ONTARIO COURT OF JUSTICE

IN THE MATTER OF appeals under 116(2)(a) of the *Provincial Offences Act,* R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

The Ministry Of The Environment Of Ontario
"Appelant" and "Respondent"

Prosecutor

— AND —

349977 Ontario Ltd. operating as Lacombe Waste Services and Tom Neilson and George Neilson
"Respondent(s)" and "Appellant(s)"

Defendants

Before Justice Ann M. Alder
Reasons for Judgment released on June 10, 2013

Mr. Paul McCulloch ..... for the Ministry of the Environment of Ontario
Ms. Dianne Saxe.....for 349977 Ontario Ltd. operating as Lacombe Waste Services and Tom Neilson and George Neilson

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On appeal from acquittals and convictions by Justice of the Peace Brian Mackey.

ALDER J.:

[1] After a lengthy trial, on September 16, 2011, Justice of the Peace Brian Mackey convicted 349977 Ontario Ltd. operating as Lacombe Waste Services of 8 offences under the Environmental Protection Act and acquitted the said corporation of 10 offences. He also acquitted Tom Neilson and George Neilson of all 18 counts charged in the Informations before the Court. His decision released on September 16, 2011, was a lengthy written comprehensive decision. This decision will hereinafter be referred to as the Trial Justice's decision.

[2] The 18 counts were included in two Informations which herein after will be referred

to as the Ottawa Information and the Lafleche Information.

[3] The defendants are appealing the convictions on counts 6, 8, 12 and 15 of the Ottawa Information and count 1 of the Lafleche Information and the Crown is appealing the acquittals of all defendants on counts 14 and 16 of the Ottawa Information and counts 2 and 3 of the Lafleche Information as well as the acquittals of George Neilson and Tom Neilson on counts 1, 2, 3, 6, 8, 12 and 15 of the Ottawa Information and count 1 of the Lafleche Information.

[4] For ease of reference, a copy of the Chart prepared by the Crown for this appeal is attached as Appendix "A". The Chart lists the counts, the offences, the decision at trial and whether they are the subject of this appeal and if so by whom.

The Law: re: Provincial Offences Appeals

[5] An appeal judge is not to retry the case, it is not a matter of substituting, his or her view of the evidence for the Trial Justice's.

[6] The Provincial Offences Act (POA) in sections 116 to 121 sets out the provisions which govern these appeals. The powers of an Appeal Court against conviction are set out in s. 120 of the Provincial Offences Act.

> **120.**
> **(1)** Powers on appeal against conviction - On the hearing of an appeal against a conviction, the Court by order,
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> (a) may allow the appeal where it is of the opinion that,
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> (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the Trial Court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

(i) the Court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or

(iii) although the Court is of the opinion that on any ground mentioned in subclause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

Idem
(2) Where the Court allows an appeal under clause (1) (a), it shall,

(a) where the appeal is from a conviction,

(i) direct a finding of acquittal to be entered, or

(ii) order a new trial; or

Idem
(3) Where the Court dismisses an appeal under clause (1) (b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the Trial Court or impose a sentence that is warranted in law. R.S.O. 1990, c. P.33, s. 120.

[7] In *R. v. Sarnia Golf & Curling Club Ltd.,* [2004] O.J., the Court interpreted these provisions as follows:

"The Court's duty is more narrowly confined to a determination of the following; (i) whether the evidence was so weak that the verdict of guilty is unreasonable or unsupported by the evidence; (ii) whether the finding of guilt resulted from a misapplication of the law, or (iii) whether a miscarriage of justice or

substantial wrong has occurred"

[8] Section 121 of the POA deals with the powers of the Court on appeals against acquittal:

> **121.**
> Powers on appeal against acquittal - Where an appeal is from an acquittal, the Court may by order,
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> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the finding and,
>
> (i) order a new trial, or
>
> (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

[9] For an appeal of an acquittal to be successful the prosecutor must demonstrate that the verdict would not necessarily have been the same, absent the error. *R. v. Power* [1994] 1 S.C.R. 601.

[10] To set aside a verdict as unreasonable, the Trial Judge's reasons must reveal that he or she was not alive to an application legal principle or entered a verdict inconsistent with the factual considerations reached.

[11] Of necessity the appeal count must differentiate between question of law, question of fact and question of mixed law and fact. In *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, the Supreme Court of Canada discussed the standard of review of appellate courts relevant to questions of law, of fact, of mixed fact and law and inferences of fact. The S.C.C. held at paragraph 8 of its decision that

> "On a pure question of law, the basic rule with respect to the review of a Trial Judge's findings is that an appellate court is free to replace the opinion of the Trial Judge with its own. Thus the

standard of review on a question of law is that of correctness".

[12] Further at paragraphs 10, 14, 18:

> "The standard of review for findings of fact, including drawing any inferences of fact, is that such findings are not to be reversed unless it can be established that the trial judge made a palpable and overriding error. Trial judges are better situated to assess the evidence due to their extensive exposure to the evidence, the advantage of hearing testimony viva voce, and their familiarity with the case as a whole. Appellate courts, on the other hand, are restricted to reviewing transcripts and considering appeals that are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole."

They defined a palpable error as one that is plainly seen.

[13] In regards to the standard of review for inferences of fact, they stated at paragraphs 22 and 23:

> "…Although we agree that it is open to an appellate court to find an inference of fact made by the Trial Judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error…In making a factual inference, the Trial Judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weigh assigned by the Trial Judge to the pieces of evidence.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the Trial Judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpable in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts".

They concluded by emphasizing that there is only one standard of review applicable to all factual conclusions made by the Trial Justice and that is of palpable and overriding error.

[14] In regards to mixed fact and law question they stated at paragraphs 26 and 28:

> "At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:
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> > "The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."
>
> Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review.

Background/Common Facts:

[15] 349977 Ontario Ltd. is a provincially incorporated company that operates a waste processing and transfer facility and waste management system located at 5555 and 5573 Power Road in the City of Ottawa hereinafter referred to as the Lacombe site. It is a family

company, Tom and George Neilson are directly involved in the operation of the business. George Neilson is listed in the corporate profile report as a director. The facilities receive non-hazardous industrial waste, liquid industrial waste, and hazardous waste. The waste is then sorted, processed, and/or bulked before being transported to other facilities for final disposal. No waste is permanently disposed of at the Lacombe site. At the times noted in the Informations, the facility was to be operated in accordance with conditions set out in a Provisional Certificate of Approval (PCA) no. 460716 issued by the Ministry of the Environment under the *Environmental Protection Act* (*EPA*).

[16] Hazardous and liquid industrial waste can only be transported to a licensed waste disposal site if the waste is manifested in accordance with regulations. Solid non-hazardous waste can be transported under a less onerous record-keeping system usually referred to as a waybill.

Crown Appeal: Counts 14 and 16 of the Ottawa Information – Dismissal of charges following non-suit application

Crown appeal out of time:

[17] The Defendants argued that the Crown's appeal of these two counts is out of time, submitting that the appeal period for that decision expired before the Crown appeal was filed.

[18] These two counts were dismissed on October 14, 2010 following a motion for a non-suit. The trial on the other counts continued and the Justice of the Peace's written reasons for decision on those remaining counts were released on September 16, 2011.

[19] Rule 5(3) of the Rules of the Ontario Superior Court of Justice and the Ontario Court of Justice in Appeals Under Section 116 of the Provincial Offences Act requires that a party who appeals shall serve the notice of appeal on the other party within 30 days after the date of the decision appealed from.

[20] The decision of the Justice of the Peace on the non-suit motion is a decision dismissing a proceeding commenced by Information under Part III of the POA, therefore section 116 and by reference rule 5 applies.

[21] This was a very lengthy trial which commenced on May 31, 2010 and continued intermittently over the next year with approximately 30 days of court time. As noted, the non-suit decision was released in October 2010.

[22] The Crown served their appeal on October 14, 2011 on the defendants. The Defendants served their appeal on the Crown on October 17, 2011.

[23] Section 85 of the POA and rule 7 of the section 116 rules grant this Court the authority to extend the deadline set out in rule 5(3).

[24] Section 116, rule 1(3) also states that "these rules shall be continued liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding."

[25] In *R. v. Meneau* O.J. No. 244 C.A., the Court of Appeal held there is no absolute rule to be applied in the exercise of the discretion whether or not to grant an extension of time. However, the following factors will generally be considered:

i. The applicant has shown a bona fide intention to appeal within the appeal period;
ii. The applicant has accounted for or explained the delay;
iii. There is merit to the proposed appeal;
iv. The Respondent will be prejudiced.

The count emphasized these are not determinative of the issue.

[26] Given the length and complexity of this trial, it would have made little sense to

deal with separate appeals. While the Crown did not explain why it did not immediately indicate its intention to appeal, I am satisfied that there is no prejudice to the Respondents in this case and the interests of justice weight in favour of permitting the appeal to proceed, I will thus exercise my discretion and extend the time for the Crown's appeal of the dismissals on count 14 and 16 of the Ottawa Information.

Analysis:

[27] The Crown submits that the Trial Justice improperly applied the legal test in granting a non-suit with respect to counts 14 and 16 of the Ottawa Information. The Trial Justice correctly identified the legal test as being "whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty." However, it is the Crown's position that, notwithstanding having articulated the correct legal test, the Trial Justice erred by proceeding to weigh and discount evidence from which it could be reasonably inferred that Lacombe was storing oxidizing waste in an area reserved only for flammable wastes which constitutes a safety hazard.

[28] The test for a non-suit is the same as the test for committal at a preliminary inquiry and is set out in *United States* of *America v. Shephard* "is there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty?" There must be some evidence on each essential element of the offence. The test is the same whether the evidence is direct or circumstantial however, the preliminary judge's analysis is different. It is well recognized that where there is direct evidence pertaining to all elements of an offence, the Court must commit the accused to stand trial, without weighing the evidence in terms of credibility or reliability. This was clearly stated by the Supreme Court of Canada in *R. v. Arcuri*, [2001] S.C.J. No. 52

[29] The Court in *Arcuri* also explained that while the test for sufficiently remains the same with circumstantial evidence the judge is required to engage in a limited weighing of

the evidence when dealing with circumstantial evidence. The Court explained it as follows.

> "The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed."

It must however be remembered that this weighing process, is not to be done in isolation and it is the cumulative effect of all the evidence that is to be considered.

[30] In addition, with respect to what inferences may be drawn, any reasonable or logically permissible inference must be resolved in favour of the Crown and as noted in *R. v. Charemski,* [1998] S.C.J. No. 23 at para. 4

> "whether or not there is a rational explanation for that evidence other than guilt of the accused, is a question for the jury."

[31] In order to infer a fact from established facts all that is required is that the inference be reasonable and logical it need not be compelling. The fact that an inference may flow less than easily does not mean that it cannot be drawn. This proposition is de-rived from *R. v. Katwaru*, [2001] O.J. No. 209 (C.A.)

In addition, it must be remembered that if there are competing inferences, which are reasonably available on the evidence, it is not for the preliminary inquiry court to engage in weighing as between those inferences and resolve them. In *R. v. Descham-plain* [2004] 3 S.C.R. 601 at para. 15, the Supreme Court approved of the following articulation:

> "Assessing the quality and reliability of the evidence, or weigh-

> ing the evidence for competing inferences in determining whether there is sufficient evidence for committal is not permitted at this stage of the proceedings."

[32] However there is a difference between speculation and available inference noting. In *R. v. Alexander* [2006] O.J. No. 3173 (S.C.J.) at para. 29, the Court dealt with the distinction between these two.

> "The requirement of reasonable or logical probability is meant to un-derscore that the drawing of inferences is not a process of subjective imagination, but rather is one of rational explication. Supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference. Therefore, it is not enough simply to create a hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or infer-ences sought to be drawn. As Fairgrieve J. noted in *R. v. Ruiz* [2000] O.J. No. 2713 at para. 3 (C.J.), "simply because a possibility cannot be excluded does not necessarily mean that a reasonable trier could be justified in reaching such a conclusion on the evidence." The inference must be one that can be reasonably and logically drawn; it cannot depend on speculation or conjecture, rather than evidence, to bridge any inferential gaps."

[33] The Ontario Court of Appeal in *USA v. Huynh* (2005) 200CCC 3d 305 (Ont. C. A.) spoke of speculation and emphasized the need for evidence from which inferences may be drawn:

> "The process of drawing inferences from evidence is not, however, the same as speculating even where the circumstances permit an educated guess. The gap between the inference that the cash was the proceeds of illicit activity and the further inference that the illicit activity was trafficking in a controlled substance can only be bridged by evidence. The trier of fact will assess that evidence in the light of common sense and human experience, but neither are a substitute for evidence. The requesting state has not offered any evidence as to the sources of the funds even though its material indicates that one of the parties to this conspiracy is cooperating with the police. Despite

> the effective argument of counsel for the respondent, I do not think there is anything in the material that would reasonably permit a trier of facts to infer that the cash was the proceeds of drug trafficking and not some other illicit activity."

[34] The Trial Justice in his decision on the non-suit began by stating his understanding of the law applicable to non-suit applications. He stated:

> **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 circum-

> stantial 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.

[35] There is no apparent error in the Trial Justice's statement as to the law.

[36] Count 14 alleges that on or about October 12, 2007, the defendant failed to comply with the condition no. 23 of the Provincial Certificate of Approval Waste Disposal Site no. A460716, namely by storing oxidizing waste in a flammable waste location and count 16 charges the same offence, with an offence date of December 3rd, 2008.

[37] The Crown and the defendants do not agree on the facts as they relate to these two counts.

[38] In regards to count 14, the Trial Justice found that area EE is a flammable waste area and that there was no evidence that areas M, BB and DD were also flammable waste areas. He also found that there was no evidence any oxidizing waste was stored in area EE.

[39] The evidence relevant to this count is that of Mr. Herringa, a Ministry of the Environment Inspector. The Trial Justice found that there was nothing in his evidence to even suggest oxidizing waste was stored in area EE, only a photograph that showed the EE area in

the background. The evidence was that the oxidizing waste was in DD, an area authorized by the Certificate of Approval for oxidizers.

[40] While the Trial Justice in his reasons referred to the possible reasons as to how oxidizing labels may be present even without any or minimal oxidizing waste and spoke of inferences and speculations which may have been errors. I am satisfied there was no error made in granting the non suit as there was no evidence that any oxidizing waste was stored in a flammable waste area as alleged in count 14.

[41] The Crown's appeal of the dismissal of count 14 is therefore dismissed.

[42] In regards to count 16, the Trial Justice stated:

> 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".

[43] While the Trial Justice did not refer to it, the Crown also relies on the evidence that Mr. Nagy (employee of Lacombe) who was accompanying the inspector stated he would make sure the oxidizer waster was moved to the correct location right after the inspection

was completed.

[44] There was also evidence that as part of Lacombe's approval, all waste storage containers must be clearly labelled showing waste classes and characteristics.

[45] In deciding to grant the non suit, the Trial Justice held, there was no permissible inference to be drawn only speculation, however a review of his reasons indicates that what he did was chose between competing inferences. This is an error in law.

[46] The Crown's appeal of the dismissal of count 16 is therefore allowed. The only remedy available is a new trial, however the Crown may wish to assess its prospect of conviction given the entirety of the evidence.

Crown Appeal of the Individual Defendants Acquittals – All Counts of the Lafleche Information and Counts 1, 2, 3, 6, 8, 12, 14, 15, 16 of the Ottawa Information

[47] The Crown appeals the acquittal of Tom and George Neilson on all counts of the Lafleche Information and counts 1, 2, 3, 6, 8, 12, 14, 15, 16 of the Ottawa Information.

[48] Some of these counts are also the subject of the Crown's appeal against acquittal of the corporation and those grounds are addressed separately.

[49] The Crown submits that the Trial Justice applied an incorrect legal test to determine whether the individuals were culpable of the offences they were charged with.

[50] The Trial Justice dealt with the individual defendants liability, in the last six paragraphs of his decision:

Individual Charges:

> "220. Regarding the charges against the individuals, the question before the Court on each and every count is whether the

Crown can prove beyond a reasonable doubt that George Neilson and or Tom Neilson are guilty beyond a reasonable doubt to any of the Ottawa and or the Lafleche (Cornwall) charges? The Court recognizes that, as individuals, their guilt would manifest itself in their lack of legally required action, their deliberate obstruction, or any violation of the EPA. The Court is of the opinion that there are few counts that rise to the level of concerns regarding their responsibilities as officers and directors of the corporation.

221. Among those that do, a number of incidents were noted by the former Environmental Manager, Jairo Guerrero, regarding specifically Tom Neilson. The Court did not find that the evidence presented by Guerrero regarding his communication with Tom Neilson proved beyond a reasonable doubt that this officer of the corporation failed in his obligation and responsibilities. Specifically, the allegations made in the email (Exhibit 8) regarding hazardous waste sent to the Lafleche site are unproven before the Court. Nor is there sufficient evidence regarding the two other similarly alleged events. Similarly, allegations made regarding his direction to Guerrero are unproven.

222. Overall, the Court acknowledges that the accusations directed toward Tom Neilson are of concern regarding the responsibilities and legal obligations of an officer and director, but the evidence falls short of satisfying the Court beyond a reasonable doubt of his guilt in any of the charges. Personality clashes and even controversial decision making do not in and of themselves prove fault. There is not sufficient evidence to prove that he did not personally take all reasonable care expected of an officer and director to ensure that the corporation did not contravene the EPA.

223. The charges against Tom Neilson are therefore dismissed.

224. Similarly, the accusations regarding George Neilson are concerning to the Court, although fewer and less vigorous than those directed at Tom Neilson. Those accusations also fail to convince the Court, based on the evidence, of proof beyond a reasonable doubt.

225. The charges against George Neilson are therefore dismissed.”

[51] The Trial Justice also discussed and analysed this issue in paragraphs 120 to 126 of his decision:

> "120. In the case of the officers and directors of corporations, the Crown notes that such persons have a special position in an organization and that failure to perform the duties imposed on them by law may attract liability for their actions. George Neilson and Tom Neilson are officers and directors of 349977 Ontario Ltd. The Crown states that both were "hands on" managers in day-to-day attendance and control of the corporation.
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> 121. It was noted by the Crown that the EPA imposes special duties on officers and directors under section 194. (1), to, "take all reasonable care to prevent the corporation from (contravening the act)." Both officers and directors are charged with direct responsibility for the offences committed by the corporation. The Business Corporation Act, section 134. (1), was also noted regarding standards of care for directors. The Court is well aware of the enhanced liability of officers and directors of corporations, particularly in environmental matters, concerning the health and safety of workers and the general public.
>
> 122. The Crown submits that nothing happened at LWS without the knowledge and approval of George Neilson and Tom Neilson. Further, the evidence of Jairo Guerrero implicated the two directors. Specifically, the Crown notes that Guerrero was told by Tom Neilson not to reject loads of waste because customers would be unhappy and that he refused to discuss the issue of unacceptable loads which Guerrero believed had gone to the Lafleche site. Additionally, Guerrero gave evidence that Tom Neilson did not want to listen to any information regarding negative analytical results, but expected Guerrero to handle the situation. He further testified that George Neilson and Tom Neilson directed loads to Lafleche rather than allow their site to be out of compliance with its capacity limits.
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> 123. The Crown further noted that the evidence indicated that George Neilson and Tom Neilson made decisions based on the cost involved. In that regard, they didn't want samples sent out to private labs because of the cost. This would become a central theme in certain charges.
>
> 124. And, Tom Neilson, in particular, did not act on the pho-

> tographs taken by Guerrero of the liquid contents of certain loads. Tom Neilson also received Guerrero's memorandum (Exhibit #8) indicating that a tetrachloroethylene sample was the "third failure this year" for allowable standards on waste going to the Lafleche site.
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> 125. Guerrero further stated that his advice was not always followed and they did not want to know about problems. One of the most concerning pieces of evidence is that Tom Neilson encouraged Guerrero to lie to MOE Inspector Clint King that MOE Inspector Heeringa had approved the company to receive grease trap waste pending the processing of an amendment to their COA. Guerrero also indicated that George Nielson asked him to conceal in a report to the Ministry via Inspector Heeringa that the site was out of compliance for volumes and weight on site.
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> 126. The Crown also looks to the lack of communication with employees about compliance, written policies, discipline of employees for transgressions, safety or environmental meetings, or employee training on the COA, to demonstrate the absence of due diligence by these directors."

[52] He clearly reiterated the Crown's position on this issue and the evidence relied on by the Crown to seek convictions for the individual defendants.

[53] He did however err in stating that Tom Neilson was an officer and director of 349977 Ontario Ltd. There is no evidence to support this finding.

[54] Crown Counsel submits that the Trial Justice placed too high a burden on the Crown when in paragraph 222 of his decision he stated "there is not sufficient evidence to prove that (Tom Neilson) did not personally take all reasonable care expected of an officer and director to ensure the corporation did not contravene the *EPA*". The defendant agree that this last line enunciated the wrong test, however submit that the Trial Justice had stated the correct test earlier in his decision. This is correct.

[55] The Crown's onus on a strict liability offence is to prove beyond reasonable doubt that the defendant committed the *actus reus* of the offence and the defendant's onus is to demonstrate on a balance of probabilities that he took all reasonable care to prevent it from

occurring. The Trial Justice referred to this in paragraphs 129 and 220 of his decision.

[56] When dealing with offence of "omission", a corporate officer or director may be convicted of committing an offence of omission when he or she has knowledge of the circumstances that result in the illegal activity occurring and fails to take the appropriate action to prevent the corporation from committing the offence. The officer may either be convicted as a principal in common with the corporation or as a party to the offence.

[57] The Crown submits that the Trial Justice failed to consider whether the individual defendants had demonstrated that as corporate officers and directors and persons of authority within the corporation they took reasonable and sufficient steps to prevent the commission of the offences committed by the company which was required of them given the offences involved "causing" or "permitting" or "failing to comply".

[58] In *R. v. Sault Ste. Marie*, the Supreme Court of Canada commented on the *actus reus* of offences that involve causing or permitting something to occur, stating:

> "The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.
>
> .....
>
> The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges," "causes," or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or whether it merely passively fails to prevent the pollution."

[59] I find little to suggest the Trial Justice applied an improper onus on the Crown in regards to Tom and George Neilson.

[60] The decision must be read in its entirety and I do not find he erred in law by applying the wrong test.

[61] Crown Counsel further submits that if the proper test had been applied, the individual defendants would have been convicted. As noted, I am satisfied he did not apply an erronous test. I am also satisfied the evidence and facts as found by the Trial Justice support his finding of a reasonable doubt as to the individual defendants' liability either as parties to the offences or principals.

[62] The Crown needed to prove beyond a reasonable doubt the *actus reus* of the offence either by proving the individual defendant was actively involved in the commission of the offence, or was in a position of influence and control over an activity and failed prevent the occurrence of the offence; or knew of the circumstances of the offence.

[63] There was as Crown Counsel pointed out some evidence to suggest Tom and/or George Neilson knew about the concerns/offences however the evidence is not as Crown Counsel submits overwhelming nor without concerns for its credibility and reliability. The Trial Justice was free to accept or reject evidence and he noted serious concerns with Mr. Guerroro's evidence which was very relevant to the issue of the individual defendants liability. In paragraph 119 of his decision, he noted:

> "119. The Court is compelled to deal with three key witnesses at this time. Firstly, the former Environmental Manager at Lacombe Waste Services, Jairo Guerrero. Guerrero must be seen as a disgruntled former employee who clearly had issues with both George Neilson and Tom Neilson. This does not mean that all of his evidence is suspect, but it does raise a number of issues regarding certain inconsistencies and possible exaggerations that the Court has taken into account. His evidence has been weighted by the Court with certain exceptions where issues were raised and documented, in some fashion, and are discussed elsewhere in this decision."

[64] The Trial Justice referred to "accusations which are of concern" and he went on to say "the evidence falls short of satisfying the Court beyond a reasonable doubt of his (Tom

Neilson) guilt in any charges. He made a similar comment in regards to George Neilson.

[65] The Crown took issue with the word accusations, and stated accusations are not elements of the offences and therefore need not be proved beyond a reasonable doubt. There is nothing in the Trial Justice's decision to suggest he believe these accusations were elements of the offence rather it appears he used the word "accusation" when referring to the evidence presented that suggested Tom and George Neilson were guilty of the offences charges.

[66] The Trial Justice was in the best position to assess all the evidence and accept or reject it. Deference is to be given to the Trial Justices. It is evident from his reasons that he did and he weighted the evidence and was not satisfied beyond a reasonable doubt.

[67] As noted, this Court should not interfere with findings of fact unless it can be established that the Trial Justice made a palpable and overriding error. That has not been established and the Crown's appeal of Tom and George Neilson acquittals is dismissed.

Corporate Defendant's Appeal of Conviction - Count 15 of the Ottawa Information

[68] Count 15 of the Ottawa Information charged that on or about October 12th, 2007, the defendants failed to comply with condition No.23 of Provincial Certificate of Approval waste disposal site, namely by storing waste outside area F2 which is not approved for waste storage contrary to section 186 (3) of the *EPA*.

[69] The defendant submits for the Trial Justice erred in law in finding that they were "storing" the waste, on the offence date arguing that the waste in question had not been accepted and was being sampled and analysed, thus not being stored within the meaning of the word in condition 23 of the Certificate of Approval.

[70] The Trial Justice dealt with this count in paragraphs 191 to 198 of his decision.

[71] It is clear from a review of these paragraphs, that the Trial Justice turned his mind

to the issue of what constitutes "storing."

[72] He concluded at paragraph 197 of his decision that the Crown had proved the offence beyond reasonable doubt:

> "197. The Court is satisfied that the Crown has proved beyond a reasonable doubt that LWS stored waste in an area not identified for that purpose in contravention of their COA and registers guilt. The F2 designated area is clearly not a storage area. Whether the lugger box was placed there temporarily for convenience or for ease of sampling is irrelevant. It was deposited in a restricted area well known to LWS. As for the meaning of the word storage, by any understanding of the natural meaning of the word, storage is the action or method of storing something for future use in a place or a space assigned for storage."

[73] It is admitted by both parties that there is an error in this paragraph: The Justice incorrectly stated F2 was not a storage area when in fact F2 is a storage area. The waste in question was not in F2, but in another area which was, not a designated storage area as required under condition 23 of its Certificate of Approval. However, this appears to be an inadvertent error and not a misapprehension of the evidence in that regard.

[74] The defendant at paragraph 20-21 of their factum submits that the Trial Justice erred in law in his interpretation of the term "storage" in condition 23 of the Certificate of Approval. They submit his interpretation does not take into account the principles of statutory interpretation, is unclear and overly broad, and is inconsistent with the Certificate of Approval as a whole.

[75] Further submitting that as an error of law, it is to be reviewed on the standard of correctness.

[76] Unfortunately, the Trial Justice reasons in regard to this count are such that it is difficult to properly address this ground of appeal.

[77] I am however satisfied this is not purely a question of law but rather a question of

mixed facts and law.

[78] As the defendant noted the modern principle of statutory analysis, adopted by the Supreme Court of Canada in *R. v. Rizzo and Rizzo Shoes Ltd* [1998] S.C.C. No. 2 states that today there is only one principle or approach to statutory interpretation, namely, the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act,* and the intention of Parliament.

[79] The defendant then argued that the term storage should be interpreted consistently within the same Certificate of Approval, noting that under condition 22, waste not accepted and entered into the waste database is not "stored" for the purposes of condition 22 of the Certificate of Approval. Therefore waste not "store" for the purpose of condition 22 should not be considered stored for the purpose of condition 23.

[80] I disagree, the context is different, it is possible to have waste waiting to be accepted for an extended period of time, thus it is being stored until it is accepted.

[81] The plan and ordinary meaning of the word should be applied in the particular context.

[82] I agree with the defendant that mere presence is not storage and that storage has an element of duration, of inactivity. In *R. v. Mielke* [2004] O.J No 5862 (Ontario Court of Justice) the Court adopted the concise Oxford dictionary definition of storage:

> "Store as place where things are kept for future use, lay up for future use, hold, keep or contain."

[83] I also agree with the defendant's submission that storage is a specific activity among many waste management activities, referred to and regulated in the Certificate of Approval.

[84] I am unable to conclude or determine with any certainty what definition of storage the Trial Justice used.

[85] I however disagree, with the defendant's argument that had the Trial Justice applied the proper definition of storage, he would have concluded the lugger box was not in storage.

[86] I am satisfied that on the evidence it was open to him to make the necessary findings of fact to conclude that the Crown had proved beyond a reasonable doubt that the waste was being stored. Therefore pursuant to section 120(1)(b)(iii) while I find the appeal might be decided in favour of the appellant on a question of law, I am satisfied that no substantial wrong or miscarriage of justice has occurred and the appeal against conviction on count 15 is dismissed.

Corporate Defendant's Appeal of Conviction – Counts 6, 8 and 12 of the Ottawa Information

[87] In regards to these 3 counts, the Appellants submit the Trial Justice erred in law in:

i. Entering convictions based on a different case than as specified by the Crown's particulars;

ii. Importing analytical requirements into the charge of failing to take representative samples as requiring analysis of individual components of a waste load, instead of the average of the load as a whole; and

iii. Retroactively creating an external analysis requirement that did not appear in the Certificate of Approval.

[88] Count 6 read as follows:

On or about September 19, 2009…did commit the offence of failing to comply with condition no. 17 of Provisional Certificate of Approval Waste Disposal site no. A460716, namely by failing to take representatives samples of incoming wastes prior to being received contrary to section 186(3) of the *Environmental Protection Act* R.S.O. 1990 C. E. 19 as amended.

[89] Counts 8 and 12 charge the same offence for loads received on different dates, namely October 3, 2005 and November 14, 2005.

[90] Section 186 of the *Environmental Protection Act* reads in part:

> **General**
>
> **186.**
> **(1)** Every person who contravenes this Act or the regulations is guilty of an offence. R.S.O. 1990, c. E.19, s. 186 (1).
>
> **Offence re approval, licence or permit, etc.**
>
> **(3)** Every person who fails to comply with the terms and conditions of an environmental compliance approval, certificate of property use or renewable energy approval or of a licence or permit under this Act or who fails to comply with the terms of a report under section 29 is guilty of an offence. 2010, c. 16, Sched. 7, s. 2 (84).

[91] Condition 17 of the Provisional Certificate of Approval states:

> All in-coming and outgoing wastes shall be inspected and tested by qualified personnel as detailed in the application and supporting documentation listed in item 7 of Schedule "A" of this Certificate, prior to being received, processed, transferred and shipped to ensure wastes are being managed and disposed of in accordance with the *Act* and Reg. 347.

[92] Schedule "A" incorporated other documents into the Certificate, including a Design and Operation Report which described the operation of the site. It detailed how loads were to be sampled, screened and coded and referred to Lacombe's on site laboratory. There is nothing in any documentation requiring offsite testing or nor is there anything defining "representative sample."

[93] Schedule "A" contains the following clause:

> Conditions 17, 18, 20 and 25 is to ensure that all wastes are properly classified, managed, processed and disposed of in accordance with Reg. 347 in a manner that protects health and safety of people and the public.

[94] In addition to counts 6, 8 and 12 there were five other counts charging the same offence for different loads. The Trial Justice acquitted on those counts. The Trial Justice's reasons for all these counts are found in paragraphs 144 to 190 of his decision:

> "144. The Court will now address the series of eight (8) similar charges alleging that LWS did not sample and test (failing to take representative samples of) incoming waste prior to being received. The Crown contends that where the defendants found themselves in possession of unknown substances, they should have taken steps to ensure that the substances could be lawfully accepted. Defence argues that a representative sample was taken of each load and tested according to standard industry procedures. At the core of these disagreements is the issue of what constitutes a representative sample for testing including the issue of unexpected substances.
>
> 145. Count Number Five (5) involves a waste load received on September 14, 2005 from Recyclex containing paint in bags. There is evidence that eight (8) boxes of sawdust were used (Work Order #81508) and that Guerrero informed Tom Neilson and Recyclex, who requested a sample of the paint. The Crown alleges that the sawdust was required because of the paint. There is no photographic evidence. The concern is regarding organic liquids that may have required the use of sawdust and was not properly tested.
>
> 146. There was no evidence of a secondary analysis. Guerrero did not testify that there were free liquids in this load.
>
> 147. Defence argues that, consistent with each of the loads, the proof of samples taken and analyzed prior to being received is found in the Incoming Waste Analysis (IWA) sheets, as recorded by the responsible chemist. Further, a number of LWS employees testified in court that samples were taken from various locations accessible from the top of each load in accordance with the only available benchmark, the ASTM standard for sampling unconsolidated waste from trucks. Note was made that the Ministry publishes no guidance in this matter and that the LWS COA is silent on the matter.
>
> 148. Defence even noted the Prosecutor's comments (page 2559, transcript) to confirm that "the best you can do is sample the surface" in reference to material sitting in the back of a truck

or in a lugger box.

149. It was argued that LWS had a "careful process for secondary inspection of debris during and after unloading," and that "(T) his is better than industry standard, and was not expressly required by the Lacombe site certificate of approval."

150. Defence suggested that, after the Crown's main witness, Jairo Guerrero stated that any liquid in all eight loads was properly sampled, the Crown prosecutor changed his theory to some unspecified provision in the LWS COA which required them to send samples to an external laboratory.

151. The defence offered various witnesses to advance the argument that LWS sampled representatively and tested each load.

152. The Court did not find the wording of Condition 17 definitive regarding a pathway to a decision, nor were the Reasons or General Terms and Conditions overly helpful in reaching a conclusion. They appear to be general in nature although broad in reach. To suggest that they are to be read and interpreted in a particular manner (with the overarching touchstone being the protection of health and safety of people and the public) is to deem the words to be obvious and somewhat absolute. If that were true, this decision would be very easy. It is not, because these conditions, reasons and terms do not establish, on their own, sampling and testing precision, but merely the requirement.

153. What is important is what happened in each case? What was discovered? What was done about it? Sampling and testing are both part of a scientific and a dynamic process — not a static event. If one is to sample, and there was a surplus of agreement on this, it must be representative to meet the EPA requirement, and the industry standard. Representativeness is established by sampling in various areas, of various components, to various depths that are particular to the load in question. It is a normal practice to follow a sampling procedure and the court accepts that LWS did sample the incoming waste prior to it being received. Each composite sample was tested by LWS chemists using their own equipment. Indeed, the Incoming Waste Analysis sheets confirmed when an aqueous phase was present, and to what degree, with other common tests administered.

154. The Court accepts that the LWS laboratory cannot do

analysis for organics based on the evidence before the Court. The Court is aware that the lab did not have the necessary validation for its analytical methods. The Court further accepts the evidence indicating that the LWS lab equipment (gas chromatogram) is calibrated for PCB's and not chlorinated solvents.

155. The Court further accepts the argument that a true representative sample must include any unexpected findings including substances and material that should properly raise concerns given the environmental concerns within this industry and the intent of the EPA.

156. Nevertheless, the documentation regarding the finding of paint in bags is sparse, the connection to what is otherwise a large quantity of sawdust is unproven, and the conversation with Recyclex also lacks demonstrable evidence.

157. On count number five (5), the Court does not find the evidence, including the Work Order (#81508), Exhibit 12, convincing enough to prove the Crown's case beyond a reasonable doubt. The Court has some doubt based on the lack of evidence regarding the presence of organic liquids and the fact that sawdust has other uses relating to the composition of various loads, not to mention the linkage to volume.

158. Count number five (5) is dismissed.

159. Count Number Six (6): This count involves a load received on September 19, 2005 from Recyclex described in a Work Order (WO) in Exhibit 13. There is no photographic evidence in this count.

160. The WO (#81509), Exhibit 14, noted "Debris mix (sic.) with oil and grease. This load did not pass the slump test." The Crown argued that this did not constitute a "solid" given that failure and required an external analysis.

161. There was no evidence of a secondary analysis.

162. The Court finds that the clear notation of an unexpected finding of a liquid along with the failure to pass the slump test should have triggered an external testing of the material. The evidence has clearly indicated that only then would LWS have known precisely the chemistry of the substance and have met the obligation for representative sampling. Sampling is not representative when an unexpected material is not properly sampled and tested. Such testing was only available at an external

laboratory with appropriate equipment that was correctly calibrated. If the notation was incorrect, it should have been dealt with at the time in concert with the Environmental Manager. One cannot accept a situation and then years later contend that it is not true. There is evidence to prove the charge.

163. On count number six the Court finds LWS guilty of the charge.

164. Count Number Seven (7): This count involves a load received on September 21, 2005 from Recyclex. There is no photographic evidence.

165. The Defence argument is that the oil was hydraulic and came from a burst hose on a customer's truck. The Crown notes the truck cleanup, but also notes that the Incoming Waste Analysis sheet indicates, "Waste arrived containing large amount of free liquid oil."

166. There was no evidence of a secondary analysis. Guerrero did not testify that there were free liquids in this load.

167. Although the Work Order (#81789) indicates the truck arriving with "free liquid oil," it is unclear, based on the evidence as to what affect the burst hose and hydraulic oil had on that condition. This issue was never dealt with to the satisfaction of the Court. The Crown has not proven its case beyond a reasonable doubt.

168. Count number seven (7) is dismissed.

169. Count Number Eight (8): This count involves a load received on October 3, 2005 from Chemtech. Exhibit 7 shows the bin full of drums with lids on them. They were not crushed and some drums had their labels still affixed. Guerrero testified that he opened the drums and found them full of liquids. The Crown notes the Work Order (WO) in Exhibit 7 as reading, "Liquid had to be removed & disposed (?). 205 L liquid handled as LOS (?)." Defence argues that there were no liquids in the drums and that no such entry can be found in the drum record database although a supplementary fee charged to Chemtech based on Guerrero's assertions was subsequently withdrawn voluntarily by LWS.

170. Once again, LWS has allowed an official document to stand with no evidence of a proper, representative sample being taken of the unexpected substance. The Court accepts that LWS

did not have the laboratory equipment to properly analyze for unexpected organics. There was no evidence of a secondary analysis.

171. This notation is importantly from the then Environmental Manager of the company who was clearly a member of the management team with commensurate responsibilities and obligations. Notwithstanding other issues mentioned elsewhere, the Court finds no lack of credibility in his record of the event, or any reason for him to fabricate the scenario. Accordingly, LWS should have sought an external assessment, given their internal laboratory limitations, to establish the chemistry of the unknown liquid.

172. The Court finds, regarding count number eight (8), LWS guilty of this charge.

173. Count Number Nine (9): This count involves a load received on October 31, 2005 from Recyclex. Photographs in Exhibit 14 show Guerrero's notations of "free oil" and "free running oil & open carbon-black bags."

174. The Crown argues that Guerrero photographed the oil to bring it to the attention of George Neilson and Tom Neilson and that the Defence witnesses never actually saw the liquid.

175. Defence stated that Guerrero's claim that there was some 4,000 to 5,000 litres of free oil in the load is preposterous. Defence witnesses pointed out that such a quantity of liquid would have come out of the box when the truck was tilted. Additionally, a witness who stood in the load stated that he could not have missed such a quantity of liquid.

176. The Crown has not been successful at convincing the Court that the evidence with notations from Guerrero regarding "free oil" and "free running oil and open carbon black," as shown on his photographs, combined with Guerrero's viva voce evidence, is sufficient to register guilt. The Work Order (#82817) refers only to sawdust (a normal occurrence in this business). The Defence position that the quantity suggested by Guerrero of 4,000 to 5,000 litres of free oil would have run out when the box was tilted to pick up the roll-off raises some reasonable doubt. Even the photographs, as poor as they are, show only a limited amount of black liquid that was contested as simply carbon water.

177. The charge in count number nine (9) is dismissed.

178. Count Number Ten (10): This count involves a load received on November 14, 2005 and involves photographic evidence from Guerrero. According to him, the photo shows free oil coming out of the load with a notation from Guerrero of "a couple (of) 100s (of) litres on the Incoming Waste Analysis sheet describing it as "carbon oil." Several Defence witnesses identified what they saw in the photograph as innocuous carbon black in a few litres of water and not oil. Defence argued that this would not have raised any concern from knowledgeable persons in the waste management industry.

179. The Court faces a similar dilemma in this count given the photographic evidence and the comment by Guerrero that the substance was "free oil" representing "a couple (of) 100's (of) litres" given the contradictory evidence presented by the Defence. The position that this was only a few litres of water identified as carbon black rather than oil raises, in this case, a sufficient doubt. The Crown has not proven this charge beyond a reasonable doubt.

180. This charge in count number ten (10) is dismissed.

181. Count Number Eleven (11): This count involves a load received on December 28, 2005. A photograph shows a truck with a large amount of liquid escaping from the rear as it leaves a building location at the LWS site. The Crown argues that it shows an oil/water mix as confirmed in testimony by Guerrero and estimated by him at 1,000 litres.

182. Guerrero indicated that he took the pictures because of his concern, and that the photographs went to Tom Neilson with the paperwork. The Crown argues that with such a large quantity of an oil/water mix that a representative sample should have been taken for external analysis.

183. Defence countered with a number of witnesses that stated the photo shows water from outside the bag and referred to heavy rainfall in the autumn of 2005 and the worn condition of the Recyclex tarps. The Defence indicates that the liquid is relatively clear which allows the taillights of the truck to actually shine through the liquid and that there was no smell or oil sheen. Defence estimated that there were some 40 litres in the photo and not the 1,000 indicated by Guerrero and that he had labelled the liquid as water at the time, but later changed to oil.

184. The photographic evidence is not conclusive and the debate over water from outside the bag, worn Recyclex tarps and a heavy rainfall only added to the issue of credibility and preference. The Crown has not proven this charge beyond a reasonable doubt.

185. This charge in count number eleven (11) is dismissed.

186. Count Number Twelve (12): This count involves a load received on May 30, 2006. There is no photographic evidence. This is concerning another Recyclex load that this time required 3,500 kilograms of sawdust to absorb the liquid according to the Incoming Waste Analysis (IWA) sheet. Guerrero's notation in the Work order (WO) reads: "Tom: a lot of oil present." The Crown notes that the chemist, Yi Zhang, said it was grease and yet he signed the IWA sheet which indicated "80% solids and 20% phases" separation of the rest of the material.

187. Defence argues that the chemist, Zhang, identified the organic phase in this load as solid grease which is a common non-hazardous waste although his IWA sheet notation is more consistent with Guerrero's identification.

188. There was no evidence of a secondary analysis.

189. The evidence against LWS is clear in this charge. Management was made aware of the presence of oil and a large amount of sawdust was used (to deal with the oil). This documentation went unchallenged until this matter surfaced. Such a notation from the Environmental Manager should have demanded a response which would include appropriate and representative sampling of the unexpected material for testing prior to acceptance. The Court does not accept, based on the evidence, that appropriate testing was available internally at that time in the LWS laboratory.

190. The Court finds LWS guilty regarding count number twelve (12).”

[95] It is necessary to read all these paragraphs to clearly understand the Trial Justice’s reasoning for acquitting on some counts and convicting on others. It also assists in determining whether as submitted by Defence he erred in law, when he convicted on counts 6, 8 & 12 of the Ottawa Information.

[96] The Trial Justice referred to the core issue for these counts as being what "constitutes a representative sample for testing including the issue of unexpected substances".

[97] This was correct, these counts allege a failure to comply with condition 17 of the PCA and specify the failure is to take representatives samples of incoming waste.

[98] I find the Crown particularized the failure both in the wording of the charge and in the Crown's response to a request for particulars and is therefore limited (absent any amendment by the Trial Justice) to the particulars it listed. A letter from the investigator received by Defence stated:

> "I think what we have to look at is their C of A it says they must take a representative sample. If you only sample the solid portion of the load is that considered representative."

[99] In paragraph 153 and 155 of his decision, the Trial Justice correctly defined the term representative sampling. He then stated he was satisfied that the appellants did sample the incoming waste prior to it being received and that each composite sample was tested by the appellants' chemists using their own equipment. He was also satisfied that when an aqueous phase was present it was noted in the Incoming Waste Analysis sheets.

[100] He then looked at the evidence for each count. In regards to count 6, he found in paragraph 162 of his decision that there was evidence which should "have triggered an external testing of the material" and that "sampling" is not representative when an unexpected material is not properly sampled and tested. He convicted on the basis that there was no external testing.

[101] Similarly in regards to count 8, he convicted on the basis that the appellants "should have sought an external assessment given their internal laboratory limitations".

[102] And again in regard to count 12, he convicted because he held external testing was required.

[103] He acquitted the appellants of the other similar charges because he was not satis-

fied that the Crown had presented sufficient evidence of unknown liquids to warrant an external analysis.

[104] It appears the Trial Justice incorporated into the charges a requirement to send samples for external analysis in certain cases, because of the limits of the appellant's internal laboratory.

[105] Crown Counsel acknowledges the Trial Justice referred to a requirement for external analysis but submits the Trial Justice also found that no representative sample of unexpected liquid was taken. The Crown refers to paragraphs 162-170 and 189 of the Trial Justice's decision. I do not agree with this interpretation as it is clear when reading his decision paragraphs 144 to 190 inclusive that he believes that to fulfill the requirement for "representative sampling" these loads required an external analysis. He has added a requirement of external analysis into the definition of representative sampling

[106] Crown Counsel further submits that common sense must be applied and the wording of the charges and by reference condition 17 of the PCA must be read and interpreted in a contextual manner.

[107] The purpose of both the PCA and the Act are relevant in interpretating condition 17 however this does not permit an interpretation which results in new legal obligation being imposed on the appellants. Condition 17 specifically refers to inspection and testing of all incoming and outgoing wastes to be done by qualified personnel as detailed in the application and supporting documentation listed in item 7 of Schedule "A" of the Certificate.

[108] These include very detailed procedures for inspecting and testing but to not include any requirement for external testing nor is there any reference to circumstances where such might be required.

[109] As noted, the Crown submits common sense and context are important in this case. While that may be these cannot be relied on to convict an accused for an offence he has not been charged with.

[110] These counts alleged specific offences, they particularize the way they were committed "failing to take representation samples" there is no mention of failing to send samples for external testing. There is however a reference to condition 17 of the Certificate of Approval which further refers to schedule A. None of these refer to external testing.

[111] While this may be an area that should be covered in future Certificates, it was not in this one and as the Trial Justice himself found in paragraph 152 of his decision the wording of condition 17 is general in nature and broad. It is however not capable of supporting the interpretation the Trial Justice made.

[112] I find the Trial Justice made an error in law when he found that by not sending samples for external testing, the appellants had failed to take representative samples and/or failed to comply with condition 17.

[113] The appeal is therefore allowed and acquittals are entered on counts 6, 8, 12 of the Ottawa Information.

Corporate Defendant's Appeal of Conviction: Count 1 of the Lafleche Information - Conviction

[114] The appellant appeal the conviction on count 1 of the Lafleche Information which read as follows:

> "depositing or causing, permitting or arranging for the deposit of waste, namely hazardous waste upon land for which a Provisional Certificate of Approval has been issued other than in accordance with condition 13 of the Provisional Certificate of Approval no. A420016 namely by depositing hazardous waste at this site contrary to section 186(1) of the *EPA*."

[115] They submit that the Trial Justice erred in law or made and error of mixed fact and law in finding that the waste was hazardous. They submit that the sample taken and analyzed was not representative of the whole load and leachate toxicity only applies to the average of a load as a whole therefore it was an error to conclude the waste i.e. the load was haz-

ardous. They also submit the sample was too unreliable to support a conviction.

[116] The Trial Justice summarized the events surrounding the load in question in paragraph 27 of his decision:

> "27. Regarding the Lafleche (Cornwall) Information, on *counts one (1) to three (3)*, LWS, generated and transported a load of waste to the Lafleche landfill site at 17125 Lafleche Road, Moose Creek, Ontario on waybill ticket number 067663 on December 4, 2006. LWS and the MOE were advised by Lafleche on December 8, 2006 that they were rejecting a load of waste received from LWS. On December 12, 2006, LWS removed the particular load at the Lafleche landfill site under the direction of Lafleche and MOE. The load was transported to Recyclex under a manifest."

[117] The Trial Justice reviewed in detail in paragraph 92 to 117 of his decision, the arguments of both the Crown and Defence as well as the evidence relevant to the Lafleche Information.

[118] His reasons for convicting the appellant on count 1 of the Lafleche Information are found in paragraphs 200 to 212 inclusive of his decision.

> "200. The Crown noted that the Lafleche Environmental landfill site was only authorized to accept solid, nonhazardous wastes. It is further stated that the demarcation line between hazardous and non-hazardous wastes is the leachate toxicity criteria set out in Schedule 4 of Regulation 347 of the EPA. In the case of tetrachloroethylene, also known as perc, that line is 3 ppm (parts per million).
>
> 201. The Court acknowledges that there was an issue between Lafleche and LWS as indicated by the Lafleche General Manager, Martin Zimmer apparently regarding excessively dusty or wet loads which brought him to consider halting future LWS loads. The court is also aware of concerns raised jointly by Zimmer and the then Environmental Manager, Jairo Guerrero. Indeed, they worked out a protocol for future deliveries which satisfied Zimmer at the time. This arrangement appeared to be based on trust. However, when Zimmer learned of Guerrero's

departure from LWS in November 2006, he decided to segregate an LWS load and test it for diligence. He did this through giving instructions to his Operations Manager, Don MacDonell, who stopped the next LWS load on December 4, 2006. Zimmer determined that it would be a good day for testing as a Golder Associates inspector Daryl Miller was on-site sampling monitoring wells. He was directed to test the LWS load.

202. The Court is, based on the evidence, satisfied that the LWS truck went directly to the segregation area as described by Zimmer and MacDonell. The argument that the load went first to the open face to be unloaded and then re-loaded and taken to the segregated area is not credible in the face of the evidence. Indeed, although Miller arrived at the load in the segregated area within five to ten minutes, MacDonell had stayed with the load from the time it arrived at that location and watched the LWS truck go to the segregated area from the Scale House.

203. Miller subsequently photographed the load and took some twelve representative samples indicating that there was no shredder or fluff cover material when sampled. He was told by a Golder engineer to get a composite sample to test for an unknown substance. He took samples of a black substance and other granular materials in the pile. This black "oozy" and granular material was estimated by him to make up about 95% of the sample. He also estimated there to be maybe 30 kilograms of black material and 50 kilograms of the granular material visible on the surface of the pile.

204. The fact that Miller used a pail that wasn't new is not a factor. The Court accepts that the pail was clean and had never been used to sample chemicals or other wastes prior to this use. There is no credible evidence to suggest any contamination. The Court also accepts the evidence supporting the need to sample with the tools at hand and that those tools were not compromised. Similarly, the Court has no concern with his mixing the twelve (12) samples together in the pail and transferring the composite material to the three (3) sample jars. Those sample jars were provided by Accutest for sampling and had lids on prior to Miller's testing. Based on the evidence and arguments, the Court is prepared to accept the validity of this testing procedure.

205. The arguments made regarding the lack of representative sampling are not accepted. Miller sampled what he considered to be the offending substance. Indeed, he acknowledged that the black, oozy material and granular material made up 95% of his sample. There was no need to sample beyond the material that appeared to him to be suspicious. Random sampling of various parts of a load is a standardized practice to establish a picture in time of a particular load. Common sense would direct a tester to any suspicious material regardless of codified techniques.

206. The argument regarding the lack of blank samples is not substantive. Miller cleared up this issue by noting that Golder Associates did not take blank samples for soil sampling on a landfill site because of the variation caused by airborne material including various contaminants on-site. Although experts on both sides provided their opposing views on sampling using blanks, the court accepts the Golder Associates position, particularly given the segregation of the load and the imperative to collect the sample immediately. Further, the Court accepts the evidence that sample blanks would not have assisted in the finding of tretrachlorethylene at a solid, non-hazardous land fill site, and any contribution from that site would have been minimal.

207. The samples were properly transferred to the Accutest Laboratory. It is not useful speculation to infer that those samples, in a zip lock bag, in a cooler, then placed in Golder's refrigerator overnight, may have been compromised. There is no reliable evidence to support an argument that the samples were compromised or otherwise not transferred properly.

208. The argument was also made that the particular load that was segregated and sampled was not a typical LWS load in appearance, odour, weight and chemistry (as noted in the LWS incoming and outgoing analyses). Defence made the argument that the only potential sources identified were Recyclex and Chemtech who denied that they sent any 'perc' waste to LWS.

209. This line of argument is not accepted by the Court. The evidence accepted by the Court is that a LWS truck was stopped at the Lafleche gate, ordered to a segregated area and sampled by Golder Associates almost immediately using sampling methodology also accepted by the Court. Argu-

> ments about appearance, odour, weight and chemistry are not accepted. It was, and could not be otherwise, based on the accepted evidence, an LWS load. The Court also accepts that the material sampled had a distinguishing odour given the compelling evidence entered at court. The weight difference when the load was returned to LWS is fully explainable by the additional soil taken from the segregated area when removing the inspected load. It would be impossible to remove only the exact load given the industrial equipment and requirement to remove the complete load from the contact area. The chemistry, as noted in the incoming and outgoing analyses, is meaningless once a leachate toxic substance is discovered.
>
> 210. A key question is, was this load leachate toxic for perchloroethlene (perc) and therefore hazardous? The answer, according to the Accutest results accepted by the Court, is yes.
>
> 211. The Court finds no inconsistency or uncertainty regarding the continuity of the material sampled and analyzed.
>
> 212. The Court finds that LWS is guilty as charged in *count number one (1)*."

[119] I will firstly deal with the appellant's argument that, the sample was too unreliable to support a conviction. This would be an error of fact or arguably of mixed law and fact, not a pure error of law, as there was clearly evidence of reliability which was assessed and weighed by the Trial Justice.

[120] The Trial Justice turned his mind to the issue of reliability of the sample and test results. He meticulously addressed the issues surrounding reliability including the integrity of the load, contamination, continuity of both the load and sample and concluded the test results were reliable and accepted them.

[121] Deference is to be given to the Trial Justice and he weighted the evidence surrounding the taking of, transfer of, and subsequent analysed of the samples and accepted the results. There is nothing in the evidence to suggest the Trial Justice exercised his discretion on his whim as suggested by the appellant in their factum.

[122] This is not a case where the evidence suggests that the Trial Justice must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion thereby erring in law. He turned his mind to the issue and considered the *viva voce* evidence of the witnesses as well as the documentary evidence filed.

[123] The expert evidence and exhibits filed are not as determinative of the issue as the appellant suggests. There is nothing to suggest the Trial Justice made a palpable and overriding error in accepting the test result and that ground of appeal must fail.

[124] Turning to the question of whether the Trial Justice erred in finding "hazardous waste" had been deposited at the Lafleche site.

[125] The appellant argues that the term "hazardous waste" in the context of section 40 of the *EPA* refers to an entire load of waste being hazardous and not simply a part thereof. The Trial Justice found approx. 80 kilos of the load was hazardous waste. The appellant submits this is only a tiny part or hot spot.

[126] The appellant submits that the relevant unit was the entire truck load and that only if the results of representative sampling of the entire load indicated concentrations above those permitted in schedule 4 could a finding of hazardous waste be made. Crown counsel submits there was no error made as the unit to be considered need not be the entire load but any portion thereof.

[127] Section 40 of the *EPA* reads as follows:

> "No person shall deposit, or cause, permit or arrange for the deposit of waste upon, in, into or through any land or land covered by water or in any building that is not a waste disposal site for which a certificate of approval or a provisional certificate of approval has been issued and except in accordance with the terms and conditions of the certificate."

[128] The term *hazardous waste* was defined in regulation 347 at the relevant time as:

> "hazardous waste" means a waste that is:

j) leachate toxic waste.

[129] There were also a number of exceptions listed including "(p) leachate toxic waste…or otherwise accumulated in an amount less than five kilograms, (i) an empty container or liner… that contained leachate toxic waste.

[130] Leachate toxic waste was defined as:

> "leachate toxic waste" means a waste producing leachate containing any of the contaminants listed in schedule 4 at a concentration equal to or in excess of the concentration specified for that contaminants in schedule 4 using the toxicity characteristics leaching procedure.

[131] The concentration for tetrachloroethylene (perc) was listed in schedule 4 as 3 ppm. The evidence accepted by the Trial Justice indicates a concentration 20 times that listed in schedule 4.

[132] There was nothing in the definition of hazardous waste referring to a load, a percentage of a load, or a part thereof.

[133] There was however a reference in 14.01 of Reg 347 to intermingling hazardous waste.

> "14.0.1 – If hazardous waste is being handled, stored, treated or disposed of at a waste disposal site or transferred to a waste disposal site, no person shall cause or permit the hazardous waste to be mixed, blended, bulked or intermingled with any other waste or material, unless the mixing, blending, bulking or other intermingling is in accordance with the certificate of approval or provisional certificate of approval issued under Part V of the Act for waste disposal site. O. Reg. 461/05, s.5."

[134] The inclusion of this section in the regulation supports the Cown's position that hazardous waste does not become non-hazardous waste by virtue of its inclusion into a large

load of non-hazardous waste.

[135] The appellant's counsel both at trial and on this appeal relied on and referred to a number of documents/reports filed as exhibits at the trial which state that characterization of an entire body of material must be based on representative samples. Both the Crown and Defence experts accepted these exhibits as benchmarks in the area of identifying reliable scientific data to characterize waste.

[136] These exhibits do not however directly address the issue of what constitutes hazardous waste in the context of section 40 of the *EPA*.

[137] The appellant's argument focuses on the requirement of representative sampling – of the entire truck load.

[138] I accept the defendant submission that results relied on by a Court in determining if a waste is hazardous must be from a representative sampling. This is clear from the exhibits filed, the *viva voce* evidence and the case law. The relevant question on this appeal is a representative sampling of what?

[139] The Trial Justice was satisfied that the samples taken by Mr. Miller were representative of that part of the full load that concerned Lafleche, and he accepted the results of their subsequent analysis. I find no reason to interfere with his finding.

[140] He was entitled to make these findings. There is nothing in the *EPA* or the regulations or case law that suggests a finding of hazardous waste in the context of section 40 of the *Act* requires representative sampling of the entire truck load.

[141] In support of their position, the appellant refer to a number of cases where the Courts dealt with the issue of what constitutes hazardous waste. *R. v. IPSCO Recycling Inc.* 2003. FC 1518 (Fed CT.) and *R. v. Precision Plastics Ltd.* (2003) 3CELR (3d) 86, *Quebec Ciments St. Laurent* JE 95 – 1944 (ct de Que). The cases did not deal with section 40 of the *EPA* and while they refer to the requirement of representative sampling they do not address the issue in this case. They do not deal with a truck load as in this case. However all the cas-

es clearly demonstrate that what is hazardous waste and what is an appropriate representative sample is a question of fact. The particular facts of the case will dictate the answer in each case.

[142] Had there been a requirement that the entire truck load or a specific percentage be hazardous waste before section 40 came into play been intended by the legislators, they could easily have included it with the other exceptions or qualifications to the term "hazardous waste." However it was not.

[143] The only references to truck load are found in sections 21 to 26 of Reg. 347 which concerns the requirements for manifests when transporting hazardous waste. The sections refer to a "truckload or part thereof" suggesting that if the intent of the legislators was not to define hazardous waste as a percentage of a predetermined load.

[144] Therefore the Trial Justice made no error of law and while there was contradictory evidence presented at trial, his decision was based on his assessment of the evidence and his findings of facts. There is no palpable and overriding which would warrant this Court to interfere with his findings.

[145] The defendant appeal of count 1 of the Lafleche Information is therefore dismissed.

Crown Appeal – Counts 2 and 3 of the Lafleche Information – *Kienapple* Principle

[146] The Crown appeals the acquittal of the defendant on counts 2 & 3 of the Lafleche Information. The Crown submits that, the Trial Justice erred in law by improperly applying the legal test governing the rule against multiple convictions, known as the *Kienapple* principle, therefore incorrectly acquitting the company of counts two and three in the Lafleche Information on the basis that he had already registered a conviction with respect to count one.

[147] The Crown argues the application of the *Kienapple* principle is limited to situations where two or more offences contain the same elements and address the same wrong and that, in this case, there are different, additional and distinguishing elements between the three of-

fences and they address different wrongs ranging from the illegal deposition of waste on the one hand and the failure to complete necessary records on the other.

[148] Count 1, 2 and 3 of the Lafleche Information are as follows:

> 1) On or about the 4th of December, 2006…did commit the offence of depositing, or causing, permitting or arranging for the deposit of waste, namely hazardous waste, upon land for which a Provisional Certificate of Approval has been issued other than in accordance with condition 13 of Provisional Certificate of Approval No. A420018, namely by depositing hazardous waste at the site contrary to section 40 of the *Environmental Protection Act* R.S.O. 1990, c. E.19, as amended.
>
> 2) On or about December 4, 2006…did commit the offence of failing to comply with condition 5(a) of Provisional Certificate of Approval No. A860156 namely by transporting to a site which was currently operating under a Provisional Certificate of Approval, namely Lafleche Environment Inc. landfill site, subject wastes which were not permitted at said site, contrary to Sec. 186(3) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended.
>
> 3) On or about December 4, 2006...did commit the offence of being a carrier having possession of subject waste failed to have accompanying the waste, a manifest in respect of the waste, completed by the generator in accordance with the Manual and Regulation 347, contrary to Sec.21(1) committing an offence under Sec. 186(1) of the said Act.

[149] The Trial Justice in his decision referred to the *Kienapple* principle and explained it as follows in paragraph 118 of his decision:

> "118. The *Kienapple* principle was raised in this incident. The Crown argues that the offences set out in each of the three counts are separate and distinct, have different essential elements and are not the same delict. The Court is aware that there must be both a legal nexus and a factual nexus before the rule would apply. The Kienapple rule should only apply if there is no additional and distinguishing element that goes to guilt contained in the other offences."

[150] He then went on in paragraph 213 to 219 to dismiss count 2 and 3 of the Lapleche Information.

> "213. The Defence has raised the case of *R. v. Kienapple* [1974 CarswellOnt 8 (S.C.C.), which established the rule against multiple convictions that arise out of substantially the same facts. The rule can only be applied when there is a relationship of sufficient proximity between the facts and the offences which form the basis of two or more charges. The factual nexus will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges. There must not be any additional and distinguishing element that goes to guilt in the offence. Justices are directed to not lose sight of the intent of the decision and the overarching question whether the same cause, matter or delict underlies the charges.
>
> 214. In this case, the requirement for a sufficient nexus is satisfied as a single act of the accused corporation grounds all three charges.
>
> 215. As to the remaining two charges (counts two (2) and three (3)), it is the finding of the Court that "transportation to a site" and "a carrier having possession of subject waste failed to have accompanying the waste, a manifest" are not only related to each other in matter and cause, but as well as to the charge of "depositing, or causing, permitting or arranging for the deposit of waste, namely hazardous waste, upon land...namely by depositing hazardous waste at the site" found in count number one (1).
>
> 216. Counts two (2) and three (3) are substantially the same in corresponding to the same element in count one (1) regarding the act and process of transporting, with or without documentation, a substance, known or unknown, to a site that is not authorized to receive the said substance. The facts and evidence that established this element are particularizations of that element in the other charges."
>
> 217. Underlying all three counts is the same cause. Nothing could have been deposited at the site without transportation to

> that site, and the manifest issue is without merit given that the site in question could not legally receive substances governed by a manifest.
>
> 218. Count Number Two (2): The transportation charge is therefore dismissed based on the *Kienapple* principle.
>
> 219. Count Number Three (3): The manifest charge is therefore also dismissed based on the *Kienapple* principle."

[151] Many of the facts pertaining to the three counts have been reviewed previously. Briefly, on December 4th, 2006 the respondent transported what was found by the Trial Justice to be hazardous waste to the Lafleche landfill site. The transport was documented by a waybill.The Lafleche landfill is only permitted to accept solid-non-hazardous waste pursuant to the terms of its certificate of approval. The waste was deposited at the Lafleche site and later voluntarily removed by Lafleche.

[152] The Supreme Court of Canada in *R. v. Prince* (1956) 2 S.C.R. 480 considered the scope of the *Kienapple* principle and found that the application of the principle required that there be both a factual and legal nexus between the offences in issue. The Court held that:

> "Once it has been established that her is sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves."

[153] The court in *R. v. Prince* further held that whether the factual proximity is sufficient will depend on a number of factors including remoteness or proximity of the events in time and place the presence or absence of relevant interviewing events and whether the accused's actions were related to each other by a common objective.

[154] In regards to the sufficient proximity as to the offences it depends on whether the constituent element of the one offence are substantially the same as or adequately correspond to the elements of the other offence. There must be no additional and distinguishing element between the offence.

[155] In *R. v. Prince*, the Court held that a constituent element of an offence is not regarded as distinct or additional in this context purpose of the rule against multiple convictions where (1) an element in one offence, is a particularization of an element in another offence, (2) there is more than one method embodied in more than one offence, and (3) the statutory provision deems a particular element, to be satisfied by proof of a different nature.

[156] The Trial Justice correctly stated the appropriate tests in paragraphs 118 and 213 of his decision.

[157] The appellant submits that despite this, he misapplied the test to the facts of this particular case. Any error made by him would be an error of mixed facts and law.

[158] The appellant submits the Trial Justice erred in finding a sufficient factual nexus because there was an intervening event – the stopping of the truck at the gate which triggered a new and different transaction and that therefore there is no proximity in time and in place. The stopping at the gate does not break the transaction, it was clearly one transaction.

[159] As noted in *R. v. R.K.* [2005] O.J. No. 2434 (Ont. C.A.):

> "The adequacy of the factual nexus between offences for the purposes of involving the rule in *Kienapple* cannot be determined in the abstract but must be resolved on a "case-by-case basis"".

[160] I am satisfied that there was there was sufficient evidence for the Trial Justice to conclude that a factual nexus existed between the three offences. All three offences arose from the same transaction, it was one continuous transaction and they had a common objective namely delivering the load to Lafleche.

[161] Turning to the requirement of a sufficient legal nexus. The appellant submits that each count has distinct element(s), a separate legislative purpose and constitutes a different wrong or delict.

[162] While the Trial Justice did not specifically address each one of these considerations in his decision, there is nothing to suggest he did not turn his mind to them. In paragraphs 118 and 213 of his decision, he correctly stated the test to be applied in determining the application of *Kienapple* principle.

[163] In *R. v. R.K.* the Court stated that while the factual nexus inquiry is relatively straightforward, the legal nexus is more nuanced.

[164] In paragraph 34 of *R. v. R.K.* the Court explained the legal nexus inquiry as follows:

> "A comparison of the constituent elements of the offences in issue is an essential part of the legal nexus inquiry. However, the mere fact that offences share common elements does not establish a sufficient legal nexus between those offences to warrant the application of the *Kienapple* rule. The legal nexus inquiry is directed not at finding common elements between offences, but at determining whether there are different elements in the offences which sufficiently distinguish them so as to foreclose the application of the *Kienapple* rule."

The Court further reiterated the factors listed by the Supreme Court of Canada as relevant to the legal nexus inquiry concluding that "the crucial distinction for the purpose of the application of *Kienapple* rule is between different wrongs and the same wrongs committed in different ways."

[165] Count 1 of the Lafleche Information on which the conviction was entered is the offence of "depositing or causing; permitting or arranging for the deposit of hazardous waste" count 2 is the transportation of the hazardous waste and count 3 being a carrier of hazardous without a manifest.

[166] The wrong that count 1 and 2 are aimed at, in these particular circumstances are the same namely ensuring that hazardous waste is only brought and deposited to a site that is authorized to accept it. The act of transporting could easily be included in "causing, permitting or arranging for the deposit."

[167] Crown counsel submits it is possible to commit one offence without committing the other, while I agree that this is possible, this is not the test.

[168] In regards to the application of the *Kienapple* principle to count 3 of the Lafleche Information, while I have some concerns, because of the different elements of the offences, I do not find it to be an error in law or mixed fact and law which require that I interfere with the Trial Justice decision.

[169] As the Court in *R. v. R.K.* noted:

> "sufficiency of the legal nexus between offences will depend on the interpretation of the statutory provisions that create the offences and the application of those statutory definitions to the circumstances of the case."

[170] Deference is therefore to be given to the Trial Justice.

[171] The Crown's appeal on count 2 and 3 of the Lafleche Information are therefore dismissed.

Conclusion/Summary:

[172] The defendants appeal against convictions of count 6, 8, 12 of the Ottawa Information is allowed and acquittals are entered.

[173] The defendants appeal against conviction of count 15 of the Ottawa Information is dismissed.

[174] The Crown's appeal of the non-suit findings of count 14 of the Ottawa Information is dismissed.

[175] The Crown's appeal of the non-suit finding on count 16 of the Ottawa Information is allowed and a new trial is ordered.

[176] The Crown's appeals of the individual defendants acquittals on counts 1, 2, 3, 6, 8, 12, 14, 15 and 16 of the Ottawa Information and all counts of the Lafleche Information are dismissed.

[177] The defendant's appeal against conviction on count 1 of the Lafleche Information is dismissed.

[178] The Crown's appeal against acquittal on count 2 of the Lafleche Information is dismissed

[179] The Crown's appeal against acquittal on count 3 of the Lafleche Information is dismissed.

Released: June 10, 2013

Signed: "Justice Ann M. Alder"

APPENDIX A

OF APPEAL DECISION DATED JUNE 10th, 2013

Ottawa Information				
Count	**Charge - EPA**	**Offence Date**	**Outcome**	**Appeal status**
1	s. 41 – Transporting waste without approval (35 Vacuum Drummond loads)	April 24 to Dec 4, 2006	Lacombe – convicted Neilsons – acquitted	- no appeal of conviction - Crown appealing Neilson acquittals
2	s. 41 – Transporting waste without approval (1 Carlex load)	October 25, 2006	Lacombe – convicted Neilsons – acquitted	- no appeal of conviction - Crown appealing Neilson acquittals
3	s. 41 – Transporting waste without approval (1 Carlex load)	November 29, 2006	Lacombe – convicted Neilsons – acquitted	- no appeal of conviction - Crown appealing Neilson acquittals
4	186(3) – Processing leachate toxic waste in non-hazardous stream	September 18, 2002	Withdrawn – Key evidence excluded on voir dire	No appeal
5	186(3) – Fail to comply with condition in an approval by failing to take representative samples	September 14, 2005	All defendants acquitted	No appeal
6	186(3) – Fail to comply with condition in an approval by failing to take representative samples	September 19, 2005	Lacombe – convicted Neilsons – acquitted	- Lacombe appealing conviction - Crown appealing Neilson acquittals
7	186(3) – Fail to comply with condition in an approval by failing to take representative samples	September 21, 2005	All defendants acquitted	No appeal
8	186(3) – Fail to comply with condition in an	October 3,	Lacombe – convicted	- Lacombe appealing

	approval by failing to take representative samples	2005	Neilsons – acquitted	conviction - Crown appealing Neilson acquittals
9	186(3) – Fail to comply with condition in an approval by failing to take representative samples	October 31, 2005	All defendants acquitted	No appeal
10	186(3) – Fail to comply with condition in an approval by failing to take representative samples	November 14, 2005	All defendants acquitted	No appeal
Count	**Charge - EPA**	**Offence Date**	**Outcome**	**Appeal?**
11	186(3) – Fail to comply with condition in an approval by failing to take representative samples	December 28, 2005	All defendants acquitted	No appeal
12	186(3) – Fail to comply with condition in an approval by failing to take representative samples	May 30, 2006	Lacombe – convicted Neilsons – acquitted	- Lacombe appealing conviction - Crown appealing Neilson acquittals
13	186(3) – Fail to comply with condition in an approval by storing hazardous liquid waste in non-hazardous waste location	October 12, 2007	All defendants acquitted Charge dismissed via non-suit	No appeal
14	186(3) – Fail to comply with condition in an approval by storing oxidizing waste in flammable waste location	October 12, 2007	All defendants acquitted Charge dismissed via non-suit	Crown appealing all acquittals
15	186(3) – Fail to comply with condition in an	October 12,	Lacombe – convicted	- Lacombe appealing

	approval by storing waste outside in area not approved to store waste	2007	Neilsons – acquitted	conviction - Crown appealing Neilson acquittals
16	186(3) – Fail to comply with condition in an approval by storing oxidizing waste in flammable waste location	December 3, 2008	All defendants acquitted Charge dismissed via non-suit	Crown appealing all acquittals
17	186(3) – Fail to comply with condition in an approval by making changes to D&O report without approval	December 3, 2008	Withdrawn by Crown at outset of trial	No appeal
Cornwall or Lafleche Information				
Count	**Charge - EPA**	**Offence Date**	**Outcome**	**Appeal status**
1	s. 40 – Depositing hazardous waste at site not approved to accept such waste	Dec 4, 2006	Lacombe – convicted Neilsons – acquitted	- Lacombe appealing conviction - Crown appealing Neilson acquittals
2	s. 186(3) – Fail to comply with condition in an approval by transporting waste to a site not approved to accept such waste	Dec 4, 2006	All defendants acquitted - Lacombe - Kienapple principle - Neilsons acquitted outright	- Crown appealing all acquittals
3	s. 21(1) reg 347 – Fail to manifest subject waste	Dec 4, 2006	All defendants acquitted - Lacombe - Kienapple principle - Neilsons acquitted outright	- Crown appealing all acquittals