

**Citation: *Ontario (Ministry of Labour) v. Semple Gooder Roofing Corporation*,
2015 ONCJ 183**

ONTARIO COURT OF JUSTICE

Toronto Region

In the matter of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33.

B E T W E E N:

ONTARIO (MINISTRY OF LABOUR)

Crown

-and-

SEMPLÉ GOODER ROOFING CORPORATION

Defendant

REASONS FOR JUDGMENT

Before: Her Worship Mary A. Ross Hendriks

Appearances:

Mr. S. Roy, Crown Counsel

Mr. J. Clark, Defence Counsel

Hearing Dates: March 17, 18, 24, 25, 2014 and November 17, 2014

Judgment: April 8, 2015, OCH, "C" court.

INTRODUCTION:

[1] These are my Reasons for Judgment concerning the alleged offences, constituted under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the “*POA*”), as set out in the sworn Information before the court. In this Information, three charges were laid against the defendant under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1, as amended (the “*OHS*”), resulting from an accident that occurred on December 12, 2011, at 875 Middlefield Road, Toronto, Ontario. This accident resulted in injury to Antonio Goncalves, alleged to be a worker.

[2] At the outset of this trial, Crown counsel withdrew the third count against the defendant. Crown counsel proceeded on the two remaining charges set out in the Information.

[3] The following is a synopsis of these charges, as against the defendant:

(a) On or about December 12, 2011, failing as a constructor, to ensure that the measures and procedures prescribed by s.26.1(1) of the O. Reg. 213/91, as amended, were carried out on a project located at 875 Middlefield Road, Toronto, contrary to s.23(1)(a) of the *OHS*; and

(b) On or about December 12, 2011, failing, as a constructor, to ensure that the measures and procedures prescribed by s. 26.1(2) of the O. Reg. 231/91, as amended, were carried out at a project located at 875 Middlefield Road, Toronto, contrary to s.23(1)(a) of the *OHS*.

[4] Through counsel, the defendant entered pleas of not guilty to each charge.

ISSUES:

[5] The following are the relevant issues in this matter:

(a) Was a worker in a workplace exposed to a fall of more than three metres?

(b) If the answer to (a) is yes, was the defendant acting in the capacity of a constructor?

(c) If the answer to (b) is yes, was a guardrail system in place to protect the workers?

(d) If the answer to (c) is yes, was the guardrail system in place at the time of the accident?

(e) If the answer to (d) is yes, were there any gaps in that guardrail system?

(f) If the answer to (e) is yes, was there an alternative form of fall protection in place?

(g) Has the *actus reus* of each offence been proven beyond a reasonable doubt?

(h) If the answer to (g) is yes, has the defendant established a due diligence defence?

DECISION:

[6] The defendant is guilty of both offences.

LIST OF WITNESSES:

[7] The following individuals testified at this trial:

- (a) Mr. Christopher Gazdik, Ministry of Labour (“MOL”) Inspector, on March 17, 2014;
- (b) Mr. Antonio Goncalves, injured worker, on March 17 and 18, 2014;
- (c) Mr. Adriano Dias, worker, on March 18, 2014;
- (d) Mr. Gilberto Nunes, worker and brother-in-law of Mr. Goncalves, on March 24, 2014;
- (f) Mr. Peter McGoey, Vice-President of Operations, Semple Gooder Roofing Corporation, on March 25, 2014; and
- (g) Mr. Adriano Carneiro, Sr., the crew's foreman, on March 25, 2014.

AGREED STATEMENT OF FACTS:

[8] At the commencement of the trial, the parties provided an Agreed Statement of Facts, which was read into the record, and set out herein.

[9] Semple Gooder Roofing Corporation is a corporation duly incorporated pursuant to the laws of the Province of Ontario.

[10] Semple Gooder Roofing Corporation is a “constructor” as defined under the *OHSA*.

[11] On December 12, 2011, workers employed by Semple Gooder Roofing Corporation were working at 875 Middlefield Road, Toronto, Ontario. In closing submissions, defence counsel further conceded that the workers were on the roof of the building.

[12] The workplace at 875 Middlefield Road, Toronto, is a “project” as defined by the *OHSA*.

SUMMARY OF THE EVIDENCE:

[13] During this trial, I heard the *viva voce* evidence from the above-noted witnesses. Transcripts have been prepared. My summary of this evidence follows below.

Crown Witnesses:**MOL Inspector Christopher Gazdik:**

[14] Christopher Gazdik testified that he is employed as a construction health and safety inspector with MOL, and that he has been so employed for over nine years. Prior to his employment with MOL, he had related work experience in the construction sector.

[15] He testified that on December 12, 2011, he was called by his office to attend at 875 Middlefield Road, Toronto, regarding a worker injury.

[16] He arrived at that location at approximately 10:15 a.m., and met with representatives of the Toronto Police Services (“TPS”) and a representative of the defendant.

[17] Inspector Gazdik identified a series of photographs of this location, which had been taken by a TPS officer, but were entered as exhibits by Crown counsel without any objection (Exhibits 1-A to 1-M).

[18] He testified that the TPS had secured the scene of the accident. They advised him that a worker had fallen off the roof, and had been taken to hospital.

[19] Inspector Gazdik met with Police Constable Robero, and took information from him regarding the injured worker, the witness, and the persons that Police Constable Robero had contacted. After he took over the scene from TPS, he did not issue a stop work order, but he did require that the scene be secured.

[20] He also spoke with Andy Carnero, Jr., the project manager for this location, on the telephone. When Inspector Gazdik arrived at the scene, he met with Mr. Carnero, Jr., and Peter McGoey, Vice-President, Operations. The health and safety representative, Paul De Sa, was also present.

[21] In accordance with the legislation for construction projects, he asked Mr. Carnero, Jr. what type of work was going on, and he requested a Notice of Project from him. Inspector Gazdik left behind a field visit report.

[22] Inspector Gazdik was provided with a Notice of Project (Exhibit 2), that morning, from the defendant. He measured the height of the building, from the rooftop to the ground, and it was 27 feet and seven inches.

[23] Inspector Gazdik also spoke to Andy Carnero, Sr., who was the site inspector at this location.

[24] Based on his discussions with a number of individuals, Inspector Gazdik learned that this was a “re-roofing job” (Transcript, March 17, 2014, at p. 34). Old roofing material needed to be removed, and new roofing material needed to be installed. Thus, the old roofing material was being dumped into the garbage, so that the new material could be installed.

[25] Inspector Gazdik personally attended the roof, and took some photographs on December 12, 2011. The roof was 27 feet, and 7 inches high, from the ground, a measurement taken by him on December 13, 2011. He also measured from the top of the trailer into which the worker fell, to the ground below, and it was 10 feet and 10 inches. From the bottom of the trailer to the asphalt below was 58.5 inches. Thus, he calculated that the distance from the bottom of the trailer bed to the roof edge, which was the height of the fall, would be approximately 22 feet.

[26] In the photographs, he identified a stair tower beside the building, which provided access to the roof (Exhibit 4). He also pointed out the guard rails installed on the roof's edge. Inspector Gazdik identified a tractor trailer on the ground below, which was used for dumping the old roofing material.

[27] At the location of the fall, he identified a brown plank and green tarp, on the roof.

[28] He testified that the guardrails on the roof, which he identified in the photographs, clearly showed the perimeter of the edge, a top rail, a middle rail, and a curb at the edge of the roof. Inspector Gazdik testified that that the curb would satisfy MOL's requirement for a "toe kick" or "toe board" (Transcript, March 17, 2014, at p. 40). Later in his evidence, he identified a photograph of the guardrail system (Exhibit 1I), that he said met the requirements of the regulation.

[29] Inspector Gazdik testified that he observed broken pieces of equipment on the ground, which he believed had been used by the worker at the time of the accident, and that this observation was reflected in a photograph (Exhibit 1C).

[30] Inspector Gazdik said that he had been advised that the worker had used a "buggy" to move old roofing material. When he fell off the roof, the buggy also fell off the roof, and broke when it hit the trailer. He was advised that the worker had landed on the wheels of the trailer (Transcript, March 17, 2014, at p. 42).

[31] When shown a series of photographs of the buggy, Inspector Gazdik explained that the buggy included a wheelbarrow portion. In his evidence, he described it as "almost like a motorized wheelbarrow" (Transcript, March 17, 2014, at p. 45). He said that a worker would "fill it with garbage, it moves along and then you release a handle and the basket portion or bucket portion lifts to dump material." (Transcript, March 17, 2014, at p. 45). He believed that the buggy belonged to the defendant, since it was "labeled that way" (Exhibit 1F), (Transcript, March 17, 2014, at p. 46).

[32] When he was on the roof, he observed another buggy with garbage in it, about 10 feet away from the location where the garbage chute would be. He also observed nearby a "temporary fall protection anchor system" (Transcript, March 17, 2014, at p. 47). He also identified a photograph of the two vertical posts (Exhibit 1G), that formed the sides of the ramp (Exhibit 1H), leading to the brown plywood wood and blue tarp, above the garbage trailer below (Exhibit 1I). Inspector Gazdik confirmed that this photograph (Exhibit 1I), which depicted a guardrail system, met the requirements of the regulation.

[33] He testified that the temporary anchor that he saw on the roof could be used by a worker to tie him or herself off when they have to be exposed to a fall. A photograph of it was entered as Exhibit 1K. He explained that it is a "portable mechanism" that a worker "can tie to so that they can perform work at

an edge of a roof without having guardrails there. You can remove the guardrails or don't have the guardrails there and you can tie off to this temporary anchor and then if you were to trip and stumble it would prevent you from falling over the edge of the roof" (Transcript, March 17, 2014, at p. 62).

[34] Inspector Gazdik testified that he would classify the temporary anchor system as a travel restraint. He elaborated further on its use, stating, "The idea is that once you're connected with your harness, your safety belt, your lanyard and your rope back - back to this piece of equipment..." (Transcript, March 17, 2014, at p. 62). The anchor system should have been connected to the orange temporary anchor cart on the roof (Exhibit 1L), and attached with a rope grab, which would stop the worker from actually going off the roof (Transcript, March 17, 2014, at p. 65-67). He further explained that this is different from a fall arrest system, which is typically used on a vertical plane, e.g. a window washer (Transcript, March 17, 2014, at p. 66).

[35] Inspector Gazdik testified that his expectation would have been that when the guardrail system was not in place, the worker would have been tied off using this equipment.

[36] Prior to his arrival at the scene, Inspector Gazdik made a do not disturb order, but did not make a stop work order. The TPS were holding the scene for him, and had secured it.

[37] Inspector Gazdik returned again on December 13, 2011 with Guy Costa, who is a health and safety inspector with MOL. Inspector Costa speaks Portuguese. Inspector Gazdik made notes of all interviews, and Inspector Costa's role was to interpret for him.

[38] They took a statement from Mr. Neto, and Mr. Carnero, Sr. They also spoke to the operations manager in order to obtain video footage of the site. They also spoke to William Zhao, who is the operations manager for Sunpan Modern Home, which is the lessee company at the building.

[39] Once they obtained the video footage on December 14, 2011, Inspector Gazdik testified, based on his recollection, that it showed the worker falling into the bin with the equipment, and a witness, who was a bystander, a delivery driver, see the accident, run to the bin, and run upstairs to get help. The video showed various people going up and down the stairs. (This video was not made an exhibit at this trial.)

[40] They interviewed Antonio Goncalves at Sunnybrook Hospital, and his brother-in-law, Mr. Nunes on December 13, 2011. Mr. Costa translated the questions from English to Portuguese. They asked him general questions about the project site, and then about the accident itself.

[41] On December 14, 2011, they also met with Adriano Dias, and Ali Alami, an employee who may have been on site, and called Joseph Ryan, who was the bystander, and left a message for him. They spoke on December 15, 2011. They made some follow up calls later in December.

[42] During cross-examination, he identified a diagram of the perimeter of the building (Exhibit 3). He was shown a package of photographs of the site from defence counsel (Exhibit 4), which included a photograph of the rope that would have been attached to the temporary anchor. He also identified a photograph of the garbage disposal trailer underneath a chute (Exhibit 5). He also identified a

photograph that he took on December 12, 2011 (Exhibit 4-7), which depicts the rope which would be attached to the temporary anchor, to the left of the chute. He also identified a photograph of a harness on a cart (Exhibit 4-10).

[43] While his inspection was mainly concerned with the southeast corner of the roof, he did go to the north part of the roof, and took a photograph of the power cart at the location. When asked if there were two temporary anchor systems on the roof, he replied that he could not recall.

[44] When asked about a photograph of the damaged cart (Exhibit 1C), he testified that it was his understanding that the cart ended up in the bin, but that when he arrived at the scene, it had been moved out of the bin.

[45] Inspector Gazdik testified that if the worker kept the guardrails in place, and used the buggy to move the garbage to the edge of the roof, that the worker did not need to tie off if he threw the garbage between the guardrails without removing them.

Antonio Goncalves:

[46] Mr. Goncalves testified that he is 24 years old, and is employed by the defendant as a labourer, and was so employed on the date of the accident. He identified Mr. McGoey as his “employer.” He also identified both MOL inspectors and said that they interviewed him in the hospital.

[47] He had only been in Canada for a few months at the time of the accident, and his English was limited. He testified that his crew at work spoke Portuguese, and that the language of the workplace at the project in question was also Portuguese.

[48] Mr. Goncalves testified that on the day of the accident, they began at 7 a.m., and that he went to the roof. On that day, they had a chute (Exhibit 7) to take the garbage, but the box was full, so they could not dump any more garbage into it. He asked the foreman, Adriano Carneiro, where he wanted them to put the garbage, and he told them to put it in the trailer. The morning of the accident, three members of the crew members made the ramp on top of the roof, which was fastened into place with nails and 2 x 4s. They placed the ramp where the guardrail was open (Exhibit 1H).

[49] He testified that his job that day consisted of putting garbage in the buggy, dumping it, loading it again, and then dumping it. He was shown a photograph (Exhibit 1C), which he described as “the machine in which I fell with” (Transcript, March 17, 2014, at p. 124). He said that it was the buggy he had been referring to earlier. He also identified the box, attached to the buggy, from his fall (Exhibit 1D). The box was on top of the buggy, and this buggy is motorized. When he wanted to dump out the garbage, he would lift a lever, which would unlock the box, and then the box dumps out the garbage.

[50] He testified that when the accident occurred, he had taken the two 2 x 4s off, as he had been told to do, and three members of his crew went to put the ramp on, and then they started to dump the garbage into the trailer. They were Domingos Neto, Paulo De Sa, and a third man whose name he could not recall. He added, “The second time I went to dump the garbage into the trailer I was stuck on the

machine, the machine didn't stop and the machine came off the roof." (Transcript, March 17, 2014, at p. 126).

[51] At the time of his accident, he testified that he was wearing a hard hat, safety goggles and boots , but he was not wearing any fall protection equipment.

[52] Mr. Goncalves testified that when the wheels of the buggy hit the 2 x 4, he would stop the machine and dump the garbage. The accident took place the second time he did this procedure. He said that the machine came back about 6 inches, and then "I accelerated the machine in order for the machine to hit the 2 x 4 in order to dump the garbage, and the machine kept going out of the roof and I got stuck with my glove and I fell inside the trailer" (Transcript, March 17, 2014, at pp. 136-137).

[53] Mr. Goncalves recalled his fall, and said that he landed inside of the trailer on top of this machine.

[54] He testified that someone helped him out of the trailer. He was hospitalized for two weeks, with a broken left cheek bone, a smashed left knee, some cut tendons, and his left wrist was broken in two places.

[55] Mr. Goncalves testified that whenever he worked for the defendant, if he did use the harness, it was not attached to anything. At this project and elsewhere, they only wore the harness when told to do so by the foreman, in case "somebody from downstairs would look up into the roof they would see us with the harness, but in truth the harness was never, never attached to anything" (Transcript, March 17, 2014, at p. 140). He testified that he was never disciplined or punished for using his fall protection equipment incorrectly.

[56] When he was shown the photograph of the harness (Exhibit 1L), he said that his harness was inside the trailer on the day he fell. During cross-examination, he denied being the person who had put it there. He recalled, "When I fell down I remember when they pulled me up from the trailer my foreman was screaming – yelling go get his harness and put his harness on him" (Transcript, March 17, 2014, at p. 145).

[57] He had been working at this site for about two weeks prior to his fall. He had not been given any specific instruction on how to safely dump garbage at this site. He had observed others dump garbage off the side of this roof, and they had not been wearing fall protection equipment, either.

[58] The defendant had previously provided him with fall protection training, in English, and tested him on it in written tests, all in English. He said he did not understand all of it. The course provided prior to the accident was at the defendant's premises, but was offered by another company. In addition, he had been given training by the defendant regarding the use of propane. During cross-examination, it was clear that he could not remember if he had been given WHMIS Fall Protection Training (Exhibit 8), although he had signed for it. At this point, he admitted that the parts of the training in English he did not understand had been translated for him by others. He then admitted to also receiving a training course on harnesses, and tie off training. He admitted knowing that if he was exposed to a fall of more than three metres, he needed to tie off. During cross-examination, he also admitted that when he first

started with the corporation, he received a copy of the Field Safety Booklet Policies and Procedures (Exhibit 9), and its Corporate Health & Safety Policy (Exhibit 10). He conceded that he had seen before the statement contained in Exhibit 9 at the bottom of p. 47, as follows:

GUARDRAIL PROTECTION:

Guardrails consisting of a top rail, middle rail and toe board must be provided around work platforms, ramps, and open areas where a worker can fall from one level to another. Temporary removal of a guardrail by workers in order to perform work, will require the worker(s) to protect themselves by use of either travel restraint or fall arrest protection methods and appropriate measures should be taken to cordon off the work area and warn others to stay clear. The guard railing must be immediately re-installed once the work is completed.

[59] He testified that he had personally seen two others besides himself fall into the trailer or the machine fell into the trailer, and the worker sat on the edge of the roof. On one prior occasion, he saw this happen at this site, and on the other occasion, at a previous job site. During cross-examination, he said that this had happened to Manuel Dias and to his brother-in-law. He said that he and the other workers did not discuss health and safety issues at this job site with their foreman.

[60] He said that every Friday, they would have a “toolbox meeting” and sign a paper saying that they had had a “Toolbox Talk,” but they never had the actual talk. Defence counsel entered the bound Toolbox Talks (Exhibit 13), but I indicated that he had to prove each of them.

[61] Mr. Goncalves testified that since his accident, the buggies have been modified, and so when a worker releases the brake, they stop. As well, they have been given health and safety training after his accident, the details of which were not clear, but he testified that Andy Carneiro, Jr., the supervisor, would show up and give them the answers to their test questions.

[62] Because of his accident, he was off work for three or four months, and now he no longer works at heights.

[63] Mr. Goncalves identified the defendant’s health policy (Exhibit 10), which included the following warning in a box, which he agreed was consistent with his training, on p. 248:

WARNING!

No worker shall expose himself to heights greater than three metres when working near an edge to an unguarded floor, roof, platform, opening or ladder without first providing travel restraint, fall arrest or guardrail protection. Any person found doing so shall be subject to disciplinary action.

[64] He testified that he always worked with the same crew: Mr. Carneiro, Sr., as foreman, Mr. Carneiro, Jr. as supervisor. His supervisor would be at the job site almost every week, and possibly several times

in a week. He also said that the defendant sent out RGM Consultants, to inspect the workplace, and that the workers did not have advance notice that they were coming out.

[65] Mr. Goncalves identified the attendance roster for the "Fall Protection Systems Safety in Construction," dated March 18, 2011, and recognized his handwriting on it (Exhibit 11). He also identified his letter of reference as a roofer (Exhibit 12).

[66] He testified that the cart on the roof "was not prepared to be used" (Transcript, March 18, 2014, at p. 5). He said that it was not ready because it did not have the weights. He added that it was not assembled. He described it as being far away from where they were working, did not have a rope attached to it, and it didn't have weights. When shown Exhibit 1K, which was a photo of a cart with ropes on it, he replied (Transcript, March 18, 2014, p. 5):

Here it shows everything is ready, but these - as you can see also, my harness was inside the trailer and not here, that is showing here.

[67] Mr. Goncalves said that the cart was on the other side of the roof, away from where he was working at the time of the accident. He admitted, however, that he could not say where the cart was on the roof, only that it was not close to him.

[68] He testified that for the nine months that he worked for the defendant prior to the accident, he never saw anyone tie off.

[69] He also testified that when he removed the guardrails, at the request of his foreman, Andy Carneiro, Sr., he did not "flag" the area, nor did anyone else, although he had been trained to do so. He also admitted that when he removed the guardrails, he did not put down the bump lines. He denied that he was trained on putting down a bump line.

[70] At the time that Mr. Carneiro, Sr. told him to dump the garbage into the trailer, the ramp had not been built yet. Defence counsel put it to him that he anticipated other witnesses would say that the ramp had been there from the previous week. He replied, "I'm only telling you what I know" (Transcript, March 17, 2014, at p. 9).

[71] Mr. Goncalves insisted that when he removed the guardrails, "they were ready to install the ramp there" (Transcript, March 17, 2014, at p. 10). His evidence was unclear as to whether they actually built the ramp that day, or it was pre-built, and they simply installed it on the day of the accident.

[72] He testified that Adriano Dias was on the site the day of the accident. He also said that Manuel Dias was there on the day of the accident, and part of his regular crew.

[73] On the day of his accident, he testified that there were seven people in total at the site, his crew plus two other people, including himself. They included his brother-in-law, Gilberto Domingos, Paul, Manuel Dias, Adriano Barbosa Dias, and Andy Carneiro, Sr. He also believes there was another person there, but could not recall his name. Paul and Domingos built the ramp, and another person not part of

their regular crew. (He did not provide the last names of Paul and Domingos.) At the time of the accident, his brother-in-law was on the ground, not the roof.

[74] When asked about the safety measures at this site, during cross-examination, he agreed that stairs had been erected, as well as a ladder, that everyone had been issued a harness, that he recalled one operational tie-back cart (although asked if there were two), and a regular wheelbarrow. When asked if he had the option of using the regular wheelbarrow instead, he said that he did not, because the foreman thought it was a waste of time, since the buggy could hold much more garbage.

[75] He testified that he is a member of a union, Local 30, which is a large union. His health and safety representative is Paul De Sa, who is the assistant foreman. However, he testified that if he took his concerns to him, he would be directed to speak with Adrian, the foreman. Then he added, "Every time I used to say something to Paul, and Paul would bring anything to - to the foreman, and the foreman would start arguing with Paul." After the accident, he started to take his concerns to the union, Joao Manso, who works for Local 30, and not for the defendant. After doing so, he testified that his boss told him that he shouldn't be speaking with Mr. Manso.

[76] During cross-examination, he admitted that he knew he should have tied-off when exposed to a fall of more than three metres.

[77] When asked why he did not assemble the tie-off cart at the time that he was removing the guardrails, he replied that in order to do so, he would have required the help of his crew, and he anticipated that his foreman would yell at him.

[78] When shown Exhibit 5, he agreed that because of various obstructions that appear in this photograph, Andy Carneiro Sr. and Paul would have still been able to see what he was doing, because he was taller than the equipment, which was low.

[79] While he agreed with defence counsel that he could have pulled the cart up to the edge, left the guardrails in place, and thrown the garbage into the trailer, between the guardrails, by hand, he said that when he had tried to do this, he heard "a lot of complaints" (Transcript, March 17, 2014, p. 21), from Andy Carneiro, Sr., and Domingos Neto.

[80] Mr. Goncalves was adamant in his testimony that they all knew that none of them had tied off.

[81] When cross-examined about the statement he provided to Inspector Gazdik a day or two after the accident, he was asked about the information that he provided at the time that he had not removed the middle guardrail. He could not recall saying this when he provided his statement to Inspector Gazdik.

[82] He was also asked about the information that he provided to Inspector Gazdik, at that time, that he knew the cart was meant to be attached to his harness, and that the cart was close to the yellow garbage chute and the hoist, but now, he testified that he could not remember where the cart was. He replied that the accident was two years ago. He admitted that the cart would have been beside the hoist, because when they operated the hoist, they needed to tie off. He then replied that no one used

the harness, even when they were dealing with the hoist. Then he added that sometimes they wore the harness, but that they were not tied off.

[83] He testified that there were two workers whose job it was to put up the guardrails on the roof, whom he described as "older." He also agreed that a hoist was used to get all the materials onto the roof.

[84] When asked about his conversation with Mr. Thompson about "Toolbox Talks" (Exhibit 13, bound booklet), he agreed that David Thompson showed him 6 or 7 pages, and that they were forms, but that he had told Mr. Thompson that they never talked about Toolbox Talks, even though he had signed several of them. During cross-examination, he denied saying that he couldn't remember the specific content, but understood it at the time, replying that it was because he was looking at the paper. He also denied saying that he remembered having Toolbox Talks once per week, saying (Transcript, March 17, 2014, at p. 26), as follows:

We didn't talk. Like I told you yesterday, the man - the foreman who - like I told you yesterday, he would give us a form, we would sign, everybody would sign, give it back to foreman, and that's it.

[85] He also admitted that he recalled telling Mr. Thompson that they had training on the use of harnesses, and tie-off training. This meeting with Mr. Thompson took place in January, 2014, at the request of Peter McGoey. He had asked if Rui, his supervisor, could go with him, and Mr. McGoey allegedly told him that Rui was not needed. Mr. McGoey remained in the room during this interview. He did not know for whom Mr. Thompson worked. He said that they had difficulty understanding each other.

[86] After he fell, someone saw him, and he said that Domingos and the foreman grabbed him and put him outside. He said that one knee was smashed and that he didn't walk out, the other men had picked him up. While he did not lose consciousness, he described his state as, "I was awake, but I was not all in me" (Transcript, March 18, 2014, at p. 29).

[87] In his testimony, with respect to the weekly Toolbox Talks, at first, he said that the talks never took place in actuality, but that Andy Carneiro, Sr. simply made them sign the forms as if they had taken place. However, when it was pointed out to him that some of these talks were conducted by RGM Consultants, he said that when they were with his foreman, they never took place. However, when he was confronted with a variety of Toolbox Talk topics, he then said he couldn't remember if they took place or not.

[88] During cross-examination, the issue of his absenteeism was raised, and defence counsel put it to him that he was absent more than 30 days during 2011. He did not deny this suggestion. During re-examination, when asked, he said that he had never been disciplined in any way for his absenteeism, prior to his accident. He did receive a letter from the defendant after the accident, stating that he had to stop failing to show up for work. This letter was received long after his three-month post-accident

absence due to his recovery. When asked, during re-examination, about why he was missing many days from work, he replied (Transcript, March 18, 2014, at p. 46):

...I cannot work with people who that cannot appreciate the value of working. And, that do not appreciate the work that good workers do.

Adriano Dias:

[89] Mr. Dias testified that he is employed by the defendant, and has been so employed for 32 years. He recognized in court Mr. McGoey, and identified him as the president of the defendant. He said that he did not know Mr. Goncalves.

[90] Mr. Dias testified that the day of this accident was his first day working at this site. His job at this site was to rip off the roofing. He arrived that day around 7:30 am, in order to help the crew. He recalled the following people from that crew: Domingos Neto, Manuel Dias and Andy Carneiro, but he could not recall the other three men. He spoke to the foreman, Andy Carneiro, Sr. He said that the foreman was present that day, but not the supervisor, who was his son, Andy Carneiro, Jr. All the crew members on the site that day were employees of the defendant.

[91] When he arrived at the site, he asked the foreman if there was a job for him to do, and he asked him to change and go start to work, ripping off the roof. He used the staircase to go up to the roof, as shown in Exhibit 1B.

[92] He testified that he was wearing a harness. He used a shovel to rip off the roofing, and then put it inside of a buggy (Exhibit 1C). The buggy in the photograph shown to him was missing the piece of equipment that carries the garbage and dumps it. He was working between 300 to 500 feet away from the trailer, where the garbage was being dumped. He believed that he was working about half an hour, when the fall took place. He also believed that he dumped four to five or six buggies at this location before the accident occurred.

[93] When shown photograph 1H, he identified it as the chute where they dumped the garbage, being made of brown plywood. He believes that it was already made, and built by another crew. He did not see it installed. He believed there were seven people in the crew that day, being Domingos Neto, Manuel Dias, the foreman, Eusebio, and the brother-in-law of the injured worker, Gilberto.

[94] Mr. Dias said that the process by which he dumped the garbage involved taking the buggy, and lining up its wheels against the chute, staying behind the buggy four to five feet. He would lift the lever, and the box would lift, and once the box lifted, it dumped the garbage. While he was performing this task, he was wearing his belt, and his safety, and he had his harness on. He had attached his lanyard to a cart, which is used as a safety. He understood that if the guardrails were up, he did not have to be tied. He said that the safety cart was about 15 feet away from the chute. He testified that he used fall protection every time he went to the edge. He also testified that he never saw any coworkers at the defendant working on the roof without using fall protection.

[95] He further testified that when the guardrail was down, they had removed the middle rail. Prior to removing this rail, he had hooked up his harness to the safety. When he finished dumping, he put back the middle rail, which was made of iron (Exhibit 11).

[96] Mr. Dias did not see anyone else dumping garbage on the day of the accident.

[97] When he was advised of the fall, he was busy cutting edges, and did not see the accident. The injured worker was already in the ambulance when he became aware of the fall. He could not recall if the foreman had given them any safety lectures prior to work commencing on the day of the accident.

[98] Mr. Dias identified Exhibit 8, and described it as the harness. While he was able to describe the photograph, he was unable to read the document, because he is unable to read in English. He was also shown Exhibits 9 and 10, but did not think he recognized them. Again, he was unable to read them because they were written in English.

[99] He testified that the defendant had paid someone named Roger to train them on fall protection and roof top safety. The training took place in English, and a Portuguese supervisor translated it.

[100] There was another place on the roof where they could have dumped the garbage, but they were not using that, because it was too far away. It was about 700 feet away from the yellow chute.

[101] He described the Toolbox Talks as occurring once per week, normally on Mondays. He said, (Transcript, March 18, 2014, at p. 72), "...we fill up the toolbox form." He testified about these meetings, at (Transcript, March 18, 2014, at p. 73) as follows:

The - the foreman gathers all the six men, and he says to be safety, to sign - to sign the toolbox, and to be safety, so there wouldn't be any accidents.

[102] He said that he doesn't understand the fall protection basics, but he does know that he has to be safe at work. He went to the training given by the defendant. He explained that there is a verbal and a written test for each topic taught, and the written test was in English. When asked how he was able to understand it, he replied (Transcript, March 18, 2014, at p. 74), "We copy from each other."

[103] During cross-examination, he was shown a number of different safety training cards, issued to him over a period of years, and he testified that some of this training was done by "Roger", and by Jake Campbell. He did not know if Roger was associated with RGM, when asked. This training was different from the Toolbox Talks (Exhibits 14 and 15).

[104] He testified that when Andy Carneiro Sr. gave them the forms to sign for the Toolbox Talks, he had also given them these Talks. He added that all the foremen give them Talks.

Gilberto DaCosta Nunes:

[105] Mr. Nunes testified that he works as a labourer at the defendant. He said that Jose Rego is his foreman. He also recognized Peter McGoey in the court room, and described him as one of his bosses.

He began working for the defendant in 2008, left in January or February of 2011, and returned on September 13, 2013.

[106] Mr. Nunes testified that he knows Mr. Goncalves, because he is his brother-in-law.

[107] At the time of the accident, Mr. Nunes was working on the ground, and did not see what happened. He became aware of his brother-in-law's fall when told about it by another man who works in his crew. When shown a photograph (Exhibit 1A), he pointed to the middle of this picture, and explained that he had been delivering asphalt from one tank to another tank. He said that they were working on replacing the roof. His duties were to clean garbage and to supply materials to the roofers so that the roofers could apply it.

[108] He estimated that he had been working at this site between one and one-half to two months prior to the date of the accident.

[109] He described the site as having two places to dump the garbage. Small garbage was disposed of using the round chute, leading to a box/trailer on the ground. The other way involved a chute with a ramp, within a railing. He used either a wheelbarrow, by hand, or if the garbage was larger, a buggy with a motor. He did not wear safety equipment while doing this.

[110] Mr. Nunes testified that the workers were ripping off the old roofing, they were not wearing fall protection equipment.

[111] He also testified that he had personally dumped garbage into the same trailer, from the roof. Larger garbage did not fit between the 2x 4s, and he said this while pointing to a photograph of the guardrails and the wooden ramp. He said that when the garbage was big, in order to dump it, they removed the middle guardrail, without putting on fall protection equipment. He said that sometimes they used their fall protection gear, and other times, they did not, in order to be faster. While pointing to the photograph of the wooden ramp and gap in the guardrail (Exhibit 1B), he said that not only did he not wear his fall protection, but other workers dumping garbage at this location failed to do so, as well, when the middle rail had been removed, prior to his brother-in-law's fall.

[112] After his brother-in-law's fall, they used their fall protection equipment. When Mr. Nunes returned to work one week after his brother-in-law's fall, he said that his foreman advised him that as of today, when we dump the garbage, we have to be thoroughly secured.

[113] Every year, the defendant holds a safety meeting, in English. They would be given training, and all sign, even though he felt that his command of English was limited. When shown a photograph of a buggy (Exhibit 1C), he identified it, but said it was missing a box. When shown a photograph of a box, (Exhibit 1D), he said it was the box that belonged to the buggy. He said that they used that box and buggy combination on the roof at this site, and had several of them.

[114] He testified that the tie-off cart (Exhibit 1K) was put on the roof from the beginning of their work. He could not recall if there was one tie-off cart, or two. The only tie-off cart he recalled was close to the hoist, to the left of the round, yellow chute.

[115] He testified that the foreman, Andy Carneiro, Sr., did not advise any of the workers, prior to the fall, that they should not remove the middle guardrail to dump the garbage without wearing fall protection equipment.

[116] An important exchange took place between Crown counsel and Mr. Nunes during his testimony (Transcript, March 24, 2014, at p. 27), as follows:

Q. And, again why?

A. Because, once you remove the middle 2x 4, we deduced that we didn't need to be secured.

Q. Okay. Did anyone tell you, when you did it that way, remove the middle rail, dump the garbage, didn't use any fall protection; did your foreman or any supervisor tell you, don't do it that way?

A. We not even talked about that. That was before my brother-in-law fell.

Q. Okay. So, do you have any memory of your foreman or your supervisor being present seeing you dump the garbage at the ramp, and remove the middle guardrail and dump your garbage and not use fall protection? Do you remember your foreman or supervisor seeing you do that, that way?

A. At that time, yeah they saw it. The supervisor - the supervisor used to tell us to make sure you guys are hooked up, secured. The foreman relating to that matter he give - gave us more freedom.

[117] However, Mr. Nunes testified that the supervisor told them to always be tied up, and that this supervisor was Andy Carneiro, Jr.

[118] Mr. Nunes testified that prior to his start at this location, there was no meeting of workers, prior to the commencement of their work. They would just change their clothes and begin working, since they knew the site and what was required of them.

[119] Mr. Nunes said that he did have a fall protection harness for his own use at this site. Since he was mostly on the ground, he did not need it, although he did wear a belt. However, he said that that he did wear the harness when he delivered asphalt from one tank to another. When he was on the roof, since his job was in the middle of the roof, he did not wear it unless ordered to do so by a boss or a foreman, when getting close to the hoist.

[120] The belt closest to the hoist was for common use. The vest was used only by persons down on the ground. He only used the harness, when working on the roof with the hoist, or before or during the perimeter was being built around the roof.

[121] After his brother-in-law fell off the roof, the procedure changed. They would hook themselves to a piece of equipment with their harnesses. The piece of equipment had weights on, and they put red flags

around it. They also started putting red flags around the chute, and the area where they dumped the garbage.

[122] The last time he saw Mr. Goncalves on the day of the accident, they were both changing their clothes, and he said that he stayed down, but that Mr. Goncalves went up. Mr. Goncalves was not wearing any safety equipment the last time he saw him prior to the fall. However, during cross-examination, he conceded that he was wearing a hard hat, safety boots, gloves, what he termed the "normal things" (Transcript, March 24, 2014, at p. 40). He stated that his brother-in-law was not wearing a belt, and denied that his harness was kept on the roof. Rather, he said that his brother-in-law's belt was inside the trailer in which they change their clothes every day. He believed that all of their harnesses were in the trailer, except for the one belonging to the person working closest to the hoist. He testified that all the harnesses were the same colour.

[123] When asked about Toolbox Talks, prior to the accident, he said that the workers would sign the sheet, and give it to the foreman, without doing anything further. Typically, this took place in the van, in the morning, on the way to work, when the foreman picked them up, or at the end of the day, when they were heading home. This foreman was Adriano Carneiro, Sr.

[124] Since this accident, they discuss the "headline" (Transcript, March 24, 2014, at p. 33), meaning that they discussed the topic within five minutes in their own language. He testified that they all understand it now, because they all understand their own language, and then they start working.

[125] When shown Exhibit 8, he testified that he recognized the pictures in it, and they had engaged in group discussion about the content in English and Portuguese. Afterward, they are tested on it in English, and their supervisor gives them the correct answers to the multiple choice questions, subsequent to their group discussion. He was shown Exhibit 9, but could not recall if the defendant had ever given him a copy of it.

[126] Mr. Nunes testified that for discussions on such subjects as fall protection or WHMIS, or propane, the workers would sign the form first, and then have the discussion. They had a supervisor with them who could translate the words that they did not understand.

[127] Mr. Nunes testified that the workers had to demonstrate, at practical tests, the ability to put on a harness and make it fit properly; orienting and installing the rope grab; how to use the rope grab; how to choose the appropriate fall protection system; how to set up the appropriate fall protection system; how to set up the lanyards; how to install a suitable connection to the anchor point; and recognize hazards associated with falls; how to identify damaged safety equipment.

[128] He identified various training certificates (Exhibit 16), which established that he had been trained on the following topics: fall protection training; safety training for operators of rough terrain forklifts; propane training; and WHMIS in construction.

[129] He testified that where there is a fall protection violation, the defendant may send the worker for re-training. However, when asked, he denied knowledge of the defendant's practice to send them

home without pay until the re-training has been completed. He confirmed that some workers are given a verbal warning if they are found to have not tied off. He denied knowledge of the defendant's practice of giving them a written warning for failing to tie off.

[130] He testified that he has been given a verbal warning over the telephone, and a three-day stay-at-home penalty and ordered to take the fall protection training when the defendant alleged that he has failed to wear a safety belt.

[131] Mr. Nunes recalled that the trainer who provided them with safety training showed the workers graphic photographs and films of workplace accidents.

[132] He confirmed that there are anchor points on top of the tankers, but could not confirm if they had been installed by the defendant.

[133] Mr. Nunes identified what defence counsel referred to as the tie-back cart, and which he had described as the orange cart, as shown in Exhibit 1K. He confirmed that it is used because there is a gap in the guardrails, at the hoist. He understands that he needs to tie off where there is a gap in the guardrails, from his training.

[134] He testified that when dumping garbage, rather than remove the middle guardrail, the worker can pull the buggy to the edge of the roof, and throw the garbage into the bin below. When asked, alternatively, rather than go to the edge, could the worker can hand the buggy off to someone else who is already tied off, he replied, "That's what - that's what should have been done" (Transcript, March 24, 2014, at p. 53).

[135] During re-examination, Mr. Nunes was asked what he meant by that answer, and if he could elaborate. He replied, (Transcript, March 24, 2014, at p. 91):

I think for security - for more security reasons, it should have been the way, as I said. It should be one person - should be one person there tied up. And, there should be some red flags around the perimeter. And, that person then will get the buggy and would dump the garbage; would return to the buggy to the person that brought the buggy, and then each one will go back to their work.

[136] In his view, as well as being his opinion, he believed that this was the law. When asked if he could recall it ever being done that way, he replied, "That I remember, no" (Transcript, March 24, 2014, at p. 92).

[137] He testified that when he squeezed the handle of the buggy, the buggy would move. The speed of the buggy varied depending upon "how much acceleration we give the motor" (Transcript, March 24, 2014, at p. 54). They would give it greater acceleration if the buggy carried a heavier load.

[138] When asked if the worker let go of the lever if the buggy would stop, he replied, "The buggy wouldn't stop." He added, "Sometimes you would have to hold onto it" (Transcript, March 24, 2014, at p. 54). Later during cross-examination, he was shown a photograph of a different cart with a lever

(Exhibit 17). When asked about what happens when the lever is released, he replied, "When we release the lever that does not necessarily makes the cart stop. It reduces the velocity of the cart" (Transcript, March 24, 2014, at p. 57). He also admitted that he had not used these carts for two years, and was having difficulty recalling the difference between the function of the left and right handles on the cart.

[139] He confirmed that at the site of the accident, there was one orange tie-back cart, fully assembled. He denied that there was another orange tie-back cart at the wooden chute. His response was, "No. At the time that my brother-in-law fell, there was nothing like that" (Transcript, March 24, 2014, at pp. 62-63). He also testified that he had it might have been about one week before the accident that he had made this observation.

[140] When asked if the cart could have been moved to the wooden chute in that intervening time, he replied that they were not working weekends at this site.

[141] Mr. Nunes said that his crew had three buggies, two of which were yellow and wider. He had left his employment with the defendant for a period of time, and when he returned to work for it, Semple Gooder was using bigger carts. Their wheels were a bit bigger, and they were a different colour. Semple Gooder was using the bigger motorized buggies that his other employer also used. At the time of the accident in December, 2011, Semple Gooder was using a slightly smaller, motorized buggy.

[142] He testified that they normally had one tie-back cart, per crew. He only recalled one tie-back cart, but admitted that he has not on the roof on the day of the accident, so he did not know where the tie-back cart was at the time.

[143] He confirmed that he had been interviewed by the MOL inspectors a day or two after the accident, and that he has also spoken to his brother-in-law about it. He denied that his brother-in-law was afraid of being charged by MOL.

[144] He testified that all the members of his crew received a ride from Andy Carneiro, Sr. He confirmed that his brother-in-law missed "a lot" of work (Transcript, March 24, 2014, at p. 67). When asked if Mr. Carneiro, Sr., would drive off without him, he stated (Transcript, March 24, 2014, at p. 68):

...everybody had a certain time to be at a certain place for him to pick us up one by one, so we could go to work. But, sometimes that person wouldn't be there at the proper time. He would wait maybe five minutes, and if that person wouldn't show up, he would drive off.

[145] Mr. Nunes confirmed that Paulo De Sa was the health and safety representative, and that he encouraged safe practices. When asked if Mr. De Sa always tied off, he replied that he was on the ground, and did not know.

[146] Mr. Nunes testified that Mr. Carneiro, Sr., was very strict and demanding, and that he always wore the belt. Since Mr. Nunes was on the ground, he could not see if he was tied off or not. He testified that if Mr. Carneiro, Sr. had found him to be not tied off, he would "Probably he would say something to me" (Transcript, March 24, 2014, at p. 69).

[147] However, sometimes the workers would "facilitate" things, as demonstrated in the exchange below between Crown counsel and Mr. Nunes (Transcript, March 24, 2014, at p. 70):

Q. If Andy Carneiro Sr. ever saw you not tying off, he would tell you to tie off, correct?

A. Yes, yes.

Q. They were always adamant you follow proper fall protection procedures, correct?

A. Yes. The company would tell us to do - you know, follow the procedures say, but sometimes we would facilitate things. Make things easy.

[148] Similarly, he testified that Andy Carneiro, Jr., their supervisor, would always tell them to tie off, and even stopped the work on one occasion to make all of them tie off.

[149] He also testified that someone named Roger would come around, unannounced, every two or three weeks, to do a safety inspection, and to remind them to tie off. If they were not tied off, there could be consequences. He was also aware of MOL inspectors, and the possibility of charges. He also "probably" knew that other construction companies, with whom they were working, might be looking for violations.

[150] During cross-examination, when he was shown a document dated February 25, 2011, that indicated he had received a Toolbox Talk from Mr. Carneiro, Sr., he replied (Transcript, March 24, 2014, at p. 73):

As I said before, as you know, he used to give us this paper. We used to sign the paper. We used to return to him and we didn't know anything else about this paper. To tell you the truth, sometimes we used to sign three, four, five pages without any date and the dates he would put in himself.

[151] When asked about his earlier statement to Inspector Gazdik that Paulo talks about safety everyday and we do a safety talk every week, and the apparent inconsistency, he replied that he was being honest with everybody.

Witnesses for the Defence:

Peter McGoey:

[152] Mr. McGoey testified that he is the Vice-President of Operations of the defendant corporation. He has been employed with the defendant for 36 years, and began as an apprentice, working his way up through the corporation.

[153] He is certified to train in sheet metal and roofing, by the Government of Ontario.

[154] Mr. McGoey said that the corporation has about 160 to 180 unionized employees, of which, about 140 to 150 are roofers. They also have 8 non-union employees, who work in the maintenance shop, and about 42 non-union office staff. He described the other large roofing projects that the defendant has undertaken around southern Ontario.

[155] He described the training that the defendant provides as follows: WHMIS; fall protection; fire extinguisher; hoisting and rigging; asbestos awareness; due diligence; basics in supervision; traffic control; and other trade specific training.

[156] In terms of fall protection training, he explained that this training does not currently expire. However the defendant sends the employees for retraining if there is any type of violation, and they are not paid, which is a form of discipline. They are also sent for non-disciplinary training when the roofing project is "out of the norm" (Transcript, March 25, 2014, at p. 8).

[157] On their first day, new roofers are provided with the following safety equipment: a hard hat; clear safety glasses; dark safety glasses; a harness and a lanyard. They also provide rope grabs depending on the crew and the location.

[158] Mr. McGoey testified that RGM Construction Industrial Safety Managers Inc. is an independent safety consulting firm, that has been in business for about 22 to 23 years, and that the defendant has employed them for about 20 years, to train its workers. RGM's training of the defendant's employees includes: fall protection; WHMIS; fire extinguishers; due diligence, and other types of training. RGM follows up with the necessary paperwork, cards and letters of accreditation, so that the training has been documented with the defendant. He identified RGM's safety course offerings (Exhibit 18), and its staff biography (Exhibit 19).

[159] Mr. McGoey stated his belief that RGM's training "meets or exceeds..what's expected" and that he is satisfied that the employees understand the material presented (Transcript, March 25, 2014, at p.11).

[160] He testified that the training provided by RGM is "totally independent" (Transcript, March 25, 2014, at p. 11) of the corporation, even when it is offered in-house, in the basement of the corporation's premises. RGM does not do all of the corporation's training, however. Additional training is done by the corporation in their maintenance and mechanical shop.

[161] Mr. McGoey testified that RGM trains their employees in the following areas: basics of supervision, due diligence, fall protection, WHMIS, fire extinguisher, and hoisting and rigging, the latter being "a big one" (Transcript, March 25, 2014, at p. 11). RGM makes their employees do practical tests to demonstrate that they understand how to wear their harnesses properly, for example. The corporation provides interpreters for training.

[162] Mr. McGoey testified that the corporation also uses Certified Training, which trains them on high reach equipment. In addition to RGM, the sites are also audited by another company, WS Services, which also conducts audits, sport and due diligence checks on the site. WS Services was retained recently by the corporation.

[163] In addition, the corporation has supervisors and superintendents oversee projects.

[164] Every Monday, at 8:00 a.m., the corporation has a production meeting with all of the supervisors and superintendents, and then they dispatch RGM to a number of those jobs to attend, unannounced and do audits, talks and spot inspections (Exhibit 20, minutes of meetings, July 25, 2011).

[165] According to Mr. McGoey (Transcript, March 25, 2014, at p.16):

Every Monday at eight o'clock sharp we have this meeting. We first talk about safety and any safety items we- because there's a variety of - well from propane dispensing through to fire services and emergency evacuations, renewing our propane licence because we dispense bulk propane, roof protection and safety, that's supposed to say sub-trades - oh sorry stop sub-trades if conditions aren't good. So we have sub-trades that we would work and list on projects and to stop them if there is anything that they see I want them supervised and stop if there was ever anything out of our policy or the Act...

[166] After that weekly meeting, a list is created of jobs that they want RGM to visit, and this list is emailed to RGM. During the week of July 25, 2011, for example, RGM was asked to visit seven sites.

[167] Every week, a Toolbox Talk is held, for all foremen, all sheet metal workers, and all siding workers. The corporation has a Toolbox Book of 52 Talks, and they ask superintendents to choose one, and discuss it with their crew (Exhibit 21). The corporation tries to keep all employees on the same talk per week, by assigning which talk to cover.

[168] The Toolbox Talk is given by the foreman, ideally, or the safety representative in the crew or the superintendent. While they are not required by law, Mr. McGoey likes them because it "keeps that communication going" within various crews (Transcript, March 25, 2014, at p. 18).

[169] He was shown the basics of fall protection users guide (Exhibit 8), which he identified as a guide developed by Infrastructure Health and Safety, a company that works with MOL, to implement safety programs, training, manuals and signs related to safety. It is the format to be used to deliver the basics in fall protection, by a competent trainer.

[170] Mr. McGoey was also shown the corporation's health and safety policy (Exhibit 10), which he explained is given to new employees broken down in booklets. The superintendents are instructed to give them to new employees and have them sign off that they have received them, before they are sent out. Further hands-on training is delivered in the workplace over time.

[171] He also was shown a breakdown of the corporation's health and safety policy (Exhibit 9), so that a new hire is taken through it, page by page, by the person who hires him/her, and are asked to sign off on the back of each page. It indicates in its checklist if the new hire knows who the project superintendent is, who is the rep in his/her crew, so that they have "a basic understanding before they go out the door" (Transcript, March 25, 2014, at pp. 21-22).

[172] In Toronto, the person who would go through Exhibit 9 with a new employee would be Andy Carneiro Jr., who speaks Portuguese.

[173] To ensure safety at work sites, Mr. McGoey testified that they complete safety paperwork, obtain insurance, the notice of project, and the items that are there. They also obtain emergency numbers, train their people, and ensure they have the specs ready. They also ensure they have MSDS sheets, and put binders together on all the products they use. Once they feel ready, they hold a pre-start meeting.

[174] At the pre-start meeting, they go through ground safety, pedestrian safety, and the set up around the building to the interior. For example, in a re-roofing project, there may be people occupying the building, and so they also consider that safety aspect and the ground, in particular. They consider where to direct trucks and large equipment, and determine in which corner to set up. They need to decide how to get to a roof, and whether or not that involves smashing any windows.

[175] They create a file that includes the work file pre-start, the superintendent's file that includes the application of the job and the MSDS sheets that apply, a map to the closest hospital, a card that explains the job, and then they implement rooftop safety in conjunction with the crew .

[176] He described, generally, the safety measures provided on-site for workers as follows (Transcript, March 25, 2014, at pp.23-24):

...is a review of, you know, one, how we're going to get up there and where the access is, safe access, we review what they're going to utilize to tie back to get all of their stuff up there right from the get go. We go through just any - any emergency response stuff. Some people mandate that we contact the fire department just so - because we have propane blazing away in their...property. We would notify the fire department and give them...everybody...and the foreman the overall of the job. And, then we provide all the safety, make sure that the safety gear is suitable for that project....if there's a special item they need we make sure that that came over and above what they always carry in their tools. Every crew has their own tools.

[177] He also described what the corporation did with respect to safety at the 875 Middlefield site, as follows (Transcript, March 25, 2014, at p.24):

They - 875 Middlefield was like a two storey building, industrial, quite a large industrial building. We were the constructor on the project. We met with - the consultant was Jeff Jamieson from, I think his company's called Green Spec. And, we met with him and he was the owner's rep from King Set and CB Richard Ellis. So, Jeff would meet with Andy on site and they...Andy Jr...they would meet on the site and they would look at ground set up, go through - because it was an occupied building, they go through the interior of the building to make sure that, you know, just do a quick walk for interior protection, to make sure that our major construction up top of the roof isn't going to impact the inside and just to make sure that, you know, the interior was relatively safe.

And, then they would do a roof top walk and talk about the specifications for the roof. And, Andy would further look at how he's going to do tie-offs, how he's going to get up on the roof with the number of people that we're sending to the job. And, do more or less a pre-start checklist of his own to make sure that he implements all those items in his pre-start into his delivery to the competent foreman that's going to run the job.

[178] Because it was such a large project, and they would have six or seven workers going up every day, he testified that Andy had opted to install a large stair tower, rather than have them use a ladder

(Exhibit 1A). Part of this decision was that this project was going to take a long time to complete, and the stair tower was better for the winter months.

[179] They spent extra money to install scaffolding, as well as guardrails. Instead of simply installing a guardrail on a zone of this roof, they put up guardrails around three-quarters of the roof, and installed bump lines as well.

[180] He testified that the 875 Middlefield site was being supervised by the following: the corporation, through its supervisor; RGM; MOL; and Andy as superintendent, who would be there once or twice per day, eight or ten times per week. At this project, the corporation was the constructor, so there was no general contractor. On other sites, there are times when the corporation has been hired by the constructor to do the roofing, in which case, the constructor would have their own supervisors monitoring the project.

[181] In December, 2011, the corporation's procedure for dealing with violations of fall protection was described by Mr. McGoey as follows (Transcript, March 25, 2014, at p. 27):

In most of our safety items we have one; two; three. Based on the - the severity of the violation we can - we can exercise a dismissal if we want, but the one, two, three is you're given a verbal warning and you are told and you're given a written warning and at that point we are able to dismiss a person. And, that would in turn satisfy the union and the, you know, we'll say people's rights.

[182] In his testimony, he identified an unannounced audit and visit by RGM, which resulted in a RGM Safety Observation Report (Exhibit 23), in which the worker, who had failed to tie off and was exposed to a hazard, was cautioned and then he complied. The superintendent was notified and this was considered his first warning. These reports from RGM are given to the superintendent and faxed to Mr. McGoey right away. Other Safety Observation Reports from RGM were described by him in his testimony, in a similar manner (Exhibits 24, 25, 26). Some employees have been dismissed after 25 and 40 years of employment, when they have failed to heed these cautions.

[183] Mr. McGoey was shown the corporation's Safety Directive - Contravention Notice (Exhibit 22). He explained that on a different site, in 2009, some workers were clearing snow off a roof without wearing fall protection, outside of the work zone, and were found by an auditor from MOL. They were brought into the shop, talked to, written up, and sent for re-training for a day without pay by the corporation. They were permitted to return to work once the corporation was satisfied that they were using their safety equipment and staying in the work zone.

[184] Mr. McGoey described the consequences to the crew after the December 12, 2011 accident, as follows (Transcript, March 25, 2014, at p. 39):

The entire crew was - we dispatched RGM, so RGM attended the site and helped Andy with the accident investigation. And, they were gathered together shortly after all Ministry - Ministry was satisfied with talking to the guys. They were brought together on that site before we left and we

did have a talk. Some was - part of the talk was a little bit of, you know, related to, I don't want to say grieving but, you know, just kind of moral support, also talk about some safety items and to tell them that we required them in our office to have a further talk and to be sent for re-training. And, that they would be, you know, going for re-training without pay, that there was discipline here and, you know, just trying to, you know, it was a pretty - it was a pretty devastating time at the site. And, the very next day we reinforced what our policies, what our requirements are and we sent them to - to Certified Training in December of '11 to be re-trained, everybody all seven workers, all spoke - there were six workers less Antonio unfortunately.

[185] He also identified general ledger accounts from 2009, 2010, 2011 and 2012, which indicate safety and first aid expenses (Exhibit 27), which do not include the cost of guardrails. These expenses include safety glasses, hard hats, training, and safety items for equipment. While they do not have a budget for safety, he testified that the corporation spends about \$100,000 per year on these items.

[186] When asked about the motorized buggies, he testified that they are used throughout the industry, and have been for about 30 years. They are produced by various manufacturers. The operator of a buggy (Exhibit 1C) has a lever in each hand, and the left lever controls the tension on the belt. The motor spins, and when the bar is raised, the pulley puts tension on the belt and makes it go forward. Underneath the bar, if the operator lets go of the left hand handle, it drops the pulley and the buggy is in neutral. The right hand side controls the hand-brake.

[187] These motorized buggies (Exhibit 28) are used to move garbage, and have other attachments that allow for the delivery of hot asphalt tanks, as well as gravel spreader heads, and some buggies travel. The buggy used at the accident is called a "Buffalo" or "Grizzly" and it travels on gravel, and can roll over cold adhesives (Transcript, March 25, 2014, at p.45). The buggy has been modified to keep the controls below the handle, so that the operator reaches down to pull up below the bars. This is so that the operator can't accidentally hit the controls underneath the bars. The corporation modified the buggy to include an automatic stop or go if the operator lets go of the bars.

[188] Mr. McGoey testified that he had never heard of a motorized buggy pulling anyone over the edge prior to this accident.

[189] He testified that Semple Gooder has been approved by "Contractor Check", and has received a certificate to this effect, dated September 14, 2012 (Exhibit 29). The corporation received this certificate, based on a review of its various divisions across the province, for the period 2009 to 2012. This certificate evinces that the corporations certified meet or exceed the requirements of the legislation, and is used for pre-qualification purposes.

[190] Mr. McGoey was shown a plastic envelope (not an exhibit) that he testified is given to all foremen, sheet metal leads, siding leads, which is typically kept in a toolbox, and which describes in basic terms how to report an accident, a checklist that accompanies the first aid kit that explains what to report if a worker goes to the doctor, and other basic safety items and paperwork, that can be accessed any time on the site.

[191] When asked about Exhibit 13, page 9, he explained that that it is a checklist that is kept in the work files of superintendents, to focus their thinking on all the things related to safety that they are responsible to check and ensure, e.g. personal protection, warning barriers, housekeeping, the hoist, the kettle, the ladders, the propane, fire protection and roof openings.

[192] Mr. McGoey was asked about the comment made by Antonio that he had gone to Florida with someone from the union. He replied that he had travelled with someone from the union, and believed it was to San Francisco, because he is part of a panel, and acts as a trustee for the owners, for the trustee benefit plan, for local 30 sheet metal and roofers. It is a joint venture that includes owners representatives and union appointed representatives that oversee the pension and benefit plan, and their health and welfare plan. He said that he attended the Canadian benefit and fiduciaries annual meeting, and believes that he went twice. Part of his mandate in this role is to attend lectures and seminars for further training as a trustee.

[193] During cross-examination, he testified that about 90 percent of their 140 to 150 roofers are "Portuguese roofers and second generation" (Transcript, March 25, 2014, at p. 53).

[194] Mr. McGoey is aware of his statutory obligation under ss.25(2)(i) of the legislation to post in the workplace a copy of the Act and any explanatory material prepared by the Ministry both in English and in Portuguese that outlines the rights, responsibilities and duties of workers.

[195] He then added (Transcript, March 25, 2014, at p.54), "The notice of project and other items I don't know if - how much of it was - would be in Portuguese, probably at that particular time probably not a lot in Portuguese."

[196] When asked if MOL field visit reports and orders that are left at a site are also translated, he responded that the corporation used to leave pre-inspection reports in English and Portuguese, but that this practice was discontinued, because the workforce includes other ethnic groups, and the corporation determined that all workers need to be able to speak basic English and call 9-1-1.

[197] Specifically, when asked during cross-examination if the corporation's field safety booklet, policies and procedures (Exhibit 9), and its corporate health and safety policy (Exhibit 10), at the time of the accident or before, were in English because the workers have testified that they could not read them, he confirmed that yes, they have "always been in English" (Transcript, March 25, 2014, at p. 56).

[198] He was then asked about much of the safety documentation, from RGM, and training sessions, that have appeared at this trial in English. He responded (Transcript, March 25, 2014, at p. 56), as follows:

The, if you want to say, luxury we have, because we are 90 to 95 percent Portuguese, that throughout all of their - their work day from training - from their original training through to every day hands on, the majority is Portuguese. So, when the majority of the language is Portuguese and our supervisor can be Portuguese, can be English, but for the most part their

work day consists of Portuguese, but the translation and the delivery of everything that we have is done in both.

We did a tanker presentation where we go through the - the tankers are the big asphalt tankers that we use. And, we've done presentations of our health and safety policy, of the tanker work and we did it - we delivered in English and then Portuguese. And, it is in English and Portuguese in their possession.

[199] When shown the notice of project for 875 Middlefield Road (Exhibit 2), he testified that he was aware of it. He confirmed that it started around October 20, 2011, adding (Transcript, March 25, 2014 at p. 57), "We try to keep the date of issue close to us starting the project, so that visits are not done prior to us getting there."

[200] He was then shown the minutes of the superintendents' meetings (Exhibit 20), and asked why this project was not discussed at the October 20, 2011 meeting, and was not discussed until the December 13, 2011 meeting, which was after the accident took place. In particular, he was asked about the reference in the December 13, 2011 minutes, which said that the procedure for dumping debris at the chute and roof area, tie off and pass off full buggies to dump to be confirmed and set up, which suggested to Crown counsel that the procedure hadn't been set up at the time of the accident. He replied that this is "a procedure that has been in place for years with Semple Gooder. And, it's us discussing it and a reconfirmation that the guys are to be doing that, should they choose to use that option for dumping..." (Transcript, March 25, 2014, at p. 59).

[201] During cross-examination, Mr. McGoey agreed with the Crown counsel's suggestion that the project at 875 Middlefield Road had been in operation for a period of weeks, prior to the December 13, 2011 meeting, and that it was a fairly large project, involving the removal of a large amount of material from the roof. He also agreed that the garbage removal or dumping of debris was a substantial part of the job at this site, and that this work involved going to the edge of the roof. Mr. McGoey replied (Transcript, March 25, 2014, at p. 61):

The disposal is - and how debris is taken off the roof is determined right in the pre-start of the job in the site visit. And, that's set up and the procedure for disposal is one of the first things that - and a part of a checklist. And, the items that are required for that disposal are sent from our shop at the beginning of that job to put that in place.

[202] The following is a key exchange between Crown counsel and Mr. McGoey regarding a pre-start checklist (Transcript, March 25, 2014, at p. 61):

Q. Now, when it says tie off and pass off full buggies to dump and then in brackets it says, to be confirmed and set up. And, I note the use of the words to be confirmed and set up. Your evidence is still that this is not something on a going forward basis; it's something that's already happened?

A. Yeah. It's something that we always do and well, in this case unfortunately somebody didn't, but we have procedures for dumping and we have various crews. And, the confirmation that everybody is following the procedure has been implemented the very next day and brought to the attention of all supervisor personnel. And, it is - it is nothing out of the norm, it is what we do. They have only so many choices for disposing of debris, and I can elaborate, based on the building.

[203] One of the methods of dumping available at this site including dumping through the yellow chute, but the receptacle below the chute had filled up, so this option was no longer available at the time of the accident.

[204] Mr. McGoey confirmed that because this option was no longer available, the workers took the garbage to a different location on the roof, and the ramp was created for this purpose. He said (Transcript, March 25, 2014, at p. 62), "The debris has to be sent down controlled."

[205] When asked if there was a specific procedure or policy, written down, that addressed the issue of dumping debris off roofs, he responded (Transcript, March 25, 2014, at p. 62):

Yeah. We address it on projects; we address it in - in our meetings; we address it in our thing. There are options. You can - the rails can be left in and they can manually grab the debris and throw it over and deflect it off the chute, so it's a controlled means of lowering garbage. You cannot throw garbage off the roof, like that is - we will be stopped - stop work order right away for just leave the rails there and throw it over the top and just let it fly, would be stop work order. We are able to leave rails in place and take the buggy to the edge, grab the pieces and dispose of them through the rails and deflect off of that particular plywood chute that we're referring to. And, it is relatively controlled going into the garbage box.

They can further - because the other chute the hole is a bit smaller and you cannot really dump the entire load of the thing. So, they have an option to go and tie off and go up and remove the rails and dump that entire load in a controlled manner through that plywood - over that plywood ramp, but always tied off. Whether you take the middle rail out or you take - if you just take the middle rail out that does not comprise a guardrail and it is not in compliance with toe board, guardrail and top rail.

[206] Mr. McGoey agreed with Crown counsel's suggestion that when Gilberto Nunes removed the mid-rail, and dumped the garbage through it, without being tied off, that once either the middle or top rail has been removed, the worker no longer has the protection of the guardrail system (Transcript, March 25, 2014, at p. 63). Mr. McGoey agreed that Mr. Nunes should have been tied off, and he was surprised by his evidence that he was not.

[207] Mr. McGoey did not personally attend at 875 Middlefield Road, but relied on his competent superintendent and foreman. He said that his superintendent attended there many times, and that the foreman was in place to ensure every aspect of safety. Thus, he does not have first-hand knowledge of where the equipment was located on the roof, since he relied on his superintendent to set it up.

[208] He was shown Exhibit 28, which was an example of a buggy called a "Predator", manufactured by Grizzly. He testified that he recognized this type of buggy, and agreed it was mechanized.

[209] He agreed that Mr. Goncalves was using some type of machine powered buggy at the time of the accident.

[210] With respect to the use of motorized buggies on roofs, Mr. McGoey confirmed that he was aware of the "documentation by all the manufacturers that caution people and state that it would be used within a certain distance from the perimeter, as a safety precaution to those companies" (Transcript, March 25, 2014, at p.66).

[211] He further confirmed (Transcript, March 25, 2014, at p. 66) that he was "very familiar" with the advice that accompanies the Grizzly Predator buggy, which was the buggy used at the time of this accident, that when operating it parallel to a roof edge, the warning line system must be at least 6 feet from the edge; and when operating perpendicular to the edge, the warning line must be at least 10 feet from the roof edge.

[212] He was then asked if the manufacturer's guidelines for use spoke of the use of bump lines, or simply referred to where the equipment can be used on a roof. Mr. McGoey interprets the roof edge warning system line, described in the manufacturer's guide, as being a bump line.

[213] Mr. McGoey clearly took the position that if the roof had guardrails on it, the workers could go as close as they wanted to the edge, using the motorized buggies. Once they took off either the middle or top guardrail, they needed to be tied off.

[214] When asked about the situation of this accident, where the worker's sleeve was caught, and the motorized buggy went over the edge, taking him with it, Mr. McGoey still maintained that the worker could let go of the handle, so that the buggy would still be vibrating and lack the momentum to go through the guardrail. He also maintained that the guardrail system was sufficient to prevent this type of accident, because it was set up based on a calculation of the force it must withstand.

[215] Mr. McGoey confirmed that Mr. Nunes refresher training, after the accident, was part of the whole crew being sent for refresher training, and that he was not singled out as being in contravention of any fall protection rules, nor was anyone else at this location.

[216] Mr. McGoey testified that his corporation does not condone the taking of shortcuts by workers, who are paid hourly, and thus not incented to get the jobs done faster. When supervisors complete accident investigation reports, he receives them.

[217] Since the accident, Mr. McGoey said that the workers can work at the roof edge dumping garbage, without being tied off, provided that the guardrails are in place. However, a Toolbox Talk sheet (Exhibit 30), which he identified, provided to the workers after this accident, indicated that workers needed to be tied off when dumping garbage, and have a second person as a spotter, even with the railings in place. He testified that the corporation wanted to continue work, since the roof was opened, and no stop order had been made.

[218] Mr. Goncalves was a new hire at the time of the accident. Mr. McGoey had not been briefed about his attendance issues, e.g. being late, delaying the crew, missing his ride to work. As a new hire, he would have been subject to more scrutiny on the job site, and limited as to what he could perform. Similarly, Mr. McGoey had not received any reports about Mr. Goncalves and safety issues.

[219] He confirmed that at this project, the corporation was the constructor (Notice of Project, Exhibit 2). He agreed that this meant the corporation had taken on additional responsibility.

[220] When I asked Mr. McGoey to clarify if the buggy shown in Exhibit 28 was the same model as the one used by Mr. Goncalves in the accident, he explained to me that it is the same model, the Grizzly Predator, with different handle treatment. The handles shown in Exhibit 28 were after-the-fact modifications, according to counsel, and not the same as at the time of the accident. Mr. McGoey described the handles on the buggy used by Mr. Goncalves as "more of a guillotine type handle that you pull up, a single bar handle" (Transcript, March 25, 2014, at p. 91).

[221] The Supervisors Accident Investigation Report, with respect to this accident, was entered without objection as Exhibit 30, although no one testified as to its contents.

Andy Carneiro, Sr.:

[222] Mr. Carneiro, Sr. testified with the assistance of a Portuguese interpreter. He is 63 years old, and he has been employed by the corporation for 40 years. He identified all of his training certificates (Exhibit 31).

[223] He confirmed that he was the foreman on the date of the accident. He cannot recall the address of the site. He said that they had begun construction at that site two or three weeks prior to the accident.

[224] Prior to the accident, the yellow chute used to dump garbage was on the east side of the building. The plywood chute shown in a photograph (Exhibit 6) had been there about two weeks. There were two tie-back carts on the roof. One was near the yellow chute and the other was near the wooden chute.

[225] He repeatedly called them lazy if they failed to tie-off, and denied that he ever told anyone not to tie-off when he or she should do so. He said he also reprimanded them if they wouldn't tie-off.

[226] When the accident happened, he was working in the north part of the building, about 300 feet away. He did not know that Mr. Goncalves had fallen off the roof, and only learned of it when a man came up the ladder and started screaming. Later in his testimony, he identified this man as the driver of a truck on the ground who saw him fall, and not as the worker known as Domingos. He did not know that Mr. Goncalves had removed the guardrails to dump, because he was on the north side. If he had known, he would have warned him that if it happened again, he would send him home. He did not have any previous experience with Mr. Goncalves not tying off.

[227] Mr. Carneiro, Sr. testified that he picked up his crew in the morning in December of 2011. He denied seeing Mr. Goncalves running or walking towards his van and leaving without him, and said that he always waited for him. He did speak to him about his absenteeism, however.

[228] He was shown a Toolbox Talk (Exhibit 13), and identified his own handwriting on it. He was shown copies of other toolbox talks, and he denied ever having the crew sign the toolbox talk without it taking place. He would read it, and then give the talk in Portuguese. He also confirmed that RGM would walk around, either with him or a worker, and prepare reports.

[229] He confirmed that his son works for the corporation as well, and that his son is his supervisor.

[230] He also confirmed that he recognized MOL Inspector Gazdik, and that he and one of his colleagues asked him questions about the incident. He then testified that he saw a man on the stairs giving him a signal, and then Domingos said one man had fallen down. Mr. Carneiro, Sr., the man and Domingos asked Mr. Goncalves if he wanted to be moved, and when he said yes, they moved him out of the trailer to the job trailer to wait for the ambulance, which took him to the hospital.

[231] He denied saying to Mr. Goncalves, after his fall, let's go and get the harness because safety is coming.

[232] He confirmed that he is familiar with the Grizzly Predator buggy, and identified the photograph of one (Exhibit 1E) as being something used at 875 Middlefield Road, as well as at other Semple Gooder sites.

[233] He denied having knowledge of prior incidents where a buggy went over a roof top with his crew.

[234] He testified that he, Antonio Goncalves, Paulo Da Sa, Adriano Dias and Domingos were all in the northeast area of the roof, and that Gilberto Nunes was working downstairs, at the time of the accident. They did not have their harnesses on, because they had the fence erected. He had picked them up that morning, and they changed clothes prior to going up to the roof. He did not see each of them take their harnesses from the job trailer, because he did not pay attention while they were changing.

[235] Before he went up to the roof, he spoke to Mr. Nunes, whom he had left downstairs to pump asphalt. He told him to put the harness on because he needs to be tied up on top of the tank. Then he went up to the roof, and went to its north side. He believes that they were all there, except for Mr. Nunes and another man. On the day of the accident, they were only dumping from the wooden chute, since there was no other place to use. He said that their harnesses were on top of the tie-off cart.

[236] During cross-examination, his evidence with respect to the day of the accident was confusing with respect to whether the workers on the roof kept their harnesses in the corner, or on top of the tie-off cart when not in use.

[237] When he was asked if, of the four men, it was one man's job to dump the garbage, he did not answer the question, but replied (Transcript, March 25, 2014, at p. 125), "All I know is that when we go dump the garbage, if you don't have the harness you cannot go dump the garbage."

[238] When Crown counsel then asked him if that meant that everybody on the roof has to have a harness because you never know when you have to dump the garbage, he replied (Transcript, March 25, 2014, at p. 126), "I can't affirm that." Despite having said that, he did agree that they did need fall

protection equipment on if they were removing the guardrail to dump the garbage. He also testified that the only place that day on the roof where the 2 x 4s had been removed was at the location of the wooden chute to dump the garbage.

[239] He recognized the scene in a photograph (Exhibit 1H). It was of the wooden chute, and the guardrail. He testified that the mid-rail in that photograph was not a wooden 2 x 4, but was made of iron. He said (Transcript, March 25, 2014, at p. 128), "I don't know how that showed up there." He was also shown another photograph (Exhibit 1I) of the guardrail, and this mid-rail was also made of iron. Again, he replied (Transcript, March 25, 2014, at p. 128), "They put iron there but I didn't put it there."

[240] Mr. Carneiro, Sr. testified that after Mr. Goncalves fell, he did not go up to the roof to examine the scene. His words were (Transcript, March 25, 2014, at p. 128), "Since Tony fell off the roof I didn't go on top of that roof."

[241] He testified that MOL showed up, and asked him for papers. Police arrived, and sealed the scene, and told all of them that no one goes up to the roof. His evidence was that none of them went to the top of the roof. He also testified that he did not see the iron bar, because he did not look up. He said he was under pressure to run and save his life.

[242] He said that when the buggy is dumping garbage it goes down two feet, but he agreed that if the wooden 2 x 4 was in the middle, it could not fit through, and the mid-rail would have to be removed.

[243] Mr. Carneiro, Sr. testified that he would not use an iron bar as a mid-rail or top-rail in a guardrail system.

[244] When Mr. Goncalves fell, his buggy landed in the trailer below, but the box landed outside of the trailer.

[245] When shown another photograph (Exhibit 1K), he recognized that buggy as the buggy that he had been using on the north side of the roof. In this photograph, it was at the location of the wooden chute. He testified that MOL and Paulo De Sa put it there, although he did not see this MOL person in the courtroom while testifying, and he claimed that this is the information provided to him by Mr. De Sa.

[246] When shown the photographs of the orange tie-off cart (Exhibits 1K and 1L), he identified one or two harnesses on top of it. He did not know where the other three harnesses were. He said it would take two people to move the tie-off cart, since it is not powered, but is moved manually. This cart was heavy, because of the number of special stones they had put in it. He believes that the cart held 12 stones, that each weighed 45 pounds, which is almost a quarter of a ton.

[247] He testified that he never observed Mr. Nunes dump garbage at this site, although he was aware that he worked on the roof from time to time. He did not check to see if he was using fall protection equipment, although he had told him to do so. He said that prior to the accident, he never saw workers at this site on the roof, at the edge, without the guardrails in place.

[248] He confirmed that they were using the wooden chute for two or three weeks prior to the accident. He testified that he did not check on them to ensure they were using their fall protection harnesses during that time, stating (Transcript, March 25, 2014, at p. 144), "Because my responsibility is giving them buggy and tell them to hook up because I can't take care of them."

[249] When shown a photograph of a buggy full of gravel (Exhibit 5), he recognized it from the top of the roof, but could not say who had been using it. He was then shown another photograph, which he identified as being the same buggy (Exhibit 32).

[250] He also identified a photograph of the wooden chute, looking down at it, which he said that he had made (Exhibit 33).

FINAL SUBMISSIONS:

[251] Defence counsel provided me with written submissions, which included his analysis of the credibility of key Crown witnesses, and he made brief oral submissions that were also helpful. He submitted that it was up to Crown counsel to prove the *actus reus* of the offences beyond a reasonable doubt. More importantly, defence counsel made detailed submissions on his client's due diligence defence, including the steps it takes to promote safety, training, and its strict enforcement policy, that includes spot audits conducted by industry consultants.

[252] In conclusion, defence counsel submitted that if the Crown is able to prove the *actus reus* of the charges beyond a reasonable doubt, the defendant should be acquitted as the acts took place without the defendant's direction or approval. The defendant, he asserts, exercised all reasonable care by establishing a proper system to prevent the commission of the offences and by taking reasonable steps to ensure the effective operation of the system.

[253] Crown counsel made detailed oral submissions. In those submissions, he asserted that the *actus reus* of each offence has been proven beyond a reasonable doubt. He characterized the combination of the legislation and the jurisprudence, which he provided, as requiring the defendant, in its due diligence defence, to show that it took every precaution reasonable in the circumstances to prevent this accident from occurring.

[254] Crown counsel asked me to consider the credibility of the witnesses, to determine if the act of Mr. Goncalves was a "one off rogue act on his part" or part of what he termed "a culture of discretion" that works to defeat the fall protection system in place.

ANALYSIS:**The Nature of the Legislation Generally:**

[255] According to the 2002 judgment of the Court of Appeal in *Ontario (Ministry of Labour) v. Hamilton (City)*, 58 O.R. (3d) 37 at para. 16:

The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[256] In *Hamilton*, at para. 17, the Court of Appeal cited with approval its characterization of this legislation in *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 at 27, which is set out below:

The Occupational Health and Safety Act is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with that purpose.

The Relevant Regulations:

[257] Section 23(1)(a) of *OHSA* states:

PART III: DUTIES OF EMPLOYERS AND OTHER PERSONS**23. Duties of constructor**

23.(1) A constructor shall ensure, on a project undertaken by the constructor that,

- (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
- (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
- (c) the health and safety of workers on the project is protected.

[258] In particular, O. Reg. 213/91 states:

26.1 (1) A worker shall be adequately protected by a guardrail system that meets the requirements of subsection 26.3(2) to (8). O. Reg. 145/00, s. 12.

(2) Despite subsection (1), if it is not reasonably possible to install a guardrail system as that subsection requires, a worker shall be adequately protected by at least one of the following methods of fall protection:

1. A travel restraint system that meets the requirement of section 26.4.
2. A fall restricting system that meets the requirements of section 26.5.
3. A fall arrest system, other than a fall restricting system designed for use in wood pole climbing, that meets the requirements of section 26.6.
4. A safety net system that meets the requirements of section 26.8. O.Reg. 145/00, s. 12; O. Reg. 85/04, s.5(1).

[259] Section 1 defines "guardrail system" as follows:

"guardrail system" means an assembly of components joined together to provide a barrier to prevent a worker from falling from the edge of a surface. [emphasis added]

[260] Moreover, a guardrail system must consist of a top rail, an intermediate rail and a toe board, as per subsection 26.3(4)(1) of O. Reg. 213/91.

[261] According to subsection 26.3(4)(2):

The intermediate rail may be replaced by material that can withstand a point load of 450 newtons applied in a lateral or vertical downward direction.

[262] Section 1 also defines "travel restraint system" as follows:

"travel restraint system" means an assembly of components capable of restricting a worker's movement on a work surface and preventing the worker from reaching a location from which he or she could fall.

[263] The requirements of a travel restraint system are set out in subsection 26.4, which provides:

26.4 (1) A travel restraint system shall consist of a full body harness with adequate attachment points or a safety belt. O. Reg. 145/00, s. 14.

(2) The fully body harness or safety belt shall be attached by a lifeline or lanyard to a fixed support that meets the requirements of section 26.7. O. Reg. 145/00, s. 14.

(3) The travel restraint system shall be inspected by a competent worker before each use. O. Reg. 145/00, s. 14.

(4) If a component of the travel restraint system is found to be defective on inspection, the defective component shall immediately be taken out of service. O. Reg. 145/00, s. 14.

The Principles of Statutory Interpretation:

[264] The Court of Appeal has recently considered the modern approach to statutory interpretation, and held, as follows, at para. 27 in *Hincks v. Gallardo*, 2014 ONCA 494 (CanLII):

...The modern approach to statutory interpretation articulated by the Supreme Court of Canada requires a court to consider the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1988 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21.

[265] The *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, provides under Part VI: Interpretation, the following similar guidance:

General Rules of Construction

Law always speaking

63. The law is always speaking, and the present tense shall be applied to circumstances as they arise. 2006, c. 21, Sched. F, s.63.

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s.64(1).

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64(2).

Relevant Jurisprudence:

[266] According to the Court of Appeal's judgment in *Timminco*, at para. 23:

Occupational Health and Safety Act offences are, *prima facie*, strict liability offences. This was made clear by Dickson J. in *R. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353. At pp. 1325-26 S.C.R., pp. 373-74 C.C.C., he said:

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[267] Thus, the Crown must prove, beyond a reasonable doubt, the *actus reus* of each count herein. If the Crown establishes the *actus reus*, then the burden shifts to the defendant to prove its defence, which in this case rests on due diligence, on a balance of probabilities. It is clear from all the evidence tendered and the submissions made by defence counsel that the defendant is not asserting any mistaken set of facts.

[268] According to Archibald, Jull, and Roach, in their loose-leaf work, "Regulatory and Corporate Liability, From Due Diligence to Risk Management," Canada Law Book, Vol. 1, Nov. 2014, ch.3, "The *Actus Reus* in Regulatory Offences: A Risk-based System," at p. 3-5:

A broad remedial approach continues to evolve.

In *R. v. Chrima Iron Works Ltd.*, a supervisor was crushed by a steel box that was being turned over while on a forklift. The company appealed from the conviction under the *Occupational Health and Safety Act*. The charge was worded as "failed to ensure that a heavy metal piece referred to as a smoke box was transported so it would not tip, collapse, or fall." The defence asserted that the box was not being transported when it fell, following the narrow interpretation necessary of a penal statute. On appeal, the court concluded that a wider interpretation was appropriate "given the remedial nature of public welfare statutes". At the *actus reus* stage, the courts have interpreted words such as "ensure" to mean that an employer is virtually an insurer who must make certain that the proscribed regulations for safety in the workplace have been complied with.

[269] In terms of how to approach an analysis of the due diligence defence, Justice Libman in his loose-leaf work, "Libman on Regulatory Offences in Canada," EarlsCourt Legal Press Inc., ch. 7, "The Defence of Due Diligence," at p. 7-6 to 7-7, refers to the distinction made by the majority of the Court of Appeal of British Columbia, in *R. v. MacMillan Bloedel Ltd.* (2002), 173 B.C.A.C. 22, 220 D.L.R. (4th) 173 (C.A.). He summarizes this distinction this way:

In a recent British Columbia case, the majority of the Court of Appeal commented that there are two "alternative branches" of the due diligence defence. The first applies where the defendant can establish that he or she did not know, and could not reasonably have known, of the existence of the hazard in question. The second branch applies where the accused knew, or ought to have known, of the hazard, in which case it is open to him or her to be shielded from liability upon establishing that reasonable care was taken to avoid the "particular event." The question, then, is whether the accused's conduct was "innocent" in the case of the first branch of the defence, or whether under the second branch, the accused took "all reasonable steps" in the context of the particular event.

[270] Assuming without deciding that defendant is in need of a due diligence defence, then its defence falls under the second branch, and it needs to show, on a balance of probabilities, that it took all reasonable steps to prevent the accident, since the hazard in question, re-roofing a tall building, was self-evident.

[271] As Justice Libman notes at p. 7-27 of his loose-leaf:

While the Occupational Health and Safety Act is concerned about the protection and safety of workers at the workplace, there is not an expectation that an employer or supervisor "be superhuman" or "perform their duties to perfection." Employers are not to be held to "an impossible standard of care such as perfection"; however, the standard must be reasonable and of prudent care for the circumstances of the case, the type of offence under consideration, and the type of industry.

FINDINGS OF FACT AND LAW:

Particulars of the Accident:

[272] Semple Gooder Roofing Corporation is a corporation duly incorporated under Ontario law, and is a "constructor" within the meaning of the *OHSA*.

[273] On December 12, 2011, workers employed by the defendant, Semple Gooder Roofing Corporation, were working on a re-roofing project, at a building, located at 875 Middlefield Road, Toronto. One of those workers was Antonio Goncalves.

[274] Mr. Goncalves fell off the roof of this building, on this date. I accept the evidence of MOL Inspector Gazdik that this building was 27 feet and 7 inches high. This evidence was corroborated by the defendant's Vice-President of Operations, Mr. McGoey, who testified that this was "a two storey building." I further accept the evidence of MOL Inspector Gazdik that Mr. Goncalves fell approximately 22 feet, from the top of the roof into the bottom of the trailer bed below, which had been placed there by the defendant to hold garbage.

[275] The defendant had erected a guardrail system on top of this roof for the protection of its workers, as well as installing a stair tower and scaffolding. I accept the evidence of MOL Inspector Gazdik that this guardrail system, which included a toe board, a middle rail and a top rail, met the requirements of the regulations.

[276] I accept the evidence of Mr. McGoey that this project commenced around October 20, 2011.

Credibility Issues:

[277] I am entitled to accept any, all or none of the testimony of any witness. See: *R. v. Somasundaram*, 2013 ONSC 7626 (CanLII), at paragraph 18.

[278] I accept as honest and accurate the evidence of Inspector Gazdik. His testimony was clear and concise, although I find that defence counsel is correct in his Final Submissions that Inspector Gazdik could not recall if there were two temporary anchor systems on the roof on the day of the accident. I attribute this to a memory lapse, and otherwise find that he has a very high level of credibility. I have relied upon his measurements taken at the scene of the accident, and his identification of key photographs of the accident scene itself.

[279] I also accept the evidence of Mr. Nunes and Mr. Dias, both of whom I found to be credible. Their evidence was clear, and consistent, and not shaken during cross-examination. Mr. Nunes's testimony that there was at least one orange cart on the roof in the weeks prior to the accident was supported by his clear identification of a photograph of such a cart (Exhibit 1-K). While Mr. Dias testified that he always used appropriate fall protection equipment, Mr. Nunes admitted that sometimes he did not wear it. Based on this evidence, I conclude that some workers tied off more routinely than others, and that their foreman, Mr. Goncalves, Sr., gave them "more freedom," as described by Mr. Nunes, than others in management did.

[280] I found the evidence of Mr. Goncalves, the injured worker, to be much less credible, and at times, prone to exaggeration if not anger towards his employer. For example, he was the only witness who testified that the harness was never attached to the orange cart by the rope when they worked on the roof of this site. During his testimony at trial, he also insisted that this cart was not properly assembled and was far away from the location of his fall. However, during a prior interview with David Thompson, in January 2014, he claimed that the cart "was further back." (Transcript, March 18, 2014, pp. 26 to 27). Not only did he contradict himself, but his prior statement and his evidence at trial were in direct contradiction to the evidence of Mr. Dias and Mr. Nunes, who both testified that they had tied off at this same site at least some if not all of the time.

[281] Nevertheless, when the evidence offered by Mr. Goncalves was corroborated by the evidence of other witnesses, or by physical evidence, I accepted it in part. Thus, I accept as true, his evidence that he had removed both the middle and upper parts of the guardrail, to dump garbage, without tying-off, when his sleeve caught on the motorized buggy, and he fell over the edge of the roof. This testimony was corroborated by the physical evidence of the broken buggy, found on the ground of the accident scene, by Inspector Gazdik. It was further corroborated by the video that Inspector Gazdik had previously viewed, in which his fall off the roof was captured, and observed by a bystander.

[282] Moreover, the testimony provided by Mr. Goncalves of his use of a motorized buggy was corroborated by all the witnesses, who testified that a motorized buggy was being used to move the garbage to this alternate location on the roof. In fact, the defendant admitted that the motorized buggies in use were modified after this accident, without describing how, in their written Final Submissions, at paragraph 98, which corroborated the testimony of Mr. Goncalves in this regard, as well.

[283] The testimony of the foreman, Andy Carneiro, Sr., was confusing. It was not clear from his evidence during cross-examination, whether on the date of the accident, the workers' harnesses needed

to tie-off were kept in the corner, or on top of the tie-off cart, when not in use. When he was asked if it had been one worker's job to dump the garbage, he did not answer the question, but replied, "All I know is that when we go dump the garbage, if you don't have the harness you cannot go dump the garbage." Despite having made this statement, Mr. Carneiro, Sr. could not confirm that each worker on the roof needed to wear a harness, since each worker would not know when he might need to dump the garbage.

[284] His confusion during cross-examination is of serious concern, since he was the foreman supervising the crew at the time of the accident. It also indicates that the defendant did not have a clear process in place for the execution of the second garbage disposal technique at the time of the accident, because if it had, as the crew's foreman, he could have answered these questions.

[285] I found Mr. McGoey to be a straightforward and careful witness. I accept as true that Mr. McGoey is doing everything in his power to ensure that his work sites are safe. However, Mr. McGoey testified that he had not been visiting this project, and was relying on his foreman and superintendent.

[286] Based on the testimony of Mr. Goncalves, Mr. Carneiro, Sr., Mr. McGoey, I find that when this re-roofing project commenced, the defendant first installed a yellow chute, with a receptacle below it, for dumping the garbage. However, the receptacle below it had filled up, and so the defendant had to make alternate arrangements to dump garbage quickly, in order to keep the re-roofing project from stopping.

[287] Again, I accept the evidence of Mr. McGoey that since the original bin was full, the workers then focused on a different location on the roof, and built a ramp, to use to dump the garbage in a controlled way. This evidence was corroborated by Mr. Goncalves, and Mr. Carneiro, Sr.

[288] I accept the evidence of both Mr. Goncalves, Mr. Nunes and Mr. Dias that at this alternate location, the guardrail system was routinely opened up, by removing at least the middle rail if not both the middle and top rails. The workers did so in order to dump the garbage out of the motorized buggy, and over the side of the building, into the receptacle below.

[289] Mr. McGoey was not surprised by the evidence of Mr. Nunes that he had removed the middle rail, and only expressed surprise that Mr. Nunes had not been tied off at the time. Mr. Dias also removed the middle rail, but testified that he had tied off prior to dumping the garbage.

The *Actus Reus* of the Offences:

[290] Based on the ample evidence before me, I find that a worker was exposed to a fall of more than three metres, and that neither the guardrail system, nor the alternate fall protection measures, both installed by the defendant, were properly in use at the time of this accident.

[291] "Reasonable doubt" was best described by Cory, J. in *R. v. Lichus* 1997 CanLII 319 (SCC), [1997] 3 SCR 320 (SCC) at paragraph 39:

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reasons and common sense. It is logically derived from the evidence or absence of evidence.

[292] Thus, based on the evidence I have heard, I find that the *actus reus* of both offences has been made out beyond a reasonable doubt.

Due Diligence Defence:

[293] The defendant has provided extensive evidence, which I accept as true, that it set up a guardrail system around the perimeter of this roof. I also accept that it provided appropriate equipment to its workers, to tie off, which constituted a travel restraint system, for use when the guardrail system was opened up. Either fall protection system, if properly used, satisfies its *prima facie* legal obligations.

[294] The defendant also demonstrated that it had clear internal policies. It held weekly production meetings to discuss safety at various project sites. It provided workers with regular "Toolbox Talks." I accept the evidence of Mr. Dias and Mr. Nunes that cheating often took place on Toolbox Talk tests, although this additional testing was not required by law. The defendant held superintendents' meetings, for which minutes were prepared. It also demonstrated that it hired outside consultants, to teach various health and safety courses, and more importantly, to perform spot audits, for its workers, as well as relying on its own management to perform such tasks. Workers who failed to use safety equipment were sent home without pay for a day, and given retraining. The defendant was prepared to use discipline to enforce safety standards, and I accept that it has fired other long-term workers who repeatedly breached its safety requirements.

[295] In fact, the defendant has generally met or exceeded many industry standards in its operations, and has obtained certificates to this effect in order to pre-qualify for competitions to obtain important roofing contracts.

[296] The issue at this trial, however, is whether the defendant can show, on a balance of probabilities, that it took all reasonable steps to prevent this accident.

[297] According to Mr. McGoey, motorized buggies have been used in this industry for about 30 years. Based on his evidence, I accept that the recommendations made by the manufacturers of motorized buggies are more restrictive when the buggies are to be used on rooftops.

The Initial Garbage Disposal Technique:

[298] The initial garbage disposal technique used, where the worker using a mechanized buggy would take the garbage close to the edge of the roof, with the full guardrail in place, and then drop the garbage down an external chute to the disposal bin below, demonstrates that the defendant was initially taking reasonable safety precautions at this project, given the height of the building, and the use of mechanized buggies.

[299] This initial garbage disposal technique presumably fell within ss.26.3(4)(2) of the Regulation, which provides that the intermediate rail can be replaced with material that can withstand a point load of 450 newtons applied in a lateral or vertical downward direction; although there was no technical evidence at this trial about the extent of the impact that the middle rail could withstand from a motorized buggy, as part of a full guardrail system, other than Mr. McGoey's testimony that it had been set up based on a calculation of force that it can withstand.

[300] Crown counsel did not challenge Mr. McGoey's evidence to this effect, and Inspector Gazdik testified that the guardrail as set up met the regulatory requirements. Thus, the initial garbage disposal technique appears to have met all legislative requirements and is not at issue in this trial.

The Second Garbage Disposal Technique:

[301] The initial garbage disposal technique was replaced with the use of a wooden ramp, and an opened guardrail, at a different location on the roof, and a new disposal bin was located beneath it ("the second garbage disposal technique"). This was the scene of the accident. I accept as true the testimony provided by Mr. McGoey, that he expected that the workers would comply with their health and safety training, and tie-off, or pass the motorized buggy to someone else who was tied off.

[302] While Mr. Goncalves, Mr. Nunes and Mr. Carneiro, Sr. all testified that a worker could hand off the buggy to another worker who was already tied off so that the second worker could dump the garbage, it was clear from Mr. Nunes's testimony, "That's the way it's supposed to be done" (Transcript of March 24, 2014, at p. 88); and Mr. Carneiro Sr.'s confusion and evasiveness when asked to explain whether it had been one worker's job to dump the garbage; that in fact there was no set process in place to hand off the buggy to another worker who would have been tied off, at the time of the accident.

[303] Moreover, the change from the first to the second garbage disposal technique was not discussed at the October 20, 2011 superintendents' meeting (Exhibit 20), and was not discussed until the next meeting held on December 13, 2011, which was the day after the accident.

[304] The workers of this crew, that included Mr. Goncalves, were given refresher training subsequent to the accident, but there is no evidence that they were given any additional instruction or refresher lecture, e.g. a Toolbox Talk, on the second method of garbage disposal, and the process in place for this crew to carry it out, prior to the accident.

[305] Moreover, I fully accept the candid evidence of Mr. Nunes, who has been with the defendant for a number of years, when he testified that he thought he could remove the middle rail of the guardrail, and did not need to be secured, and that "they" had not discussed this scenario. I also fully accept as true his testimony that while the supervisor always told them to tie off, the foreman "gave us more freedom."

The Middle Rail of the Guardrail is an Iron Bar:

[306] There was also testimony from the foreman, Mr. Carneiro Sr., that identified the middle rail in the guardrail as being an "iron bar", when he was shown photographs of the guardrail at the accident site,

taken by the TPS (Exhibits 1H and 1I). When he testified, he was clearly surprised that it was not a wooden 2 x 4, but an iron bar, and he said, "I don't know how that showed up there."

[307] Mr. Dias had also testified that after he dumped the garbage using the second garbage disposal technique, he put back the middle rail, which was made of iron, also referring to one of the same photographs (Exhibit I1).

[308] Thus, based on the clear photographs taken by TPS, and the testimony of Mr. Carneiro, Sr. and Mr. Dias, I find that the middle rail of the guardrail system had been replaced at the site of the second garbage disposal technique. The original wooden 2 x 4 had been removed, and replaced with an iron bar, that was not securely fastened to the guardrail system, at the time of the accident. Thus, the removable iron bar which replaced the middle rail compromised the guardrail system, violated the legislation, which requires its components to be "joined together," or able to withstand a point load of 450 newtons applied in a lateral or vertical downward direction.

[309] It is even more troubling that this iron bar was in place when the TPS arrived and took these photographs, since I accept, as true, the evidence of Mr. Goncalves that he had removed both the middle and top rails of the guardrail system at the time of the accident. The only reasonable inference is that someone put the bar back in place after his fall, prior to the arrival of the TPS.

Conclusion:

[310] The defendant has failed to show, on a balance of probabilities, that it took all reasonable steps to prevent this accident. There was no clear process in place for the second garbage disposal technique, at the time of the accident.

[311] In particular, the following issues are not clear from the testimony heard at this trial: how many workers were supposed to be involved in dumping the garbage under the second method of garbage disposal; how the middle rail of the guardrail system was replaced with a removable iron bar unbeknownst to the foreman; exactly where their harnesses were located on the roof if each worker needed to be wearing a harness in case he took a turn dumping the garbage; if a worker should have passed the motorized buggy to another member of the crew who was already tied off; and if so, where the motorized buggy should have stopped in relation to the open guardrail, in order to comply with the manufacturer's recommendations, which are stricter for use of motorized buggies on roof tops.

[312] The superintendents' meeting of December 13, 2011 (Exhibit 20), indicates that post-accident, a tie-off and buggy pass-off process were in the process of being implemented, since it said that it was to be "confirmed and set up."

[313] Given that the *OHS*A is a remedial public welfare statute, I recommend that the *OHS*A be amended to include requirements with the respect to the use of motorized buggies on rooftops so that future workers do not become entangled in them and fall. I am not satisfied that the current state of the legislation goes far enough to protect workers in this regard.

ORDER:

[314] For the reasons noted, the defendant is convicted of both counts, as charged.

Dated at Toronto, this 8th day of April, 2015.

Mary A. Ross Hendriks, J.P.