

2006 NPPC 12

File No.: 16355201

IN THE PROVINCIAL COURT OF NEW BRUNSWICK

Between:

Her Majesty, The Queen

- and -

**J.G.(GEOFF)GREENOUGH, ROBERT G. LUTES,
GEMTEC LIMITED AND THE CITY OF
MONCTON**

Before:

Judge Yvette Finn

Date of decision:

April 26, 2006

Appearances

Paul Adams, Esq.

On behalf of the Crown

Robert Kenny, Q.C.

**On behalf of the Defendants Robert G. Lutes and
Gemtec Limited**

FINN, Prov. Ct. J.

- [1] The Defendants were jointly charged with The City of Moncton and Mr. J. G. (Geoff) Greenough with two counts of breaches under s. 36(3) of the *Fisheries Act*. The Information was sworn before a Judge of the Provincial Court of New Brunswick on March 12, 2002 and the Crown elected to proceed by way of summary conviction.
- [2] The allegations in the first count are that between the 18th day of July, 2000 and the 27th day of April, 2001, both days inclusive, at or near the former landfill site in the City of Moncton, the defendants unlawfully did deposit or permit the deposit of leachate, a deleterious substance, in Jonathan Creek, a tributary of the Petitcodiac River.
- [3] The allegations in the second count are that between the 15th day of March, 2000 and the 1st day of November 2001, at the same location, the defendants unlawfully did deposit or permit the deposit of leachate in the Petitcodiac River.
- [4] The City of Moncton and Mr. Greenough are no longer involved in these proceedings as the charges against these defendants were disposed of before another judge of the Provincial Court prior to the trial of Gemtec Limited and Mr. Lutes. Robert Lutes is the majority owner and principal environment engineer of Gemtec.

- [5] The former Moncton landfill is located on the north side of the Petitcodiac River, adjacent to a tidal marsh, between the Causeway and Jonathan Creek, which flows in the Petitcodiac River. The landfill is divided in two parts: an older 19 hectare section to the east (the eastern fill) and a newer 16 hectare area to the west (the western fill). The fill areas are elevated and form distinct mounds with relatively flat tops (19m and 17m respectively) and are separated by a drainage channel for surface water.
- [6] The landfill opened in 1971 and was decommissioned in 1992, after being used as the dumping ground of garbage by the residents and businesses of the City of Moncton, City of Dieppe, Town of Riverview and surrounding areas. A wide variety of waste was allowed to be deposited or dumped in the Moncton landfill. This included residential, construction, commercial waste; petroleum and contaminated soil; liquid animal waste; waste oil from various service stations; asbestos; pipe insulation; medical waste; and urea formaldehyde foam insulation. All incoming waste was end-dumped on grade, compacted then covered daily, generally with imported soil and more particularly petroleum contaminated soil disposed of at the site.
- [7] Leachate is the term used to describe the liquid that emanates from a site after having percolated through it. At a landfill site, leachate is created when rainfall percolates through the site's sandy overburden, dissolving some solids, mixing with liquids and absorbing various gases from the underlying waste materials. Leachate tends to emanate from the base of the landfill typically as a leachate

plume but also emanates from the toe of the landfill as well as the side slopes in the form of seeps or springs. While leachate can have quite variable characteristics, it contains a suite of both inorganic and organic chemicals many of which would be toxic to fish.

- [8] In 1987, the Government of New Brunswick approved a comprehensive waste management program designed to replace the 200 dump sites then in operation in New Brunswick with regional containment landfills.
- [9] To comply with the New Brunswick Department of Environment's Waste Management Plan, the City of Moncton was obligated to open a "Regional Waste Disposal Site", which opened in 1992 in another location. The former landfill site on the banks of the Petitcodiac River was required to undergo closure procedures to address and minimize future environmental problems. A "Request for Proposals - Landfill Closures" containing the terms of reference was circulated to interested corporations. The objective was to obtain an environmentally acceptable closure plan which would meet all federal and provincial regulatory requirements.
- [10] In November 1993, Gemtec was retained by the City of Moncton to conduct the study for the closure of the City's landfill. In addition to properly characterizing the site and providing an environmentally acceptable closure plan compatible with long term land use objectives, the study was to identify various sources of funding which might be utilized to implement the closure.

- [11] In order to meet the study objectives, the project team carried out four broad activities. The first activity was to examine the historical records and specifically determine the types and quantities of waste that had been directed to the site over its operating life. The second activity was to characterize the site as it was at that date. The third activity was to develop the closure plan itself. The final activity was to examine the budget and scheduling requirements of the closure.
- [12] Gemtec's report, entitled "Closure of the Moncton Landfill", (hereinafter the "Closure Report"), was adopted by Moncton City Council on June 19, 1995. This Report dated May 10, 1995, is Exhibit C-30. The Defendant, Robert G. Lutes, is identified as the project leader.
- [13] In respect to the first activity, the Closure Report indicates that over a period from June, 1971, until 1992 when it was decommissioned, no leachate collection or treatment was provided. Because of site topography, leachate eventually drained to the Petitcodiac River. Pests were controlled through a licensed pest control contractor. There was apparently no salvage operations except for a small quantity of tires collected in 1984 and limited cardboard recycling prior to 1989.
- [14] Closure activities implemented when site operations ceased in 1992 included cleaning up litter, preliminary grading, and spreading a thin layer of soil over the waste disposal area. While most of the site was not seeded at the time of closure, a natural vegetative cover was reclaiming the site at the time of the report.

- [15] Section 6 of the Closure Report contains the proposed closure plan and section 6.3 deals with leachate collection and handling. This Closure Report recognized the fact that, prior to any closure activities being undertaken, the landfill site was producing leachate which was flowing into the Petitcodiac system at a rate estimated at 140,000 m³ per year – or 580 m³ per day. Chemical analysis of this leachate being produced in 1995 exceeded permissible levels as established by the Canadian Water Quality Guidelines.
- [16] Two closure approaches were considered in the report. Estimated costs for Option 1, which included grading, local handling of seeps, provision of a limited gas monitoring system, placement of vegetative cover and seeding, were 2,300,000\$. Option 2 would see the placement of a comprehensive cover with leachate collection and represented an estimated cost of 5,630,000\$. The report concluded that this estimated expenditures were not justified unless rigorous compliance with the New Brunswick Department of Environment discharge standards, with no account for dilution, must be achieved.
- [17] In the report, Gemtec recommended that the City select Option No. 1 for the closing of both the western and eastern sections of the Moncton landfill. Option No. 1 provided no measures to contain and/or prevent the deposit of the toxic leachate into the adjacent Jonathan Creek and Petitcodiac River.
- [18] The recommendation was based on the premise that the Petitcodiac River is a dynamic system with a strong tidal influence and if the leachate (580m³ per day)

is fully mixed with the river water under average flow conditions, the dilution factor is 4200 and therefore the New-Brunswick Department of Environment and Canadian Water Quality Guidelines will be met. However, the report recognized that the leachate seeps entering the river will degrade water quality along the near shore", and had "the potential of affecting aquatic life along the northern shore". The report also noted that the site provided "preferential" or "unimpeded" routes by which large quantities of leachate could reach the river system.

[19] In September 1994, Dr. Louis Lapierre, a professor of environmental studies at l'Université de Moncton, was asked to review a draft of the Closure Report prepared by Gemtec. Both during a meeting with City officials, where a Gemtec representative was present and in follow-up correspondence dated September 13, 1994, Dr. Lapierre raised concerns that Option No. 1 would not comply with the *Fisheries Act* requirements. In June 1995, Dr. Lapierre was asked to review and comment on the final Closure Report. In follow-up correspondence dated June 26, 1995, Dr. Lapierre again raised concerns that Option No. 1 recommended by Gemtec did not meet the regulatory requirements of the *Fisheries Act*. Representatives of the City advised Gemtec of Dr. Lapierre's concerns. However, the Closure Report does not address the issue of compliance with the *Fisheries Act*.

[20] On June 19, 2005, Moncton City Council accepted Gemtec's recommendation and retained Gemtec to implement Option No. 1. The defendant, Robert Lutes,

acted as project manager for Gemtec with respect to the implementation of the closure plan.

[21] The preparation and implementation of the closure plan was executed under the direction of a steering committee composed of representatives from Gemtec, the City of Moncton, as owner of the landfill site, and officials of the Province of New Brunswick, Department of Environment who was providing one half of the funding under its waste management program. This involved constant discussions and meetings to develop the closure plan, regular on-site visits and review of the annual monitoring reports prepared by Gemtec. There were no representatives from the Federal Departments or any other regulatory body on this steering committee.

[22] The closure plan was implemented in phases by Gemtec over the following five years. During that time, Gemtec representatives developed a "work plan" for each phase. Upon finalizing a "work plan", Gemtec was responsible for issuing tenders for the work and administering the implementation of the plan. Gemtec also prepared annual monitoring reports which were forwarded to the Department of Environment, Province of New-Brunswick, to the City of Moncton, to Environment Canada, to the Federal Department of Fisheries and Oceans and other interested parties. All of these reports stated that the testing results for leachate indicated that the parameters of the components found in leachate exceeded the Guidelines for Fresh Water Aquatic Life under the Canadian

Council of Ministers of the Environment, but when considering the dilution factor afforded by the Petitcodiac River, these guidelines would be met.

- [23] Over the years, other work than what was originally included in the closure plan was executed at the landfill site. This work included the placement of approximately 500 to 600 millimetres of clay on the site; this type of work is usually described as capping the site.
- [24] During the implementation of the closure plan, leachate was permitted to flow through a vegetated area between the landfill site and the Petitcodiac River. Some of the measures taken during the implementation of the closure plan involved directing leachate from the landfill site towards this area. This area included "natural channels" or "rivulets" through providing "preferential" or "unimpeded" routes facilitating the flow of large quantities of leachate to the river.
- [25] In response to the development of some unsightly leachate seeps on the eastern section of the Moncton landfill, an approximately 400 m pipe (identified as the Jonathan Creek perimeter pipe or drain) was installed in 1998 to collect the leachate flowing from various seeps and drain it directly into the adjacent Jonathan Creek. This pipe was installed on the recommendation and under the direction of the defendants. In response to public concerns raised with respect to the Jonathan Creek pipe, it was diverted in the spring of 2001 with the leachate being collected by the pipe being re-routed to the Moncton Sewage Treatment Plant for proper treatment and disposal.

- [26] Prior to the diversion of the Jonathan Creek pipe to the Greater Moncton Sewage Commission in June of 2001, the leachate flowed from the pipe into a ditch draining directly into Jonathan Creek. The cost of diverting the pipe was estimated at approximately \$10,000.
- [27] During this time, various groups were involved with the Petitcodiac River. In fact the Petitcodiac River has been a source of controversy since 1967 when the causeway was constructed. A group called "The Environmental Monitoring Working Group" which was responsible for the environmental monitoring of the Petitcodiac River system has been involved with the Petitcodiac River since 1997. This group has representatives of the major stakeholders, including the Provincial Department of Environment and Federal Departments of Environment and Fisheries, and is co-chaired by an official from Environment Canada and from the Department of Fisheries and Oceans. The results contained in the annual monitoring reports prepared by Gemtec have been used by this group in their reports.
- [28] During the summer of 2000, representatives of the "Petitcodiac Riverkeepers", an environmental group concerned with the preservation and restoration of the Petitcodiac, collected samples of leachate flowing from the eastern section of the Moncton landfill site. On July 19th and 20th 2000, leachate samples were collected from a seep at the northeast corner of the landfill site (hereinafter, "Seep No. 1") as well as from the Jonathan Creek perimeter pipe. The leachate collected from Seep No. 1 and the Jonathan Creek perimeter pipe was observed to flow directly

into the adjacent Jonathan Creek. The leachate samples were submitted to Buchanan Environmental Ltd., an accredited aquatic toxicity assessment laboratory, for analysis. In each instance, the leachate samples analyzed proved acutely lethal to aquatic life.

[29] In November 2000, the "Riverkeepers" lodged a complaint with Environment Canada in relation to the leachate deposits. Representatives of Environment Canada subsequently collected samples of leachate flowing from the Jonathan Creek perimeter pipe and from "Seep No. 1" into the adjacent Jonathan Creek. These samples were submitted to the Environment Canada Toxicology Laboratory in Moncton, New Brunswick, for analysis. The analysis of the leachate samples established that the leachate being deposited into Jonathan Creek was acutely lethal to aquatic life.

[30] On February 19, 2001, representatives of Gemtec had also collected samples of the leachate flowing from the Jonathan Creek pipe to the adjacent Jonathan Creek. Samples were collected at the point where the leachate discharged from the Jonathan Creek pipe and at the end of the drainage ditch along which the leachate flowed before deposit into Jonathan Creek. These samples were submitted to Buchanan Environmental Ltd. for toxicity assessment and the results established that the leachate collected both at "end of pipe" and "end of ditch" was acutely lethal to aquatic life.

- [31] Evidence at trial also established that samples of leachate produced from the Moncton landfill site were collected from "rivulets" flowing into the Petitcodiac River by representatives of Gemtec on May 24, 2001. These samples were collected as close as possible to the point of entry of the leachate into the Petitcodiac River. Again, they were submitted to Buchanan Environmental Ltd. for assessment. The results established that leachate collected from what was identified as "Rivulet No. 2" was acutely lethal to aquatic life.

ISSUES

Did the defendants deposit or permit the deposit of leachate

- [32] Section 36 (3) of the *Fisheries Act* provides:

“No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water”.

- [33] The term "deposit" is defined as follows in s. 34(1) of the *Fisheries Act*:

"deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

- [34] The statutory definition of "deposit" is to be understood in light of s. 40(5) (a) for the purposes of s. 36(3) of the *Fisheries Act*. Paragraph 40(5) (a) states:

For the purpose of any proceedings for an offence under subsection (2) or (3),

(a) a "deposit" as defined in subsection 34(1) takes place whether or not any act or omission resulting in the deposit is intentional;

[35] Section 36(3) of the *Fisheries Act* is a "strict liability offence". As such, proof of "the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by providing that he took all reasonable care" See *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at p. 1326.

[36] The principles enunciated in *R. v. Sault Ste. Marie, supra*, governing the interpretation and application of "*deposits or causes or permits the ... deposit ... are equally applicable to the interpretation and application of s. 36(3) of the (Fisheries Act)*" See *R. v. Northwest Territories (Commissioner)*, [1994] N.W.T.J. No. 39 (N.W.T. S.C.) at paragraph 56. As stated by the Supreme Court of Canada in *Sault Ste. Marie* at page 1329:

The "discharging" aspect of the offence centres on direct acts of pollution. 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. [Emphasis added.]

[37] That is, a "deposit" as defined in s. 34(1) of the *Fisheries Act* involves the direct act of "discharging, spraying, releasing, spilling, leaking, seeping, etc." of a deleterious substance into water frequented by fish. "Permitting" such a deposit involves the defendants' "passive lack of interference, or in other words, its failure to prevent an occurrence which it ought to have foreseen". As stated by the Northwest Territories Supreme Court in *R. v. Northwest Territories (Commissioner), supra*, at paragraph 56:

Lack of action to prevent the deposit of a deleterious substance into water frequented by fish, a deposit which ought to have been foreseen and which could have been prevented by the exercise of due diligence, therefore violates s 36(3).

- [38] Section 36(3) therefore defines a sphere or spectrum of prohibited activity. As stated by Dickson J. in *Sault Ste. Marie* at page 1330:

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. [Emphasis added.]

- [39] The defendants have argued that leachate is formed as the result of garbage being deposited in the dumpsite and when it rains or snows, parts of the garbage combine with this water to become leachate. It follows that without garbage, leachate cannot be created. Gemtec did not “deposit” or “permit the deposit” of the essential element, garbage, by any method, plan or procedure. The leachate tested by Crown experts at the sources indicated by the evidence was already being formed and deposited within the bodies of water, i.e., Jonathan Creek and the Petitcodiac River, before Gemtec became involved in 1995.

- [40] The defendants have also argued that their sole role as environmental consultants was to offer advice and environmental monitoring to both the City of Moncton and the Regulator, i.e., the Province of New Brunswick, Department of Environment. Any proposals by the defendants had to be approved by the Province of New Brunswick, Department of Environment before implementation and the ultimate control rested with this department.

[41] The defendants further argue that the facts in this case indicate only the ability for the defendants to make proposals to the Regulator, for their assessment and direction of a situation they attempted to address with available funding to the satisfaction of the Regulator. The defendants therefore submit that as such, the Crown has not established beyond a reasonable doubt this element of control over the garbage which formed the leachate tested to substantiate the charges before this Court.

[42] The Crown takes the position that the provisions of s. 21 of the *Criminal Code* pertaining to "Parties to Offences" apply to offences under the *Fisheries Act* (including s. 36(3)) by virtue of s. 34(2) of the *Interpretation Act*. Section 21(1) of the *Criminal Code* reads as follows:

Parties to offence – Every one is a party to an offence who actually commits it; does or omits to do anything for the purpose of aiding any person to commit it; or abets any person in committing it.

[43] The Crown submits that the evidence leaves no doubt that the defendants were both "principals" and "parties" to "depositing" or "permitting the deposit" of leachate into the Petitcodiac River and Jonathan Creek. They were contracted and paid to develop and implement a closure plan for the Moncton landfill site that would satisfy all federal and provincial regulatory requirements - including s. 36(3) of the *Fisheries Act*. Instead, they developed and oversaw the implementation of a closure plan that was predicated on the deposit of massive quantities of leachate into the Petitcodiac River system. The justification for doing

so was based on how much pollution the Petitcodiac River system could take. During the implementation of the closure plan, the defendants both knowingly permitted and directly deposited leachate into the nearby watercourses – most notably via the installation of the Jonathan Creek Pipe.

- [44] After reviewing the evidence, I cannot agree with the defendants' position. Gemtec was retained by the City of Moncton, not only to make recommendations but to develop a closure plan and implement this plan over a period of years. Gemtec was responsible for issuing tenders for the work and administering the implementation of the plan. In carrying out their responsibilities for the development and implementation of the closure plan, the defendants exercised a large measure and influence and control over how the closure was managed. Although the preparation and implementation of the closure plan was executed under the direction of a steering committee, Gemtec was an integral part of this committee. I recognize the fact that any proposals by the defendants had to be approved by the Province of New Brunswick, Department of Environment before implementation but in my view, this is insufficient to conclude that the defendants' involvement was merely that of adviser.

Deleterious Substance

- [45] Deleterious substance is defined in section 34(1) of the *Fisheries Act*. The British Columbia Court of Appeal has interpreted the term "deleterious substance" as defined in section 34(1), in *R. v. MacMillan Bloedel (Alberni Limited)* (1979), 47 C.C.C. (2d) 118 (B.C.C.C.) (leave to appeal to the Supreme

Court of Canada refused: [1979] 2 S.C.R. xi). In addressing the issue, Justice Seaton stated at pages 121-122:

What is being defined is the substance that is added to the water, rather than the water after the addition of the substance.

[46] This interpretation was reaffirmed by the Ontario Court of Appeal in *Ontario v. Kingston (City)* [2004] O.J. No. 1940. Gillese J.A. writes:

The focus of s. 36(3) is on the substance being added to water frequented by fish. It prohibits the deposit of a deleterious substance in such water. It does not prohibit the deposit of a substance that causes the receiving water to become deleterious. It is the substance that is added to water frequented by fish that is defined, not the water after the addition of the substance.

....

I would add, however, that if a substance, when added to water, alters the water so that the water is acutely lethal to fish, I am of the view that the substance is deleterious.

[47] The Crown has presented evidence that during the years 2000 and 2001, leachate samples were collected and analysed for toxicity, and the results established that the said samples were acutely lethal to aquatic life. Leachate would therefore constitute a “deleterious substance” as defined by s. 34(1) of the *Fisheries Act*. The defendants do not contradict this conclusion and they have conceded that Jonathan Creek and the Petitcodiac River constituted “water frequented by fish”.

Due Diligence

[48] The defendants have raised the defense of due diligence.

[49] Section 78.6 codifies the defence of "due diligence" in the *Fisheries Act* context:

No person shall be convicted of an offence under this Act if the person establishes that the person

- (a) exercised all due diligence to prevent the commission of the offence; or***
- (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.***

[50] Section 78.6(a) provides that "*an accused may absolve himself on proof that he took all care which a reasonable man might have been expected to take in the circumstances, or in other words, that he was in no way negligent*" see *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 (S.C.C.). The due diligence must relate to the commission of the prohibited act – rather than simply establishing reasonableness in a general sense. The burden rests with the accused to establish due diligence on the *balance of probabilities*. As stated by the Newfoundland Court of Appeal in *R. v. Alexander* (1999), 171 Nfld. & P.E.I.R. 74 (at paragraph 81):

The defence of due diligence requires the act of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient to simply act reasonably in the abstract or to take care in a general sense.

[51] In *R. v. Kurtzman* (1999), 4 O.R. (3d) 417 (Ont. C.A.) Tarnopolsky J.A. observed at page 429 that "*the due diligence must relate to the commission of the prohibited act, not some broader notion of acting reasonably*".

[52] The defendants' argument in respect to the defense of due diligence, centers on the following:

- That in the development and implementation of the closure plan, they relied and followed directions and guidelines provided by the Regulator, i.e. the Department of Environment of the Province of New Brunswick.
- That Gemtec looked at alternative solutions which proved more costly and complex, and the Regulator which was responsible for the closure plan and its funding made the final decision in considering the least expensive option among the two proposals.
- That in the case of landfills such as the Moncton landfill, the goal of eliminating all the leachate is impossible, that Gemtec did not undertake to do so in its proposal to the Regulator and that Gemtec did all it could do to reduce the flow of leachate, taking into consideration the financial resources available and the magnitude of the environmental problem developed prior to its involvement.

[53] I recognize that to develop and implement a closure plan for the Moncton landfill was no easy task. The evidence has shown that the dump site was an environmental disaster, resulting in its closure in 1992. The kinds of garbage which accumulated were varied, i.e. residential, commercial, institutional and construction waste. Gemtec did not choose this site to establish a landfill adjacent to the Petitcodiac River and Jonathan Creek. Obviously, the defendants inherited a mess. To address this, the Regulator imposed environmental and financial requirements.

[54] However, my duty in this matter is not to evaluate the defendants' actions in respect to the environmental and financial requirements imposed by the Department of Environment of the Province of New Brunswick, but to determine

whether the evidence supports the conclusion, on a balance of probabilities, that the defendants took reasonable steps to avoid committing the statutorily-barred activity described in section 36 (3) of the *Fisheries Act*.

[55] In the present case, the "prohibited act" was the deposit(s) of leachate, a deleterious substance, into the Petitcodiac River and Jonathan Creek.

[56] The defense of due diligence was dealt with by the Supreme Court of Canada in the recent decisions of *City of Laval v. Tetreault* 2006 SCC 12 (SCC) (April 13, 2006) and the companion case, *City of Levis v. 2426-4470 Quebec Inc.* (same citation 2006 SCC 12). At paragraph 30, Mr. Justice Lebel writes:

The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are.

[57] In my view, the due diligence defense raised by the defendants has not been made out. Evidence at trial established that the defendants either, at best, did not know, or at worst, were "wilfully blind" as to the requirements of s. 36(3) of the *Fisheries Act*. Further, the defendants were forewarned, via the correspondence of Dr. Louis Lapierre that the closure option they were recommending may not comply with *Fisheries Act* requirements. No evidence has been presented that they did consult Environment Canada, or the Department of Fisheries and Oceans as to whether the closure plan complied with federal regulatory requirements.

[58] Between 1995 and 2001, the defendants neither recommended nor implemented any reasonable measures to prevent toxic leachate from being deposited into the

Petitcodiac River system. In fact, during that time, the defendants recommended and oversaw the installation of the Jonathan Creek pipe which collected and deposited leachate directly into Jonathan Creek. This involved the installation of approximately 400 meters of perimeter drain in 1998. The drain collected leachate from various points on the site and piped it directly into Jonathan Creek.

[59] Prior to re-routing the Jonathan Creek pipe in the summer of 2001, the flow of leachate from the Jonathan Creek pipe was estimated at between 36-40 litres per minute. The re-routing of the Jonathan Creek pipe to the Moncton Sewage Treatment Commission in the summer of 2001 reduced the direct discharge of leachate into the Jonathan Creek by as much as 95%. Gemtec estimated the cost of re-routing the pipe at only \$10,000.

[60] In my view the evidence presented does not support the conclusion that the defendants either recommended or implemented any measures to avoid the "prohibited act", i.e., the deposit of leachate into the Petitcodiac River system. There were no provisions for proper leachate management or collection in order to minimize leachate deposits as the defendants' approach was predicated on allowing leachate to flow directly into the river system and relying on its dilution capacity to mitigate any environmental harm.

Officially Induced Error

[61] The defendants have also raised the defense of « officially induced error ». They submit that all of the various reports, the actions and comments of highly

qualified experts at both levels of government and their testimony at trial together with Crown and Defence experts' testimony at trial, confirm that officials from the federal Department of Environment and of Fisheries and Oceans endorsed the approach taken by GEMTEC at the landfill site to rely on dilution by the receiving stream to meet the Canadian Water Quality Guidelines by making use of the assimilative capacity of the receiving water. In other words, their interpretation of Section 36 of the *Fisheries Act*, R.S.C., 1985, Chapter C-F-14 was the effect on the receiving water of any deleterious substance, i.e. the Petitcodiac River.

- [62] The defendants say that in the annual monitoring reports prepared by Gemtec to provide to the City of Moncton and the Regulator reports of on-going work and testing results, including testing results for leachate, Gemtec made full disclosure of the fact that the parameters for such components as ammonia, iron, copper, zinc, aluminium and lead, exceeded the "Guidelines for Freshwater Aquatic Life (FAL)". The defendants argue that these disclosures were of no concern to Federal officials as the data contained in these reports was examined and used in other projects and studies related to the Petitcodiac River by various officials employed with Environment Canada and Fisheries and Oceans and none of these officials took any action to cause an investigation for a violation of the *Fisheries Act*. These circumstances, according to the defendants, make the defence of "officially induced error" available.

[63] The defence of “officially induced error” was also reviewed by the Supreme Court of Canada *City of Laval v. Tetreault*, supra and *City of Levis v. 2426-4470 Quebec Inc.* At paragraph 26 and 27, the Court confirmed the analytical framework of this defense, developed by Chief Justice Lamer, as he was at that time, in *R v Jorgensen*, [1995] 4 S.C.R.55, and more particularly the conditions under which it will be available, i.e.:

- 1) That an error of law or of mixed fact was made;
- 2) That the person who committed the act considered the legal consequences of his or her actions;
- 3) That the advice obtained came from an appropriate official;
- 4) That the advice was reasonable;
- 5) That the advice was erroneous and;
- 6) That the person relied on the advice in committing the act.

[64] In my view, it has not been demonstrated that these conditions have been met. The evidence shows that the defendants were forewarned, via Dr. Lapierre's correspondence, that the closure plan they recommended may not meet *Fisheries Act* requirements. In response, the defendants failed to contact or consult with Dr. Lapierre as to the nature of his concern. Nor did they consult with the Department of Fisheries and Oceans or Environment Canada with respect to the closure plan or submit the plan for review by these agencies. No legal advice was sought as to the lawfulness of the recommended closure plan. In fact, there is no evidence that Mr. Lutes or anyone employed by the Defendants reviewed the plain wording of

s. 36(3) of the *Fisheries Act* before proceeding to recommend and implement the closure plan in issue. There is also no evidence of such consultations during the subsequent work at the site by Gemtec.

[65] In his evidence, Mr Lutes referenced a single phone call to Environment Canada in September 1994. There was no evidence that this individual had responsibility or authority over the administration or enforcement of s. 36(3) of the *Fisheries Act*. In fact, there was little evidence as to who this person was or what position he/she occupied at the time. Also, even if the evidence established that this person was an "appropriate official", there was no evidence that he/she offered any opinion or advice as to the application and interpretation of s. 36(3) of the *Fisheries Act* as it related to the Moncton landfill site.

[66] I recognize, as the defendants have argued, that there is evidence that officials employed by Environment Canada and Fisheries and Oceans, did review the annual monitoring reports prepared by Gemtec and used the contents of these reports in other studies, however, there is no evidence that any of these officials were vested with the responsibility, duty or authority to enforce s. 36 of the *Fisheries Act*, and there is no evidence that specific advice was given or representations were made by these officials as to whether the closure plan and subsequent work by the defendants at the Moncton landfill violated the requirements of s. 36(3) of the *Fisheries Act*. As noted by Lamer J. in *Jorgensen*, (at page 112), "*it is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that her conduct was permissible*".

Conclusion

[67] I am satisfied from the evidence that the wrongful act described in the charges against the defendants has been established, that a due diligence defence has not been made out and that it has not been demonstrated that all the conditions under which the defence of officially induced error is available have been met.

[68] Sections 78.2 of the *Fisheries Act* provides that “*Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.*” I am satisfied by the evidence that these requirements are met in the case of the defendant Robert Lutes.

[69] As a result, the defendants are found guilty of the offences with which they are charged.

Dated this 26th day of April 2006.

Yvette Finn
Provincial Court Judge