

CANADA
PROVINCE OF PRINCE EDWARD ISLAND
IN THE PROVINCIAL COURT (CHARLOTTETOWN)

Case #: PIFC2018001841
PIFC201800188
PIFC201800189

BETWEEN:

HER MAJESTY THE QUEEN

INFORMANT

AND:

SKYE VIEW FARMS LTD.,
ALEXANDER DOCHERTY and
LOGAN DOCHERTY

ACCUSED

RULING ON CHARTER MOTION

Judge Nancy K. Orr
June 26th, 2019

Gylaine Basque & Gilles Daigle

Public Prosecution Service of Canada

Brandon Forbes & Brendan Hubley

Counsel for the Accused

Charge:

[1] Skye View Farms Ltd., Alexander Docherty and Logan Docherty are jointly charged that they did, between the 20th day of July, 2016 and the 28th day of July, 2016, at or near parcel 219725, in Elmwood, Province of Prince Edward Island, unlawfully deposit or permit the deposit of a deleterious substance, namely agricultural runoff containing pesticides in water frequented by fish, to wit: Clyde River, or in any place under conditions where the deleterious substance may enter such water, contrary to section 36(3) of the Fisheries Act, R. S. C. 1985, c. F-14, thereby committing an offence contrary to section 40(2) of the Fisheries Act, R. S. C. 1985, c. F-14.

Background:

[2] An agreed statement of facts was filed in this matter, indicating that Skye View Farms Ltd. is a body corporate, incorporated under the laws of Prince Edward Island. In 2016, the sole director of the company was Alexander Docherty, and the officers were President Alexander Docherty and Secretary Logan Docherty.

[3] Skye View Farms Ltd. is in the business of growing and exporting seed potatoes, and as part of its operations, it owns various fields, including one field east of the Colville Road, in Elmwood, PEI, identified as PID 219725.

[4] PID 219725 is split into smaller sections, identified as the “*pit track*” and “*three little fields*”. When I refer to field 1, 2 or 3, I am referring to one of the “*three little fields*”. In 2016, PID 219725 was planted with seed potatoes.

[5] Around 5:30 p.m. on July 25th, 2016, dead fish were reported to have been found in the Clyde River. Provincial Environmental Officers and Federal fisheries officers responded to a call advising them of a fish kill on the evening of July 25, 2016.

[6] On October 23, 2018, the above-noted charge against the three accused was laid in Provincial Court in Charlottetown as a joint information. A not guilty plea was entered on behalf of all three accused on February 19th, 2019. Defence counsel later filed a notice of motion alleging a breach of section 8 of the *Charter*, and Crown counsel filed argument and case law in reply.

[7] The trial commenced on June 11th, 2019, and by agreement of counsel, it began with a *Charter* *voir dire*. Evidence was heard on four days, namely, June 11th, June 12th, June 18th and June 19th, 2019. Extensive summations were then made by both counsel on June 21st, 2019, and the matter was adjourned to today for a ruling on the *Charter* motion.

ISSUES:

[8] The issue in this case is whether the activities of the federal fishery officers and the provincial conservation officers, carried out in response to the report of a fish kill in the Clyde River on July 25th, 2016, constituted an inspection pursuant to section 49 (1) of the *Fisheries Act*, or whether they constituted an investigation, and thus required an warrant, pursuant to section 49.1 of the *Fisheries Act*.

[9] If the activities of the officers fell outside the provisions of section 49 (1) of the *Fisheries Act*, were they an unauthorized search and in violation of the *Charter* ?

[10] If there was a breach of the *Charter*, what is the appropriate remedy?

[11] In particular, defence counsel has objected to the admission into evidence at the trial of a number of items, marked for identification for the *voir dire*, on the basis that these items were the subject of an unlawful search and seizure, and should be excluded from the trial due to the alleged *Charter* breach. The items in question are marked for identification as V-1 to V-8, being eight separate certificates of analysis; V-11 to V-16, being six separate certificates of analysis; V-49 video taken on July 26th, 2016; V-18 and V-19, being measurement of buffer zone, taken July 25th, 2016; and V-20 to V- 48, being pictures taken on July 26th, 2016.

FACTS:

[12] Nine witnesses testified for the Crown on the *voir dire*. The Defence called no evidence. Counsel had agreed at the outset of the proceeding that all issues, whether relating to the *voir dire* or the trial proper, would be canvassed with each witness, so that the witnesses would not have to be recalled, in the event that the defence's *Charter* motion was not successful. That applied to the first eight witnesses, but counsel then agreed that the evidence of the main investigator, Officer Fernand Comeau, would only relate to the *voir dire* and the remainder of his evidence would be dealt with at the trial.

[13] As a result, at this point, I will only deal with the evidence that relates to the *Charter* motion. Although the evidence in this matter took four full days to present, there is little dispute as to what was done. It is how to characterize those actions that is in issue.

[14] Andrew Ing was qualified as an expert, on consent of the defence. He had created a number of maps of the area in question in this matter, and explained the various maps, his sources of information and how he had prepared such maps. Those maps were entered into evidence by consent and were referred to extensively throughout the various witnesses' testimony.

[15] Rosanne MacFarlane is a fresh water biologist with the Province of Prince Edward Island. Around 5:15 pm on July 25th, 2016, she received a telephone call from the manager of the Clyde River watershed that 2 or 3 dead fish had been found near the Bannockburn Road, near Clyde River, PEI. Shortly after that, she received confirmation that there were more dead fish in that area, and she then contacted Wade MacKinnon, Manager for Investigation and Enforcement, Department of Justice and Public Safety. Federal Fisheries Officer Fernand Comeau was contacted as well.

[16] Ms MacFarlane went to the Bannockburn Road, in the Clyde River area and walked upstream a short distance and saw a number of dead fish in that section. She went back to the Bannockburn Road and met up with Officer Wade MacKinnon. Together they walked various portions of the Clyde River, moving upstream to find the source of the dead fish.

[17] Ms MacFarlane described what was found, and at which of the various places that she and Officer MacKinnon walked. Ms MacFarlane and Officer MacKinnon then went to a point where a tributary of the Clyde River crossed the Baltic Road. Live fish were seen at that area. They continued to the end of the Baltic Road where a number of dead fish were located in the stream.

[18] Ms MacFarlane and Officer MacKinnon then went to the next crossing point, which was the Colville Road, where they saw dead fish on the downstream side of the Colville Road, which runs alongside the ditch, before veering off. Ms MacFarlane kept five brook trout and one stickleback of those collected from that area and later delivered them to the Atlantic Vet College for a necropsy.

[19] Ms MacFarlane and Officer MacKinnon continued upstream to a road crossing in the community of Kingston. As it was the head waters of the system, there was no defined stream. She did find a small stream and a pond upstream from the Colville Road. No dead fish were found at this point.

[20] The upper point where dead fish were found was at the culvert of the road crossing of Colville and Wynn Roads, which is in the community of Elmwood, P.E.I. Ms MacFarlane walked for a considerable distance above the road and did not see any signs of dead fish above the culvert.

[21] Ms MacFarlane acknowledged that there had been heavy rain the previous day, July 24th, 2016. She had personal knowledge, as her home was not far from the area in question and from the many signs she noted during her walk, she indicated that the water level in the Clyde River had been considerably higher than normal.

[22] Ms MacFarlane testified that the collection of the dead fish only started once she was given clearance by Officer Wade MacKinnon to do so on July 26th, 2016. A total of 259 brook trout, 18 rainbow trout, and 65 three spine stickleback dead fish were retrieved over a two day period. She noted that was not necessarily how many were dead, as they cannot find them all.

[23] Ms MacFarlane testified that she does not do investigations. Her role when dealing with a fish kill is cleanup and restoration. Although she saw a large potato field at Colville and Wynn Roads, she indicated that she did not go into any fields. Her focus was the stream. She indicated that she saw four Environment Canada officers at the scene, but was only familiar with Officer Fernand Comeau. Her only contact with the officers on July 26th was by telephone, when she was advised by Officer MacKinnon that she could start the cleanup.

[24] Ms MacFarlane testified that this was the seventeenth fish kill that she had responded to since 2003. She indicated that, excluding ones where there was a lack of oxygen, all were row crop related and most involved potatoes, although three were not. Most occurred in July or August, the high spraying season for row crops. She indicated that this, at the Clyde River, was not a hypoxic event.

[25] Officer Wade MacKinnon, Manager for Investigation and Enforcement, Department of Justice and Public Safety, testified he has been a conservation officer since 2005 and the manager since 2012. After receiving a phone call from Rosanne MacFarlane confirming she was onsite and had found dead fish in the Clyde River, he called the Environment Emergency number to report the fish kill, as per the established protocol. Officer MacKinnon then met Ms MacFarlane at the Bannockburn Road and he confirmed her testimony regarding the sections of the river system that were walked and the findings that were made regarding the location of live or dead fish.

[26] When asked on direct examination as to what was in his mind at the time he got the call about a fish kill, Officer MacKinnon indicated that it was the same each and every time, as every fish kill is dealt with in the same manner. He indicated they arrive; assess; look at potential sources of pollution; identify teams, who will be responsible for what, who will walk which sections of the stream and try to have enough people there to help with the work. He testified his authority as a conservation officer came from the *Environmental Protection Act*, the *Wildlife Conservation Act* and the *Fisheries Act*. He indicated he exercised that authority to see if there were any point sources of pollution, by which he indicated they were looking for any indication of runoff or soil erosion. He testified that “*runoff was water leaving a field carrying sediments or a ditch or whatever.*”

[27] In particular at the area of the Colville and Wynn Roads, Officer MacKinnon indicated there was a potato field on the right side of the road, and that the potato crop was obvious from the highway, although he did not enter that property. He testified that the potato field sloped towards the Colville Road and Clyde River and there was evidence of recent soil erosion. He saw standing water in the ditch and there was evidence between the rows of soil erosion towards the Colville Road. Officer MacKinnon indicated that he had been on the property in the past and knew the property was registered to Skye View Farms and that Alex Docherty was the owner and President of the company. He acknowledged that Mr Docherty’s home was in close proximity to the Colville and Wynn Roads.

[28] Officer MacKinnon testified that he and Ms MacFarlane went to Bagan Lane, the headwaters of the west branch of the Clyde River, to see if there were any live fish there or any point sources of pollution. There was intermittent flow and they did not see any indication of live or dead fish there, but did see invertebrates or amphibians. He entered one potato field off Bagan Lane and took a picture and a G.P.S. point at that location.

[29] Following that, Officer MacKinnon, Ms MacFarlane and the Environment Canada officers met at Officer MacKinnon’s office, secured the samples and went home for the evening.

[30] Officers Fernand Comeau, Shawn Sanson, Charles Richard and Mark Donovan are all enforcement officers with federal department of Environment and Climate Change Canada (or its various names) and are all designated as fishery officers pursuant to the *Fisheries Act*. For ease of reference, I will refer to them as fishery officers.

[31] Testimony from the fishery officers established that there is no enforcement office for Environment Canada in P.E.I. as it is run from Moncton. Officer Sanson was stationed in Cape

Breton and he met the other three officers, who were from New Brunswick, to do enforcement work on PEI. He indicated that Officer Comeau was in charge and that a list of various places that had to be inspected would be prepared, and they would visit those locations to see if the various Acts and regulations they were responsible for enforcing were being complied with.

[32] It just happened that the four fishery officers were in P. E. I. the week of July 25th, 2016 to carry out a list of inspections under various legislation they were responsible for. All witnesses confirmed that the Clyde River was not a site that they had planned to visit or inspect. All fishery officers indicated that they were only at the Clyde River in response to the indication of a fish kill. All agreed that the call came in after they had finished work for the day on July 25th and that they had no plans to work that evening. In addition, a number of the fishery officers indicated that they had no familiarity with that site, as they had never been in the area previously.

[33] All agreed that Officer Comeau was in charge of the scene in respect of the Clyde River, and for the purposes of this trial, he was acknowledged by both counsel as the investigating officer.

[34] Immediately upon arriving on scene, Officer Comeau and Officer Sanson, who worked together in this matter, began to walk parts of the Clyde River system, looked for dead fish and took water samples.

[35] Officer Richard testified he was summoned to the area because of a report of a fish kill. He testified that when he arrived at Colville Road and Wynn Road no one was there but he parked there as there were vehicles in the area. He saw a potato field and indicated he recognized it as a commercial operation, as opposed to a garden. He knew that potato fields were sprayed, but not what for. He indicated that the potato rows sloped towards him and downhill towards the river. He noted signs of recent rainfall including signs of sedimentation coming from the field, and some on the access road.

[36] Fishery officers Richard and Donovan worked together, and they were directed by Officer Comeau to go into the potato field parcel PID 219725 where they collected samples of potato leaves, (the foliage samples) and took pictures while on the property. On July 25th, 2016 they collected five foliage samples and one water sample, which was taken directly from the Clyde River.

[37] Officer Donovan indicated that there was some soil deposited in the grass at the end of the field and there was quite a bit of wet soil. He did not see any water rushing on the property. In some places the grass was covered in sediment. Officer Donovan indicated that only Officer Richard was in the potato field as he was at the end of the field. He indicated that he did not want to go on a person's property and when asked why, he said he "*just didn't want to*". When asked if he had a warrant before taking the first four foliage samples on the field, he indicated "*no*".

[38] Officer Sanson testified that he and Officer Comeau walked upstream from the Bannockburn Road where he collected dead trout and a water sample was taken in this area. They then went to the Baltic Road where he took a water sample from the culvert. The water was clear and live fish were there and did not seem subject to any pollutants. At the intersection of Wynn

and Colville Roads, he saw potato fields and trees and a buffer zone at the end of the fields. He saw water in the ditch next to a berm and collected a water sample there.

[39] Officer Sanson testified he helped Officer Comeau measure the buffer zone between the potato rows and the ditch. Officers Sanson and Comeau went to Bagan Lane to check another potato field and Officer Sanson collected a foliage sample from that potato field. At another location they walked a significant distance but did not collect any other samples.

[40] Fernand Comeau is an enforcement officer with Environment Canada and designated as a fishery officer within the *Fisheries Act*. On July 25th, 2016, he and Fishery Officer Sanson arrived at the Bannockburn Road at 6:20 pm and met Ms MacFarlane. He testified that he took out his sampling equipment and walked 125 meters upstream from the Bannockburn Road where he saw 8 dead fish and collected water samples.

[41] The first water sample, EC404 was taken, the dead fish recovered and Officer Comeau had returned to secure such in his vehicle when Officer MacKinnon arrived at the site.

[42] From the watershed maps of the area, they divided the area to be walked and Officers Comeau and Sanson walked a portion of the river, taking sample EC 422, while Officer MacKinnon and Ms MacFarlane walked another portion. Officer Comeau received a phone call from Officer MacKinnon indicating he found dead fish upstream and that the source of pollution could be upstream. They agreed to meet at the next crossing, which was the Wynn and Colville Roads.

[43] At that location, Officer Comeau indicated he saw three or four potato fields to the western and eastern sides of the Colville Road. He saw a puddle of water in the road ditch held up by a berm. Officer Sanson collected a water sample from the ditch, EC 421. A second sample was taken from a grassy area within the road ditch EC 420. A third sample EC 419 was taken from the Clyde River.

[44] Officer Comeau testified that there was a culvert under the Colville Road and it seemed there was a drainage area which could drain into the Clyde River. As he walked north from the Colville Road there was a potato field near the watercourse. He entered the field and with Officer Sanson, he measured the width of the buffer zone from the edge of the rows of potatoes to the riverbank. Pictures were taken to show where the officers were situated for such measurement. (V-18 and V-19)

[45] Officer Comeau testified that after taking the measurements and taking the pictures of those points, he and Officer Sanson walked in the headland area of the potato field and took a number of pictures. In field 3 of parcel PID 219725, in the lower area of the field he indicated there was a downslope and he could see soil, and the flow direction seemed to be north to south as the grass was bent indicating that direction. V-20 was a picture Officer Comeau took on July 25th 2016 showing the soil eroded.

[46] Officer Comeau testified that around 9:15 pm on July 25th, 2016, he was approached by the owner of the potato fields sampled, Alex Docherty and was asked why he was on the site.

Officer Comeau told him he was doing an inspection. Mr. Docherty advised him that it had rained the day previous and when asked as to what he had sprayed on the field, Mr. Docherty indicated that the last application was the week prior and was Manzate.

[47] Officer Comeau testified that he has been involved in seven fish kills in PEI and is aware that there is a wide variety of pesticides used in PEI. He indicated he had no concerns regarding the use of pesticide Manzate, as it has not been linked to a fish kill.

[48] Officer Comeau indicated that on July 26th, 2016 there was a meeting to discuss the inspections for that date. He testified that he did not have grounds to get a warrant as under section 36(3) of the *Fisheries Act*, he needed to have an offence.

[49] On returning to the Colville and Wynn Road area on July 26th, 2016, Officer Comeau and Officer Sanson again returned to the field, parcel PID 219725. They walked the lower end of the potato field and the ditch that ran parallel to the Colville Road, and took more pictures. Officer Comeau walked north on field 3 on the grass headland until he got to the pit track road where there was a planted headland. He indicated that there was evidence that soil was entering the road ditch at the pit track road.

[50] Photos marked as V- 22 to V 40 were the photos Officer Comeau took while in the fields that make up parcel PID 219725. As they walked the lower end of the potato field and the ditch that ran parallel to the Colville Road, Officer Comeau recorded his path with a hand held video camera and made 4 videos. (V-49 video made July 26, 2016). When asked why he made videos he indicated it was in order to go back and see what the site looked like on that date.

[51] Around noon on July 26th, Officers Comeau and Sanson had returned to their vehicle and it started to rain. The water started to pool in the headland area of field 3. The officers returned to that field and Officer Comeau asked Officer Sanson to collect a water sample using the cap of the collection bottle to scoop out water. EC 433 was collected as a result.

[52] At 12:15 pm, it was still raining and Officer Comeau could see water running down the potato drills from field 3. He took photos as the water moved south towards the Colville Road. Between fields 2 and 3, it was pooling then down the gully through the headland in the buffer zone, hit the ditch and after 10 to 12 feet would go directly to the Clyde River. Water samples EC 434 and 435 were taken from the gully which discharged into the road ditch and were approximately 10 to 12 feet from the Clyde River. He also took a video of the runoff. He used Officer MacKinnon's camera to make that video (V-41).

[53] Officer Comeau indicated that at that point, he did not know what pesticides or chemicals had been applied to the field or what was in the samples collected.

[54] Of note are the photos V-44, 45 and 46 which were of the gully which Officer Comeau noticed on July 26th, 2016 before it started to rain that day. Most of the other photos were of the gully after the rain started during the time they were at the site.

[55] The water samples and the foliage samples obtained by the fisheries officers on July 25th and 26th, 2016 were taken to the lab for analysis, and on September 2, 2016, Officer Comeau received the preliminary report of the analysis.

[56] The Crown's position is that only at that point, on September 2, 2016, was Officer Comeau in a position where he could apply for a search warrant, pursuant to section 49.1 of the *Fisheries Act*.

LAW:

[57] The *Fisheries Act*, R.S.C., 1985, c. F-14 clearly sets out the powers of fishery officers in sections 49 and 49.1 of that *Act*. In fact, the heading to that part reads:

*Powers of Fishery Officers and Fishery Guardians
Inspection*

[58] The relevant portions of the legislation are as follows:

49 (1) Subject to subsection (2), for the purpose of ensuring compliance with this Act and the regulations, a fishery officer or fishery guardian may enter and inspect any place, including any premises, vessel or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking or any fish or other thing in respect of which this Act or the regulations apply and may

(a) open any container that the officer or guardian believes on reasonable grounds contains any fish or other thing in respect of which this Act or the regulations apply;

(b) examine any fish or other thing that the officer or guardian finds and take samples of it;

(c) conduct any tests or analyses and take any measurements; and

(d) require any person to produce for examination or copying any records, books of account or other documents that the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this Act or the regulations.

Search

49.1 (1) A fishery officer with a warrant issued under subsection (2) may enter and search any place, including any premises, vessel or vehicle, in which the officer believes on reasonable grounds there is

(a) any work or undertaking that is being or has been carried on in contravention of this Act or the regulations;

(b) any fish or other thing by means of or in relation to which this Act or the regulations have been contravened; or

(c) any fish or other thing that will afford evidence in respect of a contravention of this Act or the regulations.

Authority to issue warrant

(2) *Where on ex parte application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place referred to in subsection (1) any fish or other thing referred to in subsection (1), the justice may issue a warrant authorizing the fishery officer named in the warrant to enter and search the place for the thing subject to any conditions that may be specified in the warrant.*

Where warrant not necessary

(3) *Notwithstanding subsection (1), a fishery officer may exercise the power of search referred to in that subsection without a warrant issued under subsection (2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.*

Exigent circumstances

(4) *For the purposes of subsection (3), exigent circumstances include circumstances in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.*

Powers during search

(5) *In carrying out a search of a place under this section, a fishery officer may exercise any power mentioned in subsection 49(1), (1.1) or (1.3).*

[59] Section 8 of the **Charter of Rights and Freedoms** states:

Search or seizure

8. *Everyone has the right to be secure against unreasonable search or seizure.*

[60] In this case, the defence alleges that the fishery officers and/or provincial conservation officers violated the accused's section 8 **Charter** rights, by going onto parcel PID 219725 in Elmwood, P. E. I. between July 25 to 28th, 2016, taking samples of foliage and water from that property, taking videos and pictures while on that property, all of which were done without a search warrant.

[61] The Crown submits that the fishery officers were conducting an inspection of the property in question, and that all of their actions were authorized by section 49(1) of the **Fisheries Act**. The Crown contends that what occurred was not a search, and as such, a warrant was not required.

[62] The law is clear that the party alleging that there has been a breach of a **Charter** right bears the burden of establishing that breach, on a balance of probabilities.

[63] In **R. v. Haas** [2005] 76 O.R. (3d) 737 the issue was whether breath samples taken by a breathalyzer should be excluded in respect to a charge contrary to section 253 of the **Criminal**

Code. At paragraph 24, Justice Goudge, writing for the Ontario Court of Appeal stated:
[24] *Since the seizure here was warrantless, the principle in R. v. Collins, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 applies. [page743] It set out the fundamental proposition that an accused bears the burden of persuading the court on a balance of probabilities that his or her Charter rights have been infringed, but that in the s. 8 context, once the accused has demonstrated that the search or seizure was a warrantless one, the burden of persuasion shifts to the Crown to show that on a balance of probabilities the search or a seizure was reasonable. The court said this at pp. 277-78 S.C.R., p. 13 C.C.C.:*

The appellant, in my view, bears the burden of persuading the court that her Charter rights or freedoms have been infringed or denied. That appears from the wording of s. 24(1) and (2), and most courts which have considered the issue have come to that conclusion [see R. v. Lundrigan (1985), 19 C.C.C. (3d) 499, 33 Man. R. (2d) 286, 15 C.R.R. 256 (Man. C.A.), and the cases cited therein, and Gibson, The Law of the Charter: General Principles (1986), p. 278]. The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.

[64] Both counsel included the decision of **R. v. Jarvis**, 2002 SCC 73 in their book of authorities. That case addressed the question of whether there was a distinction between the Canada Customs and Revenue Agency's (CCRA) audit and investigative functions under the **Income Tax Act**.

[65] Justices Iacobucci and Major, writing for the Supreme Court of Canada in **Jarvis, supra**, stated at paragraph 2:

[2] *Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation.*

[66] That Court noted in its decision that the income tax system, which was based on self reporting, was dependent on integrity of the taxpayer in reporting and assessing income. In considering the application of the **Charter**, the Court stated:

63 *At this stage, it is a firmly established principle that the Charter must receive contextual application. The scope of a particular Charter right or freedom may vary according to the circumstances: Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at pp. 1355-56, per Wilson J.; McKinlay Transport, supra, at p. 644; Symes v. Canada, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695, at p. 793, per L'Heureux-Dubé J. (dissenting); 143471 Canada, supra, at p. 347 (per Lamer C.J.) and at pp. 361-62 (per La Forest J., dissenting); Comité paritaire, supra, at p. 420, per La Forest J.*

64 *For present purposes, where ss. 7 and 8 of the Charter are at issue, it is instructive to note both that the requirements of fundamental justice relevant to the former section "are not immutable; rather, they vary according to the context in which they are invoked" (R. v. Lyons, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 361, per La Forest J.) and that context will determine the expectation of privacy that one can reasonably expect the latter section to protect (Thomson Newspapers, supra, at pp. 495-96, per Wilson J., dissenting, and at p. 506, per La Forest J.; McKinlay Transport, supra, at pp. 645 and 647; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 1991 CanLII 50 (SCC), [1991] 3 S.C.R. 459, at p. 478, per Cory J.; Baron, supra, at p. 436, per Sopinka J.; British Columbia Securities Commission v. Branch, supra, at para. 51, per Sopinka and Iacobucci JJ.).*

[67] The Supreme Court of Canada, in the **Jarvis** case, was dealing with informational privacy in the context of the documents that the CCRA could demand a tax payer provide. The Court was reluctant to draw a firm line as to when the line was crossed between an administrative inquiry and an investigatory one. The Court noted that in the income tax context, even when there was a reasonable ground to believe an offence had occurred, it was still open to the CCRA to use the lesser administrative sanctions, as opposed to penal ones, and indicated it did not want to preclude the CCRA from having that option. That legislation differs from the section of the **Fisheries Act** in this matter.

[68] Officer Comeau testified that he was conducting an inspection to verify compliance with section 36(3) of the **Fisheries Act**, which provides as follows:

Deposit of deleterious substance prohibited

36 (3) *Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.*

34 (1) For the purposes of sections 35 to 43,
deleterious substance means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,
and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

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

water frequented by fish means Canadian fisheries waters.

[69] Counsel provided a number of cases which dealt with sections 49 and 49.1 of the *Fisheries Act*. Although in some of the older cases the section references are to 35 and 35.1, the wording is unchanged.

[70] In the case of *R. v. Hackett*, [1988] 67 Nfld & P.E.I. R. 353, fishery officers had received an anonymous phone call indicating that there were untagged traps being loaded on a vessel or vessels at Sea Cow Head Harbour. The officers proceeded to that harbour and began boarding fishing boats loaded with lobster traps to look for untagged traps. The fishing season was due to start within 18 hours. When the officers boarded the accused's boat, they saw two untagged traps, then found several more before the accused was contacted at his home and asked to attend at the wharf right away because of the untagged traps.

[71] In *R. v. Hackett, supra*, Chief Judge Thompson stated at paragraph 5:

[5] *Were the fisheries officers in the instant case conducting an "inspection" or a "search"?*

Black's Law Dictionary defines "inspection" as follows:

"A critical examination, close or careful scrutiny, a strict or prying examination, or an investigation".

Black's defines "search" as follows:

"An examination... with a view to the discovery of ... some evidence of guilt to be used in the prosecution of a criminal action for some crime or offence with which (a man) is charged".

[72] In **R. v. Hackett**, *supra*, the Court determined that the fishery officers had conducted a warrantless search, and not an inspection and as such, the Crown had the onus of establishing that the warrantless search was reasonable. In determining that the Crown had met that burden, Chief Judge Thompson stated:

[20] *In relation to the inspection of vessels and gear which is not situated in dwellings, I do not feel that a fisherman, who becomes involved in a regulated industry such as the fishery, can have a reasonable expectation of privacy to the point of not having property examined unless the enforcement officers have reasonable grounds to believe an offence has been committed.*

...[24] *Section 35 of the Fisheries Act provides that a fishery officer may enter vessels in order to carry out such inspections as he deems necessary to ensure compliance with the Act and the regulations. That provision, in my view, was intended by Parliament to cover situations involving not only routine inspections but also situations where there is insufficient evidence to justify the issuance of a warrant. To hold otherwise would be to hold that a fishery officer can examine a vessel with no grounds to do so whatsoever, other than the fact that there is gear on board, but that he cannot do so where he has information which is sufficient only to bring his grounds minimally above those which are sufficient to justify a routine inspection such as that set out above.*

[73] In **R. v. Kinnear**, [1997] CanLII4609 (PE SCTD) the fishery officers had received a tip about undersized lobsters being landed by three named boats and three named captains. The officers attended the wharf and carried out an inspection of the accused's catch, finding short (undersized) lobsters in it. The trial judge excluded the evidence on the basis it was a breach of section 8 of the **Charter**. On summary appeal, Justice Matheson stated:

[19] *In this case, the activity (lobster fishing) is permitted only under a license issued pursuant to the Fisheries Act. It is a highly regulated activity. The premises sought to be inspected was a lobster boat. The lobsters, which were the items sought to be inspected, are kept on the open deck. Fisheries Officer, Sheidow, testified he saw lobsters in the boat before he boarded it. In these circumstances, given the highly regulated nature of the activity sought to be inspected, the nature of the facilities, or premises, and the subject matter being inspected, the respondent had very little expectation of privacy. I agree with the comments of Chief Judge of the County Court Palmeto in R.v. Kent, [1991] 102 N.S.R. (2d) 181, where he states at p. 189:*

. . . I further accept that in a regulatory and administrative context persons subject to regulatory control must assume that those administering the regulations under which they operate can take reasonable measures to ensure compliance. . .

A person licensed under the Act must expect to be under the watchful eye of fishery officers. Fishery officers should expect to be able to take all such reasonable measures to ensure compliance with the Act and the Regulations. . .

[74] A further appeal to the PEI Court of Appeal in **Kinnear** was dismissed (**R v. Kinnear**, 1997 CanLII 4567 (PE SCAD)), and Chief Justice Mitchell stated as follows:

[3] *I agree with Matheson J. that the officers in the circumstances of this case were properly exercising their inspection function under s. 49 of the Fisheries Act when they boarded the appellant's vessel and examined his catch. The fact that the officers may have been prompted to do an inspection by a complaint does not change the character of what they were doing so as to require prior authorization under s. 49.1. See: R. v. Potash, (1994) 1994 CanLII 92 (SCC), 91 C.C.C. (3d) 315 (S.C.C.) per La Forest J. at p. 325 and L Heures-Dubé J. at p. 351. The appellant was engaged in a highly regulated industry and therefore had a correspondingly low expectation of privacy with respect to his vessel and catch. Furthermore, the degree of intrusion was minimal. Accordingly, I agree with Matheson J. that there was no unreasonable search or seizure in this case.*

[75] Similarly, in **R. v. Kinghorne**, 2002 NBPC 9 the trial judge found that the fishery officers were engaged in an inspection, as they were following up on information which raised a suspicion. He determined that the fishery officers did not have sufficient information to obtain a warrant, pursuant to section 49.1 of the Act. After reviewing the aforementioned cases, he stated:

[45] *From these three cases, **Kent, Hackett and Kinnear**, it appears clear that courts have recognized that the power to do an inspection pursuant to s. 49(1) of the Act is not limited to routine inspections where the subject vessel or premises is not selected for a specific reason. The power also includes inspections of vessels and premises selected for specific reasons such as from a tip, complaint or suspicion.*

[76] As in this case, the defence in **R. v. Kinghorne, supra** referred to the case of **R. v. German** (1991) 104 N.S.R. (2d) 298 (N.S.Co Ct.). In **German, supra**, fishery officers during a fish plant inspection, noticed a purchase slip for that date on the manager's desk. The manager put it in the drawer and gave the officers another purchase slip. Suspecting an offence, the officers returned without a warrant and took the slip which contained different information from the one given them.

[77] In **R. v. German, supra**, Haliburton, J. clearly made the distinction when he observed at para.20:

[20] *To reiterate, the consequences discussed here flow from the prior knowledge of the Fishery Officers; and the fact that they were investigating an offence which they believed on reasonable and probable grounds had taken place. As a consequence, they were obliged to follow the formula specified in s. 35.1. This situation is clearly distinguishable from one in which an officer discovers some evidence when carrying out his duties in accordance with s. 35 (now 49).*

By reason of that distinction, this case is quite different from the circumstances in R. v. Kent and R. v. Hackett, cases cited by Counsel.

[78] Subsequent appeals to Queens Bench (2003 NBQB 341) and to the Court of Appeal of New Brunswick (2005 NBCA 60) in the **Kinghorne** case were dismissed.

[79] While counsel provided many other cases, the ones I have referenced are the most relevant in this case.

APPLICATION OF THE LAW TO THE EVIDENCE:

[80] What information then did Officer Comeau have available to him, upon which to consider whether he had sufficient grounds to seek a search warrant pursuant to section 49.1 of the **Fisheries Act**.

[81] It is a sad and unfortunate comment, but Rosanne MacFarlane, Officer Wade MacKinnon and Officer Comeau in particular, all had a great deal of experience in dealing with fish kills.

[82] As noted, Ms MacFarlane testified that this was the seventeenth fish kill she had responded to since 2003.

[83] Officer MacKinnon testified that he has been involved in thirteen fish kills. Throughout his evidence, he made many references to the fact that throughout the walks that he and Ms MacFarlane took along the Clyde River on July 25th, 2016, he was trying to identify point sources of pollution.

[84] Officer MacKinnon testified that through that past experience, he knew that certain crops were at greater risk of being involved in a fish kill. He indicated that the lower risk crops were cereals, grains, legumes and soybeans, in part, because they received less chemical applications than a row crop would. He testified that a row crop, such as potatoes, carrots, turnips and could include cabbage, had inter row cultivation - in other words, there was exposed soil between the rows.

[85] Officer MacKinnon testified that it was standard procedure to obtain the pesticide records for the fields in the area. He indicated that under the **Pesticides Control Act**, farmers are required to keep detailed records of any pesticides applied, indicating, amongst other things, what was applied, when, by whom, and in what quantities. From the pesticides records, he indicated it was possible to determine what pesticides were applied to all of the fields in the area.

[86] Officer MacKinnon had directed Officer Schofield to obtain these pesticides records, and he received the records from Officer Jay, and then provided them to Officer Comeau on July 28th. In respect of the “*three little fields*”, Bravo and oil was applied on July 16th and July 20th as well as on the same dates to the “*pit track field*”. These fields are part of Parcel PID 219725.

[87] On cross-examination, Officer MacKinnon indicated that runoff from the potato field in question was obvious. He indicated that the common element most of the time in the thirteen fish kills he had been involved in since 2011 is a row crop. He testified that it is what leaves the field

that causes problems. As to pesticides, he indicated that there are thousands of registered products, but was aware that Bravo was one that was commonly used in P. E. I.

[88] Officer Comeau indicated it was the seventh fish kill in P. E. I. that he had been involved in. He indicated that he was aware that some courts had determined that sediment could be considered a deleterious substance. In his testimony, he indicated that they were looking for sources of pollution. He was also aware that the active ingredient in Bravo was considered to be deleterious.

[89] Fish kills in this province have, unfortunately, become very well known. As one would expect, they attract a great deal of attention from the communities affected, from the agriculture community, the environmental community, and the general public.

[90] To summarize the evidence of the various witnesses who have had experience with the many fish kills in this Province, they indicated that there is usually a heavy rain, either in intensity or duration or both, during the summer months when agricultural crops have been planted. Those who engage in commercial farming operations spray those crops with chemicals to prevent disease and/or eliminate pests and have end products that will be saleable. In the event of recent spraying of commercial crops, if there is heavy rain the products used may not have completely absorbed, or if absorbed into the soil, and there is runoff due to soil erosion, then those chemicals may leave the field. If the buffer zones required to be in place are not adequate to handle such circumstances, and the witnesses referred to the various buffer zones established in this matter, the runoff may enter the many rivers and waterways that are prevalent in this province.

[91] What then did Officer Comeau know?

[92] Officer Comeau had been involved in seven fish kills in P. E. I., and several others in New Brunswick. He was working with at least two people who had more local experience with fish kills than he did, Officer MacKinnon and Ms MacFarlane. Both were on site. They were communicating back and forth. They were meeting up at various times.

[93] Officer Comeau knew that there were many dead fish in the Clyde River and that there was no indication of a hypoxic event. Some live fish were found in the river and the dead fish were located below the Colville and Wynn Roads intersections. There was a large potato field at that point, with an indication that there was soil erosion in it. The field was in close proximity to the Clyde River, which essentially is described as running along side the Colville Road for a distance in the ditch to that road, before it passes through a culvert. There had been heavy rain the day before, and there were signs of heavy rain, with the grass being bent, signs of high water in the river and sediment displaced, including some on the road.

[94] Officer Comeau would have been aware that in past fish kills, fields sprayed recently with pesticides, in particular, potato fields, were particularly susceptible to erosion and to having the pesticides from the field leave the field and enter the nearby waterways.

[95] Although Officer Comeau asked Mr Docherty what he sprayed on the field and when, he had already taken the samples from the field at that time. Officer Comeau could have made a demand for the pesticides records that evening - or had one of the provincial conservation officers do so. If he had done that on July 25th, instead of, I believe the evidence indicated it was the July 27th or 28th before that occurred, he would have known that Bravo had been applied recently to that field and to the various portions of that field.

[96] Officer MacKinnon and Officer Comeau, in particular, indicated throughout their testimony that they were searching for the source of the pollutant. From that testimony, it is clear that both of them believed that there was a pollutant in the river where the dead fish were located. While they did not know the specifics of what that pollutant was until they had the water analyzed, they both testified to the belief they had of there being a pollutant in the water. They were looking for the source of that pollutant, as you would expect them to do.

[97] Considering where the dead fish were downstream from, and the obvious signs of erosion leaving the potato field in question, on July 25th, 2016 Officer Comeau would have had reasonable grounds to believe that a deleterious substance had been discharged from parcel PID 219725 and entered waters frequented by fish or waters leading to that. It could have been sediment, as found by some courts or it could have been pesticides.

[98] To obtain a warrant, Officer Comeau would not have to know the specific substance or its chemical composition. Had he asked for the spray records from Skye View Farms on July 25th, he would have had more than enough information, given his knowledge of Bravo and the indication that it had been recently applied to the fields in parcel PID 219725.

[99] In the case of **R. v. Wilcox**, 2001 NSCA 45 (CanLII), Cromwell, J.A. stated the following, as to the test to be applied:

[39] The foundation of the respondents' argument is that the officers had reasonable and probable grounds. The trial judge considered this issue. That consideration required him to make findings of fact as to the knowledge and belief of the fisheries officers and to apply to those findings the legal standard for obtaining a warrant. Simply put, the judge had to determine whether the knowledge and belief of the fisheries officers were such that "credibly based probability" had replaced "suspicion": see Hunter v. Southam, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 at 167.

[100] Since the Provincial Court Judges of this Province have been responsible for the issuance of any search warrants or production orders for the last four years, while the issue of the independence of the justices of the peace is addressed, I have had many occasions during that time to review informations to obtain a warrant or productions order, and I have a much better appreciation of what is required, as a result.

[101] To obtain a search warrant, one does not need to have all of the evidence that a particular person committed a particular offence in a particular way.

[102] For example, if a person goes to the police and complains that she lost her cheque book and has now been advised by her bank that a number of cheques were written on her account by a person she does not know, the police may seek a production order to compel the bank to provide the details of the account holder who cashed the cheques. If there is an indication that the cheques were deposited by way of an ATM, and that there is a camera showing who used that ATM at the time of the deposit, a production order would normally be granted for the police to obtain a copy of that video.

[103] In neither case would the police know who had written the fraudulent cheques, because the signature on the cheque may not match the account holder's name nor the person using the ATM to make the deposit. However, the results of those production orders may go a long way in the police determining if a crime occurred, and by whom it was committed.

[104] On occasion, judges or justices of the peace have issued warrants for the collection of DNA. Instead of linking the individuals who were then the subject of the warrant for the DNA, it was then determined that such suspect was not responsible for the alleged offence, as a match was not made. In those cases the police officer had a reasonable belief that the suspect was involved, but the results of the DNA warrant showed otherwise.

[105] Applying the facts of this case to section 49.1 of the *Fisheries Act*, that section requires:

- an ex parte application,
- information on oath that are reasonable grounds to believe:
 - that there is any place (which the legislation indicates includes any premises, vessel or vehicle, so that the potato field would fall within that definition),
 - any fish
 - or other thing
 - that will afford evidence
 - in respect of a contravention of the *Fisheries Act* or the regulations.

[106] Officer Comeau had personal knowledge of past fish kills, namely seven on P. E. I.

[107] As well, Officer Comeau could have obtained additional information from Officer MacKinnon and Ms MacFarlane from their even more extensive experiences, to supplement his personal knowledge of what had happened in past fish kills, namely: of how row crops were usually implicated in such; of how row crops in commercial operations were routinely sprayed with pesticides, some of which pesticides had been determined to be deleterious substances in other cases; of his observations of Parcel 219725, showing it sloped towards the Colville Road and Clyde River; of his and the observations of the other fishery and conservation officers at the scene that the dead fish were all located downstream of the Colville Road and that the likely point of pollution would not be where live fish were found; of the recent heavy rain event the day previous, as evidenced by the signs he observed of such and the information of the others at the scene; as well as Officer Comeau's belief that there was a pollutant in the Clyde River, as opposed to a hypoxic event that had contributed to the death of the fish.

[108] All of the above-noted information was within the personal knowledge of Officer Comeau and his ability to gather that could have been supplemented by the personal knowledge of Rosanne MacFarlane and Officer Wade MacKinnon.

[109] While Officer Comeau did not know initially, at the time that the foliage samples were taken from the potato field, as to what pesticides had been applied to the field and when, that information would have been available to him, had the pesticide records been requested immediately.

[110] This was not a case where no one knew who owned the field in question. It was not in an isolated area. The maps and testimony in this case clearly established that Officer MacKinnon was quite familiar with the field in question, that he knew Alex Docherty was the President of the company listed as the owner of the field and that Alex Docherty's house was in the immediate area of the field.

[111] Even without having the actual spray records for Skye View Farms, I am satisfied that Officer Comeau's knowledge and belief were sufficient to support the legal standard for obtaining a warrant pursuant to section 49.1 of the *Fisheries Act*.

[112] Applying the test as set out in *R. v. Wilcox, supra*, the facts that I have found, as set out above as to the knowledge and belief of Officer Comeau, I am satisfied that they are sufficient to meet the legal standard for obtaining a warrant. I am satisfied on the evidence in this case that Officer Comeau's knowledge and beliefs were such that there was a credibly based probability. This was not a question of simply just a suspicion.

[113] From a review of all of the evidence in this matter, I am satisfied that this was **not** an inspection, carried out pursuant to the authority in section 49(1) of the *Fisheries Act*.

[114] From the onset of the attendance of the fishery officers at the site, this clearly was an investigation, and as such, Officer Comeau and the other fishery officers required a warrant, pursuant to section 49.1 of the *Fisheries Act*, before they could enter on parcel 219725, take measurements, obtain any samples or take pictures and videos on that property.

[115] Given my determination that a warrant was required before the fishery officers could go on parcel 219725 and take samples, make videos and take pictures, what occurred was a warrant-less search and the defence has established, on a balance of probabilities, that the accused's section 8 *Charter* rights have been breached.

[116] As noted earlier, the Crown must then show that the warrant-less search was reasonable. The Crown has submitted that there is little or no reasonable expectation of privacy in a potato field. The Crown has further submitted that because farming is a highly regulated industry, those who participate in such industries have a lower expectation of privacy, as they will be subject to inspections to ensure compliance with the many acts and regulations that they are subject to.

[117] In respect of that argument, Crown counsel has cited the *King* decision. It must be remembered that in the *Kinnear*, *King* and *Kinghorne* cases, referred to previously, each of

those dealt with individuals who were fishers, and the provisions of the *Fisheries Act* to conduct inspections of their vessels or catch to ensure compliance with the regulations they were subject to. The courts indicated that each of those individuals were given a license to fish and that they should not expect to be exempt from inspection in such a regulated industry.

[118] It is well acknowledged that farming is also a regulated industry, but a license to farm is not the norm, as it is for a fisherman.

[119] The Crown submitted that because there were no signs posted or fences to exclude unauthorized entry, that there should be a finding that the accused had no reasonable expectation of privacy in the potato field in question.

[120] Several matters stood out during the testimony of a number of the witnesses. Rosanne MacFarlane indicated she saw the potato field but never went in it as she did not do investigations. Her role was cleanup and restoration.

[121] Officer Wade MacKinnon made a point of stating, several times, during his testimony that he never went in the potato fields in question, parcel PID 219725.

[122] Officer Donovan stressed during his testimony that he never went in the potato field while Officer Richard was taking the foliage samples there, and I already quoted from his comments earlier in this decision.

[123] Each and every one of the four fishery officers, Ms MacFarlane and Officer MacKinnon testified that before they started any of their walks in this area, and before they went in the Clyde River or the potato field, each and every one of them disinfected their boots with a spray that had been provided to them by the Department of Agriculture. When questioned on why this was done, even by those who made note of the fact that they never went into the field, each witness indicated that it was routinely done when around potato fields to ensure there was no spreading of disease.

[124] The actions and testimony of the fishery and conservation officers at the Clyde River in this matter establishes that, while reduced from what one would have with a home, a car, or perhaps even an outbuilding, they appreciated that there was a privacy issue at play in regards to the property, the potato field, in question.

[125] While diminished from what one would have with those other situations, such as a home, or a motor vehicle, for example, I am satisfied that the evidence in this case established that the accused did have a reasonable expectation of privacy in the potato field in question.

[126] The Crown has failed to meet the burden of establishing, on a balance of probabilities, that the warrantless search which was conducted in this matter was reasonable.

[127] The next issue to be determined is what effect, if any, should the breach of the accused's section 8 *Charter* rights have in this case.

[128] Defence counsel has urged this court to exclude the evidence obtained in respect of the breach of the accused's **Charter** rights.

[129] The Supreme Court of Canada has provided direction in this regard in **R. v. Grant** 2009 S.C.C. 32 (Can LII) as to how section 24 (2) of the **Charter** should be applied. Writing for the majority, McLachlin C.J. and Charron J. stated as follows:

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

(a) Seriousness of the Charter-Infringing State Conduct

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter Charter breaches, although deterrence of Charter breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the Charter.

[74] *State conduct resulting in Charter violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of Charter rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.*

[75] *Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a Charter breach: R. v. Silveira, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, per Cory J. “Good faith” on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: R. v. Genest, 1989 CanLII 109 (SCC), [1989] 1 S.C.R. 59, at p. 87, per Dickson C.J.; R. v. Kokesch, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, at pp. 32-33, per Sopinka J.; R. v. Buhay, 2003 SCC 30 (CanLII), [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the Charter by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established Charter standards tends to support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.*

[130] Applying that direction to the case at bar, the breach in this case is a serious matter. There is no question that the fishery officers have wide powers of inspection, and the cases I have referred to have indicated why that is.

[131] However, in this case, it is clear that little or no thought was directed to obtaining a warrant before the samples from the potato field were taken.

[132] It was noteworthy that when asked about the inspection powers in section 49 of the **Fisheries Act**, Officer Comeau practically recited the section off by heart. When he was asked about the provisions of section 49.1 of the **Act**, he indicated he would need to see a copy of the section to see exactly what it said.

[133] Officer Comeau is an experienced fishery officer, well educated with a bachelor’s degree in chemistry and a Masters of Environmental Studies. Unfortunately, he is also very experienced in the subject matter of this case, dealing with a fish kill.

[134] This is not a case where Officer Comeau was presented with a unique or unexpected situation. Testimony indicated that there is a emergency phone number and an established

protocol as to how fish kills are to be dealt with. As noted above, all of those factors contribute to this breach of the *Charter* being a serious matter, not a trifling one.

[135] Returning to the case of *R. v. Grant, supra*, the Supreme Court of Canada stated as follows in respect of the impact on the Charter-protected interests of the accused:

[76] This inquiry focuses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the Charter include the s. 7 right to silence, or to choose whether or not to speak to authorities (Hebert)- all stemming from the principle against self-incrimination: R. v. White, 1999 CanLII 689 (SCC), [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[78] Similarly, an unreasonable search contrary to s. 8 of the Charter may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[136] There is no question that the impact of a search of a potato field, without a warrant, does not have the same impact on an accused as a body search, or a statement taken without the right to counsel being provided.

[137] In this case, however, the search in question, which occurred in 2016, did not result in a charge being laid until October, 2018. Given the nature of the charge and the type of evidence that defence might wish to present in respect of it, the accused's ability to present a full answer and defence may have been significantly impacted, by the manner in which this matter proceeded.

[138] As noted in summation by defence counsel, had the accused been served with a warrant to search the property and to obtain the samples from that property, the accused would have been alerted to the possibility that they might face charges and might have made efforts to obtain information themselves at that time with respect to any potential defence that they might want to mount.

[139] One aspect that was noted in the testimony was that Officer Comeau indicated that the established protocol for dealing with a fish kill involved taking samples of soil, but that was not done in the present case. Officer Comeau testified that was not done in this case, nor were any of the other officers requested to take soil samples, because it had not shown any results in past cases.

[140] However, two and a half years later, when the charges were laid, the defence may well have lost the opportunity to obtain its own samples in respect of the soil, since the condition of the soil two and a half years later may not be the same as it was at the time, in July, 2016. They definitely would not be obtaining any relevant samples of water and foliage, with those matters long having passed on from the state that they were in during July 2016.

[141] This certainly is not of the same category, as I noted, of some types of searches that could have been undertaken. I also have to consider as well that there was not the same high expectation of privacy here, given that it was a potato field, as there would have been, for example, in a home, but there may well have been an impact on the accused's ability to make full answer and defence.

[142] In *R. v. Grant, supra*, the third branch that the court is to look at is society's interest in an adjudication on the merits, and the Court stated as follows:

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": R. v. Askov, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in Collins that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see R. v. Wray, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

[81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the

truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[82] *The fact that the evidence obtained in breach of the Charter may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to “balance the interests of truth with the integrity of the justice system”:* Mann, at para. 57, per Iacobucci J. *The court must ask “whether the vindication of the specific Charter violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial”:* R. v. Kitaitchik (2002), 2002 CanLII 45000 (ON CA), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, per Doherty J.A.

[83] *The importance of the evidence to the prosecution’s case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.*

[84] *It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society’s interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)’s focus. As pointed out in Burlingham, the goals furthered by s. 24(2) “operate independently of the type of crime for which the individual stands accused” (para. 51). And as Lamer J. observed in Collins, “[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority” (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.”*

[143] As noted earlier, fish kills in this province are certainly a matter of great concern and a great deal of angst. The implications of such fish kills are extremely serious and many laws have been implemented in this province in an effort to eliminate, or at least reduce, the possibility of such events occurring.

[144] There is no question that society's interest in having this case adjudicated on its merits is quite high to determine what, if in fact it is possible to determine, may have led to the difficulties in the Clyde River in July, 2016. Certainly the public has an interest in having that issue determined.

[145] As noted in *R. v. Grant, supra*, these are the three lines of inquiry that the Court has to look at in determining how a breach of the *Charter* should be dealt with, and whether or not evidence obtained as a result of the *Charter* breach should be excluded, or not.

[146] The Supreme Court of Canada in *R. v. Grant, supra*, makes it quite clear that there is no magic formula to be applied as to which, if any, of those three lines of inquiry had more impact. It is a question of balancing. It is a question of applying the facts of the particular matter that is before the Court and assessing in respect of the particular circumstances, how each of those lines of inquiry play out, and in which, if any, or if all of them have equal significance and impact. It is a question of balance. It is a question of weighing the various indications.

[147] Something that I neglected to mention earlier should be noted in respect of this matter when we are dealing with the reasonable expectation of privacy. It was acknowledged by defence counsel that there was certainly no reasonable expectation of privacy with respect to any of the samples that were taken in the public waterways, in the Clyde River, or in the public ditch. There are no privacy interests there to be protected. Certainly it was acknowledged that any actions that were taken by the officers in respect to obtaining samples in those public areas, such as government owned property or waterways, that although warrant-less, that there would be no requirement in respect of those matters for a warrant to have been obtained.

[148] With respect to the searches that were conducted warrant-less, which I found Crown has not justified, those are the ones in respect of the potato field. It is in respect of the private property that was entered upon and the searches and the samples, the evidence that was obtained from that area, that is what is at issue in this particular matter.

[149] Certainly, as I have said many times today, fish kills in this province are a matter of great concern. They attract a great deal of attention. They have resulted in a great deal of legislation in this province.

[150] What we have in this particular case is a report of a fish kill. Immediately upon arriving at the scene, there is a belief by the Fishery Officers and Conservation Officers that there are dead fish and that there is a pollutant in the water, and the efforts over the next few hours are to determine the source of that pollutant. The samples that are taken, other than those that are from the ditch and the river, the water samples, are taken from PID 219725, a potato field. I stand to be corrected but I believe there is only one sample that was taken, other than from that area, (PID 219725), one other foliage sample, or perhaps one water sample, in respect to this matter.

[151] From a review of the evidence and the testimony in this matter, it was quite clear when you look at it objectively, that the belief was that run-off had left that field, PID 219725, that it probably contained chemicals, since it was a potato field in the middle of the summer when chemicals would ordinarily be applied to it, and that those chemicals had run off into the water

and were a factor as to why there were dead fish in that water system, downstream from that point.

[152] This was not an inspection, as I have already noted. It is in stark contrast to the inspection that was carried out earlier that day by Officer Mitchell Jay, acting on the direction of Officer Shawn Schofield, in response to a complaint about a buffer zone violation. That was an inspection at the same property earlier that same day.

[153] This was an investigation to establish that there were pesticides in the potato field, that there were pesticides in the water and to ensure that a direct link between the two was obtained.

[154] I made the comment during the course of the proceedings and the case law is extremely clear on this point. An offence under s. 36(3) of the *Fisheries Act* does not require the Crown to prove that the deleterious substance caused the death of the fish. All that the Crown has to prove is that it was a deleterious substance, that it was discharged into waters frequented by fish. I read the definition earlier as to all the various possibilities and permutations that are there, as to how that can occur.

[155] This was a case in which we had extremely experienced and knowledgeable fishery officers, a biologist, and conservation officers at the scene. They had a great deal of experience in past fish kills in this province, as to how they were, what had happened, and what was considered to be likely sources of those past incidents.

[156] Chief Conservation Officer McKinnon testified it was the same every time. There was a procedure and he outlined the procedure: attend, assess, obtain information in respect to the matter. They were looking for sources of pollution. They were trying to determine a direct link to the potato field and the event that had caused the mortality of the fish. That is why they were there. That is why they were taking the samples. They had more than enough information, even without the pesticide records, to obtain a warrant. They did not turn their minds to it. The fishery officers claimed that their broad powers of inspection were sufficient, that they could do anything that they wanted, which is what they did in respect of the matter. They took a measurement of the buffer zone, although the evidence of Officer Comeau was that was not anything that was regulated under the *Fisheries Act*. It is under the provincial legislation that buffer zones are regulated.

[157] In my view, although I would anticipate that the impact of the decision in this matter will have a significant negative impact on the Crown's case in this matter, as the Supreme Court of Canada has said on many occasions, as have many other courts across this country, that there is not much point in having a *Charter* right if it's not protected.

[158] If there are procedures that need to be followed and they are ignored, where there are legislative avenues available to obtain the evidence that you need, then when you do not take them, the Court should not reward individuals who follow that course of activity. If you are looking to establish an offence, you follow the procedures that are there, you use the tools that are provided to you to get the evidence in a proper manner.

[159] As noted earlier, I have considered that the *Fisheries Act* provides wide powers to fishery officers to conduct an inspection.

[160] The cases I have referred to have indicated that the powers of inspection as set out in section 49(1) of the *Fisheries Act* are necessary for fishery officers to ensure compliance with the provisions of that *Act*. Those cases also indicate that for those engaged in the fishing industry, whether as licensed fishers or those licensed to operate fish plants, for example, given it is a licensed activity, their reasonable expectation of privacy is lower.

[161] The accused in this case are not participants in the fishing industry. They are not licensed fishers nor do they operate a fish plant, for example. They are farmers, and because some of their property is near a river, they are affected by some of the provisions of the *Fisheries Act*, with section 36(3) being one in particular.

[162] This case is distinguishable from many referred to, on that basis.

[163] However, as wide as the powers of inspection are, Parliament has clearly indicated in section 49.1 of the *Fisheries Act* that there are situations in which a warrant will be required.

[164] In this case, I have found that the actions of the federal fishery officers and provincial conservation officers constituted an investigation, almost immediately from their arrival at the scene.

[165] In conclusion, for the reasons stated earlier, I am satisfied that the *Charter* infringing state conduct, namely the warrantless searches, was serious. It had a significant impact on the *Charter* protected interests of the accused. Finally, I acknowledge that society does have a significant interest in the adjudication of this case on its merits, given the prevalence of fish kills in this province.

[166] In applying the test, as set out by the Supreme Court of Canada in *R. v. Grant, supra*, and weighing those three lines of inquiry, I have determined that admitting the evidence obtained in this matter in violation of the *Charter* would indeed bring the administration of justice into disrepute, in the short term, as well as in the long term.

[167] As a result, the evidence obtained in violation of section 8 of the *Charter* is hereby excluded, pursuant to section 24(2) of the *Charter*.

[168] This matter will be adjourned until Wednesday, July 3rd, 2019 at 10:30 a.m. for the Crown to decide how it wishes to proceed.

Dated at Charlottetown, Queens County, Prince Edward Island this 26th day of June, 2019.

Sgd NKOr

Nancy K. Orr
Chief Judge of the Provincial Court
of Prince Edward Island