

Cause No. **5JM-164-2024**

IN THE COURT OF KING'S BENCH OF  
NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

**CRANE MOUNTAIN  
ENHANCEMENT INC.,**

Applicant,

- and -

**FUNDY REGIONAL SERVICE  
COMMISSION and THE MINISTER  
OF ENVIRONMENT AND LOCAL  
GOVERNMENT.**

Respondents.

**NOTICE OF APPLICATION**

(Form 16D)

**TO:** Fundy Regional Service Commission  
10 Crane Mountain Road  
Saint John, New Brunswick  
E2M 7T8

**AND TO:** The Minister of Environment  
And Local Government  
Marysville Place  
P.O Box 6000  
Fredericton, New Brunswick  
E3B 5H1

**LEGAL PROCEEDINGS HAVE BEEN  
COMMENCED BY FILING THIS  
NOTICE OF APPLICATION.**

COUR DU BANC DE LA REINE DU  
NOUVEAU-BRUNSWICK

DIVISION DE PREMIERE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE



ENTRE:

Requerent,

- et -

Respondent.

**AVIS DE REQUETE**

(Formule 16D)

**DESTINATAIRE:**

**MICHAEL LUI**

...  
...  
...

**PAR LE DEPOT DU PRESENT AVIS  
DE REQUETE, UNE POURSUITE  
JUDICIAIRE A ETE ENGAGEE.**

The Applicant will make an Application before the Court at 10 Peel Plaza, Saint John NB, on the 18<sup>th</sup> day of December, 2024 at 9:30 a.m. (or p.m.) for an order as set out hereunder.

If you wish to oppose this application you must appear at the hearing of the application at the place, date and time stated, either in person or by a New Brunswick lawyer acting on your behalf.

If you intend to appear on the hearing of the application and wish to present to the Court at that time affidavit or other documentary evidence to support your position, you must serve a copy of such evidence on the applicant or his lawyer and, proof of such service, file it with this Court Office prior to hearing of the application.

If you fail to appear on the hearing of the application **AN ORDER WHICH MAY AFFECT YOU MAY BE MADE IN YOUR ABSENCE.**

You are advised that:

- (a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;
- (b) the Applicant intend to proceed in the English language; and
- (c) if you require the services of an interpreter at the hearing you must advise the clerk at least 7 days before the hearing.

Le requérant présentera une requête à la Cour à , le 2012 à h en vue d'obtenir l'ordonnance décrite ci-dessous.

Si vous desirez contester cette requête, vous devrez comparaître à l'audition de la requête aux lieu, date et heure indiqués, soit en personne ou par l'intermédiaire d'un avocat du Nouveau Brunswick chargé de vous représenter.

Si vous prévoyez comparaître à l'audition de la requête et desirez présenter à la Cour un affidavit ou une autre preuve littérale en votre faveur, vous devrez signifier copie de cette preuve au requérant ou à son avocat et la déposer, avec une preuve de sa signification, au greffe de cette Cour avant l'audition de la requête.

Si vous ne comparez pas à l'audition de la requête, **UNE ORDONNANCE POUVANT VOUS CONCERNER POURRA ÊTRE RENDUE EN VOTRE ABSENCE.**

Sachez que:

- (a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;
- (b) le requérant a l'intention d'utiliser la langue ; et
- (c) si vous avez besoin des services d'un interprète à l'audience, vous devez en aviser le greffier au moins 7 jours avant l'audience.

**THIS NOTICE** is signed and sealed  
for the Court of King's Bench by Melanie Patrick  
the Clerk of the Court at Saint John, New  
Brunswick, on the 13<sup>th</sup> day of  
August, 2024.

Original signed by / signé par  
Melanie Patrick

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Clerk of the Court of King's  
Bench of New Brunswick

Court Seal:

Court Address:

**Saint John Law Courts**  
10 Peel Plaza  
Saint John NB  
E2L 3G6

**CET AVIS** est signé et scellé au nom  
de la Cour du Banc de la Reine par , greffier  
de la Cour, a , ce 2012.

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Greffier

Seceau de la Cour:

Adresse du greffe:

**APPLICATION**

**ORDER SOUGHT**

On the hearing of this Application, the Applicant    À l'audition de la présente requête, le requérant a  
intends to apply for an order as follows:                    l'intention de demander qu'il soit ordonné que ..

.....

1. An order pursuant to Rules 3.02(1) and 69.03 of the ***Rules of Court*** extending the time for filing an application for judicial review, if required.
2. A declaration that the Applicant, Crane Mountain Enhancement Inc. (“**CMEI**”), has private standing as of right to bring this Application and, in addition, or in the alternative, an order granting CMEI public interest standing to bring this Application.
3. An order pursuant to Rule 69.05 of the ***Rules of Court*** dispensing with service of the following exhibits referred to in the Affidavit of John F. Doubt: Exhibit 1 (the 2023 GEMTEC EIA) and Exhibit 2 (the 2024 GEMTEC PES).
4. An order pursuant to Rules 40.01(b) and 69.06 of the ***Rules of Court*** for interim and interlocutory relief until this Application is heard on the merits, including:
  - a) A stay of the Certificate of Determination in the New Brunswick Department of the Environment and Local Government (“**NBDELG**”) File 1617 dated May 14<sup>th</sup>, 2024 (the “**Certificate of Determination**”) issued by the Honourable Glen Savoie, then-Minister of the Environment and Local Government (the “**Minister**”) under subsection 6(6) of the ***Environmental Impact Assessment Regulations***.
  - b) An injunction enjoining the FRSC from taking any actions authorized by the Certificate of Determination and, without limitation, applying for any Approval to Operate, commencing any construction under the Certificate of Determination, stacking municipal solid waste beyond the original design of 90 meters above sea level, or otherwise implementing the Project.



- c) In the alternative, an injunction enjoining the FRSC from stacking municipal solid waste beyond the original design of 90 meters above sea level.
5. An order pursuant to Rules 40.04 and 40.05 of the ***Rules of Court*** that the Applicant be relieved from any undertaking to pay damages arising from the interim injunction in the preceding paragraph.
  6. An order pursuant to Section 43 of the ***Evidence Act*** declaring certain expert reports (1997 Fracflow Report, 2005 ADI Report, and 2009 ADI Report) to be admissible.
  7. An order for production pursuant to Rule 69.10 of the ***Rules of Court*** that the Minister produce the entire record that led to the decision to issue the Certificate of Determination (the “**Decision**”), including:
    - a) Any reasons for the Decision, including the decision that the Project (whether viewed in isolation or together with any enterprise, activity, project, structure, work or program that the Minister considers likely to be carried on if the Project is carried on) would not result in a significant environmental impact and how the thirteen (13) conditions included in the Certificate of Determination were taken into consideration.
    - b) Any summaries, briefings, memoranda, advice, opinions, or recommendations provided to or prepared for the Minister by the NBDELG or prior Ministers.
    - c) Any summaries, briefings, memoranda, advice, opinions, or recommendations provided to or prepared for the Minister by third-party consultants other than publicly available information.
    - d) Any consultations with, or complaints or advice from, interested groups other than CMEI and publicly available information.
  8. An order pursuant to Rule 52.01 of the ***Rules of Court***, qualifying John Sims, M.Sc, P.Geo, P.Eng of EXP and Kerry Rowe, Ph. D as expert witnesses and admitting their expert reports into court.
  9. An order pursuant to Rule 69.13 of the ***Rules of Court*** that the Court quash the Certificate of

Determination and remit the matter to the Minister with directions.

10. An order pursuant to Rule 59 of the *Rules of Court* requiring each party to bear their own costs regardless of the success or outcome of this Application.
11. For such further and other order as this Honourable Court considers just and appropriate.

## I. THE PARTIES

The capacity of all persons who are parties to the proceeding and the place of residence of the Applicant:	La qualité de toutes les personnes qui sont parties à l'instance et Le lieu de résidence du requérant:
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1. The place of residence and capacity of the Applicant and Respondents are as follows:
  - a) The Applicant, CMEI, is a not-for-profit corporation under the *Companies Act*, RSNB 1973, c C-13, with a head office at 2483 Westfield Road, Saint John, New Brunswick. It brings this Application for itself and, in addition, or alternatively, in the public interest.
  - b) The Respondent, the FRSC, is a body corporate under the *Regional Service Delivery Act*, RSNB 2012, c 37, with a head office and place of business at 10 Crane Mountain Road, Saint John, New Brunswick. The FRSC is a Respondent solely concerning injunctive relief.
  - c) The Respondent, the Minister, is his Majesty in Right of the Province as Represented by the Honourable Glen Savoie as Minister of the Environment and Local Government. This Application will use the term “**Minister**” to refer to the Minister himself or a delegate responding on his behalf and “**NBDELG**” to refer more broadly to the Department of the Environment and Local Government.
  - d) All parties will be referred to by their current name and abbreviations, even though there have been changes over the years.

## II. GROUNDS

The grounds to be argued, including a reference to any statutory provision or rule to be relied on. Les motifs à discuter et les renvois aux dispositions législatives ou règles qui seront invoquées.

The grounds to be argued are:

### A. Overview of Application

1. This Application is for judicial review of the Decision to allow the Project to proceed without an environmental impact assessment (a “**Comprehensive EIA**”) subject to FRSC meeting certain routine conditions. The Project allows the FRSC to double the height of municipal solid waste at the Crane Mountain Landfill in Saint John, New Brunswick (the “**Landfill**”) and extend its lifespan until it is full by 22 years, from approximately 2048 to 2070.
2. The Landfill poses serious environmental risks, including inadequate liner design, questionable liner integrity, groundwater contamination by leachate, odour, visual impacts, and insufficient monitoring. While the Landfill was designed with appropriate methods at the time, subsequent research has shown that it is not well suited by current standards for its lifespan.
3. Both common sense and expert research dictate that doubling the height of municipal solid waste and adding 22 years of operation will seriously exacerbate the existing problems.
4. The Decision was made following a ‘rubber stamping’ process on an inexplicably fast timetable, given the more than two decades of remaining capacity. It was based on flawed, incomplete, and misleading information that failed to comply with the NBDELG’s guidelines and modern best practices.
5. CMEI is a not-for-profit organization that the Lieutenant-Governor-in-Council tasked with monitoring the Landfill and representing the nearby residents (the “Host Community”) as a condition of the landfill's original approval in 1996. One of the central purposes and mandates of CMEI is to report Host Community concerns to the Minister.

6. CMEI attempted to raise questions and concerns with the Minister and FRSC in writing. When FRSC responded with token answers, CMEI sought a meeting with the Minister to discuss these matters. The Minister agreed to meet but made the decision before any meeting.
7. The Decision was procedurally unfair to CMEI (and, by extension, the Host Community) being made by the Minister who demonstrated a closed mind and a reasonable apprehension of bias, did not entertain serious, research-based questions and concerns, and did not give reasons that are capable of review.
8. The Decision was also substantively unreasonable because, among other reasons, the Minister didn't apply NBDELG guidelines, was inconsistent with a prior decision on a similar proposal for the same site, and didn't explain apparent gaps in reasoning.

#### **B. New Brunswick's Environmental Impact Assessment Framework**

9. The Legislature of New Brunswick enacted the Clean Environment Act because it recognized the importance of assessing the impact of certain undertakings, such as landfills, on the environment, including air, water, and soil, and the related effects on the social, economic, cultural, and aesthetic conditions of the community.
10. Sections 5 and 6 of the *Environmental Impact Assessment Regulation* ("**EIA Regulation**") under the *Clean Environment Act* set out a process for evaluating those impacts. Briefly, the process involves the following steps:
  - a) Before starting a designated undertaking (including a waste disposal facility or any modification, extension, abandonment, demolition or rehabilitation to such a facility), the proponent must register the undertaking with the NBDELG for review.
  - b) The Minister may require further information from the proponent to determine whether the completion of an environmental impact assessment is required (a "**Comprehensive EIA**").
  - c) Upon receipt of all information the Minister considers necessary, the Minister must decide whether a Comprehensive EIA is required.

- d) The Minister shall determine that the completion of Comprehensive EIA is required if the undertaking, in isolation or with any associated works, may result in a significant environmental impact in the Minister's opinion.
  - e) The Minister may determine that a Comprehensive EIA is unnecessary and, in that case, issue a Certificate of Determination. The Minister may also impose terms and conditions on the undertaking and consider those conditions when deciding whether a Comprehensive EIA is required.
  - f) A Comprehensive EIA involves significantly increased public participation and setting guidelines for conducting the assessment.
11. The NBDELG publishes “A Guide to Environmental Impact Assessment in New Brunswick”, and the January 2018 version was in effect at the material time (the “**General Guidelines**”).
12. The NBDELG’s policy and practice, as set out in the General Guidelines, prescribe what information the Minister requires to determine whether an undertaking will result in a significant environmental impact.
- a) The proponent must conduct a preliminary environmental impact assessment, including details of the proposed undertaking, its potential environmental impacts, and how significant impacts may be addressed (the “**Review EIA**”).
  - b) Before the Minister decides whether a Comprehensive EIA is required, the Review EIA undergoes review by a technical review committee (“**TRC**”) appointed by the Minister and consultation with the public, First Nations, and other interested groups (a “**Determination Review**”).
  - c) The General Guidelines set out extensive mandatory requirements for the content of any Review EIA. They provide that the NBDELG may waive specific information requirements if they are not applicable but provide that requests for waivers should be clearly stated and justified.

- d) The General EIA Guidelines state that the Minister may allow the undertaking to proceed (subject to Conditions) if the Minister “decides that significant project related negative impacts are unlikely or that potential negative impacts have been reduced or eliminated through changes made to the project or proposed mitigative measures as a result of the Determination Review[.]”
- e) The General Guidelines also refer to other mandatory, sector-specific information required for certain undertakings. This includes “Additional Information Requirements for Waste Disposal Facilities”, Version 04-07-22 (the “**Landfill Guidelines**”).
- f) The Landfill Guidelines prescribe extensive additional requirements, including field hydrogeology studies, needed for a Review EIA for landfills or modifications to landfills, ostensibly due to the enormous environmental impacts of landfills.

### C. The Crane Mountain Landfill

13. The FRSC operated the Landfill. It is one of the province’s six regional municipal solid waste (MSW) landfills, but has unique features that create increased environmental risks:
  - a) It is close to a 10-kilometre housing stretch in Saint John, Grand Bay-Westfield, and the Saint John (Wolastoq) River.
  - b) The bedrock underlying the Landfill is highly fractured, creating pathways for the rapid spread of leachate contamination. Leachate is the liquid formed when water percolates through landfill waste and is one of the most difficult wastewaters to treat. This could cause irreversible damage to the surrounding communities and environment.
  - c) Due to the site's hydrogeology, leachate-contaminated groundwater and surface water discharged from the Landfill would tend to flow downgradient to the river and approximately 1,000 nearby domestic wells.
14. The Landfill was designed in the late 1990s and intended to operate for 25-40 years. However, due to a reduced annual volume of municipal solid waste (to FRSC’s credit, partly due to waste



diversion measures it implemented), it will likely exceed its planned lifespan and is projected to operate until 2048.

15. Certain fundamental aspects of the Landfill, including the design of the liner system and the site's hydrogeological conditions, have not changed. The site and design are inadequate for the Landfill at the original height and lifespan, let alone double the height and three extra decades.
16. The Landfill is divided into 17 containment cells. Cells 1-8 are full. Cell 9 is complete and in use, and it is projected to be full by August 2027.
17. The Landfill has a single composite liner design. The system is comprised, from top-down, of a leachate collection system (a layer of 25 millimetres clear stone, over geotextile B, over gravel, over geotextile A, over a geonet), on a geomembrane, on a clay soil liner.

#### **D. The Applicant, Crane Mountain Enhancement Inc.**

18. CMEI is a not-for-profit, independent, community-based advisory committee responsible for monitoring the Landfill. Order in Council 96-849 approving the Landfill's construction required FRSC to establish such a committee. By agreement with FRSC in 1999, CMEI became the Landfill's proverbial 'watchdog' tasked by the Minister to represent the Host Community's concerns regarding the Landfill.
19. CMEI's mandate under the agreement with FRSC, as approved by the Minister, includes the following:
  - a) Monitoring the operation of the Landfill.
  - b) Ensuring that its members are regularly and fully informed concerning the operation of the Landfill.
  - c) Receiving information and representation from residents of the community near and most impacted by the Landfill, including residents of Grand Bay-Westfield and a small portion of Saint John (the "**Host Community**") concerning any matter relating to the operation of the Landfill.

- d) Reporting to the Minister and other authorities having jurisdiction relevant views of residents of the Host Community.
  - e) Advising the FRSC and other authorities having jurisdiction over CMEI's views and comments and those of the Host Community concerning the operation of any element of the FRSC's solid waste management system where it directly impacts the operation of the Landfill.
  - f) Commenting or making representations to such body or authority as CMEI may think fit concerning any matter falling within CMEI's mandate.
20. CMEI has retained engineers, geologists, and other experts to fulfill its mandate. They have provided external reviews and reports directly relevant to this Application. These include 2005 and 2009 Reports by EXP Services Inc. ("**EXP**") and its predecessor, ADI Limited ("**ADI**"), about the site's hydrogeology and risks of leachate contamination to the environment, particularly the Saint John (Wolostoq) River and domestic wells.
21. Those reports are produced as part of CMEI's mandate under the express or implied authority of NBDELG and the Minister and published on CMEI's website. They have been widely available to the public and shared and discussed with FRSC.

#### **E. The Height Increase Proposal**

22. The FRSC registered the Project with NBDELG on June 28<sup>th</sup>, 2023, as File 1617 to increase the maximum depth of municipal solid waste at the Landfill to 117.5 metres above sea level (about 25 meters above ground level) for all current and future containment cells, an increase of 27.5 meters beyond the original height of 90 meters and extend the expected lifespan of the Landfill from 2048 to 2070.
23. The Project has severe environmental and socio-economic implications for the Host Community, including:
- a) Increasing the risk of contamination of surface water and groundwater by leachate, particularly to the 1000 domestic wells in the community.

- b) Increasing the volume of leachate and altering the chemistry of leachate, including emerging contaminants of concern.
  - c) Increasing the pressure on the liner and geomembrane underlying the containment cells and the leachate collection infrastructure.
  - d) Increasing the Landfill's lifespan and extending the closure date from 2048 to 2070, thereby extending all existing risks and impacts of the Landfill.
  - e) Increasing the Landfill's visibility and negatively impacting views.
  - f) Increasing the quantity and potency of Landfill gas and consequently the level of odours from the neighbouring community of Grand Bay-Westfield.
24. FRSC proposed a height increase of 10-15 meters in 2004, which resulted in the TRC asking at least 53 technical questions. FRSC did not answer any of them and abandoned the proposal. While FRSC gave no formal reasons, there is no other logical inference but to believe that FRSC's inability to address the questions meaningfully was a significant factor.
25. Many of these questions are valid technical concerns for the present Project and relate squarely to CMEI's questions and concerns as set out in this Application. Due to the larger height proposed and additional research in the last twenty years, those questions are even more imperative to the Project than the 2004 height increase.

#### **F. The 2023 GEMTEC EIA and Public Engagement**

26. GEMTEC Consulting Engineers and Scientists Limited ("**GEMTEC**") prepared the Review EIA for the Project (the "**2023 GEMTEC EIA**") on behalf of the FRSC.
27. GEMTEC has been the FRSC's consulting engineering firm for the Landfill's entire lifespan. They did a Comprehensive EIA for the Landfill's original selection in 1994. They also performed Review EIAs for the 2004 height increase proposal and a 2019 proposal for an

alternate source of marine clay for the liner.

28. While the TRC for the Project asked three rounds of questions, they did not delve into many of the deficiencies in the 2023 GEMTEC EIA. Notably, they did not raise substantively any of the questions or concerns the TRC had for the 2004 height increase despite those questions being as or more applicable to the Proposal.
29. FRSC and GEMTEC nominally undertook the requisite public engagement set out in the General Guidelines. This included two public information sessions – a virtual session on October 3<sup>rd</sup>, 2023 and an in-person session on January 18<sup>th</sup>, 2024. The latter session restricted questions to non-technical matters.
30. The 2023 GEMTEC EIA and the subsequent public engagement were essentially a ‘sales pitch’ to bolster the Project. FRSC and GEMTEC nominally responded to many questions and concerns but with superficial answers and little or no justification. Meanwhile, they expounded on the project's advantages, which were essentially cost savings. Public engagement was an advocacy program to justify the Project and downplay concerns.
31. The 2023 GEMTEC EIA and public engagement considered the height increase in isolation. They avoided subjects and largely rejected current questions and concerns regarding the operation, monitoring, and closure of the landfill that would exist even with its current height, even those the height increase and lifespan augmentation would amplify existing issues as a matter of common sense and expert research.

#### **G. Deficiencies in the 2023 GEMTEC EIA and Public Engagement Process**

32. The 2023 GEMTEC EIA is deficient and fails to meet the Guidelines in several ways, and the deficiencies were never justified, corrected, or waived. The following refers non-exhaustively to some significant ways the 2023 GEMTEC EIA does not meet the Guidelines.
33. The General Guidelines require detailed information about prior EIAs and environmental studies and documents, including:

Details of previous EIA registrations (e.g., project name, submission date(s), EIA file number(s), etc.).

Copies of any available reports describing environmental studies (research, monitoring, design work, site investigations, surveys, etc.) already completed in relation to the undertaking or the location where it will take place.

Copies of all relevant, available correspondence previously received from any municipal, provincial or federal government agency or department with respect to the undertaking or the location where it will take place.

A list of all of the above documents [...].

34. The 2023 GEMTEC EIA mentions the original site selection EIA from 1994 but does not provide other relevant information.

- a) It does not mention the 2004 EIA for a height increase, authored by GEMTEC.
- b) It does not mention the list of 53 TRC questions arising from the 2004 EIA and any responses by FRSC (CMEI does not know of any responses).
- c) It does not mention a 1997 report by Fracflow Consultants Inc. commissioned by a nor 2005 and 2009 reports by ADI. These reports highlight environmental issues, including the Landfill's unique hydrogeology, which increases the risk of groundwater and domestic wellwater contamination and inadequacies in the liner system. FRSC and GEMTEC were aware of these reports because CMEI has referred to them extensively in dealings with them over the years.

35. The Landfill Guidelines require a great deal of detail regarding a hydrogeological assessment and direct the proponent to:

Provide a hydrogeological assessment of the surface and subsurface conditions in and around the facility. The assessment should include test pits, boreholes and/or monitoring

wells and provide appropriate detail concerning stratigraphy, hydraulic conductivity, groundwater elevations, topography, flow directions and gradients at various depths. The information should be presented in sufficient detail to determine the flow path and ultimate receptor of a liquid contaminant if that contaminant were released in an uncontrolled fashion at the facility. To aid in interpreting the details, provide cross-sectional drawings of the site showing the stratigraphy, assumed groundwater surface(s) and hydraulic conductivities, where known. Provide a plan of current and future groundwater monitoring wells and surface water monitoring stations.

36. The 2023 GEMTEC EIA fails to provide the detailed hydrogeological assessment required by the Landfill Guidelines.

- a) It is a desktop study on core areas, particularly hydrogeology, where the guidelines explicitly require field testing, including test pits, boreholes and monitoring wells.
- b) It does not conduct any, or a sufficiently detailed, hydrogeological assessment, including stratigraphy, hydraulic conductivity, groundwater elevations, topography, flow directions and gradients at various depths in sufficient detail to determine the flow path and ultimate receptor of a liquid contaminant if that contaminant were released in an uncontrolled fashion.
- c) It does not provide appropriate interpretational aids for hydrogeological assessment (such as cross-sectional drawings).
- d) It does not provide a detailed plan for current and future groundwater monitoring wells and surface water monitoring stations.
- e) The only substantive hydrogeology assessment was by reference to a 2018 Numerical Groundwater Flow Model by EXP that was not intended to be used for that purpose and incorporated numerous untested assumptions.

37. The 2023 GEMTEC EIA also may not meet professional engineering standards. While GEMTEC's client is the FRSC, they owe a duty of care to the public that will ultimately suffer



the impacts of the Landfill and the Project. In particular, the 2023 GEMTEC EIA does not address emerging contaminants, notably per- and polyfluoroalkyl substances (“**PFASs**”).

38. PFASs are known to be hazardous to human health and the environment. Health Canada sets limits for drinking water on at least one PFAS. They are called “forever chemicals” because they can linger in the environment almost indefinitely and are a common component of many modern materials. A professional engineer on a landfill-related EIA should address the existence of these contaminants and their near-ubiquity in leachate, the risks they pose, and mitigation measures.
39. GEMTEC must identify such environmental hazards and propose appropriate mitigation, even if NBDELG doesn’t prescribe monitoring. GEMTEC dismisses PFASs because the NBDELG does not require monitoring. This is circular reasoning. The NBDELG is not given the information it needs to impose guidelines (generally) or conditions (for a specific project), and consequently, consultants appear justified in ignoring these contaminants.

#### **H. CMEI Involvement and Advocacy with the Height Increase Project**

40. CMEI has advocated for the Host Community and brought their questions and concerns about the Project's potential impacts to the Minister, the NBDELG, the FRSC, and GEMTEC. These concerns include:
- a) The 2023 GEMTEC EIA's conclusions, particularly regarding hydrogeology, leachate contamination, and liner integrity, are lacking in fieldwork.
  - b) Increasing the demands on the leachate collection and treatment system.
  - c) Increasing the pressure on the liner and geomembrane underlying the containment cells and the leachate collection infrastructure.
  - d) Increasing the risk of contamination of surface water and groundwater by leachate, particularly to the 1000 domestic wells in the community.
  - e) Increasing the volume of leachate and altering the chemistry of leachate, including PFAS.

- f) Increasing the Landfill's visibility and negatively impacting views.
- g) Increasing the quantity and potency of landfill gas and consequently the level of odours from the neighbouring community of Grand Bay-Westfield.
- h) Extending all existing risks and impacts of the Landfill for an extended period.

41. CMEI has consulted with expert witnesses to support its concerns before and after the 2023 GEMTEC EIA. Among other studies, expert research shows that:

- a) All liners will inevitably leak some leachate, even at full integrity.
- b) The Landfill's single composite liner, while considered adequate when designed, will not offer sufficient leachate containment.
- c) The installation of the liner system was poorly documented. Factors that may reduce liner integrity (such as wrinkles in the geomembrane or the clay liner drying out) or the liner drying out) are unknown. This creates uncertainty about the liner's integrity in existing cells whose height will be increased under the Project.
- d) PFASs are a large, complex group of synthetic chemicals used in modern consumer products. Health Canada recognizes them as emerging contaminants with adverse environmental and health effects. It presently limits one such PFAS – perfluorooctanoic acid (PFOA) – to 200 ppt (200 ng/L) in drinking water.
- e) There is extensive evidence that PFASs can be expected in municipal solid waste. The original liner system was not designed with PFAS in mind, and there is a high probability that well water will exceed Health Canada's limit, particularly with the height increase.
- f) If a proper analysis is performed, there is a high probability that PFASs at levels above drinking water guidelines will be detected in the leachate, and this risk increases with increasing waste height.
- g) The service lifetime of the geomembrane of the liner at the Landfill will not meet its current lifespan, let alone the extended lifespan after the height increase.

- h) Increasing the waste height will increase the concentration of PFASs in leachate due to the greater waste mass and longer travel time to the collection system.
  - i) Increasing the waste height will increase the Landfill's contaminating lifespan and, hence, likely exceed the design life of both the leachate collection system and the geomembrane liner. The contaminating lifespan is the period a containment facility still has chemicals at a level that could have an unacceptable impact if released into the environment.
  - j) Increasing the Landfill height will increase leakage once the service life of the leachate collection system is reached.
  - k) Increasing the Landfill height will increase leakage through the geomembrane due to increased tensile stress in the geomembrane because of higher waste loading and, hence, more stress cracking of the geomembrane, reducing its integrity and speeding its deterioration.
  - l) Current point monitoring will not effectively detect a hole in a geomembrane liner due to the low chance of a fracture intersecting a monitoring borehole. The only way to confidently and effectively detect this leakage is with a leak detection system underlain by a composite liner to minimize environmental losses.
42. CMEI raised its concerns with FRSC and GEMTEC in the public sessions, in a letter it sent on January 30<sup>th</sup>, 2024, and in letters sent by EXP on September 28<sup>th</sup>, 2023 and January 31<sup>st</sup>, 2024. When it became apparent that FRSC and GEMTEC would not provide meaningful answers, CMEI turned to another of its mandates – reporting directly to the Minister as appropriate to represent the citizens of the Host Community
43. On January 31<sup>st</sup>, March 16<sup>th</sup>, and April 15<sup>th</sup>, 2024, CMEI made at least three written requests, setting out questions and concerns about the Project, explaining CMEI's role, and requesting a meeting with the Minister. The Honourable Gary Crossman was the Minister until April 19<sup>th</sup>, 2024, but was unsuccessful in securing a meeting with Minister Crossman.

44. The Honourable Glen Savoie was appointed sometime after Minister Crossman's resignation. CMEI renewed written requests for a meeting with Minister Savoie on April 25<sup>th</sup> and May 1<sup>st</sup>, 2024.
45. On May 6<sup>th</sup>, 2024, the Minister's office invited the CMEI Chair to a one-hour meeting in Fredericton on May 10<sup>th</sup>, 2024, with the FRSC and GEMTEC present. The CMEI Chair immediately responded that he was unavailable and expressed continued interest in a meeting. The Minister did not respond and held the meeting without the CMEI Chair present.
46. In the late afternoon of May 13<sup>th</sup>, 2024, the Minister notified the CMEI Chair that the meeting had proceeded and that the CMEI Chair had failed to attend. No other members of CMEI were copied on the invitation, and CMEI had not been aware that the Minister was expecting others to attend.

#### **I. The Minister's Decision**

47. The Minister issued the Certificate of Determination the next day, May 14<sup>th</sup>, 2024, without further communications with the CMEI Chair.
48. The Minister did not issue any reasons for the Decision or even communicate the Decision to CMEI.
49. The CMEI continued to correspond with the Minister to arrange a meeting for several weeks, but the Minister did not mention that the Decision had already been made. The CMEI only learned of the Decision in early June.

#### **J. Procedural Grounds for Review – The Minister's Decision was Procedurally Unfair**

50. Given the following factors, the Minister owed CMEI a high degree of procedural fairness:
- a) The expanded role of public engagement in the NBDELG's General EIA Guidelines. They state:

Open and transparent public involvement is required for all registered projects. To fulfill the requirements of Section 6(1) of the EIA Regulation, the proponent must

demonstrate that the affected public and stakeholders have been given the opportunity to review and comment on the proposed undertaking.

- b) CMEI's mandate, assigned by the Minister itself, to report to the Minister and the NBDELG about the very issues raised by the Project.
- c) CMEI's unique role as an advocate and representative of the members of the Host Community to bring their collective concerns about the Landfill before the Minister.
- d) CMEI's requests to meet with the Minister and provide a written summary of its questions and concerns, which the Minister ultimately acknowledged by offering to meet.
- e) The Project's large scale – doubling capacity and extending operation by decades.
- f) The profound or potentially severe impact on the Host Community from the height increase and the duration for which the Landfill would operate.
- g) The deficiencies in the 2023 GEMTEC EIA in failing to satisfy the General Guidelines and the Landfill Guidelines.
- h) The prior height increase proposal resulted in 53 unanswered questions by the technical review committee.
- i) CMEI's right to communicate with and be kept informed by FRSC during the lifetime of a project as reflected in a 2019 Certificate of Determination for an alternate source of marine clay.
- j) GEMTEC is an interested party. They perform the quarterly and annual reporting on the Landfill, have a vested interest in ensuring its continued operation and expansion, and are disincentivized to report on problems with the status quo.

51. At a minimum, CMEI was entitled to the following elements of procedural fairness:

- a) Meeting with the Minister and NBDELG staff to make oral submissions.

- b) In particular, having its expert research reviewed and independent technical consultants heard to point out deficiencies in the Review EIA and public engagement and offer an alternative perspective.
  - c) Receiving meaningful answers and responses to questions and concerns (including frank responses that a problem cannot be addressed).
  - d) Being advised of a closure date of submissions or that a decision was imminent.
  - e) Receiving notice of and reasons for the Decision.
52. The Minister breached procedural fairness and the legitimate expectations of CMEI and the Host Community, as represented by CMEI, by:
- a) Failing to answer or respond to CMEI's questions and concerns or require FRSC to do so.
  - b) Failing to establish clear submission deadlines and failing to notify CMEI in early May 2024 that a decision was imminent.
  - c) Refusing to meet with CMEI despite numerous requests at all or until it was too late in the decision-making process to make a meaningful impact.
  - d) Failing to reschedule a meeting after agreeing to do so when CMEI communicated its unavailability.
  - e) Conducting a meeting in CMEI's absence after sending an invitation and being immediately informed that CMEI wasn't available at that particular time but was still interested in a meeting.
  - f) Making the Decision the next day after informing CMEI that the meeting went ahead anyway.
  - g) Failing to notify CMEI of the Decision, even after CMEI continued to engage the Minister for a meeting.



h) Failing to issue reasons for the Decision.

53. The preceding breaches of procedural fairness also give rise to a reasonable apprehension of bias. A fully informed, reasonable person could conclude that the Minister was prone to bias in the matter. The Minister had already effectively made the Decision and was not open to persuasion by CMEI. The meeting was a token gesture that the Minister was eager to avoid.

**K. Substantive Grounds for Review – The Minister’s Decision was Unreasonable**

54. The Minister’s decision is not reasonable within the framework in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII). Without limitation, the following factors indicate unreasonableness:

- a) As set out in the General Guidelines, the test applied is more lenient than the test in the *EIA Regulations*.
- b) The Certificate of Determination contains no conditions responsive to CMEI’s concerns backed by external expert consultants (or any concerns raised by public engagement, for that matter).
- c) The Minister does not give CMEI a meaningful role in implementing the Project despite granting such a role in a 2019 proposal by the FRSC for an alternate source of clay.
- d) The Minister did not consider the 53 TRC questions from the FRSC’s prior 2004 height increase and did not require the FRSC to answer them or explain why they were no longer applicable.
- e) The Minister did not hold FRSC to the NBDELG’s General and Landfill Guidelines nor explain any waiver of their requirements.
- f) There are no written reasons that are capable of review. To any extent, the Conditions in the Certificate of Determination can be read as reasons, they are too generic to provide the opportunity for meaningful review.

## **L. Applicant's Standing**

55. CMEI is proceeding with this Application without obtaining an order for public interest standing because CMEI is directly affected and has standing as of right on account of its mandate under the agreement with FRSC in 1999 as approved by the Minister.
56. The Project directly impacts almost every aspect of its mandate. If the Project goes forward, CMEI's monitoring functions will become more demanding, urgent, and imperative. It engages CMEI's function as the representative of the Host Community's views. Finally, CMEI is tasked with commenting or making representations to such body or authority as CMEI may think fit concerning any matter falling within CMEI's mandate.
57. CMEI also has public interest standing to bring this Application. It has raised serious justiciable issues relating to the Decision, has a real stake and genuine interest in the proceeding arising from its mandate and its history of involvement with the Landfill, and offers a reasonable and effective way to bring this matter to judicial review.
58. Individual residents in the Host Community who are directly affected would not likely bring such a Court challenge given the complexity and technical nature of the record. The residents may not have CMEI's institutional knowledge and history of involvement. There is no logical individual to represent all the residents. Each resident would have concerns, whereas CMEI pooled concerns with the benefit of a full appreciation of the Landfill's history and access to relevant expertise.
59. Municipalities affected may have the resources to bring such a challenge but do not have CMEI's institutional knowledge and history of involvement. Further, the mayors of the municipalities serve as board members of the FRSC and must act in a dual role that could cause a chilling effect on a challenge of this nature.

## **M. Costs**

60. CMEI does not seek costs and asks that costs not be ordered against it.
61. CMEI is a not-for-profit that the FRSC wholly funds at the behest of the Minister.

**N. Other**

62. The Applicant may rely on additional or modified grounds that counsel may advance at or prior to the hearing of this Application.

**III. STATUTORY PROVISIONS AND RULES**

1. The Statutory Provisions and Rules to be relied on are as follows:

- a) The *Clean Environment Act*, RSNB 1973, c C-6, generally, and section 31.1 in particular.
- b) The *Environmental Impact Assessment Regulations*, NB Reg 87-83 generally, and section 6 in particular.
- c) The *Evidence Act*, RSNB 1973, c E-11 generally, and section 43 in particular.
- d) The *Judicature Act*, RSNB 1973, c J-2 generally, and sections 9(1) and 21 in particular..
- e) The *Rules of Court*, NB Reg 82-73 generally, and Rules 1.02, 1.02.1, 3.02, 5.03, 16.04, 38, 39, 40, 59, and 69 thereof, specifically.
- f) Such further and other statutory provisions and Rules as Counsel may advise.

**IV. EVIDENCE**

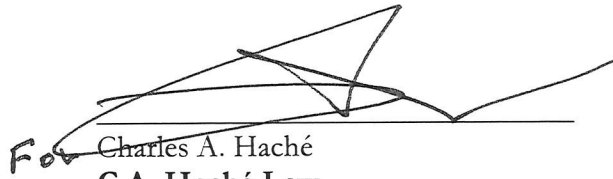
A list of the documentary evidence to be used at the hearing of the application.      Une liste des preuves littérales qui seront utilisées lors de l'audition de la requête.

1. The affidavit or other documentary evidence intended to be used on the hearing of the application is as follows:

- a) Affidavit of John F. Doubt, President of CMEI, sworn on August 13<sup>th</sup>, 2024.

- b) Reports and affidavit evidence of expert witnesses, including John Sims, M.Sc, P.Geo, P.Eng of ADI and R. Kerry Rowe, OC, Ph.D, D.Eng, P.Eng of R. Kerry Rowe Inc.
- c) The full record before the Honourable Glen Savoie.
- d) Such further and other admissible evidence as Counsel may advise.

**DATED** at Rothesay, New Brunswick, this 15<sup>th</sup> day of August 2024.

  
For Charles A. Haché  
**C.A. Haché Law**  
Solicitor for the Applicant

**C.A. Haché Law**  
20 Marr Road, Suite 300  
Rothesay, NB  
E2E 2R5

Tel: (506) 216-8800  
Fax: (506) 717-0281

Email: [charles@cahachelaw.ca](mailto:charles@cahachelaw.ca)

PROVINCE OF NEW BRUNSWICK



PROVINCE DU NOUVEAU-BRUNSWICK

**Client Copy / Copie du Client**

August 13, 2024 / Le 13 août 2024

Saint John  
10 Peel Plaza

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Reçu de:

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Case Number Numéro de Cause	Charge Accusation	Financial Transaction Type Type de Transaction Financière	Amount Montant
1		Filing an Application/Petition / Dépôt d'une demande ou d'une pétition	\$75.00
		TOTAL	\$75.00
		Amount Tendered / Montant versé	\$75.00
		Change Given / Monnaie remise	\$0.00
		Payment Method / Méthode de Paiement	Cheque / Chèque

Official receipt number:  
Numéro officiel du reçu: 21068171

**Remarks / Remarks:**

SJM-164-2024  
CHQ# 000310  
RJ