fit within the definition of a constructor under the *Act*, but I have not given it much consideration. Eastin is not before me charged with an offence.

[50] The question for me to decide is whether Aecon was a constructor. There is nothing in the *Act* which says there can be only one constructor on a project. The charge before the court does not allege that Aecon was ‘the’ constructor on the project. I must examine the evidence to determine whether Aecon as a contractor, hired as the Construction Manager, fulfilled the role, authority, and control of a constructor as well.

[51] Aecon did not have a contract with any of the other contractors on the project. In its contract with Dal (Exhibit 2, Tab 12), however, Aecon assumed the following roles, control and authority:

#### Schedule A1

##### 2.1 General Services

.1 Chair and minute regular project meetings with the Owner, the Consultant and Trade Contractors.

.2 Organize and distribute all documents related to the performance of the contract and execution of the work of each Trade Contractor.

.3 Provide administration as described in the trade contract documents including,

(1) Facilitate all communications among the Owner, the Consultant, the Payment Certifier, and Trade Contractors that relate to the Project.

(2) In the first instance, receive all questions in writing by the Owner or Trade Contractor for interpretations and findings relating to the performance of the Work or the interpretation of

the trade contract documents except with respect to financing information required of the Owner.

(3) In the first instance, give interpretations and make findings on matters in question relating to the performance of any Work or the requirements of the trade contract documents, except with respect to any and all architectural and engineering aspects of the Project or financing information required of the Owner.

(4) During the progress of the Work, issue supplemental instructions to Trade Contractors with reasonable promptness or in accordance with a schedule for such instructions agreed to by the Construction Manager and Trade Contractors.

(5) Promptly investigate, make findings and inform the Owner, Trade Contractors and the Consultant concerning all concealed or unknown conditions which are discovered by the Construction Manager or of which Notice in Writing is given to the Construction Manager.

(6) Make findings upon all claims for a change in any trade contract price, and provide Notice in Writing of such findings to all parties within 30 Working Days after receipt of such claim or within such other time period as may be agreed by the parties.

(7) Give instructions necessary for the proper performance of Work of each Trade Contractor during any dispute so as to prevent delays pending settlement of such dispute.

(8) Investigate the impact on Work of each Trade Contractor of the discovery of any fossils, coins, articles of value or antiquity, structures and other remains or things of scientific or historic interest discovered at the Place of the Project, and advise the Owner concerning the issuance of appropriate instructions for any change in Work as a result of such discovery.

(9) Act on behalf of the Owner, Trade Contractor and the Consultant for the purpose of adjusting the amount of any loss or damage payment with insurers under property or boiler and machinery policies affecting any Work.

(10) Prepare CCDC-17 contracts for all trade packages for execution by Owner and trade Contractor.

(11) Ensure the Construction Manager and Trade Contractors implement such measures and submit such information as required during construction and close-out in order to achieve LEED Gold certification. As a minimum this applies to:

Prereq#1 Erosion and Sediment Control

MR-2 Construction and Waste Management

MR-4 Recycled Content and Regional Materials

MR-3 Material re-use

MR-6 Rapidly Renewable Materials

MR-7 FSC Certified wood

IEQ 4.1-4.4 Low Emitting Materials

IEQ 3.1-3.2 Construction IAQ Management Plan

.4 Maintain a competent full-time Site Superintendent and such other staff at the Place of the Project as required to coordinate and provide general direction of the Project and progress of the Trade Contractors on the Project.

[52] In addition to these general services, the contract between Aecon and Dal provided Aecon control over the scheduling of work on the project, coordinating the progress of the work, monitoring, controlling and directing the work of the

trade contractors, and reviewing the performance of the respective trade contractors and their personnel in meeting the project schedule (clause 2.2). It, also, gave Aecon the responsibility to process any changes in work, to make necessary recommendations to Dal and the consultant for changes in the work, to take the lead role in negotiations with trade contractors for changes to work, and to issue change orders to trade contractors (clause 2.5). Furthermore, Aecon was given authority to conduct quality control assessments and to reject work that in the opinion of Aecon did not meet the requirements of the trade contracts (clause 2.7).

[53] It is important to notice that through its contract with Dal, Aecon had the responsibility to prepare for execution all other contracts between Dal, the Owner, and the trade contractors; Schedule A1, clause 2.1.3(10) above.

[54] Of particular note, because it has been considered in the caselaw as a significant factor in determining whether a party was a constructor, Aecon had the responsibility under its contract with Dal to establish, initiate, maintain, and oversee health and safety on the project. Aecon had the authority to Act immediately if unsafe work practices were being used (clause 2.8). This responsibility for overall health and safety on the project and for compliance with construction health and safety legislation was acknowledged in each of the trade

contractors' contracts they had with Dal, as well; McCarthy's at Exhibit 2, Tab 14, clause GC 9.4; Economy at Exhibit 2, Tab 15, clause GC 9.4; Flynn at Exhibit 2, Tab 16, Clause GC 9.4.

[55] The trade contracts previously referenced all acknowledged at various parts of the documents the supervisory role of Aecon as the construction manager on the project. The contracts required trade contractors, but for a limited number of exceptions, to communicate with Dal through Aecon (Article A-6). With regard to the administration of the contracts, the authority of Aecon was set out in clause GC 2.1. The role of Aecon was described in clause GC 2.2. Aecon's role and authority to review and inspect the work of the trade contractors was set out in the contracts at clause GC 2.3.

[56] The testimonies of the persons who worked on the project in 2013 prior to the injury incident confirm the role, authority and control exercised by Aecon on the project. Aecon had a site trailer in place. All persons seeking to enter the project site were required to attend at the Aecon site trailer, report in, and receive a site safety orientation before going inside the fence (for examples: Exhibit 2, Tab 23 and Exhibit 5, Tabs 3A-3E). That fence had been installed at the direction of Aecon. It had a gate with a lock. Aecon controlled the keys to that lock. Aecon required all persons to conduct themselves on site in accordance with the safety

protocols set out in Aecon's Environmental Health and Safety Manual, referred to by Aecon employees as the Red Book (Exhibits 3 and 4). Aecon could and did write people up for safety violations (for example: Exhibit 5, Tab 3F).

[57] Other indicia of Aecon's control and authority in relation to the trade contractors include: (a) Aecon maintained a work schedule on the wall of the site trailer which was constantly being up-dated by Aecon in order to coordinate the progress of work on the project; (b) trade contractors were required to submit to Aecon each day Job Assessment Risk Review (JARR) cards intended to identify potential hazards and to help workers address risks before commencing work (for example: Exhibit 2, Tab 24); (c) Aecon issued notices to trade contractors of additional safety practices to be implemented to address specific incidents (for example: Exhibit 2, Tab 22); (d) Aecon chaired project start-up meetings with the trade contractors (for example: Exhibit 5, Tabs 2A-2C); and (e) Aecon conducted regular trade coordination meetings (for example: Exhibit 5, Tabs 3H-3X).

[58] The contracts in place for this project clearly establish that Aecon, as construction manager, occupied a role that gave it on-site control and authority over all other persons and trade contractors. The testimonies of Aecon's employees, Andrew Merrick, Patrick Boudreau, Newton Matheson and Justin Matheson confirm Aecon's supervisory capacity on the project and the

responsibilities for construction coordination and overall occupational health and safety.

[59] The evidence available when examined through the lens of the decided cases convinces me beyond a reasonable doubt that Aecon, as construction manager, was a constructor on the project. I can find little, if any, factors in this case which would cause me to find differently from the decision in **Reid and Deleye**, in which a construction manager was held to be a constructor under Ontario legislation.

2. What responsibility did Aecon have to ensure the swing stage or its components were properly disassembled, secured or stored?

[60] As the construction manager with responsibility for health and safety practices on the project, for facilitating requests among trade contractors, and for seeing that tasks were performed as scheduled, Aecon had the ultimate responsibility to ensure the swing stage or its components were properly disassembled, secured, or stored.

[61] As set out previously under the trade contracts, trade contractors were required to communicate any requests of other trade contractors through Aecon as construction manager. This arrangement was implemented on the project. The need to adhere to this protocol was emphasized in McCarthy's job orientation

given by Aecon. It is the reason that Paul Fancy from McCarthy's approached Aecon's representatives Newton Matheson, Site Superintendent, and Justin Matheson, Assistant Site Superintendent, a day or two in advance with the request to have a couple of outriggers on roofs moved, including, and most importantly to this case, the outrigger on the penthouse roof where McCarthy's was expected to lay roofing material on Saturday, September 7, 2013. The outrigger was under the control and responsibility of Flynn.

[62] The evidence received from the various employees of the trade contractors and Aecon, also, indicated that it was understood on construction projects that one contractor does not interfere with or use the equipment of another contractor. If equipment needs to be moved, the contractor responsible for the equipment should be asked to move it. If a contractor wants to use another contractor's equipment, prior permission must be sought. On this project, the Flynn outrigger needed to be moved so McCarthy's could lay roofing material on the penthouse roof. It was, therefore, necessary that Flynn be asked to get the task done.

[63] The outrigger as described in the testimonies received was an essential component of the swing stage assembly. It was one of two such beams from which the swing stage would be suspended using wire cable. Its proper assembly required joining two or three pieces of metal pipe tube using pins. The beam

would be fit into a bracket, saddle or cradle sitting on the roof and counter-balancing weights would be placed on the saddle assembly. Two safety cables would then be run through the weights to a tie-off point on the roof where they would be secured. The outrigger would extend over the roof edge approximately 16 inches (from the testimonies of Charles Cox and Robert MacKinnon).

[64] Once Aecon received the request from McCarthy's to have this particular outrigger moved, it became Aecon's responsibility to see that the task was performed. It was a requirement of the schedule of work to be completed on the project that the penthouse roof be laid. Aecon was coordinating the schedule. The roof material could not be laid with the outrigger in the way. Aecon was contractually obligated and legislatively required to see that the task be carried out in a way that would ensure the health and safety of persons at the workplace; in this case, the project. Consequently, Aecon would routinely check to see that work was done safely, in the right place and manner, and within the proper timeframe (Newton Matheson).

[65] Aecon's Red Book required that temporary structures like swing stages be constructed, installed, and used in such a way to prevent injury. This necessitated that counter weights for outriggers be securely fastened and that outrigger beams and swing stage cables be properly anchored (Exhibit 4, section 24, page 16). This

was part of Aecon's Safe Work Practices established January 1, 2013. The policy statement read:

Safe work practices cover typical daily Activities in the workplace; such as use of tools, equipment, and vehicles and work methodology. Aecon recognizes the importance of safe work practices in all our workplaces. It is imperative that all workers adhere to these practices to maintain a safe working environment. (Exhibit 4, section 24, page 1)

[66] Under the heading 'Safe Work Practices' was this statement:

Project management and direct supervision play a major role to ensure that the internal responsibility system of informing, directing, and maintaining compliance to health & safety standards is always achieved in the workplace. (Exhibit 4, section 24, page 1)

[67] My colleague Judge Tax in **Eagles** at paragraph 93, had this to say about the *Act* and the Internal Responsibility System:

[93] The foundation of the NS OHS Act is the Internal Responsibility System which is based upon the principle that employers, contractors, and employees and self-employed persons at a workplace and the owner of a workplace, supplier of goods share the responsibility for the health and safety of persons at the workplace: See subsection 2(a). Another major principle of the Internal Responsibility System is that it assumes that the primary responsibility for creating and maintaining a safe and healthy workplace belongs to all of the parties listed in subsection 2(a), to the extent of each party's authority and ability to do so.

[68] I note that there is no specific reference to 'constructors' in the immediately preceding quote, but constructors are in the *Act* included in the general definition of 'employers', which was mentioned.

[69] Judge Tax continued at paragraph 94 in **Eagles**:

[94] These major principles which form the basis of the philosophy of the OHSA are also highlighted in subsection 23(2) of the *Act*. That section states that where the *Act* or Regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement. The element of control was noted as being one of the cornerstones of the policy framework of “public welfare” legislation in *Sault Ste. Marie, supra*, by Mr. Justice Dickson at page 1322:

“The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control.”

[70] The internal responsibility system is structured on the principle of collective responsibility for health and safety of all persons at a workplace. It is not limited to merely the assembly and use of equipment and material, but, logically includes the proper disassembly, securing and storage of equipment and materials as machinery and supplies are moved about a workplace. Such activities would be common during construction and were frequent on this particular project (as gleaned from the testimonies of Derek Kelsie, James Traynor, Charles Cox, Robert MacKinnon, Paul Fancy, Patrick Boudreau, Justin Matheson, Newton Matheson, and Andrew Merrick).

[71] Both on September 5, 2013 and September 6, 2013 Aecon received the request from McCarthy's to have the outrigger on the penthouse roof moved. This was the protocol under contract McCarthy's was obliged to follow and was confirmed through Aecon's job orientation with McCarthy's. Aecon by contract was required to coordinate this construction activity. Aecon superintendents, Newton Matheson and Justin Matheson, made McCarthy's request known to Flynn through Robert MacKinnon and Paul Barton. The outrigger had to be disassembled and moved to allow McCarthy's unobstructed access to the entire penthouse roof. That had to be done properly and safely. In its role as construction manager, Aecon was obligated to oversee that this was performed properly and within the timeframe required. In my view, Aecon had the greatest degree of control as contemplated in Section 23(2) of the *Act*. Aecon, as the party responsible for ensuring the trade contractors' activities were coordinated, was ultimately responsible to see that this task be completed in compliance with health and safety standards for the workplace and for the specific equipment involved.

3. Was the swing stage or its components disassembled, secured or stored?

[72] The outrigger, a component of the swing stage, was improperly disassembled, not safely secured as required, and its pieces were not properly stored.

[73] Paul Fancy described how he dismantled the outrigger that was preventing McCarthy's from performing its scheduled work on September 7, 2013. He unplugged the power cord to the motor on the swing stage. He disconnected the tie-back cable and removed the counter weights from the cradle. Those weights were placed on the parapet wall on the perimeter of the penthouse roof. The cradle was, also, placed on the parapet. The outrigger beam was laid on the parapet while the roofing work was carried out. Upon completion, Paul Fancy returned the outrigger beam to its prior location on the penthouse roof. He did not reassemble the outrigger set-up with the cradle, weights, and tie-back cable.

[74] Aecon in its submission questions whether this amounts to the swing stage or its components being 'disassembled, secured or stored'. I have been provided dictionary definitions to suggest that what was done to the outrigger by Mr. Fancy does not meet what is meant by those three words; 'disassembled', 'secured', or 'stored'. Aecon argues that the Crown has failed to provide any evidence that the swing stage or its components were disassembled, secured, or stored. In my view, this is framing the inquiry in an incorrect fashion.

[75] I am required to interpret the words used in setting out statutorily imposed duties in their proper grammatical structure and ordinary meaning having regard to the intent of the legislation; see *Watters v. Glace Bay (Town) et al*, (1987) 77

N.S.R. (2d) 148 (C.A.) as referenced in *R. v. Nova Scotia (Department of Supply and Services)* [1997] N.S.J. No. 496 (P.C).

[76] The Crown has alleged that Aecon “failed to ensure” the particular piece of equipment was “disassembled, secured, or stored properly”. In my view, the Crown need only provide evidence that the swing stage or some component of it was not disassembled properly, not secured properly, or not stored properly. The above evidence from Mr. Fancy clearly provides proof that a component of the swing stage, an outrigger, was taken apart, moved to a temporary location and returned to its previous spot without putting the pieces back together as required for safe and proper use.

[77] The photographs found in Exhibit 2, Tab 4, nos. 22 and 23, depict counter weights resting along the parapet wall, loose rope in one corner draping from the parapet wall onto the roof, and pieces of the cradle for the outrigger placed on the parapet wall. These items were placed there by Mr. Fancy according to his testimony. The weights and pieces of the cradle were removed from the outrigger assembly by him when he dismantled it for the purpose of getting it out of the way so the roofing material could be applied. But Mr. Fancy did not first remove from the outrigger the cable that connected to the motor on the swing stage. Mr. Cox, trained in the proper method of assembly and disassembly of swing stages and

their components, said the first step to properly disassemble a swing stage outrigger is to remove that cable. This in and of itself is sufficient evidence to prove the outrigger was not properly disassembled.

[78] I disagree with Aecon's characterization of Mr. Fancy's actions as merely 'moving' the outrigger. Taking the individual weight plates off the outrigger, removing the outrigger from its cradle, and moving the parts of the cradle to the parapet wall amounts to more than moving the outrigger. Mr. Fancy dismantled the outrigger, or, in other words, disassembled the outrigger. He took it apart; not completely, but, nevertheless, he did break it down into pieces. That equates to a component of the swing stage being 'disassembled', an ordinary meaning of the word.

[79] Mr. Fancy, also, testified that when he placed the outrigger back on the penthouse roof without putting it in the cradle and without putting the counter weights back in place, he did not run the tie-back cable for the outrigger to an anchor point on the roof. He did not properly secure the outrigger in the manner described by Mr. Cox as necessary. The evidence of these two witnesses is sufficient to prove the outrigger in question, a component of the swing stage, was not properly 'secured', as interpreted by its ordinary meaning.

[80] Furthermore, the placement of the weights and the pieces of the cradle along the parapet wall would not by any reasonable standard be acceptable for proper storage. It does not require the evidence of a person in the construction industry to establish this as an improper activity. Any reasonable person viewing photographs 22 and 23 from Exhibit 2, Tab 4 would be able to come to that conclusion. As well, it was implicit in Mr. Fancy's testimony that such equipment was put there as a temporary measure and that it was expected the items would be used in the near future to reassemble the outrigger for safe usage. Thus, those parts were by ordinary or common definition 'stored', but not properly.

4. Did Aecon fail to take every precaution reasonable to ensure the health and safety of a person at a workplace?

5. Did Aecon exercise due diligence so as to be excused from liability for the alleged omission?

[81] Because this general duty 'to take every precaution reasonable' is so inextricably linked to the concept of due diligence (see **R. v. Della Valle**, 2011 NSPC 67), I am of the view that I must address both issues in the same discussion.

[82] The Crown has established beyond a reasonable doubt that Aecon did not take every precaution reasonable in the circumstances. In doing so, the Crown has negated Aecon's defence of due diligence.

[83] In this analysis, it is vitally important to recognize that the *Act* is a piece of welfare legislation; a regulatory scheme aimed at preventing harm by enforcing "minimum standards of conduct and care", in **Eagles** at paragraph 95 referring to *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 and *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. As such, I am required to interpret its provisions generously in order to achieve the purpose of the legislation, which is the protection of workers at a workplace; as stated in *Ontario (Labour) v. Quinton Steel (Wellington) Limited*, 2017 ONCA 1006 at paragraph 19 with reference to earlier decisions in *R. v. Timminco Ltd.* (2001) 54 O.R. (3d) 21 (C.A.); *R. v. The Corporation of the City of Hamilton* (2002) 58 O.R. (3d) 37 (C.A.); *R. v. Dofasco Inc.*, 2007 ONCA 769, 87 O.R. (3d) 161 (C.A.).

[84] This approach was succinctly stated by my colleague Judge Tax in **Eagles** at paragraph 98:

“As a result, I conclude that the terms of the OHSA and regulations applicable to each count are to be interpreted in their entire context and in their grammatical and ordinary sense, consistent with the scheme and object of the *Act*, as well as the intention of the

legislature. They are not to be given a narrow technical interpretation, but should be interpreted in a manner consistent with the OHSA's broad purpose."

[85] The provision under Section 15 of the *Act* that I must consider is: "Every constructor shall take every precaution that is reasonable in the circumstances to ensure (a) the health and safety of persons at or near a project."

[86] This is a general duty provision similar in nature to the duty imposed on employees under section 17 of the *Act*. Such provisions are included in the *Act* "because it is not possible to foresee every safety-related circumstance which will arise in a workplace.", Ross, J. in *Della Valle*, at paragraph 35. Workers can be tired. They can be in a hurry. They can be inexperienced. Sometimes workers can ignore workplace protocols. It would be impossible to predict when any one of these factors will present itself at a workplace, but it is probable that one will arise at some time in most workplaces. Thus, there is the need for such general duty provisions; to set minimum standards of conduct and care intended to protect workers' health and safety in the presence of their own short-comings and frailties.

[87] A failure to meet those expected minimum standards is a strict liability offence under the legislation. The Crown is required to prove the actus reus. There is no requirement on the Crown to prove a mental element to the offence; Eagles at paragraph 69. But it is open in most strict liability offences for the

defence to establish on a balance of probabilities that due diligence was exercised;

*Sault Ste. Marie.*

[88] In *Della Valle*, the court found that in the case of a general duty provision, the burden on the Crown in proving its case beyond a reasonable doubt requires the Crown to negate the availability of due diligence; paragraphs 45 – 47. ‘Due diligence’ had been expressed by the Supreme Court in **Sault Ste. Marie** in equivalent terms as ‘without negligence’ and ‘took all reasonable care’. In *Della Valle*, Judge Ross equated ‘every reasonable precaution’ to ‘all reasonable steps’. In my view, ‘all reasonable care’, ‘all reasonable steps’, and ‘all reasonable measures’ mean the same. Therefore, the way in which I have conducted my assessment of this matter was to examine what conduct led to the hazard and to determine what, if any, precautions available at that time could have been implemented to address the hazard. I do not look back in hindsight with the clarity of such knowledge to say what should have been done. I make my observations in light of the practices, knowledge, and procedures available on the project at that time. That allows me to determine whether in all the circumstances the Crown has established that Aecon failed to take all precautions reasonable to avoid the hazard that existed. If the Crown cannot negate that Aecon exercised all due care, then the Crown will not have proven the allegation before me.

[89] Aecon, as construction manager, maintained a construction schedule in the site trailer. This kept track of the sequence and timing of specific jobs to further the construction project. Andrew Merrick was primarily responsible for this project schedule. (From the testimonies of Patrick Boudreau, Justin Matheson, Andrew Merrick, and Newton Matheson)

[90] Aecon monitored the tasks on which each trade contractor was working, partly to keep trade contractors from interfering with each other's work activities, but mainly to coordinate the flow of construction and to make certain the work was being done in the right place and in the proper manner. (From the testimonies of Patrick Boudreau, Newton Matheson and Justin Matheson.)

[91] Aecon was the conduit through which one trade contractor would communicate requests to another trade contractor. (Trade contractor contracts at Exhibit 2, Tab 14, Tab 15, and Tab 16)

[92] Aecon, responsible for overall site safety, implemented routine safety inspections and rooftop inspections for any roof on which work was done on any given day. (From the testimonies of Patrick Boudreau, Justin Matheson, Andrew Merrick and Newton Matheson.)

[93] Aecon required all trade contractors with the input of their employees to complete JARR cards before commencing work each day and to submit them at the end of the day to Aecon. (From the testimonies of Paul Fancy, Patrick Boudreau, Justin Matheson, and Newton Matheson.)

[94] It was known by Aecon that Flynn and Economy would use each other's swing stages from time to time. (From the testimonies of Newton Matheson and Derek Kelsey.)

[95] The testimony I received established that McCarthy's had requested that Flynn move the outrigger in question to permit McCarthy's to do its work on September 7, 2013. That request went through Aecon, specifically Justin Matheson and Newton Matheson, and was conveyed to Flynn. Although Mr. Newton Matheson recalled that he told Patrick Boudreau that McCarthy's was going to be on site on September 7, 2013 to do the penthouse roof and that Flynn would be there first thing in the morning to take down the outrigger, Mr. Boudreau testified that he was not aware of the task involving the removal of the outrigger. When he attended the project on September 7, 2013 to fulfill his role as site supervisor for that day he did not give any consideration or attention to the safe handling of the outrigger. It was not on his radar, so to speak.

[96] Mr. Boudreau's ignorance of the anticipated tasks on the project that date impacted his ability to supervise the site. He did not check with Mr. Fancy from McCarthy's whether Flynn had moved the outrigger as requested. He made no observation of the outrigger when he attended the roof for the purpose of making certain McCarthy's had a hot work permit. By logical inference, Mr. Boudreau did not confirm with Flynn that its employees moved that outrigger as was requested. Given his complete lack of attention to the outrigger, I am satisfied that Mr. Boudreau was not informed by Newton Matheson about the request to have Flynn attend to remove it from the penthouse roof. Mr. Boudreau was very clear in his evidence, that, prior to the injury incident happening, he knew nothing about the need to have the penthouse outrigger moved by Flynn on September 7, 2013. It was not communicated to him in advance of him attending the project to supervise the site on September 7, 2013.

[97] This, in my view, is the critical point in the assessment of whether Aecon met its statutory obligations. It appears from the testimony of Mr. Boudreau, that, although he was aware McCarthy's would be doing roofing work on the penthouse roof and would require a hot work permit, he was not cognizant of the need to ensure the outrigger on that roof was properly disassembled, stored or secured. It was a major component of swing stage apparatus and its improper handling could

create a significant hazard at the workplace. This was known at the project. That is why only persons trained in the proper assembly and disassembly were expected to move outriggers. Mr. Boudreau was not aware this particular outrigger needed to be or was moved on September 7, 2013. This provides some explanation for Mr. Boudreau at the end of the day deciding, apparently, that it was not necessary for him to inspect the roof where McCarthy's had been working.

[98] The request by McCarthy's to Aecon to have this outrigger moved was confirmation of McCarthy's knowledge and awareness that: 1) one trade contractor has no authority, without seeking permission, to move the equipment of another trade contractor, 2) all requests to move another trade contractor's equipment had to go through Aecon, and 3) it required special training to assemble and disassemble swing stages and their components. Safe work practices necessitated having qualified persons move the outrigger.

[99] Aecon recognized the need to identify safe work practices for swing stages in its Red Book at Section 24, page 16 of 124, exhibit 4. This is an indication of the care and attempt by Aecon to ensure safe work practices and supervision at work places. The materials contained in its Red Book, exhibits 3 and 4, is evidence of a comprehensive effort by Aecon to meet and exceed industry standards for corporate health and safety programs. The testimony of Mr.

Archambault, a senior vice-president and Chief Safety Officer for the Aecon Group, clearly set out the on-going efforts by Aecon to be aware of and to incorporate best practices from around the world into its own operations. The fact that Aecon's safety department is separate from its operations division and that Mr. Archambault reports directly to the Chief Executive Officer for the company is further evidence of the importance that Aecon placed on workers' health and safety.

[100] The focus on work place health and safety by Aecon was clearly evident in its response to an earlier incident of loose material blowing off the building under construction by implementing roof top inspections for loose materials, tools or equipment that could pose a hazard of blowing off or falling from height and by bringing that issue to the attention of the individual trade contractors. Also, on more than one occasion Aecon supervisors on site ordered employees for trade contractors off the site for failure to follow safe workplace practices.

[101] Aecon implemented the practice of having trade contractors and their employees complete JARR cards each day they worked on the project. These would be submitted to Aecon at the end of each workday. Aecon did not review them daily. Instead, Aecon randomly surveyed cards to check for compliance with the practice of daily job risk assessment.

[102] The injury sustained by Mr. Conrod on September 9, 2013 was avoidable. It should never have happened. It occurred because several people did not do what they were instructed to do or were expected to do beginning on September 6, 2013, continuing on September 7, 2013, and into September 9, 2013. At any point along the way, if one person had done what was necessary, that outrigger would not have fallen from the roof. Mr. Conrod probably would still be working. Aecon would not be defending itself against this allegation.

[103] After hearing all the testimony in this matter and considering the photographic and documentary evidence tendered, I am of the view that each of the following was a failure to meet industry standards of conduct, company policies or practices, or legislated responsibilities:

- Flynn did not remove the outrigger from the penthouse roof September 6, 2013 when requested to do so by Aecon on behalf of McCarthy's;
- Flynn did not attend the penthouse roof the morning of September 7, 2013 to move the outrigger as requested and promised, or at least to ensure that it was removed properly;
- Aecon's site superintendent, Newton Matheson, on September 6, 2013 did not communicate in a clear and effective manner to Patrick Boudreau the anticipated disassembly of the penthouse outrigger by Flynn for the morning of September 7, 2013, because Patrick Boudreau on September 7, 2013 made no inquiry about that equipment;

- Paul Fancy on September 7, 2013 moved another trade contractor's equipment without permission and without training or knowledge of how to do so in a safe and secure manner;
- Paul Fancy returned the outrigger to its original position on the penthouse roof September 7, 2013 after completion of the roofing job without properly securing it to the roof and without replacing counterbalancing weights, but leaving a cable running from the outrigger to the swing stage motor below, thus creating a real and significant hazard to any workers that could find themselves below that outrigger at the workplace;
- Paul Fancy did not inform Aecon's on-site supervisor, Patrick Boudreau, on September 7, 2013 when leaving the project that the penthouse outrigger was not properly secured and posed a significant hazard at the workplace;
- Aecon's on-site supervisor for September 7, 2013, Patrick Boudreau, did not conduct an end-of-day inspection or survey of the penthouse roof despite knowing that McCarthy's had been working on that roof and despite knowing Aecon's protocol to conduct such inspections; and
- Economy employees on September 9, 2013 did not inspect for safety the equipment they were about to use before connecting power to the apparatus.

[104] Had any one of these persons met their obligations, the injury to Mr. Conrod would not have happened. Of that, I am certain.

[105] If Flynn had attended to the task of removing that outrigger so McCarthy's could execute its roofing work, Mr. Fancy would not have chosen to move it himself improperly and without care to ensure the safety of all others at the workplace.

[106] If Mr. Fancy had exercised patience and spoke to Mr. Boudreau about the outrigger not having been moved out of the way as requested, Mr. Boudreau could have spoken to Flynn personnel and had the task attended to properly then.

[107] If the means of communication between Mr. N. Matheson and Mr. Boudreau had been perhaps more structured, clear and detailed, Mr. Boudreau would have had the disassembly of the penthouse outrigger as a task he was to monitor September 7, 2013; it would have been on his radar and I am satisfied he would have attended to it.

[108] If Mr. Boudreau on September 7, 2013 had conducted the rooftop inspections at the end of day for any and all roofs on which work had been performed that day, he would have discovered the penthouse outrigger (with the cable running to the swing stage motor) not anchored, not in its cradle, and without any counterbalancing weights.

[109] If the employees of Economy had followed the proper procedure for inspecting the safety of the swing stage set-up before enabling power to the motor, the hazard present would have been discovered before any downward force on the outrigger would have been permitted.

[110] As I have said on many occasions during the course of proceedings in this matter, Aecon has not been accused of doing anything to create the circumstances that led to Mr. Conrod's injury. Aecon did nothing to cause Mr. Conrod's injuries. Aecon's culpability is in its failure to take the reasonable steps available to it to prevent, discover, and/or mitigate an unsafe condition at the workplace. It does not escape responsibility by arguing that it was not its equipment that was handled improperly or that such apparatus was not under its control. The entire project site was the responsibility of and under the control of Aecon as a constructor on site. The oversight of health and safety practices on the project was one of the key responsibilities in Aecon's contract with Dal.

[111] This situation is unlike the matter that was before Judge Stroud in *R. v. Nova Scotia (Department of Supply and Services)* [1997] N.S.J. No. 496. Aecon did not contract with the other trade contractors to do the work for Aecon and could not in the circumstances merely rely on the professionalism of McCarthy's, Flynn, or Economy. Aecon was specifically contracted by Dal to monitor the project for proper completion of work and to oversee workplace health and safety of all trade contractors and their employees. The comparison to *Nova Scotia (Department of Supply and Services)* might be appropriate if Dal as a constructor had been charged in this matter.

[112] Aecon had protocols, practices, and procedures in place that should have protected the workers on site at the workplace from their own shortcomings and frailties. Unfortunately, those were not adhered to on September 6, 2013 and September 7, 2013. It would have been a reasonable precaution in relation to the disassembly, securing and storing of the penthouse outrigger for Aecon's supervisory personnel scheduled to be on site September 7, 2013 to be clearly made aware of the need to have the penthouse outrigger disassembled and the need to ensure that only properly trained persons attended to the task of removing that outrigger. That was not done.

[113] Additionally, it would have been a reasonable precaution more generally, but certainly in relation to the disassembly, securing and storing of swing stages and their components, for Aecon on-site supervisory personnel to have conducted at the end of day September 7, 2013 an inspection of the penthouse roof where McCarthy's had been working earlier in the day. It was part of the protocol Aecon had implemented on the project following earlier incidents of materials blowing off roofs. Such an inspection was not done.

[114] These were reasonable precautions in the circumstances present on that project that could have been and should have been taken to ensure the health and safety of persons at or near the project. Had they been performed, the very real

and obvious significant hazard created and left behind by Mr. Fancy would most certainly have been discovered and recognized by Mr. Boudreau.

[115] To be clear, the circumstances present on that project I find to be particularly relevant in this case are:

- The multi-level structure under construction,
- The use of swing stages by more than one trade contractor,
- The sharing of those swing stages,
- The requirement that swing stages be assembled and disassembled at various locations and times to allow specific tasks to be performed,
- Aecon recognizing the specific requirements for the proper assembly and use of swing stages,
- Previous incidents of materials blowing off roofs following work being carried out on those roofs,
- Specific requests from McCarthy's to have the penthouse outrigger removed to allow roofing work to be done September 7, 2013,
- The contractual requirement for all trade contractors that all such requests were to go through Aecon,
- The site orientation all trade contractors went through with Aecon that emphasized that request protocol trade contractors were expected to follow,
- Aecon having previously recognized the need to conduct rooftop inspections, and
- Aecon being contractually responsible for overseeing health and safety at the workplace.

[116] While Aecon demonstrated diligence in its creation of safe work practices, procedures, and protocols, those were not followed by Aecon supervisory personnel on September 6, 2013 and September 7, 2013. Aecon's culpability rests with the failure of those persons to do what could have and should have been done to ensure the penthouse outrigger was properly disassembled, secured, or stored. That resulted in a real and significant hazard to the health and safety of persons at or near a project not being discovered despite that hazard being obvious to anyone attending the penthouse roof in the afternoon of September 7, 2013.

[117] As a constructor, Aecon was both contractually and legislatively obliged to ensure the reasonable measures necessary to ensure the health and safety of all persons on the project were followed so unsafe work practices and or unsafe conditions and equipment would be identified and addressed before injury could occur. That was not done in this instance. I am satisfied that the Crown has established beyond a reasonable doubt that Aecon did not meet its obligation under Section 15(a) of the *Act*.

[118] Aecon should have, and easily could have, had a daily log or chart (similar to a patient chart in a hospital) for the project in which all Aecon supervisory personnel, not just Mr. Merrick, could have written down the specific tasks requiring follow-up the next working day. In that way, each supervisor attending

the workplace would have had a means of knowing precisely what tasks required attention each and every day (just like nurses arriving on shift can read a patient chart and know what medication or treatment schedule has been ordered for a particular patient). If such had been in place on the Lemarchant Street project, Mr. Boudreau would have known to address the proper and safe disassembly, securing and storing of the penthouse outrigger that fell on Mr. Conrod September 9, 2013.

6. Was there evidence lost by the Crown? Yes.

[119] The issue of lost evidence was raised early on in these proceedings.

Following a review of decided cases, including *R. v. La* [1997] S.C.R. No. 30 and *R. v. F.C.B.*, [2000] N.S.J. No. 53 (C.A.), counsel were advised that this issue would be addressed after all the evidence had been received. It would only be at that time that I would be in a position to determine what, if any, evidence was lost and what, if any, impact such had on Aecon's ability to defend itself against this allegation.

[120] At the outset of this trial, Crown counsel conceded that nine witness statements taken by Cst. Cole with Halifax Regional Police on the morning of September 9, 2013 immediately following the injury to Mr. Conrod were lost and have not been located. Cst. Cole had placed those statements on his shift

supervisor's desk for proper keeping. The constable had no further dealings with those statements until a request was made by defence counsel for disclosure.

Despite efforts to find them, Halifax Regional Police were unable to discover the whereabouts of those documents.

[121] I am, also, satisfied on a balance of probabilities that Mr. Patrick Boudreau gave an audio statement to Mr. Chant of Labour on September 9, 2013 in the Aecon site trailer and that statement has been lost. As I observed in my decision November 14, 2017 on the request for stay due to unreasonable delay, Mr. Boudreau has specific recollection of him attending the project site on September 9, 2013 after learning about the injury incident. He had not otherwise been scheduled to work that day. Mr. Boudreau recalled speaking with Mr. Chant and an audio recording device being present. The injury incident at the project was an extraordinary event for Mr. Boudreau. I am satisfied such circumstances would make it a memorable experience for Mr. Boudreau and in all probability not one for which he would create a false memory.

[122] Mr. Chant denied he took such a statement. He had no note of it and he did not have it to pass on to Mr. Chase. What he did have was a statement he took on September 8, 2013 from Mr. Chet Boudreau in relation to a matter completely distinct from this incident (Exhibit 1, Tab 7).

[123] I find it more likely in the circumstances of this investigation that Mr. Chant could have misplaced one of two audio recordings for persons with the same surname than Mr. Patrick Boudreau would have created a false memory. I accept that Mr. Patrick Boudreau did indeed give an audio statement to Mr. Chant September 9, 2013 and that has been lost without any explanation.

[124] There has been evidence adduced that suggests photographs taken by Elaine Marshall of Labour on September 9, 2013 have been lost, as well. This is based on the testimony of Mr. Teal with Labour, who said that he was with Ms. Marshall when she took multiple photographs later in the morning of September 9, 2013. Ms. Marshall testified that she took only five photographs. She knows that because she prepared an index for her photos and provided that to Mr. Chant. Her photos were disclosed. She says she did not take the additional photos Mr. Teal suggests were taken. Mr. Teal took meticulous notes and was adamant Ms. Marshall did take the additional photographs. He recalled pointing out items to be photographed.

[125] Both were truthful witnesses. But I am inclined to find that it was more likely Ms. Marshall would have downloaded all images from her camera to her computer than selectively choosing only the five that were disclosed and forgetting about the rest. I find it more likely that Mr. Teal was confused about who was

taking images later in the morning. Mr. Chant took photos later in the morning while accompanied by Ms. Marshall and Mr. Teal. Those photographs were introduced as Tab 4 in Exhibit 2. While Mr. Teal might recall pointing out specific scenes to be photographed, it appears more probable that Mr. Chant was the photographer, not Ms. Marshall. I have not been persuaded on a balance of probabilities that there were any photographs lost in this investigation/prosecution.

[126] During the course of testimony in this matter, it was discovered that Mr. Eakin of Eastin kept notes of his discussions and meetings concerning the project. Those were not sought by Labour and were not disclosed to Aecon or Crown counsel. Also, it was learned that Mr. McKinnon of Flynn maintained a log book for tasks requiring attention. That was not sought by Labour or disclosed. The materials kept by these two witnesses would appear to have been personal records in their individual possession. They were not documents the Crown knew about or should have known about. The Crown can only disclose what is in its possession. There is no requirement for the Crown to seek out, take control of, and preserve potential evidence it does not know exists or, if it did exist, did not acquire. Justice Rosinski so found in, *R. v. Howe*, 2016 NSSC 151.

[127] I do not find that Mr. Eakin's notes or Mr. McKinnon's log amount to lost evidence as that is considered in decided cases.

7. Was the evidence lost due to unacceptable negligence on the part of the Crown so as to amount to a violation of the defendant's fair trial rights protected under Section 7 of the Charter? Yes.

[128] Every time evidence is lost, there is the risk that it could affect the fair trial rights of the accused. That is not, however, automatically the case. The Crown has the opportunity to explain the circumstances of how the evidence has been lost. If it was not through negligence on the part of the Crown, then the defendant would have to establish actual prejudice to its ability to make full answer and defence (*La*). If, however, the loss was due to unacceptable negligence, then the Crown would have failed to preserve and disclose evidence resulting in a breach of the defendant's right to a fair trial (*La* at paragraph 23).

[129] In this case, the Crown has acknowledged that the nine police statements taken September 9, 2013 by Cst. Cole have been lost due to unacceptable negligence. This amounts to a breach of Aecon's fair trial rights protected by Section 7 of the *Charter*.

[130] The loss of Patrick Boudreau's statement given to Mr. Chant was not explained. In fact, the Crown maintained that it never existed despite Mr. Boudreau's clear memory for the circumstances in which it was given and despite

the finding of Judge Derrick (as she was then) in *McCarthy's*. As now two courts have found, it probably did exist. Such evidence once received by the investigator, was required to be preserved and made available for disclosure to the defence as per *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The loss of that audio recording by the investigator without explanation amounts to unacceptable negligence and has resulted in a breach of Aecon's Section 7 *Charter* rights.

8. Should the case be stayed pursuant to Section 24(2) of the *Charter*?

No.

[131] As stated by Justice L'Heureux-Dube in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paragraph 82:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[132] This principle has been reinforced by the Supreme Court of Canada in *La* and by our Court of Appeal in *F.C.B.*

[133] Before I can entertain a decision to stay this matter, I am required to assess the actual prejudice suffered by Aecon in its efforts to defend itself against the Crown's allegations. I must determine the context in which the lost evidence

relates to the theory of the accused and its ability to make full answer and defence (*F.C.B.*). This can only be accomplished by examining the evidence that was heard and determining what impact, if any, the lost evidence had in the presentation of the case.

[134] In *R. v. Bradford*, [2001] O.J. No. 107, the Ontario Court of Appeal observed at paragraph 8:

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.

[135] This approach was applied by Derrick, J. in *McCarthy's* and more recently by the Alberta Court of Appeal in *R. v. Girou*, 2017 ABCA 426 (CanLII).

[136] With this in mind, I turn to the impact the lost police statements had on Aecon's ability to make full answer and defence. In my assessment there was no impact, whatsoever. The crucial evidence in this case and the evidence that addressed the key issues of whether Aecon was a constructor and whether Aecon took all precautions reasonable in the circumstances was not what happened the

morning of September 9, 2013. What was important to those issues was what had transpired in the days leading up to injury incident.

[137] On September 9, 2013, the witnesses on the scene at the time of Mr. Conrod's injury were asked to give three statements. The first was to Cst. Cole. When Aecon learned that morning that Cst. Cole would not provide copies of the police obtained statements to Aecon, Mr. Merrick gave Aecon statement forms to the same witnesses and requested that those individuals provide the same details to Aecon. The third series of statements were obtained by Labour inspectors, Ms. Marshall and Mr. Teal.

[138] The Aecon statements were in my view contemporaneous to the police statements. Aecon received statements from only seven of the nine witnesses. Those Aecon statements filed with the Court in Exhibit #1 at Tabs 10A-G were brief eyewitness narrative accounts of what people saw, heard, or were doing around the time of Mr. Conrod's injury occurring. The exception was the statement of Mr. Paul Fancy. He provided a brief narrative account of what his involvement had been in the days previous with the outrigger that fell on Mr. Conrod.

[139] According to Cst. Cole's Occurrence Report (filed in Exhibit #1 at Tab 4), he arrived at the project at 7:37 a.m. and turned over the scene to Ms. Marshall with Labour at 9:00a.m. and left to check on Mr. Conrod at the hospital. But he had briefed Ms. Marshall at 8:40 a.m. about the accident and the witnesses available to provide statements. Between his arrival and briefing Ms. Marshall, Cst. Cole had gone to the location where Mr. Conrod was injured and was being attended to by paramedics and firefighters, spoke with witnesses, had the witnesses attend Aecon's site trailer after Mr. Conrod was removed from the scene, and had the nine witnesses provide written statements.

[140] Given this timeframe and the brevity of the seven contemporaneous statements provided to Aecon, I believe it is reasonable to infer that the police statements now lost were as brief and similar in detail. They were, with the exception of Paul Fancy's statement, accounts of what happened that morning at the workplace.

[141] The statements obtained by Labour later in the morning of September 9, 2013, were in the style of question and answer. The details provided were far greater than what was contained in the Aecon statements. The nine witnesses interviewed by Labour were the same as those who had given police statements. It is reasonable to infer that the Labour statements were far more useful in gaining a

full account of what each person could say than were the police statements. The Labour statements in all probability provided a much better foundation for cross-examination.

[142] I would note, however, that the mechanism of the injury incident was never in dispute. Furthermore, witness credibility was never a real concern for me during the course of this trial.

[143] The bulk of those witness statements did nothing to address the issues arising from the allegations against which Aecon has been called upon to defend itself. I do not find that Aecon has suffered any real prejudice in its ability to fully defend itself with the loss of the nine police statements. Therefore, despite the loss of those nine statements amounting to a breach of Aecon's Section 7 *Charter* right, this is not a circumstance that makes this one of the clearest of cases in which a judicial stay would be justified.

[144] The loss of Mr. Boudreau's audio statement obtained by Mr. Chant September 9, 2013 would seem, at first blush, to be more difficult to assess for its impact on Aecon's fair trial rights. Mr. Boudreau was a key witness in this prosecution. He was Aecon's project coordinator and for September 7, 2013, was the acting on-site Aecon supervisor for the workplace. Mr. Boudreau's knowledge

of the project and his recollection for the duties tasked to him and carried out by him for September 7, 2013 were crucial to this case.

[145] There is no question that his memory for what he did or did not do around September 7, 2013 would have been clearer and more precise on September 9, 2013 than when Mr. Chase interviewed him May 30, 2014 and when he testified in this trial in January 2017. That was evident in cross-examination in this case when Mr. Boudreau could not recall whether Mr. Fancy had said anything about the penthouse outrigger to Mr. Boudreau when he had attended the penthouse roof to issue the hot work permit to McCarthy's on September 7, 2013. Mr. Boudreau allowed there might have been some mention by Mr. Fancy of he having to deal with other people's equipment, but Mr. Boudreau was not certain. If there were such comments, Mr. Boudreau attributed it to normal workplace grumbling.

[146] In that same exchange, however, Mr. Boudreau was positive that he had not been made aware beforehand that the penthouse outrigger needed to be disassembled, and/or that Flynn was expected to attend to that task before McCarthy's started to work on September 7, 2013. That was, also, what he had told Mr. Chase when interviewed on May 30, 2014. Mr. Boudreau was adamant that he only learned about the request to have Flynn remove that outrigger after the incident on September 9, 2013.

[147] Mr. Paul Fancy testified that he did not mention anything to Mr. Boudreau about the outrigger. There was no conversation about that piece of equipment at all, not while Mr. Boudreau was on the ladder in the morning or when McCarthy's was packing up in the early afternoon of September 7, 2013 after completing their task for that day.

[148] According to Mr. Fancy's testimony, the outrigger when dismantled by him was placed along the parapet wall in front of where the ladder to access the penthouse was tied off. When Mr. Boudreau was on the ladder talking with Mr. Fancy September 7, 2013, the outrigger would have been directly under his nose. Yet, according to Mr. Boudreau's evidence, he took no notice of it or the component parts required for its proper assembly.

[149] These details were the most crucial to the assessment of the Crown's case that Aecon failed to take all precautions reasonable in the circumstances to ensure the health and safety of persons on the project. What could Mr. Boudreau have said to Mr. Chant on September 9, 2013 that would have altered these testimonies or could have led to a conclusion other than what I have reached? If Mr. Boudreau on September 9, 2013 in his audio statement had said he had been told about the need to have Flynn remove the penthouse outrigger for September 7, 2013, what would that have done for Aecon's defence to the allegation? He was Aecon's

representative on-site. For all intents and purposes on the project on September 7, 2013, Mr. Boudreau was Aecon. He was more than just another employee. It was his responsibility to uphold Aecon's contractual obligations with Dal to oversee the coordination of work and to ensure the health and safety of all persons on site. If he did not give his attention to the task of having Flynn's outrigger removed from the penthouse roof once informed of it, then the Crown would argue Aecon deliberately ignored its obligations. That circumstance would not in any way assist Aecon's defence of the allegation against it.

[150] In the final analysis, I fail to see how the loss of Mr. Boudreau's statement given on September 9, 2013 to Mr. Chant of Labour has resulted in any real prejudice to Aecon's ability to make full answer and defence. Although its Section 7 *Charter* protected rights were infringed, this is not one of the clearest cases that should lead to a stay of proceedings.

9. Has Aecon established the grounds necessary for the Court to award costs against the Crown? No.

[151] The Supreme Court of Canada determined in *R. v. 974649 Ontario Inc.*, 2001 SCC 81 that costs can be awarded against the Crown in provincial summary offence matters. In a case that dealt with untimely disclosure by the Crown, the

Court held that such awards are restricted to exceptional or remarkable situations.

At paragraph 87 of the decision, McLachlin C.J.C. wrote:

Neither is there any indication that the Crown will be subjected to such awards unfairly or arbitrarily. Crown counsel is not held to a standard of perfection, and cost awards will not flow from every failure to disclose in a timely fashion. Rather, the developing jurisprudence uniformly restricts such awards, at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[152] In *R. v. Taylor* [2008] N.S.J. No. 14 (NSCA) the rules for awarding costs against the Crown were said to be: a) costs could be awarded in exceptional circumstances as a Section 24(1) remedy under the *Charter* or within the inherent jurisdiction of the court, b) the *Actions* of the Crown would have to amount to oppressive or otherwise improper conduct, and c) such an award would be viewed as unusual, reserved for marked departures from the reasonable standards expected of the prosecution.

[153] In the matter before me, the Crown made full disclosure of the materials it had collected. There was some delay in the Crown responding to requests from defence for further information and there were materials the Crown could not disclose, because it did not have them (such as the lost statements addressed previously).

[154] The Crown opposed a motion for particulars. My decision was to order particulars on two counts but not on two others.

[155] Following the decision in *McCarthy's*, the Crown invited dismissal of two counts and chose to continue the prosecution of the remaining two counts.

[156] The Crown acknowledged from the outset of the trial that it was responsible for unacceptable negligence in relation to the loss of nine police statements.

[157] The Crown disputed any other claims of lost evidence. I found on a balance of probabilities that a statement given by Mr. Boudreau was lost, but I, also, found that there were no missing photographs taken by Ms. Marshall.

[158] The Crown sought to have Ms. Marshall testify via video feed from Great Britain. The defence opposed the Crown's application. I granted the Crown's request.

[159] At the conclusion of the Crown's case, Aecon sought directed verdicts. I ordered an acquittal on the count alleging Aecon failed to coordinate communication between employers and self-employed persons. There were no self-employed persons at the workplace. I did not, however, direct an acquittal on the remaining count.

[160] Aecon sought a stay for unreasonable delay and pre-charge delay. The Crown opposed those *Charter* motions. I decided in favour of the Crown.

[161] Otherwise throughout the conduct of this matter, the Crown has encouraged this court to accommodate early dates for motions and trial continuation.

[162] This has been a professionally contested matter by both Crown and defence. It has been a fine example of the adversarial process in the courts. I cannot find, however, anything in the course of these proceedings, the positions taken by the Crown, the finding of lost evidence, or the rulings that have been made against the Crown, that would allow me to determine that the Crown's conduct was oppressive or otherwise improper. The Crown's actions were well within the professional standards expected of the prosecution.

[163] I decline in the circumstances to award costs against the Crown.

[164] There being no issues with date, jurisdiction or identity, I am convinced the Crown has met its burden to prove beyond a reasonable doubt the sole count remaining before me. Aecon is found guilty.