Revised October 14, 2010 Justice Brian Mackey

I intend to first briefly summarize each count starting with the defence position and finishing with the Crown’s arguments. I will give the court’s decision for counts 5-12, and then 13, 14 and 16 at the end of each review.

**Non-suit Motion**

I am dealing with a motion of non-suit regarding the Ottawa ‘Part 3 Information’ charging George Neilson and Tom Neilson and numbered company 34977 Ontario Ltd., operating as Lacombe Waste Services, with counts five through twelve, and counts thirteen, fourteen and sixteen, with violations of the Environmental Protection Act.

As noted in the Superior Court of Justice (Ontario) ruling of Regina vs. Munoz, in 2006, regarding the role of a preliminary inquiry judge, the question to be asked by a preliminary inquiry judge under s.548 (1) of the Criminal Code is the same as that asked by a trial judge considering a motion for a directed verdict, namely, “whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. “

This decision followed the Regina vs. Arcuri ruling of the Supreme Court of Canada in 2001. The Chief Justice noted that, “It is a well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict,” as noted in the frequently quoted Shephard case.

The evidence before the court must be weighed in the limited sense of assessing whether it is capable of supporting the inferences that the Crown asks the jury to draw. This task does not require the preliminary inquiry judge to draw inferences from the facts or to assess credibility. Rather, he or she must consider whether the evidence taken as a whole could reasonably support a verdict of guilt**.**

Inferences are addressed in Regina vs. Arcuri noting that: “Any inferences relied upon by the judge to commit an accused must be both: (1) reasonably based on the evidence heard at the preliminary inquiry; and (2) reasonable. Such inferences cannot be based on speculation, no matter how seemingly reasonable.” The court further stressed the requirement for inferences to be reasonably drawn from the evidence.

It is understood that where the Crown does not call direct evidence, a limited weighing of the circumstantial evidence is needed, as the question then becomes whether the remaining elements of the offence may reasonably be inferred. In dealing with the issue of an inferential gap between the evidence and the matter to be established, the judge must assess whether the evidence is reasonably capable of supporting the inferences that the Crown asks the judge to draw. It is imperative that the judge only ask whether the evidence, if believed, could reasonably support an inference of guilt.

The Regina vs. Masterson case in 2008 from the Ontario Court of Appeal also dealt with a non-suit matter and the court noted that the judge had gone farther than he should have in weighing the evidence and effectively ended up trying the case. The court also noted that the assessment of the evidence was done on a piecemeal basis instead of considering the whole. The Crown has also noted the court’s position that, “In deciding the issue, the trial judge was to take the case for the Crown at its highest, and in so doing, it was incumbent upon him to resolve competing permissible inferences in favour of the Crown.” This naturally became a matter of discussion and I will return to it later in my decision.

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I will start my review by stating that I have read and re-read everything presented to me and have tried to capture the essence of the arguments and place them in the following review. There is a lot of material and exhibits, a lot of evidence and many of the counts are repetitive.

With that in mind, I now intend to summarize the positions on each of these counts:

Count 5:

Charge: Failing to take representative samples of in-coming wastes prior to being received on September 14, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

 This load has been identified as Work Order #81508 and Incoming Waste Analysis #IB9241.

Defence notes that the only direct evidence regarding sampling was given by Mr. Guerrero who testified that a representative sample was taken, supported by the Incoming Waste Analysis sheet, and that a chemist trained by him analyzed the samples. Neither the use of sawdust nor the inconsistency between Mr. Guerrero’s notes on the work order and the chemist’s note on the Incoming Waste Analysis sheet are seen as giving rise to a reasonable inference regarding the charge. Defence argues that the use of sawdust does not support a reasonable inference of other than solid waste and that Mr. Guerrero’s and Officer Heeringa gave evidence that sawdust is used with greasy and dusty loads.

Further, defence argues that Mr. Guerrero testified that nothing in his notes indicated a failure to take a representative sample, that the only reasonable inference of paint received in bags is that it was solid. And, that second samples, not recorded in the Incoming Waste Analysis sheets, were taken of unexpected waste after unloading the waste. Additionally, the obligation to take a representative sample occurs before unloading the roll-off box. Mr. Guerrero confirmed that certain waste may be present and undetectable before unloading, and that his notes relate to a time during or after unloading.

The Crown argues that there is evidence that water tests were done on the aqueous phase only proving an aqueous phase in the load. Samples were taken and analyzed but not a representative sample analyzed by an outside lab due to the limitations of Lacombe’s lab regarding volatiles, semi-volatiles, tetrachlorethylene, etc. The final point is that there is evidence of two hours labour to mix sawdust and reference to 4,000 kilograms. The Crown’s conclusion is that the load was liquid enough to need solidification.

Count 6:

Charge: Failing to take representative samples of in-coming wastes prior to being received on September 19, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #81509 and Incoming Waste Analysis sheet #IB9267.

Defence argues that the Crown witness, Mr. Guerrero testified that a representative sample was taken as supported by the Incoming Waste Analysis sheet. The waste samples were analyzed by a chemist trained by Mr. Guerrero.

Mr. Guerrero stated that his note “mix with oil and grease” is consistent with a waste described as 100% solid. Defence pointed to Exhibit 11 photographs with debris coated with oil and grease noting that there is no evidence to suggest it was improper to call waste with some ‘sludge’ as 100% solid, that the use of sawdust does not support a reasonable inference of other than 100% solid waste given the testimony of Mr. Guerrero and Mr. Heeringa. Indeed, the Incoming Waste Analysis sheets may not describe the results of all samples given Mr. Guerrero’s comment that a second sample may be taken and those samples may not be recorded on the sheets.

Any inconsistency relates to after unloading given the requirement to take representative samples before unloading.

The Crown noted that the business of Recyclex is basically collecting and reclaiming solvents and the waste from them is supposed to be free of those solvents. Note was made that this load contained sufficient liquid that it did not pass the slump test which is a requirement of Regulation 347. Although some sampling was done, the position is that a representative sample was not taken of the organics.

Count 7:

Charge: Failing to take representative samples of in-coming wastes prior to being received on September 21, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #81789 and Incoming Waste Analysis sheet #IB9285.

Here again, the defence position is that Mr. Guerrero, as the Crown witness, testified that a representative sample was taken as supported by the Incoming Waste Analysis sheet. The further position on circumstantial evidence is that there are other credible explanations for the alleged inconsistency between Mr. Guerrero’s notes on the work order, and the chemist’s note on the waste analysis sheet.

The Crown notes that the Incoming Waste Analysis document confirms that an aqueous phase test was performed from this load and that sawdust was used. The Crown referred to the note on the work order for this load stating: “Waste arrives containing large amount of free liquid oil,” and took the position that if, “that’s not something that needs to be tested. I don’t know what needs to be tested.” This suggests to the Crown that there is some evidence that this load contained something unexpected and should have been subject to a representative sample as required in the Certificate of Approval.

Count 8:

Charge: Failing to take representative samples of in-coming wastes prior to being received on October 3, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #82096 and Incoming Waste Analysis sheet #IB9351.

Defence argues that Mr. Guerrero testified that a representative sample was taken and analyzed by a chemist trained by him. In fact, this is one case where Mr. Guerrero testified to taking a second sample of the liquid in question. The argument is also made that there are other credible explanations for the alleged inconsistency between Mr. Guerrero’s notes and the chemist’s note on the waste analysis sheet.

The Crown referred to work order #82096 and the reference to, “Drop off empty roll-off boxes.” Colour photographs are available for this load showing drums in a lugger box. Mr. Guerrero noted that drums could be received as long as they were empty and crushed without lids on. The work order notes, “Box came in with several drums with the tops on all the drums. Tops had to be removed. Some 205 litres of liquid was removed and Mr. Guerrero sent the pictures to the Neilsons. This load was invoiced as solid, non-hazardous industrial waste debris and an aqueous phase analysis was performed on the liquid. Mr. Guerrero stated, “And when I opened them, they were full of liquids...you’re not gonna send me something that says solid, non-haz, but you send them in drums with something inside which I have no idea what it is.” The Crown argues that this constitutes some evidence.

Count 9:

Charge: Failing to take representative samples of in-coming wastes prior to being received on October 31, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #82817 and Incoming Waste Analysis sheet #IB9497.

Defence noted that the only direct evidence is that of the Crown witness, Mr. Guerrero, who gave evidence that a representative sample was taken as supported by the waste analysis sheet. There are other explanations put forward by the defence for the alleged inconsistency between the notes of Mr. Guerrero and the chemist. The argument was also made that any inconsistency must relate to a point in time and is therefore not relevant to the obligation to take a representative sample before unloading the roll-off box.

The Crown noted that this is a load from Recyclex with the sampling of an aqueous phase. Reference was made to seven buckets of sawdust used with each bucket the size that a loader would lift (which was described in evidence as the size of a desk). There is a letter from Recyclex noting this to be a load of “filters, absorbents, grease contaminated with hydrocarbon.” Again photos were taken and showed to the Neilsons. Mr. Guerrero noted on the photos “free oil” (as well as carbon black on one photo). The Crown made the point again that no tests were conducted on this free oil except the aqueous test that wouldn’t confirm contamination and is considered a limited test.

Count 10:

Charge: Failing to take representative samples of in-coming wastes prior to being received on November 14, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #83440 and Incoming Waste Analysis sheet #IB9560.

Here again, the defence argues that the only direct evidence comes from the Crown witness, Mr. Guerrero, who testified that a representative sample was taken as supported by the waste analysis sheet. Regarding circumstantial evidence, the argument continues that there is none to support the charge. Inconsistencies between Mr. Guererro’s notes and photographs and the chemist’s note are seen as explainable including a very small amount of liquid in the photo, the use of sawdust for dusty and greasy loads, and evidence that second samples were taken of unexpected wastes after unloading. The argument was also used here that any inconsistency (wastes that were not detected before unloading) relates to a point in time after the unloading, with the requirement to sample a roll-off box before unloading.

The Crown notes an aqueous phase with this load and refers to the comment on the Incoming Waste Analysis sheet for “carbon oil” which is a liquid. The work order refers to five buckets of sawdust used to solidify the load and pictures taken by Mr. Guerrero for the Neilsons which appears to show an oil slick.

Count 11:

Charge: Failing to take representative samples of in-coming wastes prior to being received on December 28, 2005 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #84674 and Incoming Waste Analysis sheet #IB9771.

The defence argues that Mr. Guerrero gave direct evidence that nothing in his notes indicated a failure to take a representative sample. Further, that the alleged inconsistency is based on the invalid assumption that the Incoming Waste Analysis sheet describes all the samples taken and that second samples were taken after unloading, but not recorded on the waste analysis sheet. And, that any inconsistency relates to a point in time after unloading.

The Crown noted the standard Recyclex documentation referring to the load as “filters, absorbents, grease contaminated with hydrocarbon.” Photos were taken by Mr. Guerrero who referred to a liquid coming out of the back of the truck as “oil.” He clarifies this position as he referred to it originally as water, but says it was a mixture with oil given the colour. It was further noted that the load contained a large volume of liquid, approximately 1,000 litres.

Count 12:

Charge: Failing to take representative samples of in-coming wastes prior to being received on May 30, 2006 at 5555 and 5573 Power Road in Ottawa as per condition 17 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

The load in question relates to Work Order #89037 and Incoming Waste Analysis sheet #IB10415.

The defence notes that Mr. Guerrero testified that nothing in his notes indicates a failure to take a representative sample. Defence further argues that there is no inconsistency between Mr. Guerrero’s note that the waste contained a lot of oil and the chemist’s note that the waste contained 20% organics.

The Crown points to another case of an aqueous phase on the Lacombe Incoming Waste Analysis sheet including a section called, “% - Phase separation.” Under the column “organics” it reads 20 with 80 under “solids.” The Work Order notes that 3500 kg of sawdust was used with an entry from Mr. Guerrero of, “Tom, a lot of oil present. It couldn’t be separated.”

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Defence Summary on Counts 5 to 12:

Regarding the eight charges listed above, the defence takes the position that the Crown is relying on not finding any evidence that samples of any of these loads were sent to outside laboratories as evidence. It is noted that the charges are for breaching the Certificate of Approval which sets out a particular method for screening waste and it is not related to sending out samples. The Ministry has approved this process; it is their methodology. The argument is made that there is absolutely no requirement from the Ministry for offsite analysis. Nothing is said about sending offsite any load with organics in it. Defence did point out that there is direct evidence from Mr. Guerrero that secondary sampling was standard practice if something unexpected was found.

Regarding the Crown’s position on aqueous phase testing, defence notes that there was no evidence to suggest that this section of the waste analysis sheet is used only when there is free liquid. Further, if it were correct it would prove that any liquid was in fact tested. Defence also makes the point that Mr. Guerrero often thought certain testing would be nice, but it is not required in the Certificate of Approval.

Additionally, there isn’t evidence that all of the loads had any liquid. Mr. Guerrero testified that sometimes when he got to the load it was already mixed.

Crown Summary on Counts 5 to 12:

The Crown noted that there is a requirement in the Certificate of Approval that representative samples be taken of all incoming loads. The issue of when to take a sample was discussed, noting the need to sample immediately that a truck arrives and the inability to know what is in the load until it is dumped at the site. The Crown acknowledged that an initial sample may miss material that is deep in the load. The issue was raised that there are financial incentives to mix into a load those things which would be expensive to otherwise dispose.

The Crown made the point that because of the limitations of the initial sampling, the load cannot be properly assessed, and therefore representatively sampled, until the load is exposed, generally at the time of unloading or dumping. Further, that all eight of the counts deal with the incoming waste analysis documents showing an ‘aqueous phase’ analysis which, in fact, lead to the charges. These loads had sufficient liquid content that a sample could be taken although the Lacombe laboratory could not analyze for organics or anything listed in Schedule 4, the ‘leachate’ toxic regulation. This is the Crown’s point, that without that sampling and analysis, Lacombe could not know what the liquid was, such as ‘tetrachlorethylene’. This led to a review of the questioning of Mr. Guerrero wherein he refers to Lacombe’s ability for basic analysis in their lab as opposed to the Fisher lab which is certified with greater analytical capabilities. Reference was made to Officer Heeringa’s comments that Lacombe had the capacity to perform a limited suite of chemical analysis in-house.

The Crown further noted that Mr. Guerrero confirmed that once sawdust is added to a suspect load that you cannot then take an accurate representative sample because of dilution. Mr. Herlihy made the additional argument that although sawdust may be used for dust or grease, it could also be used because the load was full of liquid.

The Crown summarized the position that there is evidence on every count of liquid being present, to a greater or lesser degree, and in some cases we are told specifically how much is present. There is no proof of any sampling for the range of contaminants, volatiles and semi-volatiles that may have been present. Additionally, the Crown asserts that when Mr. Guerrero asked either Tom or George Neilson for permission to send loads out that concerned him for sampling, he wasn’t given the clearance.

On that note, Mr. Herlihy finished with a comment about George and Tom Neilson being Lacombe Waste Services. He referred to the Environmental Protection Act and Section 194 which states that: “Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation, from... (a) Discharging or causing or permitting the discharge of a contaminant. The Crown referred to the examination of Mr. Guerrero regarding the involvement of either Tom or George Neilson where Guerrero stated that he occasionally gave photographs directly to Tom Neilson and that the normal paper trail would lead to Tom Neilson. The Crown makes the argument that nothing happens at Lacombe without the oversight and approval of either Tom or George Neilson.

**Non-suit Motion Decision**: Counts 5 to 12 (Ottawa Information)

In addressing these counts, I am aware that the test for each is: “whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty.” Additionally, under this test, a preliminary inquiry judge must commit the accused to trial “in any case in which there is admissible evidence which could, if it were believed, result in a conviction.” Given that there is circumstantial evidence, the court is required to consider the inferential gap between the evidence and the matter to be established and assess whether the evidence is reasonably capable of supporting the inferences in question.

These counts all involve the same charge at different times of “failing to take representative samples prior to being received.” The Crown essentially took the position that the presence of liquid, and often oil or some other unknown substance requiring extensive use of sawdust was never sampled properly by an offsite laboratory thereby confirming the charge. In that regard, the Crown referred to Lacombe documentation showing notes regarding unexpected materials.

The Defence counter argued that a representative sample was taken each and every time, according to the Certificate of Approval, and in compliance with standard testing, with additional sampling, as and when required, but not recorded. Also, that the use of sawdust was not probative given the multiple uses at such a site and particularly the presence of dust and grease. Much of the discussion revolved around the Certificate of Approval, the testimony of Mr. Guerrero and the photographs taken by him of certain loads. Additionally, the argument was made that there was no evidence, at any rate, that either of the individuals charged were complicit or involved.

So, is the evidence presented by the Crown reasonably capable of supporting the inferences that the court is asked to draw? Is there any evidence that warrants moving these matters forward to a full trial?

The court recognizes that there is an issue regarding the meaning of a representative sample and the process of receiving a load. The procedures and directions are not the main issue in this application although not inconsequential. Defence is quite right in returning to the specific charges and challenging the Crown against those specifics of “failing to take representative samples of incoming waste prior to being received.”

However, the questions raised by the defence, in my opinion, speak to issues that must be addressed by the trier of fact. The issues of representative sampling, sampling of unexpected liquids, aqueous analysis, the use of sawdust and inconsistencies in notes provide some evidence that, if believed, could provide a conviction. I have been careful to weigh this evidence only in the sense of assessing that it is reasonably capable of supporting the inferences put forward by the Crown.

There is some evidence in support of the charges on each count that representative samples were not taken of incoming wastes prior to being received and that a reasonable jury or trier of fact could return a verdict of guilt. The fact that there may be a defence does not eliminate the evidence in each of these counts that substances were discovered that required sampling and no such documentation is available. Additionally, the quantity of sawdust used is evidence in itself of the necessity to contain and dilute liquids. These counts are a matter for a full trial.

Similarly, the individual defendants need to be assessed regarding these counts through the trial process as there is evidence of their involvement. I am satisfied that, on counts 5 through 12, on the whole of the evidence that a sufficient case is made out to put the defendants to trial.

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Now, I intend to deal with the Ottawa counts 13, 14 and 16.

Count 13:

Charge: Storing hazardous liquid waste in a solid non-hazardous waste location on or about October 12, 2007 at 5555 and 5573 Power Road in Ottawa contrary to condition 23 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

Defence raised the issue that a container, such as the tote in question, is not hazardous waste unless it contains 2.5 cm. of material and that this minimum quantity is an essential element of what classifies it as hazardous. The position taken by defence is that the Crown has the onus of proving the presence of a legally relevant quantity of hazardous waste in the tote. Officer Heeringa offered no evidence, beyond the observation of residue in the tote, about the depth through measurement or estimate. An empty container is not considered to hold hazardous waste if either empty or containing less than 2.5 centimetres of material. Officer Heeringa was acting in response to a comment from the yard foreman that the container had liquid escaping from it necessitating the move. There is no evidence of any legally relevant quantity, but there is evidence that he was also told that the tote was empty as it had been pumped out and placed on the pad to be destroyed. Finally, the compliance with Officer Heeringa’s order to move the tote to the hazardous pad is not seen as anything more than recognition of his statutory powers.

The Crown stated that a 1,000 litre tote which was found by Officer Heeringa sitting on a solid, non-hazardous pad had markings indicating 233H which translates into “flammable hazardous” waste. He saw liquid in the tote and took photographs. He received conflicting stories from three Lacombe sources and had the tote moved to what he considered to be the proper pad.

Count 14:

Charge: Storing oxidizing waste in flammable waste location on or about October 12, 2007 at 5555 and 5573 Power Road in Ottawa contrary to condition 23 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

Defence notes that the essential element of this charge is that oxidizing waste was stored in a flammable waste location. Defence argues that the Crown has offered no direct or circumstantial evidence that areas M, BB and DD were flammable waste locations. Indeed, it is argued that the Certificate of Approval specifically lists these locations for the storage of oxidizing waste and that Officer Heeringa confirmed that this designation has never been changed. Further, that nowhere in the evidence does he claim that there is oxidizing waste in area EE. In fact, in evidence, Officer Heeringa refers to area EE in the background of an exhibit photograph, but the oxidizer waste is in area DD which is specifically authorized by the Certificate of Approval for oxidizers.

The Crown confirms that this is another charge from Officer Heeringa’s inspection of the Lacombe site which is labelled “October 2007 Inspection.” He reports seeing oxidizing waste stored in a location with flammable wastes. This involved a waste storage container. The Crown noted that the Certificate of Approval lists row EE as the flammable waste storage area. (This was raised as an issue by Miss Saxe regarding her earlier request for particulars (pg.105 Mr. Herlihy’s non-suit argument).

The issue was raised by the Crown that the Certificate of Approval requires very strict labelling of containers and the necessity to keep hazardous material separately from non-hazardous material.

Count 16:

Charge: Storing oxidizing waste in flammable waste location on or about December 3, 2008 at 5555 and 5573 Power Road in Ottawa contrary to condition 23 of their Provisional Certificate of Approval (Waste Disposal Site #A460716).

Defence notes that an essential element of this count is that oxidizing waste was stored in a flammable waste location. The location was identified by the Crown witnesses, Officers Heeringa and Straberger, as area EE at the Lacombe site. According to the Certificate of Approval, this is where lab packs of oxidizing and other wastes were lawfully processed and emptied. Certain containers in area EE had oxidizer labels, but defence argues that the Crown offered no evidence that any container had any waste at all in them. Neither of the inspectors opened, sampled or weighed any containers, other than possibly one. The defence position is that no evidence was offered to prove that any container has more than 2.5 cm. of any waste. Officers Heeringa and Straberger testified that incorrect labels may be present on containers in that area because of customer error, empty bulk drums labelled for future waste use, and empty lab packs may have labels from previous use. The Crown is left with one possibility out of several and the Crown has not proven oxidizing waste according to defence counsel.

The Crown notes that this charge came from the inspection of the site by Officers Heeringa and Straberger. Note was made of the Certificate of Approval requirement to label storage areas and containers as per the certificate. Photographs were taken of pails and buckets noting labels identifying oxidizing wastes stored amongst drums of flammable waste.

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Defence Summary on Counts 13, 14 and 16:

The defence took exception with the Crown’s position that the Crown’s case must be taken at the highest. Reference was made to the problem of confusing a reasonable inference with mere speculation and the need to connect inferences to actual evidence. In a nutshell, the primary fact must be firmly established before you can draw an inference that has a logical premise and defence does not believe that has been accomplished. Most of the defence arguments have been dealt with within the individual counts and so will not be repeated in any detail here.

The defence argued that the Crown has adduced no direct evidence, that either of the individual defendants committed the offences with which they have been charged, nor any circumstantial evidence, if believed, to support the charges. In particular, defence notes that it has not been proven that either George or Tom Neilson instructed anyone to commit the offences or aided and abetted anyone in that regard.

It is noted that s.193 of the EPA deems a corporation to be liable for the acts of its officers and directors, but it does not deem the officers and directors to be liable for the acts of their corporation. And further, that there is no evidence that the individual defendants had any knowledge of, or personal involvement in the movement or storage of the wastes referred to in the various counts.

Crown’s Summary on Counts 13, 14 and 16:

The Crown points out that regarding count 13, the fact that the inspector got conflicting stories from Lacombe personnel added to his concern. He disagreed that the depth of any residue was a non-suit topic. Mr. Herlihy noted that Section 47 (3) of the POA Act shows that the burden of proof for any exemption or exception lies with the defendant regarding proof that there was more than one inch of waste material in the tote. Besides, Officer Heeringa testified that it was not empty.

With count 14, the Crown argues that the photographs and evidence from Officer Heeringa show that, contrary to the Certificate of Approval, oxidizing waste was stored in row EE, a flammable waste location. Defence argued that area EE was never disclosed to them and is not the subject of the case and that the only photographs previously specified dealt with areas M, BB and DD. The Crown went on to state that area EE is the storage area for flammable/toxic lab packs and there is evidence that oxidizing waste was stored there.

Finally, count 16 deals with the joint inspection by Officers Heeringa and Straberger regarding the proper labelling of storage areas and drums and pails. The officers discovered containers with universal symbols indicating oxidizing waste stored with flammable waste. The Crown rejects the defence position that the containers were empty

The Crown’s arguments regarding the involvement of George and Tom Neilson in these counts were dealt with earlier regarding counts 5 through 12. The same argument applies that they were not only liable for the actions of their employees, but they were also hands-on managers with the responsibility of directors and officers.

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**Non-suit Motion Decision**: Counts 13, 14 and 16 (Ottawa Information)

Count 13:

As stated, this involved a 1,000 litre tote found during an inspection labelled as flammable hazardous on a solid, non-hazardous pad. The court finds that the fact that the inspector received conflicting evidence from multiple sources regarding this tote lessens the Crown’s case. The inferential gap to a conclusion is just too wide to cross and verges on speculation. The court is left with no evidence regarding what was in the container? On the other hand, there is clear evidence that an empty container, or one designated as empty, does not violate any condition, at least for a temporary period of time. Evidence must be relevant and material and the court does not find any tendency for the facts to establish any proposition sought by the prosecution. No measurement was ever taken and, therefore, we will never know with any certainty the truth. Measurement, where it matters, is an integral part of any routine investigative technique so as ensure accuracy and for the fulsome provision of professionally collected evidence. The court does not accept that there is any evidence upon which the defendants should be put to trial. There are no permissible inferences that can be reasonably drawn from the evidence. I am satisfied that the evidence, on the whole, cannot support a guilty verdict. A sufficient case is not made out to put the accused to trial. The application to dismiss is granted.

Count 14:

This count involves oxidizing waste being stored in a flammable waste location. What the court has before it is witness evidence from the investigating officer regarding photographs where he refers to an area EE (a flammable waste area), but with no proof that oxidizer waste is actually stored there. Although there was some discussion regarding the locations, the court was ultimately left with some evidence that areas M, BB and DD are listed for oxidizing wastes and oxidizing waste was properly stored in area DD. Multiple reasons were offered in evidence as to how oxidizing labels may be present even without any or minimal oxidizing waste. There is no way for the court to make the factual leap when the investigative evidence is lacking in substance. Other possible conclusions trump what amounts to speculation given those other options. The limited investigative evidence does not meet the test of relevancy. The fact that the Certificate of Approval requires a strict regime of labelling and storage is all fine and good, but there is no evidence, outside of speculation, to support the charge. There are no permissible inferences that can be reasonably drawn from this evidence. I am satisfied that on the whole of the evidence a sufficient case is not made out to put the accused to trial. The application to dismiss is granted.

Count 16:

This count is similar to the previous count in that it also involves storing oxidizing waste in a flammable waste location. The Certificate of Approval allows for lab packs of oxidizing waste to be processed and emptied in that area. Some containers were found during an inspection in area EE with “oxidizer” labels. The investigating officers admitted in evidence that incorrect labels may be present on containers for several reasons. They may also be empty. They did not check or verify the contents of the containers in question, in any way, but simply laid the charges. Any common sense inference does not apply to the officers’ assumptions. There is even evidence that the company was allowed to have other types of empty containers in the area, at least temporarily. Based on the evidence, there is absolutely no evidence to support the charge other than speculation, and there are no permissible inferences that can be reasonably drawn from the same evidence. I am satisfied that on the whole of the evidence a sufficient case is not made out to put the accused to trial. The application to dismiss is granted.