

**C A N A D A
PROVINCE OF PRINCE EDWARD ISLAND
IN THE PROVINCIAL COURT (CHARLOTTETOWN)**

BETWEEN:

HER MAJESTY THE QUEEN

INFORMANT

AND:

ALEXANDER DOCHERTY

ACCUSED

AND BETWEEN:

HER MAJESTY THE QUEEN

INFORMANT

AND:

M. BLAKE MACDONALD

ACCUSED

ORAL DECISION FOLLOWING TRIAL

September 27th, 2013 before Judge Nancy K. Orr

John McMillan, Q.C.

Crown Prosecutor

Brandon Forbes

Counsel for the Accused

Charges:

Alexander Docherty and M.Blake MacDonald are each separately charged, that each of them did on or between the 26th day of May, 2012 and the 26th day of October, 2012, at or near Kingston in the County of Queens, Province of Prince Edward Island, on any provincial parcel of land, cultivate one or more hectares of row crop on any area of that parcel which has a slope which is greater than 9%, unless there is a management plan for that area and the cultivation of the row crop is done, pursuant to, and in accordance with, that management plan contrary to subsection 8(2) of the Watercourse and Wetland Protection Regulations, Environmental Protection Act R.S.P.E.I. 1988, cap. E-9, and did thereby commit an offence under subsection 14.(5) of the said Regulations.

Although separately charged, Crown and defence counsel requested that the two informations be heard as one trial. Although defence counsel initially indicated that he would be filing a charter motion in this matter, he later advised he would not be filing such motion, and so the trial proceeded in normal fashion. The Crown called five witnesses, and seven exhibits were eventually entered by consent. The defence called no evidence and no exhibits were entered.

Background Facts:

Erin McEvoy is a conservation officer for the Province of Prince Edward Island. While en route to Borden, P.E.I., in June, 2012, she saw a field in the Kingston P.E.I. area which was planted in potatoes, and she thought the slope of the field looked too steep to have such a crop in it. She returned to the field in July 2012 and undertook an investigation which resulted in these charges being laid. Officer McEvoy took pictures of the field in question, and obtained the G.P.S. coordinates for the portion of the field that was planted in potatoes. When those G.P.S. co-ordinates were plotted on the P.E.I. Slope Land Inventory, a data base which shows the land on P.E.I. which has a slope over 9%, portions of that field of potatoes were indicated to have a slope over 9%.

From her investigation, Officer McEvoy determined the land in question had recently been purchased by two people from Richmond, B.C., but that the previous owner, Hollis Newson, was the caretaker for the property. Officer McEvoy obtained a warrant to enter on the field in question with Robert Wakelin, a surveyor, and with Scott Holyrod, a plant health inspector with the Department of Agriculture. Mr Wakelin was asked to survey the field in question, and determine which portions of it had a slope over 9%. Mr. Wakelin's survey indicated that 4.15 hectares had a slope over 9%. Mr Holyrod was asked to seize a sample of the crop. Officer McEvoy received little assistance in response to her efforts to determine who was responsible for the crop of potatoes on that property.

As a result of further investigation by Officer McEvoy and documents obtained via production orders from the Canadian Food Inspection Agency and the Prince Edward Island Agricultural Insurance Corporation, Officer McEvoy determined that documents had been submitted to those agencies on behalf of Alex Docherty, Blake MacDonald, and Justin MacDonald, indicating certified seed potatoes had been planted in the field in question, and seeking to have those potatoes certified and insured as seed potatoes. Charges were then laid separately against Alex Docherty and against Blake MacDonald, and the matters ultimately proceeded to trial.

The evidence at trial clearly established that the property which is the subject of this trial was property number 226522, located at Kingston, Prince Edward Island. The area planted in seed potatoes was referred to as McRae Farm by Mr. Docherty in his dealings with the Canadian Food Inspection Agency and the Agricultural Crop Insurance Corporation. Furthermore, the evidence at the trial established that references to potatoes planted on property #226522 or on McRae Farm are to the same location in Kingston, P.E.I. Finally, it should be noted that these facts were not disputed by the accused.

At the outset of the trial, defence counsel advised that identity of the two accused was admitted, without further proof, and admitted, as a fact that there was no management plan in effect for the land in question.

According to the documentary evidence in this matter, Skye View Farms was a provincially incorporated company, with one of its objects listed as to carry on the business of farming. According to the information in the Corporate/Business Names Registry, as of the last return on March 31, 2012, Alexander Docherty was listed as the President, shareholder, director and officer of such company, while Kenneth Docherty was listed as the Vice-President, Secretary/Treasurer. No one else was listed.

Burden of Proof:

Fundamental to our system of justice is the principle that Alexander Docherty and M. Blake MacDonald are each presumed innocent until proven guilty. It is the Crown who must prove, beyond a reasonable doubt, that each accused committed the offence with which he is charged.

In determining whether the Crown has met that burden, the evidence of all witnesses who appeared before the Court during the trial must be scrutinized. While exhibits have been entered by consent in this matter, the question remains as to what weight is to be accorded to each of those exhibits. There is no obligation on any accused person to testify. An accused person has the right to remain silent. In this case, each accused person exercised that right.

Issues:

Section 8 of the **Watercourse and Wetland Protection Regulations**, made pursuant to the **Environmental Protection Act, R.S.P.E.I. 1988, Cap. E-9** provides as follows:

8. (2) No person shall, on any provincial parcel of land, cultivate one or more hectares of row crop on any area of that parcel which has a slope which is greater than 9%, unless there is a management plan for that area and the cultivation of the row crop is done, pursuant to, and in accordance with, that management plan.

The issues in this case are straightforward. Does the evidence presented at the trial, which includes both the viva voce testimony, as well as the documentary evidence contained in the various exhibits, prove beyond a reasonable doubt, each and every element of the offence against each of the two accused. Some of those elements have, as noted, been admitted by counsel for both accused. Defence counsel have, however, submitted that the Crown has not established four of the elements of the offence, and those will be considered individually.

1. Is the land in question a provincial parcel of land?
2. Is the crop in the field in question a row crop?
3. Does the field in question have a slope greater than 9%?
4. Has the Crown established beyond a reasonable doubt that each accused person cultivated the land in question?

Issue 1: Is the land in question a provincial parcel of land?

To determine this issue, it is necessary to refer to a variety of statutes and regulations.

Section 1 of the **Watercourse and Wetland Protection Regulations** states:

(z) "provincial parcel of land" means a parcel of land having a parcel identifier number assigned by the Provincial Treasury of Prince Edward Island;

Section 1 of the **Real Property Tax Act** states:

(h) "Minister" means the Minister of Finance, Energy and Municipal Affairs of the province and includes anyone designated by the Minister to act on his behalf;

Section 1 of the **Regulations to the Real Property Tax Act** states:

1. In these regulations

(a) "Act" means the Real Property Tax Act R.S.P.E.I. 1988, Cap. R-5;...

(d) "parcel number" means the account number assigned to a parcel of land by the Minister to identify it and distinguish it from any other parcel of land in the province, also known as property account number;

Anyone who has worked in or with the Provincial Government of P. E. I. will be well aware that government departments and/or the Minister responsible for such departments change on a regular basis. In fact, a review of the Royal Gazette for the Province of Prince Edward Island illustrated just how often those changes have been made. It indicated that, through various **Government Reorganization Acts**, the department known as the Provincial Treasury was first changed to the Department of Finance and Municipal Affairs, and that name was more recently changed to Department of Finance, Energy and Municipal Affairs.

However, the **Public Departments Act**, R. S. P. E. I. 1988, Cap. P-29 addresses such changes and provides in sections 5 and 6 of that **Act** as follows:

5. (1) The Lieutenant Governor in Council may, by order published in the Gazette,

(a) establish, vary or disestablish any department or transfer any powers, duties or functions or the control or supervision of any part of the public service from one Minister of the Crown to any other Minister of the Crown or from one

department of the public service to any other department of the public service;
(b) amalgamate and combine any two or more departments under one Minister of the Crown and, subject to subsections 7(3) and (4), under one Deputy Minister or change the name of or reorganize any one or more departments;
(c) alter the style by which any Minister of the Crown or public officer is to be known.

6. (1) Whenever under section 5, any power, duty or function, or the control or supervision of any part of the public service is transferred from one Minister of the Crown to any other Minister of the Crown, or from one department of the public service to any other department of the public service, the Minister or department to which the power, duty, function, control or supervision is so transferred, and the appropriate officers of that department shall, in relation thereto, be substituted for and shall have and may exercise the respective powers and duties which formerly belonged to or were exercisable by the Minister or department and the respective officers of the department from which the power, duty, function, control or supervision is so transferred, and references in any statutory provision to the latter Minister, department or officers shall be read and construed as references to the Minister, department or officers to which the power, duty, function, control or supervision is so transferred.

6. (2) Where under section 5 the name of any department or the style of any Minister of the Crown or public officer is changed, references in any statutory provision to the department, Minister or public officer in the old name or style thereof, shall be read and construed as referring to the department, Minister or public officer according to the new name or style thereof.

In this case, when Officer McEvoy had first noticed the field in question, on June 22nd, 2012, she had noted the civic address of the property next to that field and as a result, through an online data base, was able to obtain an orthophoto of the area, which indicated that the property number of the area in question was PID #226522. While the orthophoto was obtained from the Resource Inventory & Modeling of the P.E.I. Department of Agriculture, there is no indication that such department assigned the parcel number to it. On July 27th, 2012, she returned to that field and obtained G.P.S. co-ordinates of the perimeter of the portion of the field that was planted in potatoes. She then provided the G.P.S. co-ordinates to a global information system technician, who plotted them on an orthophoto, which also showed the P.E.I. Slope Land Inventory. That document was entered as an exhibit, (Exhibit C-1, (Tab 2)) and showed in red the portions of the field that the P.E.I. Slope Land Inventory identified as having a slope of over 9%.

Officer McEvoy did a search to see if there was a management plan in effect for property number 226522, and the results of that search indicated that there was no such plan for that property number (Exhibit C-1(Tab3)). Officer McEvoy did a search by parcel number on the P.E.I. Geo Linc system, and one assessment was found, indicating the parcel number, owner, owner address and property location.

(Exhibit C-1 (Tab4)). From her investigation, she obtained a certified copy of a deed, showing that parcel #226522 was part of a conveyance from Hollis Parker Newson of Kingston, P.E.I. to Ming Lo Shao and Yeh Wah Chong, both of Richmond, British Columbia on October 31, 2011 (Exhibit C- 1, (Tab 4)). Schedule “A” to that deed of conveyance specifically refers to the parcel number 226522, and then provides a legal description of that property. Furthermore, the deed of conveyance includes a certified copy of the Order in Council dated September 6, 2011 granting permission to Ming Lo Shao and Yeh Wah Chong to acquire such land from Hollis Parker Newson, pursuant to the **Lands Protection Act**. The topographic survey prepared by Mr. Wakelin refers to PID No. 226522, being the lands in Kingston, P.E.I. of Ming Lo Shao and Yeh Wah Chong. That survey also shows a number of different PID numbers on the adjoining properties. Finally, the covering letter faxed to Officer McEvoy regarding the care taking agreement between the above noted owners and Mr. Newson refers to P.E.I. farm land parcel number 226522.

Considering the legislative provisions referenced above, as well as the documentary evidence which forms part of the record in this trial, I am satisfied beyond any reasonable doubt that parcel number 226522 is a provincial parcel of land, as defined in the **Watercourse and Wetland Protection Regulations**. It is obvious from the evidence in this matter that 226522 is a number that has been assigned to identify and distinguish it from any other parcel of land in the province, and such a number produces an assessment as contemplated by the **Real Property Tax Act** and its regulations. Furthermore, it is a number that has been used by various government departments in reference to that property for some time. Finally there is no evidence to show that the number has been used in respect to any other property in P.E.I. To suggest that the Crown must call evidence to show who assigned that number to the property is not reasonable nor necessary. It clearly has been assigned in accordance with the legislation.

Issue 2: Is the crop in the field in question a row crop?

Section 1(1)(aa) of the **Watercourse and Wetland Protection Regulations** provides as follows:
1(1) (aa) “row crop” means any crop planted in rows that are wide enough apart to allow for inter-row cultivation, and without limiting the generality of the foregoing, includes potatoes, carrots, rutabagas, onions, cole crops, string beans, dry beans, sugar beets, beets, sweet potatoes, parsnips, pumpkins and lettuce;

According to both **Black’s Law Dictionary** and the **Concise Oxford Dictionary** (5th edition) the word “*inter*” is a prefix which means “*between; among*”. That same **Concise Oxford Dictionary** defines the word “*row*” as a noun and “*is a number of people or things in a more or less straight line*”.

Sometimes, a picture is worth a thousand words, such as those constituting Exhibit C-1 (Tab 1 and Tab 7) in this matter. The crop planted in those photos certainly has been planted in rows. I would expect that the vast majority of Prince Edward Islanders over the age of five would be able to correctly identify the items in photo 1 of Exhibit C-1(Tab 7) as potatoes, but in any event, there is evidence from Erin McEvoy, Robert Wakelin and John MacDonald who were all in the field in question at varying times during the offence period, and each of whom testified that they recognized the crop being grown

as potatoes. John MacDonald, in fact, testified that he had inspected that field on two occasions in the summer of 2012 as part of his employment duties, and that he was required as part of his work to be able to not only recognize potatoes but the specific varieties of seed potatoes.

The **Watercourse and Wetland Protection Regulations** define “cultivate” as follows:
1(1) (g) “cultivate” means to dig, plant, cut, prune, irrigate, fertilize, tend, till, manage, farm, maintain, spray, plough, harvest or engage in any other activity related to growing or harvesting, and “cultivation” means the act of doing any of the above;

Property #226522 is more commonly referred to as the McRae Farm, a name which, according to Hollis Newson, the caretaker and previous owner, relates to a former owner of it. Exhibit C-5 contains a number of documents provided, via a production order, to Officer McEvoy by the Agricultural Crop Insurance Corporation in respect of Alexander Docherty and Blake MacDonald. In particular, it contains the notes of the inspector (indicated to be a S. Moore) who visited McRae farm, and the observations that on July 6 / 9 “rows recently sprayed. Hilled.” August 20/12 “same as above(plants dying down on own). Not yet killed for PHV testing.” Aug 28/12 “Tops dead-killed on Aug 25 for PHV coverage”. Sept 19 “Tops pulled”. If that is not enough to meet the definition of inter-row cultivation, then the evidence of Officer McEvoy should satisfy it. She testified that she monitored the field and on October 26th, 2012, she saw a digger, harvester and potato trucks in that field. She observed trucks entering the field empty and leaving loaded with potatoes. That would indicate that harvesting was occurring. Despite not having any measurements of the distances between the rows, as defence counsel suggested was required, it appears that the digger/harvester was able to get the potatoes out of the rows and into the potato trucks, and that inter-row cultivation did in fact occur.

I am satisfied that the Crown has proven, beyond any reasonable doubt whatsoever, that potatoes that were grown on property number 226522, also known as McRae Farm, between at least June 22, 2012 and October 26th, 2012, and that those potatoes were in fact a row crop as defined by Section 1(1)(aa) of the **Watercourse and Wetland Protection Regulations**. They were in rows, inter-row cultivation did in fact occur, and finally, it must be noted that potatoes are one of the types of crops that the legislation contemplates would constitute a row crop.

Issue 3: Does the field in question have a slope greater than 9%?

With the consent of defence counsel, Robert Wakelin was qualified as an expert in surveying. He testified that he was asked to survey the portion of property number 226522 in Kingston, P.E.I., that had potatoes planted in it, and to determine the areas of that property that had a slope over 9%. Officer McEvoy provided him with a copy of the Provincial Geo Linc map, (Exhibit C-1 (Tab 2)), showing the property number, location, and general area, which was the same map that had the G.P.S. co-ordinates, previously obtained by Officer McEvoy, plotted on it. He went onto the property in Kingston, P.E.I. with Officer McEvoy on October 2, 2012. He testified that he recognized the potato plant, and confirmed photos taken were of the field he surveyed (Exhibit C-1, (Tab 1)). In addition, he testified that he also

saw a member of Agriculture Canada dig and take a sample of the potatoes in that field before he started his work.

According to Mr. Wakelin, he set up on the provincial grid monument in the area, and walked up and down the field, taking elevations every 50 to 60 feet, using a G.P.S. receiver to take measurements. He then returned to his office, where the information stored in the G.P.S. receiver was entered into a computer software program. The topographic survey showing PID No. 226522 was prepared and signed by Robert A. Wakelin, as a Prince Edward Island land surveyor, certifying that the survey was executed under his direction and supervision and that the plan is a true and correct representation of said survey. It was signed by Mr. Wakelin and dated October 5, 2012, and the survey plan was entered as Exhibit C-1 (Tab 8) by consent. Mr. Wakelin testified that he surveyed about 25 % of property number 226522, which was 8.8 hectares or about 21.736 acres. The survey limits are shown by a black line, and he indicated that within the surveyed area, each number is an elevation where he recorded a shot with the G.P.S. The area within the survey limits shown in red is the area where the slope was determined to be over 9 %.

He testified that slope is measured as a percentage or ratio of change in elevation over change in distance. He further testified that it is very easy to determine slope of land. He also indicated that when he looked at property number 226522 prior to taking any measurements, while he could not tell by the naked eye the exact slope of the land, it was obvious to him as a surveyor that there were areas that might be over 9 %. Of the area that he surveyed, Mr. Wakelin determined that 4.15 hectares had a slope over 9 %, and that area was shown on the survey in red, as well as that being indicated on the right side of the survey plan under the heading of “*Summary*”.

On cross-examination, Mr. Wakelin acknowledged that some averaging was used and that if there were double the reference points, it would be even more accurate. He noted, however, that the survey points taken had been 50 to 60 feet apart, and that there would be very, very little within the area where the slope was indicated to be over 9 %, that would in fact be under 9 % slope. Mr. Wakelin confirmed that the survey plan did in fact show one such small area shown in white, within the red area, and near the point shown as +68.12, in which the slope was not over 9 %.

Mr. Wakelin was then asked about the report that he had prepared for Erin McEvoy, dated March 18th, 2013 (Exhibit C-1, (Tab 8)). He testified that Jonathan Spears had done the computer work. He was asked if the letter summarized the methodology that produced the area shown in red on the survey plan, and he indicated that it did and that it was his methodology. That report was signed by Mr. Wakelin, and contained the following two paragraphs:

“The topographic survey on portion of field located in Kingston being property identification number 226522 was conducted on October 2, 2012. The measurements were obtained by using a Topcon hyper G.P.S. System with a base station located on P.E.I. Grid Monument Number 2266, with a listed elevation of 68.89m. Shots were taken on an approximate 15m grid over the area as outlined on the plan. Total area measured was 8.80 hectare.”

Measurements were taken back to the office and downloaded into our software (Carlson Surveys 2012). The software calculated the areas that had a slope of 9% or greater and outlined it in red. The area that was determined to be 9% and greater was 4.15 hectare.”

No questions were posed to Mr. Wakelin regarding the apparent contradiction between his sworn testimony together with the topographic survey plan itself, and the last two sentences of his report to Erin McEvoy dated March 18th, 2013. In summation, counsel for the accused relied on the last two sentences of the March 18th report in support of the proposition that the Crown had not established beyond a reasonable doubt that the slope of the area shown in red on the survey plan was over 9 %.

Every reference made by Robert Wakelin in his sworn testimony was to “*a slope over 9 %*”. At no time during his testimony did Mr Wakelin use the term “*a slope of 9% or greater*” or the term “*9 % and greater*”.(Emphasis added.) He was asked to survey the portion of the field containing potatoes that had a slope over 9%. Officer McEvoy confirmed that was what he had been retained to survey. Mr. Wakelin testified that he determined that 4.15 hectares of that field did have a slope over 9 %. He made numerous references to the survey plan that had been produced on October 5th, 2012, and certified by himself, which plan clearly showed, in words and red coloring, that 4.15 hectares had a slope over 9%. The only time he used a term other than “*over 9%*” in his testimony was when he indicated that only a very small area would have a slope under 9%, and reference was made to the small white area in the area otherwise shown in red.

The Topographic survey plan, certified by Mr. Wakelin on October 5th, 2012, as well as the reporting letter to Erin McEvoy dated March 18, 2013, and signed by Mr. Wakelin, were admitted as an Exhibit (C-1, (Tab 8)) by consent. While documents may be admissible in a court proceeding, it is well accepted law that it is for the trial judge to determine what weight, if any, is to be given to those documents, once admitted. That principle was referred to on several occasions throughout this trial. I am not prepared to ignore sworn and detailed testimony on the basis of a somewhat ambiguous question to the witness concerning a letter. Mr. Wakelin was asked if the letter of March 18th, 2013 was the methodology he had used to determine the areas in red on the survey, or if it was the methodology of the computer technician. He was not asked what parameters were set on the computer program, and in fact the only mention of parameters was made by defence counsel in his summation. The use of the terms in the March 18, 2013 letter appear to be an error, given the other documentation and the clear and unequivocal testimony of Mr. Wakelin at trial. As such, I place little weight on the letter dated March 18th, 2013.

Section 8 of the **Watercourse and Wetland Protection Regulations** provides as follows:

8. (1) *In this section,*
 - (a) “*Prince Edward Island Sloped Land Inventory*” means the database

layer produced by the Department's Geographic Information System Database, which identifies land in the province having a slope greater than 9%; and
(b) "row crop" does not include corn.

(2) No person shall, on any provincial parcel of land, cultivate one or more hectares of row crop on any area of that parcel which has a slope which is greater than 9%, unless there is a management plan for that area and the cultivation of the row crop is done, pursuant to, and in accordance with, that management plan.

(3) Where land is identified in the Prince Edward Island Sloped Land Inventory, it is deemed to

(a) have a slope greater than 9%; and

(b) be one hectare or more in size,

unless the contrary is proven on a balance of probabilities.

Officer Erin McEvoy testified she took G.P.S. co-ordinates of the perimeter of the part of parcel number 226522 that was planted in potatoes. She provided the G.P.S. co-ordinates to a global information system technician, who plotted them on a map which also showed the Prince Edward Island Slope Land Inventory. That document was entered as an exhibit, (Exhibit C-1, (Tab 2)) and showed in red the portions of the field that the P.E.I. Slope Land Inventory identified as having a slope of over 9%. Although the topographic survey plan and the map showing the P.E.I. Slope Land Inventory for property number 226522 are on different scales, a comparison of the two illustrates the very significant overlap of the areas that each have identified as having a slope of over 9%. In reference to the P.E.I. Slope Land Inventory, Mr. Wakelin testified it was a map showing areas on P.E.I. where the slope was over 9%, and that while it was a good indication of areas of concern and relatively accurate, it was not as accurate as his survey.

According to the provisions of Section 8(3) of the **Watercourse and Wetland Protection Regulations**, as noted above, the land identified in the P.E.I. Slope Land Inventory in respect of property #226522 is deemed to have a slope in excess of 9%, unless the contrary is proven on a balance of probabilities. In this case, I find that the sworn testimony of Robert Wakelin and the topographic survey plan do not contradict the P.E.I. Slope Land Inventory, but rather provide more specific detail of the area on property #226522 that has a slope over 9%. While the deeming provision could be applied in this case, it is not required, since I am satisfied beyond a reasonable doubt, on the basis of the sworn evidence provided during the trial by Robert Wakelin and the topographic survey plan certified by him on October 5th, 2012, (part of Exhibit C-1, (Tab 8)) that approximately 4.15 hectares of the field planted in potatoes, as part of property number 226522, had a slope over 9%.

Issue 4. Has the Crown established beyond a reasonable doubt that each accused cultivated the land in question?

Sandra Wright Shaw testified that she is the regional program officer for the Canadian Food Inspection Agency, which is a federal department, responsible for safe food for Canadians. She indicated that the seed potato certification program is a national program, administered by that agency, and she explained the seven generations of seed potatoes. She noted that table stock potatoes are the ones that are eaten. Seed potatoes are replanted from year to year, until they have passed through the various generations, and they are not eaten. She indicated that her responsibilities include passing on information from head office in Ottawa, where policies and regulations are made, to the front line inspectors.

Ms Wright Shaw testified that any person in Canada who wishes to grow seed potatoes is required to file an application for seed potato crop inspection by June 30th every year. She testified that a unique number is assigned to each grower across Canada, and as it relates to this case, she indicated that the number 1021327 was the grower number assigned to Blake MacDonald, Justin MacDonald and Alex Docherty. Those names appear on their forms as “*MacDonald, Blake, Justin & Alex Docherty*”. She reviewed the process used, the various forms and requirements for a grower to have potatoes certified as seed potatoes, and explained some of the information contained on those forms. For example, she indicated that the certification number of the seed planted in field 006, referred to as McRae Farm (Exhibit C-1 (Tab 10)), 20118022090004 indicated that it was produced in the crop year 2011; the #8 referred to the province in which it was grown, in this case, Alberta; 02 was the district in Alberta where the farm is located; #2090 was a number specific to that farm; and 004 was the lot of seed.

She noted that inspectors do an on site inspection of the crop and report any diseases, as well as specific tests that must be conducted if the grower wants to ship the seed potatoes to certain countries. Page 7 of Exhibit C-5 was a Seed Potato Certification Growing Crop Certificate that Ms Wright Shaw had signed, dated 2012/09/26, which she testified would have been mailed to the grower , #1021327, being Blake MacDonald, Justin MacDonald and Alex Docherty. That certificate indicates as follows: “*The Canadian Food Inspection Agency declares that the growing crop indicated by the certificate number meets the requirements for the class indicated.*” As noted on that document, the purpose of seed potato certification is to provide reasonable assurance as to freedom from pests, varietal purity and to indicate class of seed. As can be seen from the documents that follow that certificate in Exhibit C-5, field 005 and 006 were combined, for a total of 13.355 hectares, which is the total of those two fields as indicated in Exhibit C-1 (Tab 10). Field 006 is part of McRae Farm. Other fields and varieties were noted on the certificate.

Ms Wright Shaw testified that Skye View Farms had a grower number 1021073, and noted that it was different than that assigned to Blake MacDonald, Justin MacDonald & Alex Docherty. She indicated that it is possible to have different grower numbers on the same farm. A seed potato certification Growing Crop Certificate dated 2012/09/26 in respect of Skye View

Farms formed part of Exhibit C-4.

Ms Wright Shaw testified that Canadian Food Inspection Agency does not record who actually works on the potatoes in the field, and that inspectors obtain the information required for the certification from the grower. Canadian Food Inspection Agency's verification is with respect to inspection, reporting of disease and establishing the class of seed potato. Finally, she noted that if a grower sold seed potatoes off his or her farm, the grower is required to complete a bulk movement form, which shows the seller and the purchaser. If that purchaser sells the same potatoes to someone else, another certificate of bulk movement is required to be completed, again showing the seller and the purchaser.

John MacDonald testified that he has been a plant program inspector with the Canadian Food Inspection Agency for eleven years, and his duties included inspecting seed potatoes in the field, as well as assisting growers to complete the paperwork to meet the regulatory requirements for seed potato certification. He indicated that in 2013 he had 7 growers allotted to him, but that he would deal with 25-30 growers a year, to a lesser degree. He testified that he has known Alex Docherty for seven or eight years. He indicated that he had a good, cooperative relationship with him, that Mr Docherty was accurate and knew what information John MacDonald required in order to keep his crop certification in order. John MacDonald indicated that he had known Blake MacDonald and Justin MacDonald for two or three years, and understood them to be father and son. He indicated that Justin was more of a worker on the farm and was not as involved in decision making, and in fact also worked out west for periods of the year.

John MacDonald reviewed a blank Application for Seed Potato Crop Inspection Growers Declaration(Exhibit C-1(Tab 10)). He indicated that this form indicated to him which fields that his six or seven growers were interested in having a seed inspection done on. He noted that he is the person who fills out the information required, with the assistance of the grower, so it can be accurately transferred to the database. He indicated that it used to be done as a courtesy, but now it was a necessity, as it is a complicated process, and it was important to ensure accurate information. As such, he indicated that he would meet with the grower, obtain the information needed and enter that on the form, and then have the grower sign the form. He testified that he had followed such a process with Alex Docherty on three occasions, for other crop seasons. Neither Blake MacDonald nor Justin MacDonald had met with him to complete such a declaration.

John MacDonald testified he met with Alex Docherty on June 12, 2012 for approximately three hours. He indicated that the typed information on the Application for Seed Potato Crop Inspection Growers Declaration was generated by the computer from the previous year's information, and showed the surname or partnership name to be "*MacDonald, Blake, Justin & Alex Docherty*". The address had been crossed out and he had written in a new address. The Grower Number was 1021327, and John MacDonald confirmed that this was a unique number, assigned by Canadian Food Inspection Agency to "*MacDonald, Blake, Justin and Alex Docherty*".

John MacDonald testified that the information needed to complete the Application for Seed Potato Crop Inspection Growers Declaration (Exhibit C-1(Tab 10)) other than what was generated from the computer, was provided to him by Alex Docherty. He indicated that he understood that the partnership of Blake MacDonald, Justin MacDonald and Alex Docherty was that they were all related and Blake and Alex were brother-in-laws, with Alex Docherty as the main partner in that group. He indicated he had that understanding from the years of working with him, as he always dealt with Alex Docherty, rather than Blake, as Blake was busy with other things.

John MacDonald testified that the same application had been prepared in respect of the name Skye View Farms, which had a separate grower number, namely 1021073, with the information being provided to him by Alex Docherty (Exhibit C-4). That application was also signed by Alex Docherty but dated June 13, 2012. John MacDonald indicated that he did not know why the date was different, as most, if not all of the information would have been provided during the meeting on June 12, 2012.

When asked why there would be two applications, John MacDonald indicated that in ten years, he had never been clear on why there were two separate applications, other than that was the way that Alex Docherty had organized it. He testified that Skye View Farms and “*MacDonald, Blake, Justin and Alex Docherty*” are considered by Canadian Food Inspection Agency to be one farm unit, which generally means there is shared or common farm equipment. He acknowledged that part of his job is to be able to identify for disease, and that if there was a problem with disease with one of those entities, he would immediately check the other entity, since he knew from his work with them that they shared farm equipment. He further indicated that Canadian Food Inspection Agency has never required an grower to indicate why there are separate applications and is not concerned with the organization but rather the certification process, and as long as the grower wants to pay the \$50 fee for each application, there can be multiple applications for certification. John MacDonald indicated that he understood that Alex Docherty was the owner of Skye View Farms and he was not aware of any involvement by Blake or Justin MacDonald in Skye View Farms.

John MacDonald testified, in detail, as to the information provided to him on June 12, 2012 by Alex Docherty regarding the Application for Seed Potato Crop Inspection Growers Declaration in the names of “*MacDonald, Blake, Justin & Alex Docherty*” (Exhibit C-1 (Tab 10)). He indicated that he gave a number to the field, but in the order that Alex Docherty gave him the information. In respect of field 006, which was listed for certification, Mr. Docherty had told him the variety planted was Atlantic, the acreage planted was then converted by John MacDonald to hectares and entered on the form as 10.927; the class of the seed planted was E2, which meant Elite 2; the certification number of the seed planted was 2011802209004, and in respect of that, a bulk movement certificate would have been provided to him by Alex Docherty, confirming where the seed had come from; the quantity planted was 810 cwt; the date planted was May 26/12; the field history (crop) the previous year was hay; the 2nd year previous was hay;

and the location of the field was McRae Farm. He indicated he always asks a grower what he wanted to call a field. In respect of McRae Farm, he had been there in the spring of 2012 to obtain a soil sample and had received directions from Mr. Docherty as to the location. He indicated it was easy to find, as he had been in neighboring fields previously. John MacDonald confirmed that the area indicated by yellow lines on the orthophoto as property number 226522, (Exhibit C-1(Tab 2)) was what was known as McRae Farm.

In respect of field 007, on that same application, entered for certification, John MacDonald testified that Alex Docherty had told him that the variety planted was Atlantic; the acres planted were converted by John MacDonald to hectares and were 1.011; the class of seed was PE, which he indicated was pre-elite; the certification number was 20111021327015, with a notation that it was "own seed", which it should be noted, corresponds to the grower number indicated at the top of the application; the quantity planted was 70 cwt; the date of planting was May 26/12; the field history was previous year hay; 2nd year previous was hay; and the location of the field was "*short rows at McRae Farm*". For both fields, John MacDonald had added a short form notation indicating he had performed certain tests or inspections required for exporting seed potatoes to the United States.

The Application for Seed Potato Crop Inspection Growers Declaration was signed by Alex Docherty, at the bottom of each of the two pages comprising that Application, and dated June 12, 2012. (Exhibit C-1 (Tab 9)). Blake MacDonald's signature does not appear on the document. In addition to the information provided to John MacDonald to complete the application, the document included a typed declaration with five points regarding the nature of the seed planted, testing had been conducted for particular diseases and had not been found, inspection fees had been paid, the crop would be graded to the required tuber standards and consenting to release information from the inspections for marketing purposes. Mr. Docherty's signature followed that declaration. Fees payable in respect of the eleven fields to be inspected for Blake MacDonald, Justin MacDonald & Alex Docherty were \$1060.50. The fees payable by Skye View Farms in respect of twenty-nine fields listed on that application were \$1354.50.

John MacDonald testified that he personally inspected the potatoes planted in McRae Farm. Part of his training is to know the varieties of potatoes and he confirmed that Atlantic were the variety in that field. He inspected that field on August 1, 2012 and again August 21, 2012, and his inspection reports are found in Exhibit C-6. He indicated that he reported to Alex Docherty what he found in his first inspection, sometime after August 1, 2012, and unless there was something significant in the second inspection, said that there may not have been a further report. John MacDonald testified that the McRae Farm actually was given two different field numbers because it contained different classes of seed potatoes, although the same variety and it was the same farm. Field 006 was to the right, while field 007 was to the left of property #226522. He further testified that the orthophoto, found at Exhibit C-6 was the map that he used to identify the property for his work in 2012, showing the McRae Farm, with all the notations but one being in his handwriting. He indicated that Alex Docherty's handwriting was on the document, where the words "*pre-elite*" was written, and confirmed that this was the area that

Alex Docherty had advised him had been planted with the class pre-elite, as also shown on the Grower's Declaration (Exhibit C-1 (Tab 10)).

John MacDonald testified that with respect to McRae Farm, the only variety of potatoes planted there was Atlantic. He also confirmed that the Application for Seed Potato Crop Inspection Growers Declaration completed in respect of Skye View Farms did not list McRae Farm on it.

John MacDonald indicated that he was required to file a report of field inspection for each field listed on the Application for Seed Potato Crop Inspection Growers Declaration that had potatoes to be certified as seed potatoes. He noted that he filed such a report for field 005, but on the report for field 006, one of the fields on the McRae Farm, he noted that the report was combined with field #005. He testified that he did that because he had a conversation with Alex Docherty and knew, from that conversation, that those potatoes in field 006 would be combined with the potatoes in field 005, and in fact, the Seed Potato Certification Growing Crop Certificate, previously referenced, and signed by Ms Wright Shaw on 2012/09/26 shows such a combination.

John MacDonald testified that he did not see anyone working in the potato fields while he was conducting his inspections.

David Aiton testified that he is the manager of the Agricultural Crop Insurance Corporation, a Crown corporation set up by the P.E.I. Department of Agriculture to deliver farm safety net programs. He indicated that potatoes were the biggest crop that this corporation insures. Mr Aiton explained the various types of insurance available and the process for obtaining such. Mr. Aiton indicated that the applicant had to apply for insurance prior to May 30th, indicate the type and acreage expected to be planted, the type and amount of insurance coverage desired and then had to declare to the Agricultural Crop Insurance Corporation, by June 30th each year, the actual acreage planted. He indicated that in the case of seed potato producers, rather than recreating all the information regarding what has been planted, they can file a waiver so that the Agricultural Crop Insurance Corporation can get that information from Canadian Food Inspection Agency, or the producer can file directly with the Agricultural Crop Insurance Corporation.

In particular, Mr. Aiton confirmed that an application had been made, indicating the producer's name as Blake MacDonald and Alex Docherty, client number 10541, dated May 15/12 and signed by Alex Docherty (Exhibit C-1(Tab 9)). He indicated that the term "*producer*" referred to an insured client under the program, and that for the most part, they were individual producers, but some were companies. Each producer was assigned a unique client number by Agricultural Crop Insurance Corporation. He indicated that Alex Docherty was a longstanding client in the program, and that the client number assigned to Alex Docherty and Blake MacDonald indicated that they had a relationship for some time. He indicated that Alex Docherty provided or had Canadian Food Inspection Agency provide the Application for Seed

Potato Crop Inspection Growers Declaration dated May 26th, 2012 to Agricultural Crop Insurance Corporation to confirm the actual acres and varieties planted (Exhibit C-1(Tab 9)). Mr Aiton confirmed that the potatoes being grown on the property, known as McRae Farm, were part of those for which crop insurance was requested and provided.

Mr. Aiton referred to the Statement of Account for Blake MacDonald and Alex Docherty (Exhibit C-5) for the 2012 crop year, showing over \$20,000 had been paid by that account for insurance premiums, and that the total insured value of those crops was just over \$500,000. He indicated that such a statement was sent out to insured clients so they would know the coverage provided. The final acreage report showed a reconciliation between what was filed by Mr. Docherty on May 15th, 2012 and the Canadian Food Inspection Agency declaration on May 26th, 2012. He noted that regarding Atlantic E-2, 25 acres were to be planted but in fact 33 acres were planted, which represented a combination of fields 005 and 006. That was the same combination that John MacDonald had made following his conversation with Alex Docherty. He noted that the premium for insurance coverage on those 33 acres was \$18,772.04 (less various contributions from the federal and provincial governments) and the insured value of that portion of the crop was \$131,678.40. Mr. Aiton confirmed that there were two inspection reports prepared, as they monitored the crops insured under the program, since signs of problems might lead to claims or a short fall in production.

When asked what insurable interest Skye View Farms had in those 33 acres of Atlantic potatoes, Mr Aiton confirmed that the Agricultural Crop Insurance Corporation only insures one acre once. He indicated that he did not see any reference to McRae Farm on Skye View Farms' application for crop insurance (Exhibit C-4) and that Skye View Farms had a different client number than that of Blake MacDonald and Alex Docherty.

It is important to consider this testimony in light of the provisions of the **Watercourse and Wetland Protection Regulations** which define "cultivate" as follows:

1(1) (g) "cultivate" means to dig, plant, cut, prune, irrigate, fertilize, tend, till, manage, farm, maintain, spray, plough, harvest or engage in any other activity related to growing or harvesting, and "cultivation" means the act of doing any of the above;

None of the witnesses in this trial saw Alex Docherty or Blake MacDonald personally working in the potato field on McRae Farm during the 2012 season. At some point, however, some common sense must be used. From the documentation filed in this matter, this was a reasonably sized seed potato operation. Some growers may be lucky enough to have others do the manual work involved in growing a crop of potatoes. Some may have to do all the work themselves. The definition of "cultivate" provides examples of many activities that relate to actual work that would be carried out in a field, but it also includes many other activities that are much broader in scope.

In this case, the evidence is uncontradicted and unchallenged. On May 15, 2012, Alex

Docherty applied to the Prince Edward Island Agricultural Insurance Corporation for a contract of insurance in the names of Blake MacDonald and Alex Docherty, indicating the variety and class of seed potatoes and the acreage anticipated to be planted. On June 12, 2012, Alex Docherty submitted an Application for Seed Potato Crop Inspection Growers Declaration to the Canadian Food Inspection Agency in the name of Blake MacDonald, Justin MacDonald and Alex Docherty, providing John MacDonald, the plant program inspector, with information regarding what were classified as eleven different fields of seed potatoes planted, indicating the variety and class, the certification number, the acreage, and the quantity of seed potatoes planted, the date planted and the field history of each of such fields for the previous two years, as well as the location of the field. The information regarding fields 006 and 007 of such Application was provided in respect of what is referred to as McRae Farm, or otherwise referred to as property #226522 in this matter. He signed each of those forms submitted. There is no suggestion that that is not his signature or that he did not meet with those agencies as indicated.

Mr. Docherty then provided or had the Canadian Food Inspection Agency provide, on his behalf, that same Application for Seed Potato Crop Inspection Growers Declaration to the Prince Edward Island Agricultural Insurance Corporation to verify, as required for crop insurance, what had actually been planted and where. The fields were inspected by both agencies on two occasions each and found to actually contain the variety of seed potato Mr. Docherty indicated had been planted there.

As a result of a conversation that John MacDonald had with Alex Docherty, John MacDonald combined his inspection report for fields 005 and 006 (006 being on McRae Farm). John MacDonald forwarded at least his first inspection report to Alex Docherty, shortly after such inspection in early August, 2012. David Aiton indicated that the Prince Edward Island Agricultural Insurance Corporation sent the Statement of Account for the 2012 crop year to Blake MacDonald and Alex Docherty, showing details of their coverage and insurance premiums for the listed crops. It should be noted that the insurance premium was paid, and in fact, that there was a credit in the amount of some \$3,000 to Blake MacDonald and Alex Docherty in respect of that statement.

Both John MacDonald and David Aiton indicated that most of their clients were individual growers, but acknowledged that some were companies, of which Skye View Farms would be an example. Sherwood Produce was referred to as being insured by the Agricultural Crop Insurance Corporation, and Mr Aiton indicated that it contracted with individual growers to grow for it, and Sherwood Produce took all the risk. While the evidence indicated that there may be entities, other than someone actually farming the crop, who applied to have seed potatoes certified or insured, there was no evidence to show the nature of such an entity, how it operated, or how, if at all, it related to Blake MacDonald and Alex Docherty.

Although there were numerous references to Skye View Farms in this matter, the evidence clearly showed that it was considered as a separate entity from that of Blake MacDonald, Justin MacDonald and Alex Docherty for the purposes of certification of seed

potatoes and for crop insurance on such potatoes. There are no references to McRae Farm on any of the documentation submitted in respect of Skye View Farms. All references to McRae Farm are found only in respect of the application regarding Blake MacDonald and Alex Docherty. John MacDonald indicated that he knew Blake MacDonald and Alex Docherty shared farm equipment with Skye View Farms, and as such he would consider them to be one farm unit for disease control issues, but each had separate grower numbers and separate applications for seed certification.

I am satisfied beyond a reasonable doubt that the Crown has established in this case that Alex Docherty's involvement and actions as detailed above, did in fact constitute cultivation of the McRae Farm, property number 226522, as that term is defined in Section 1(1) (g) of the **Watercourse and Wetland Protection Regulations**.

Hollis Newson testified that he sold property #226522 (and other land) approximately two years ago, and confirmed the arrangements by which he was to look after it. He testified that he rented that land in the fall of 2011 to Skye View Farms. He testified that he dealt with Blake MacDonald, and figured he was doing the business for Skye View, and indicated that Blake MacDonald and Skye View are partners. It should be noted that there was no evidence presented to support such a partnership and in fact, according to the information in the Corporate/Business Names Registry, as of the last return on March 31, 2012, Alexander Docherty was listed as the President, shareholder, director and officer of such company, while Kenneth Docherty was listed as the Vice-President, Secretary/Treasurer. No one else was listed.

Mr. Newson testified that there was no rental price per acre, but rather he was paid \$5000 one time, approximately six months previous, and a further \$2000, paid about a month previous. He testified that he was paid by way of a personal cheque of Blake MacDonald. He testified that he had nothing to do with farming or planting potatoes on the property in question, and although the property was beside or behind his house, he testified he did not see who was farming or growing potatoes on the property.

Starting in mid October, 2012, Officer McEvoy monitored property #226522, as she was aware that the crop would soon be harvested. She testified that on October 18th, 2012, while monitoring the field in Kingston, P.E.I., she was approached by Brandon Forbes, counsel for the accused in this matter, who told her that neither his clients nor their employees wished to speak to her and that she was to deal with Mr. Forbes directly. While his clients might not wish to speak to Officer McEvoy, that certainly could not extend to any of their employees. Furthermore, such a direction certainly flies in the face of the principle that there is no property in witnesses.

It also is contrary to the provisions of the **Watercourse and Wetland Protection Regulations** which provide in Section 12 (10) and (11) as follows:

12(10) All persons to whom a request is made by an inspector or an officer under these regulations shall provide all reasonable assistance to enable the inspector or the officer to carry out his or her functions under

these regulations, and shall furnish the inspector or officer with all information reasonably required to administer or enforce these regulations.

(11) No person shall impede or obstruct or knowingly make false or misleading statements to an inspector or an officer engaged in carrying out the inspector's or officer's functions under these regulations.

When these regulations were enacted in 2008, the Government of the day clearly gave those charged with the enforcement of them broad powers to ensure that these provisions were being complied with and enforced.

On October 26, 2012, while monitoring property #226522, Officer McEvoy saw people and farm machinery, including a digger, harvester, and potato trucks in the field. She saw trucks enter the field empty, and leave the field loaded with potatoes. She recorded the license plates of the two vehicles that she saw entering and leaving the field in question, and one vehicle, bearing P.E.I. license plate #QR021 was determined to be registered to M. Blake MacDonald, Kingston, P.E.I., as confirmed by the certificate from the Registrar of Motor Vehicles filed as an Exhibit in this matter (Exhibit C-1 (Tab 11)). Other vehicles in the field were registered to Skye View Farms.

The Application for Seed Potato Crop Inspection Growers Declaration and the Application to the Prince Edward Island Agricultural Insurance Corporation were made in the name of Blake MacDonald and Alex Docherty. Justin MacDonald's name also appeared on the first application, but not for crop insurance. Blake MacDonald did not sign either of these applications. John MacDonald testified that while he knew Blake MacDonald, he had always dealt with Alex Docherty on his behalf. There is no evidence before the Court to indicate that Alex Docherty did not have the authority to act on behalf of Blake MacDonald, or that Alex Docherty misrepresented Blake MacDonald in any way.

According to the evidence, a truck registered in the name of Blake MacDonald was seen in the potato field on McRae Farm on October 26th, 2012, entering the field empty and leaving the field loaded with potatoes. There is no evidence before the Court to indicate that anyone was using Blake MacDonald's registered truck without his permission. Finally, he paid Hollis Newson two cheques from his personal account for the use of the land, which included McRae Farms.

I am satisfied beyond a reasonable doubt that the Crown has established in this case that Blake MacDonald's involvement and actions, as detailed above, did in fact constitute cultivation of the McRae Farm, property number 226522, as that term is defined in Section 1(1) (g) of the **Watercourse and Wetland Protection Regulations**.

CONCLUSION:

The evidence in this matter has therefore established that property number 226522, known as the McRae Farm, is a provincial parcel of land located at or near Kingston, Prince Edward Island, and that Alexander Docherty and M. Blake MacDonald did each cultivate a row crop, namely potatoes, on 4.15 hectares of that parcel which had a slope that was greater than 9 %, and for which there was no management plan.

The Crown has therefore proven all of the elements of the offence against each of the accused in this matter.

I therefore find that Alexander Docherty and M.Blake MacDonald did, each of them, on or between the 26th day of May, 2012 and the 26th day of October, 2012, at or near Kingston in the County of Queens, Province of Prince Edward Island, on any provincial parcel of land, cultivate one or more hectares of row crop on any area of that parcel which has a slope which is greater than 9%, unless there is a management plan for that area and the cultivation of the row crop is done, pursuant to, and in accordance with, that management plan, contrary to subsection 8(2) of the Watercourse and Wetland Protection Regulations, Environmental Protection Act R.S.P.E.I. 1988, cap. E-9, and that each of them did thereby commit an offence under subsection 14.(5) of the said Regulations.

I therefore find Alexander Docherty guilty of the offence pursuant to Section 8(2) of the **Watercourse and Wetland Protection Regulations**, made pursuant to the **Environmental Protection Act** R.S.P.E.I. 1988, cap. E-9, and subsection 14.(5) of the said **Regulations**.

I therefore find M. Blake MacDonald guilty of the offence pursuant to Section 8(2) of the **Watercourse and Wetland Protection Regulations**, made pursuant to the **Environmental Protection Act** R.S.P.E.I. 1988, cap. E-9, and subsection 14.(5) of the said **Regulations**.

Dated at Charlottetown, Queens County, Province of Prince Edward Island this 27th day of September, 2013.

Sgd NKOr

Nancy K. Orr
Provincial Court Judge