Action No.: 110339678P1
E-File No.: RCP13MATHERD
Appeal No.: _____

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF RED DEER

HER MAJESTY THE QUEEN

v.

DALE ANDREW MATHER

Accused

T R I A L
EXCERPT

Red Deer, Alberta
November 30, 2012

Transcript Management Services, Regional
4909 - 48 Avenue
Red Deer, Alberta T4N 3T5
Phone: (403) 340-5235 Fax: (403) 340-7986

TABLE OF CONTENTS

Proceedings taken in the Provincial Court of Alberta, Courthouse, Red Deer, Alberta

---

November 30, 2012	Morning session
The Honourable Judge Deck	Provincial Court of Alberta
S. L. McRory	For the Crown
T. M. Dawe	For the Accused
G. Cook	Court Clerk

Reasons for Judgment

THE COURT: Dale Andrew Mather has been charged with two offences under the *Water Act*. The Information alleges the following:

> Count 1: On or about the 1st day of September, 2009, at or near Gull Lake in the Province of Alberta, did willfully commence or continue an activity without an approval or as otherwise authorized under the *Water Act*, and did thereby commit an offence contrary to section 142(2)(f) of the *Water Act*.
>
> Count 2: On or about the 1st day of September, 2009, at or near Gull Lake in the Province of Alberta, did commence or continue an activity without an approval, or as otherwise authorized under the *Water Act*, and did thereby commit an offence contrary to section 142(1)(h) of the *Water Act*.

The evidence in this matter was heard from June 11th to June 15th, 2012. At the conclusion of the evidence I pointed out to counsel that section 142(2)(f) does not refer to a person "willfully" commencing or continuing an activity. Rather, it refers to a person who "knowingly" commences or continues an activity. I asked counsel to address this matter in their written argument.

The activity in question was the removal of vegetation from the shore area of Gull Lake by a contractor retained by Mr. Mather.

Angela Fulton administers the *Water Act* in the Red Deer area for Alberta Environment, and has done so for 20 years. She testified that for many years the Summer Village of Gull Lake (which I will simply refer to as the Summer Village) graded, harrowed, and raked the full beach area within their boundaries. Alberta Environment and Alberta

Sustainable Resource Development were concerned about this. While some people may see reeds in the shoreline area as ugly, the reeds protect the shoreline, was Ms. Fulton's evidence.

Ms. Fulton testified that the Summer Village made an application to Alberta Environmental Protection, more recently known as Alberta Environment (and which I shall refer to from now on as Alberta Environment) to maintain 100 percent of the shoreline as beach. On July 14th, 2000, Alberta Environment issued an approval under the *Water Act* which allowed for the removal of vegetation to a maximum of 20 percent of the beach.

Subsequently, Alberta Environment and Alberta Fish and Wildlife met with the mayor of the Summer Village and educated him about the benefit of allowing some of the beach to be left in its natural state. Also, the Summer Village did not have sufficient funds to continue to maintain the entire beach. As a result, Alberta Environment and the Summer Village agreed that the Summer Village would submit a revised application, which was dated July 27th, 2000, in which the Summer Village would commence improving 25 percent of the beach. In their application amendment letter the Summer Village advised Alberta Environment that the Summer Village would continue further avenues available to them under the *Water Act*, to seek to increase the allowable improvement [to] somewhere between 25 and 100 percent of the beach.

Attached to that application amendment was a drawing indicating the sections of shoreline that the Summer Village was going to maintain as beach. The plan specified that beach development would be completed at nine locations, each approximately 74 metres in width. The nine areas were subsequently referred to by the Summer Village residents as" pods".

On September 1, 2000, Alberta Environment issued an approval to the Summer Village pursuant to the *Water Act*, which approval was to expire on September 30, 2001. The approval included the proposed community beach areas and specified that the Summer Village would ensure that activity was confined to the work area designated on the plans or to areas prescribed in the approval. The approval allowed the Summer Village to rake/harrow the shore (high to low water level) in order to retard vegetation growth and to remove vegetation in the water to a distance of 40 metres past the water's edge when necessary.

Approvals were extended and new approvals were given by Alberta Environment from time to time. The approval that was in place in September 2009 was granted on November 15th, 2007, and was due to expire on September 14th, 2011. That approval was based on an application letter submitted by the Summer Village dated September

28th, 2007. I may be in error, that might expire on September 14th, 2009. And I do not have that copy of the exhibit with me. In any event, the November 15th, 2007 approval was the one in effect on the day in question.

So the approval was based on an application letter submitted by the Summer Village dated September 28th, 2007. The Summer Village had been unable to develop all of the pods set out in the original plan, therefore, in their September 28th, 2007 application they sought approval to complete the development of the most easterly pods. They specified that the sandy beaches in the easterly pods would be. . . "maintained vegetation free during the spring and summer months thereafter in the same manner as those existing in the rest of the Village by the Village foreman".

The beach pods have sand with no vegetation. Between the beach pods is natural vegetation which helped the overall health of the lake for fish. The implementation of the beach pods was a plan to attempt to balance the community use of the beach with the needs of the fish and wildlife.

Notices of the initial applications were advertised in the local papers. No notice was published with respect to the 2007 application as it was viewed by Alberta Environment as part of an earlier application. The Summer Village could choose whoever they liked to conduct the work, which was the subject of the approval, as long as the person doing the work complied with the approval. The person at the Summer Village who decided which person would do the work, which was the subject of the approval, was their maintenance foremen. He would also decide what work could or could not be done under the approval.

Ms. Fulton had met Ernie Wiebe and a previous mayor of the Summer Village at site visits early on. She believed that Mr. Wiebe was present when they discussed what could be done under the approvals. Ms. Fulton would only know if the terms of the approval were not being complied with if complaints were made to Alberta Environment's compliance department. She does not walk the shore area to check for compliance.

Ms. Fulton testified that their enabling legislation precludes Alberta Environment from delegating their approval authority to anybody else. Ms. Fulton is responsible for processing applications for activities that affect water management. Written applications must be submitted. When an application is received she will typically review it to see how the proposed activity will affect the lake. She also refers the application to other government departments for their input. The advice that Alberta Environment received from Fisheries Management regarding the Summer Village applications was that fish do use the areas that were proposed for pods as part of the fish life span.

Ms. Fulton holds the files for any approvals granted for activity at Gull Lake. No application was made by Dale Mather or Kyle Mather with respect to activity at Gull Lake.

Ms. Fulton attended at the Summer Village annual general meeting on July 12, 2008. She met Dale Mather briefly before the meeting. He was interested in accretion, which is not her specialty, so she gave him one of her business cards and suggested that he talk to other people in her office. He was also interested in the lake shore and she invited him to come into the meeting. She was unable to recall whether he did go into the meeting.

Kimball Sanderson testified that he has been going to Gull Lake since he was born, and he has had a cabin there since 1999. He testified that years ago the entire beach was cleared, but he knew that now only certain areas are approved for beaches, and the areas between the beaches are not cleared of vegetation. He learned this from the Gull Lake newsletter that was distributed to home owners. When he was asked who he believed was responsible for the maintenance of the sandy beaches and the beach generally, Mr. Sanderson replied, the Village. He said that some people do pick up weeds in front of their place, and he did not know if they had obtained permission to do so. He testified that he did not know of anybody giving permission for clearing by the lake other than the Summer Village. He also testified that the Summer Village mows down to the high water mark in the areas where vegetation is growing.

On August 11, 2009, Mr. Sanderson and his father-in-law were walking on the beach at Gull Lake when they noticed a large patch of brown reeds in the water adjacent to an area in which the reeds were green. His father believed that this brown colour was indicative of the reeds having been sprayed recently, and he encouraged Mr. Sanderson to report this to Alberta Environment. Mr. Sanderson took pictures of what they saw and he reported this to Alberta Environment.

Todd Urquhart is an Environmental Protection Officer/Investigator with the Red Deer office of Alberta Environment. He received a notification from the department's call centre that it had received a call on August 10, 2009 from a caller who identified himself as Trevor Wannop, mayor of the Summer Village of Gull Lake. The caller made a complaint in which he alleged that someone had sprayed some reeds in the lake. Mr. Urquhart called Mr. Wannop to obtain more information, and then Mr. Urquhart scheduled a site visit for August 13th, 2009. A further complaint was received from Kim Sanderson on August 11, 2009.

On August 13th, 2009, Mr. Urquhart along with Bryan Thornton, who was another Environmental Protection Officer, went to a location he understood to be 81 Lakeview Drive in the Summer Village, the location of the alleged incident. A map entered as an

exhibit indicated that the location is known as Lakeview Avenue. They met Matt Formold (phonetic) there, Mr. Formold is an officer with what was then Sustainable Resource Development, which has now been combined with Alberta Environment to form one department. I will refer to Sustainable Resource Development as SRD.

At that location, Mr. Urquhart met with a person who identified himself as Dale Mather, the accused. Mr. Urquhart told Mr. Mather that he was there because of complaints of alleged spraying of reeds within Gull Lake. Mr. Urquhart testified that he asked Mr. Mather how far he had sprayed into the water, and Mr. Mather denied that he had sprayed the reeds. Mr. Mather said that anyone, such as the Village, could have done it, as there are lots of people who frequent the beach at any given time. Mr. Urquhart testified that he then provided Mr. Mather with his business card and advised him that spraying of reeds or the removal of reeds without approval is a serious offence under the *Water Act*.

When he was asked under cross-examination if he had a specific recollection of his educating Mr. Mather, Mr. Urquhart reiterated that he told Mr. Mather on August 13th that the spraying or removal of reeds without an approval was a serious offence under the *Water Act*, and he also told Mr. Mather that he would need an approval from Alberta Environment. They are the same people who had an agreement with the Summer Village. Mr. Urquhart testified that he told Mr. Mather that he was interested in finding out who did the spraying, and asked Mr. Mather to contact Mr. Urquhart should he hear or know of anyone who actually did the spraying.

The four men then went to the waters edge. Mr. Urquhart observed that the reeds appeared to be dead, and they were red and brown in colour. There was a discussion there regarding the bed and shore of the lake. Mr. Urquhart was asked whether Mr. Mather seemed to hear what Mr. Urquhart was saying when he said that the spraying or removal of the reeds was a serious offence. Mr. Urquhart responded by saying, "yes, he reiterated that he did not do it".

Mr. Urquhart took a number of photos of the sprayed area which was approximately 30 to 40 metres in width, and about 25 metres deep. He testified that the location of the spraying seemed to be right in front of the Mather property. However, the legal lots run north, south, but people have paths to the shore that are not aligned with the lot lines. When the lot lines were plotted on an aerial photo of the affected area it was clear that the affected area was outside the area immediately north of the titled area of Mr. Mather’s lots.

Mr. Urquhart took samples of the dead reeds. He eventually closed his file. He was convinced that there was a contravention of the relevant legislation, but he was of the

opinion that he could not proceed with the investigation unless someone came forward who could identify the person who did the spraying.

Bryan Thornton accompanied Mr. Urquhart to the site on August 13th, 2009. He observed four one litre Killex bottles on the ground between the beach and the Mather residence. He understood that Killex was a herbicide used on broadleaves not grasses. He also saw a sprayer tank that would be pulled behind a vehicle next to the Mather residence.

Mr. Urquhart received information that there had been a call to the department's 24 hour complaint line on August 30th, 2009 alleging that a track hoe was doing work on the beach near the Mather property. The complainant had identified himself as Trevor Wannop, the mayor of the Summer Village. Mr. Urquhart and Lorne Cole, an SRD officer, attended at the Mather property on August 31, 2009. The hoe was on the Mather property, not the beach, and was not operating. There were hoe tracks around the Mather property. Nobody was present.

Mr. Urquhart testified that given that he had educated Mr. Mather on August 13th that spraying or removing reeds was a serious offence under the *Water Act*, he thought this was not an issue and that the hoe was not there to work on the beach. He left the scene as there was no contravention.

Wayne Adrian was the operator of the piece of equipment in question, which he referred to as an excavator rather than a hoe. The excavator was owned by a corporation which Mr. Adrian had an interest in. Mr. Mather hired Mr. Adrian, or his corporation, by the hour to do some work around the Mather property. Mr. Mather told him what to do. Initially the work was cleaning up the yard, building a firepit, cleaning some sand berms, moving a gazebo, and moving some big rocks on the property. There had been some discussion about doing work on the beach. It was Mr. Adrian's evidence that he asked Mr. Mather whether he wanted work done on the beach, and Mr. Mather said, check with Ernie. Mr. Mather never told Mr. Adrian to check with anybody else. Mr. Adrian did not know anything about permits at that time.

Mr. Adrian testified that he checked with Ernie and he said, yeah, but don't go in the water. Mr. Adrian testified that Mr. Mather told Mr. Adrian that he had riparian rights, which meant he had rights to the water's edge. Mr. Wiebe had also told Mr. Adrian that Mr. Mather had riparian rights. Mr. Adrian testified that Mr. Mather did not tell Mr. Adrian about previous dealings that Mr. Mather had had with the government officials regarding the beach. Mr. Adrian had no knowledge that Mr. Mather had dealings with other government officials regarding the beach.

Mr. Mather wanted a clear pod on the beach like the other places along the shore. Mr. Adrian testified that he made a mark with the excavator, left it for about a week, and then asked Mr. Wiebe if it was okay to work from the mark, and that Mr. Wiebe said it was. About another week later he again asked Mr. Wiebe if it was okay to work, and he said it was, because Mr. Mather had riparian rights.

Mr. Adrian testified that he made it clear to Mr. Wiebe that he would not do that work with permission. He testified that he did the work because he thought that Mr. Wiebe had the necessary authority to grant permission, and that he made it clear to Mr. Wiebe that he would not do the work without permission from Mr. Wiebe. Mr. Adrian testified that Mr. Wiebe did not refer Mr. Adrian to any other government agencies that would have to be consulted before the work was commenced.

Mr. Adrian testified that he started scratching the reeds off the beach with the excavator and putting the material from the beach into a pile. He testified that he worked one day and then came back a day or two later to continue. He testified that Mr. Wiebe drove by where Mr. Adrian was working on a regular basis, as Mr. Wiebe was on his way to work on other pods.

When Mr. Adrian was working on the second day, people came by and were taking pictures of the work. They told him to stop doing the work and he complied. It was at this time that Mr. Adrian realized that there were people higher than Mr. Wiebe that had to give permission to do work on the beach.

Mr. Adrian testified that Mr. Mather's son, Kyle Mather, was not involved with the beach work. He was only involved in the gazebo move and the firepit construction.

Mr. Mather later contacted Mr. Adrian and asked him to knock the pile of material down, said Mr. Adrian. Mr. Adrian testified that he would not do so until he spoke to the "fisheries" people. When he contacted the fisheries people he was told not to knock the pile over.

Mr. Adrian testified that he had done little work directly for the Summer Village. He thought that the Summer Village once had him move some sand berms, and he also thought that the Summer Village had rented his equipment "alone" (which I assume he meant without Mr. Adrian as the operator of the equipment) to work on some of the walkways.

Ernest Wiebe was the Village foreman for the Summer Village for a nine and a half year period commencing in 2000. Mr. Wiebe testified that he did not issue any permits. This was done by the development officer and by the chief administrative officer for the

Summer Village.

Mr. Wiebe testified that his responsibilities included cleaning up beach grass that washed up on the shore, picking up garbage at the beach, and removing vegetation from the seven developed community beaches, which were each about 70 metres wide that had been established in about 2000 and 2001. The remaining two authorized beaches were not initially constructed. He testified that the spacing of the beaches was to enable each owner reasonable access to the beach. In those specific beach areas they were to maintain the beach as much as possible and remove vegetation. The Summer Village mowed the grass between the beaches. Residents were encouraged by the counsel to rake the reeds from the water in front of the groomed beaches. He testified that nobody ever asked him for the permission to do so.

Mr. Wiebe was asked if he had seen the actual approvals issued between 2000 and 2009. He initially replied that he had glanced at them, and that some of them were left with him in case there were questions. However, when he was shown the approvals at the trial he said that he had not seen any of them.

Mr. Wiebe was the person responsible for the work on the beach. He took his instructions on what the Summer Village could do from the Village counsel. He testified that he attended counsel meetings where the beach issues were brought up. He dealt dealt primarily with Trevor Wannop, who was initially the deputy mayor, and later became the mayor.

He testified that access to the beach for equipment was through a gate. The access was used primarily by the Summer Village staff but was occasionally used by others to take boat launches down to the water or to bring equipment through. The gate was open when Mr. Wiebe was working, which was between 7:00 AM and 3:30 PM Monday to Friday. Occasionally he would open the gate outside those hours when people made requests.

In 2009, Mr. Wiebe started keeping a record of some of the comings and goings around the beach. He did so with the assistance of his wife. He would ask her at the end of the day to record the activities for the day.

The recorded entries on July 18 and 25, 2009 were with respect to calls from Mr. Adrian requesting that the gate be opened. There is also an entry from August 20th, which with respect to a call from Mr. Mather's son requesting that the gate be opened so that some equipment could be moved through it.

He has a note from August 21 regarding a threat he received from Mr. Mather. Mr. Wiebe testified that he could hear Mr. Mather on that date, but could not understand

him given the distance between the two men, and Mr. Wiebe's poor hearing. However, he testified that he felt threatened given Mr. Mather's body language. He reported the threat to the mayor, Trevor Wannop, who said, let the authorities deal with it.

An entry on [Friday], August 28 says, "Wayne wants to remove weeds from water's edge, because of the threat I tell him I can't stop him, but please wait until Monday as there is a wedding on the beach on August 29". It was Mr. Wiebe's evidence that property owners knew the rules and that he could not tell a contractor what he could do and what he could not do. He could not give that kind of permission. He could allow entry but could not give permission.

When he was being cross-examined, Mr. Wiebe was told that when he testified, Mr. Adrian was adamant that he had talked to Mr. Wiebe on three occasions about the removal of the reeds. Mr. Wiebe said he could not remember that kind of conversation. Mr. Wiebe agreed that on Friday, August 28th, Mr. Adrian talked to Mr. Wiebe about his interest in removing weeds from the lakeshore, but Mr. Wiebe testified that he did not know to what extent Mr. Adrian wanted to remove them. Mr. Wiebe said he did not go into any detail with Mr. Adrian, and said to him, "If that is what you have to do for your customer, do it, I can't stop you". Mr. Wiebe had no recollection of Mr. Adrian making the mark with the excavator setting out where he was going to take reeds from.

Mr. Wiebe testified that at the time there were a number of issues between Mr. Mather and the Summer Village. These included the moving of a carport, the extent of Mr. Mather's riparian rights, being denied off hours access through the Summer Village gate, and removal of trees in alleged contravention of a development permit. This was frustrating for the Summer Village counsel, including Mr. Wannop and also for the chief administrative officer for the Summer Village. Mr. Wiebe said he was not aggravated by this, but he was concerned about what was happening. It did not affect him directly or personally, but it affected the whole community in general because of the cost of the litigation between Mr. Mather and the Summer Village, which had resulted in tax increases. He said it was fair to say that there were some people who were against Mr. Mather.

Mr. Wiebe's next diary entry is for September 1. Mr. Wiebe testified that the hoe had been sitting on the beach in the morning, and the first time he saw it working was probably after lunch. Mr. Wiebe saw the track hoe in the water moving soil and putting it in a huge pile. When he was asked on whose property this occurred, Mr. Wiebe said, that is a question that has always been an issue out there, whose property is it. As far as Mr. Wiebe knew, it was adjacent to Mr. Mather's property. Mr. Wiebe's belief at the time was that Mr. Mather owned the property to the water's edge. He testified that he had heard this from many people, including people who worked for Mr. Mather, but not

from anybody official, or directly from Mr. Mather.

Mr. Wiebe testified that he called SRD and they came to the scene. Mr. Wiebe testified that he did not stop Mr. Adrian from working, as he had no authority to do so. He has a note from 3:30 PM in his diary which states that, "Environment people arrive, SWO issued, Wayne says Ernie gave him permission". And SWO means stop work order. Mr. Wiebe testified that he gave Wayne access.

When he was asked why he reported the events on September 1 to the authorities, Mr. Wiebe said that, " There were other issues going on in the Village but they always happened on weekends or when you weren't around. Here was a great issue happening when we were there, and it's our duty to report activity that is not permitted, and we tried to at other times, but if you didn't catch somebody at it, it was worthless".

Mr. Wiebe testified that at the time he did not have any animosity towards Mr. Mather. Mr. Wiebe was simply working for the Summer Village.

A note in Mr. Wiebe's diary dated September 4th at 4:00 PM, says that Dale Mather tried to get through the gate and then ripped into Mr. Wiebe's yard yelling, started mouthing off, and said we shouldn't have called Sustainable Resources, and that the Village is going to pay dearly for it.

Lorne Cole is a land management specialist within what was SRD at the time. He is responsible for the development or work on Crown lands in Central Alberta. Section 3 of the *Public Lands Act*, RSA 2000, Chapter P-40, states that:

> 3(1) Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of
>
> (a) all permanent and naturally occurring bodies of water, and
>
> (b) all naturally occurring rivers, streams, watercourses and lakes,
>
> is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores.

Subsection (2) says:

(2) Subsection (1) does not operate

(a) to affect a grant referred to in subsection (1) that specifically conveys by express description a bed or shore referred to in subsection (1) or a certificate of title founded on that grant,

(b) to affect the rights of a grantee from the Crown or of a person claiming under the grantee, when those rights have been determined by a court before June 18, 1931, or

(c) to affect the title to land belonging to the Crown in right of Canada.

Subsection (3) says:

(3) For the purposes of subsection (1), a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.

Section 17 of the *Surveys Act*, RSA 2000, Chapter S-26, states:

17(1) A surveyor who needs to determine the position of a natural boundary when performing a survey under this Act may do so by any survey method that has the effect of accurately determining its location at the time of survey, relative to the surveyed boundaries of the affected parcel.

(2) When surveying a natural boundary that is a body of water, the surveyor shall determine the position of the line where the bed and shore of the body of water cease and the line is to be referred to as the bank of the body of water.

(3) For the purposes of this section, the bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself.

Mr. Cole sets the conditions pursuant to which work or development may be done on Crown lands. This includes the amount of disturbance that is allowed, the type of activity that is permitted, whether mechanical equipment may be used, etcetera.

Mr. Cole testified that accretion of land occurs when terrestrial land starts to grow on it. He said that this is important in situations where the owner of lands adjacent to a water body has riparian rights, as that owner can claim accreted land when the land changes from aquatic to terrestrial. Such a land owner can gain and lose land by virtue of accretion.

On August 27, 2009 Mr. Cole received a phone call from Mr. Mather in which Mr. Mather advised him that Mr. Mather owned the land to the high water mark on a parcel of land adjacent to Gull Lake, that he had had a survey done in order to identify the property line, that he had tried to register the plan at the Land Titles Office, but it was not approved as there was a disagreement with the water boundaries unit as to where the boundary was. Mr. Cole testified that he told Mr. Mather that he had not heard of a title having a high water mark as the boundary, but he would discuss it with his superior. He also indicated that he might come out to view the property. Mr. Mather told him that he wanted a quick decision so he could proceed with registration of his plan and start construction. Mr. Cole refused to give Mr. Mather permission to proceed at that time.

Mr. Cole discussed the matter with his superior and with the water boundaries unit. He and his superior agreed with the position taken by the water boundaries unit. Mr. Cole phoned Mr. Mather on September 1 to advise him of this, and that Mr. Cole did not need to come out to view the property.

That same afternoon Mr. Cole received a call from Trevor Wannop, who was the mayor of the Summer Village, advising that there was a hoe in the bed lands. Mr. Cole travelled to the site, arriving around 4:00 PM. He walked to the site where the hoe was, took photos, and waited for the Summer Village chief administrative officer, or CAO, and Mr. Wiebe to arrive. The photos show that the hoe was working in an area between two existing beach pods. They also show a large and a smaller pile of what Mr. Cole called substrate and vegetation. Mr. Cole testified that substrate is sand and particles from the bed and shore of the lake. There was green vegetation in the pile as well as aquatic vegetation that appeared to have been sprayed earlier. The large pile was fresh, moisture was coming out of it, and it was starting to dry as they stood there. It was taller than Mr. Cole who is six foot five inches tall. The smaller pile was a bit older. Mr. Cole testified that when he arrived the hoe was mopping up. It was being used to take material that had been excavated and to put it into one of the piles. There were tracks in front of the pile that went from at least one of the piles to the Mather property.

Mr. Cole went to the hoe and told the operator to stop working. Mr. Cole gave the operator his card and told him he was doing work on public lands and he did not have permission to do so. The operator said that he had permission from Mr. Wiebe to do the

work. Mr. Wiebe was not there at that time. When Mr. Wiebe arrived a few minutes later, Mr. Cole asked him if he had given permission, and he said no, he hadn't. Mr. Cole testified that Mr. Wiebe does not work for the Provincial Government and was not able to give permission.

The operator said that he was working for Dale Mather. Kyle Mather then came up while he was talking on a cell phone. Kyle Mather handed the phone to Mr. Wiebe and then to Mr. Cole. Dale Mather was on the phone. Mr. Cole told Dale Mather that he was doing work on public lands and was not authorized to do so. Dale Mather denied he had given Wayne Adrian permission to do the work, and that Ernie Wiebe had given permission. Mr. Mather accused Ernie Wiebe of lying. When Mr. Cole asked Mr. Mather whether he hired Mr. Adrian, Mr. Mather did not respond. Mr. Cole repeated the advice that he had given Dale Mather earlier; that the work was being done of exposed substrate and was considered to be part of the bed and shore of the lake.

The photos taken by Mr. Cole show that the excavation had stopped just before the water. The excavated area was below the lake level and water was flowing from the lake into the excavated area. About 20 centimetres of material was removed from the bed and shore. Mr. Cole pointed out that there were rushes and sedges growing in the area at the edge of the excavation. He testified that this is aquatic vegetation. It confirmed for him that the excavation was on the bed and shore, and that accretion had not started as there was no evidence of terrestrial vegetation.

After the earlier telephone discussion with Mr. Mather, and prior to talking to his superior, Mr. Cole had checked to see if any authorizations had been issued by his department (SRD) or by Alberta Environment for activity in the area in question. He determined that no permission had been given for activity in that area other than the permission that had been given to the Summer Village.

Mr. Cole understood that Mr. Wiebe was the person who did most of the mowing and weeding on behalf of the Summer Village. Mr. Cole was not aware of any clause in the authorization letter which precluded Mr. Wiebe (on behalf of the Summer Village) from sub-contracting any of the work out, but such work had to be done within the scope of the authorization letter.

Mr. Cole was asked if in conversations with Mr. Wiebe or the CAO he was made aware of any conflicts between Mr. Mather and the Summer Village with respect to any other matters. Mr. Cole said that there were discussions of litigation that had occurred in the past, but he would not call it animosity. Rather, it was presented to him as information. He could tell they were unhappy, but this would not affect Mr. Cole's activities.

Todd Lemire is a compliance officer responsible for enforcement under the *Public Lands Act*. He testified that he received a call at 3:40 PM on September 1, 2009 from Lorne Cole requesting assistance in issuing a stop work order, as Mr. Cole had not issued such an order in the past. Mr. Lemire arrived at the scene at 16:10 hours and he was given an explanation as to the circumstances by Mr. Cole, by the CAO, Marilee Yakunin, and by Mr. Wiebe. Mr. Lemire observed that work had been done right up to the edge of the water. Mr. Lemire had not met Mr. Wiebe prior to his arrival at the scene that day. He had not had any dealings with Marilee Yakunin, Mr. Wiebe, or Trevor Wannop leading up to the event. Mr. Lemire issued two stop work orders under the *Public Lands Act* directing Dale Mather and Kyle Mather to stop work for 96 hours.

When Environmental Protection Officer, Todd Urquhart, arrived ar work on September 3, 2009 he learned there had been a complaint called in by Ernie Wiebe at 13:39 hours on September 1, 2009 regarding another incident at 81 Lakeview in the Summer Village. Mr. Urquhart was not working on September 1, 2009. He learned that his counterparts at SRD had attended on the scene on that date, and they provided him with their reports, including information that the operator of the hoe was Wayne Adrian. Mr. Urquhart then commenced an investigation including meeting with witnesses.

On September 9, 2009, Mr. Urquhart asked Ernie Wiebe if he authorized the hoe to go on the beach, and Mr. Wiebe told Mr. Urquhart that he did not give that authorization to anybody. Mr. Wiebe told him that Mr. Adrian did not ask Mr. Wiebe for permission to remove the reeds, because if Mr. Adrian did so Mr. Wiebe would have said that he was not in that position.

Mr. Urquhart testified that based on the information that he had obtained to that date, he told Dale Mather on September 10, 2009 that he was under investigation for removing the reeds from a body of water, and instructed him not to remove the piles of the material as they were evidence.

On September 11, 2009, Mr. Urquhart took photos of some of the locations that he had previously photographed on his August 13th, 2009 attendance at the site. He testified that the September 11, 2009 photos show that reeds had been removed, and that those reeds appeared to be within the piles of materials on the beach. The vegetation had been removed from the area that had been sprayed earlier. There was only one pile when Mr. Urquhart attended on the site, he estimated the size of the pile at ten to 12 feet high. On the ground in front of the pile there was vegetation in the sand and tire tracks nearby. Tracks that could have been from a pickup truck not a track hoe.

On September 16, 2009, Mr. Urquhart issued a notice of investigation to Mr. Mather advising him that he was being investigated with respect to his involvement in the

removal of the aquatic vegetation within the bed and shore of Gull Lake on or about September 1, 2009.

Mr. Urquhart received a call from Mr. Mather on September 25, 2009, wanting to know what was going on regarding the pile of material, as he was concerned about blowing sand and also that the pile might be a safety issue. Mr. Urquhart testified that Mr. Mather made a similar call on October 21, 2009, and was told that the department had not made a decision yet, and it did not appear to be a safety issue to Mr. Urquhart.

Robert Bedingfield was qualified as an expert in fish and fish habitat biology. He attended at the site on September 9, 2009. He determined that 784 square metres of aquatic and riparian vegetation was removed from the lake. This was based on his measurement of the piles. As far as he was aware there was no approval from Fisheries and Oceans for the removal of vegetation from the area in question. His immediate concern was the risk of sediment from the piles entering the lake. When sediment enters a fish habitat it has the potential to affect the life processes of fish, like spawning or feeding. Many fish are visual feeders. If the water becomes cloudy with sediment, it affects their ability to see food.

His concern with respect to the excavation was that the area was not available to stabilize the shore from wave erosion, and was not available for spawning of pike when the water level is higher. The area would only be accessible to fish when the water lever was higher than it was in September, 2009. Pike spawn in April or early May, which would not be an issue at the time of this incident. It would take numerous years to reestablish the vegetation that was removed. He testified that he did not have concerns with respect to the limited removal of material, but he did not want to see further activities like this going on in the future.

Martin Robinson has been an Alberta land surveyor since 2004. He testified that Mr. Mather retained him to register a subdivision plan at the Land Titles Office which, among other things, would show that the size of Mr. Mather's lots had increased by virtue of accretion. On August 4, 2009, he sent a copy of the proposed subdivision plan, as well as a consent to register the plan, to the Water Boundaries Units of SRD. Their consent was necessary as the province is an adjacent landowner.

As part of his work with respect to the preparation of the plan, Mr. Robinson went to the site where he looked at the vegetation and he also viewed historical and current aerial photographs. He testified that since the vegetation had been manipulated by the Summer Village, which would have included the mowing of the grass, he did not think that the status of the vegetation was particularly useful in determining where Mr. Mather's property ended. He testified that what he based his determination of the property

boundary on was where he believed the water of Gull Lake ordinarily lies on ordinary times, in ordinary years.

Mr. Robinson testified that after the plan was submitted and reviewed by the water boundaries unit, he was advised by Allen Bureyko (who is more commonly known as Jake Bureyko) from SRD, in a letter dated August 26th, 2009, that ungranted Crown bed and shore land that is specifically excluded from original grants and titles remains Crown land until the gradual, natural, imperceptible process of accretion is complete and the lands have become vegetated over with a typical mixed upland vegetation community native to the area, and the lands have become indistinguishable from the privately owned upland. In the letter Mr. Bureyko stated that the bank shown on the plan that Mr. Robinson had submitted had not completed the process of accretion. The land between the bank shown on the then currently registered plan (which was registered in 1993) and the bank shown in the proposed plans submitted by Mr. Robinson was vegetated with rushes rather than mixed upland vegetation. As a result, SRD could not consent to the registration of the proposed plan.

In the letter Mr. Bureyko told Mr. Robinson that if he wished, he could contact the Red Deer land managers for SRD, Barry Cole or Lorne Cole, to discuss the nature of the vegetation. The letter was sent by fax to Mr. Robinson on August 27th, 2009, a copy of the letter from Mr. Robinson's file has a notation that a copy of the letter was e-mailed to his client [which would be Dale Mather] on August 27, 2009. When Mr. Robinson was asked whether he had shared the letter with Mr. Mather, Mr. Robinson testified that he assumed so, although he had looked for evidence of the e-mail and was unable to find it. When Mr. Mather was asked if he received a copy of the letter, he testified that he didn't believe he did.

Mr. Robinson contacted Mr. Mather when he received the letter and told him that he would be meeting with Barry Cole and Lorne Cole. Mr. Robinson believed that he would have told Mr. Mather that he was dealing with SRD with respect to the consent to register the plan.

Section 17 of the *Surveys Act* sets out where the natural boundary is between land and a body of water. SRD and Mr. Robinson had a difference of opinion on where that boundary was. Mr. Robinson said the vegetation is only one tool he uses in determining the boundary. He testified that the definition is vague, as it refers to vegetation but does not clearly state that it cannot be transition vegetation - vegetation that is not regular upland vegetation (such as grasses and trees), but also not aquatic (vegetation that will grow when submerged in water). He testified there is a lawful procedure in place to resolve differences of opinion, such as the one SRD and Mr. Robinson had.

When he was being cross-examined, Mr. Robinson was asked whether his advice to Mr. Mather would be to not proceed with development in the area that was the subject of the dispute between himself and SRD. Mr. Robinson said that he would not advise anyone to go ahead without proper consent, but he would have told Mr. Mather, you own land basically to the water's edge, but exactly where, I don't know. He testified he would not tell Mr. Mather to proceed with work in a contested area.

Mr. Robinson testified that Mr. Mather told Mr. Robinson he did not -- Mr. Mather told Mr. Robinson that he did have someone go ahead with the work on the beach, but Mr. Robinson didn't know what type of consent Mr. Mather had to do that work.

In the course of his work with respect to attempting to register the plan, Mr. Robinson did not give any consideration to the *Water Act*. Mr. Robinson testified that the excavation took place outside of the area that was Mr. Mather's land in the proposed plan. Mr. Robinson testified that Mr. Mather had a gazebo which was located ten to 20 percent on Mr. Mather's land, and the balance was located on a neighbour's land. He testified that as a boundary expert he had a duty to tell his client, Mr. Mather, that the gazebo was not located on his property. When Mr. Mather was asked about this, he initially testified that Mr. Robinson did not tell him this unless it was after the fact. Mr. Mather then said he did not recall this.

Jake Bureyko was qualified as an expert in the areas of land research analysis, specializing in land boundaries in bed and shore. He has been determining bed and shore boundaries on a full-time basis since 1987, and part-time for the five years preceding. He works with the Riparian Land Management and Water Boundaries Unit of SRD. This group deals with boundaries and ownership of riparian lands. He testified that the water's edge is not a dividing line between Crown land and private land. Rather, the boundary is that set out in section 17 of the *Surveys Act*, and pursuant to section 3 of the *Public Lands Act*, the Crown owns the bed and shore.

Mr. Bureyko testified that even if Mr. Mather owned the land down to the water's edge, the excavation was not done on his land. The excavation took place on the shore, which is exposed bed. It was his evidence that it took place on Crown land.

Mr. Bureyko gave a great deal of evidence with respect to accretion. He testified that it is a process of transformation. He testified that in Canada it includes both the transformation of bed and shore to upland, as well as the transformation of upland to bed and shore. As water withdraws from bed and shore, the land will be in transition. It was his opinion that accretion only occurs when the transformation is complete. He testified that ownership does not change until the transformation is complete. He testified that it is not necessary for the landowner to apply to the Land Titles Office to change his title in

order to complete the change of ownership. An owner may make an application under the *Land Titles Act* to change his title to reflect any accretion that has taken place. However, an owner of land who is entitled to the benefit of accretion will own the accreted land as soon as the transformation is complete irrespective of whether or not he or she bothers to change their land title.

Mr. Bureyko testified that the side lot lines in the area of Mr. Mather's lots run north-south. The shore of the lake runs east-northeast. As a result, when residents of the area come out of their cabins, the closest way to the lake is not heading north along their property line, but rather to proceed to the northwest-perpendicular to the lake. Over time, paths to the beach have evolved which are perpendicular to the lake and which do not follow the property lines.

It was Mr. Bureyko's evidence that the vegetation in the shore area that is outside the beach pods is primarily rushes, which are aquatic. There is no upland vegetation.

Mr. Bureyko was asked whether the mowing of the areas by the Summer Village would affect accretion. He testified that actions such as mowing or harrowing would affect the process. It was his opinion that whether it would make a difference in terms of the recognition of accretion would depend on factors such as whether the actions were done with proper authorizations and whether the actions were taken for reasons other than to interfere with the boundary line. He said that with respect to the subject lands, a major limiting factor on the upland vegetation taking effect is that a large part of the sand on the shore is saturated. The sand is virtually at the level of the water table. He testified that the presence of surface water is a greater impediment to growth of upland vegetation than mowing would be, and that mowing would not prevent the growth of upland vegetation.

When Mr. Bureyko received the proposed plan that had been prepared by Mr. Robinson, he was surprised to find that the plan showed that it included 70 metres more of lake front than was on the 1993 plan. He checked with the department's field staff, Barry Cole or Lorne Cole. He checked photos that the government officials had taken. He then satisfied himself that the ground had not changed much since they had consented to the registration of the 1993 plan. The only difference was that the Summer Village was no longer keeping the entire area as a groomed beach. Mr. Bureyko therefore faxed the August 26, 2009 letter to Mr. Robinson, advising that they would not be consenting to the registration of the plan.

The next thing that occurred was that Mr. Bureyko received a phone call from Mr. Mather on September 2nd, 2009 in which Mr. Mather told him that his title gave him ownership right up to the high water mark. Mr. Bureyko testified that he told Mr. Mather that it sounded to him like someone had given Mr. Mather a great deal of bad information, and

Mr. Bureyko suggested that Mr. Mather should acquire copies of the *Public Lands Act* and the *Surveys Act*, and that he should read over sections 3 and 17 respectively.

Dale Mather testified that he has been living in one fashion or another at 81 and 83 Lakeview, Gull Lake, for 40 years. He testified in great detail about difficulties he has had with the Summer Village and neighbours regarding developments he has made or attempted to make on his property. One issue involved the removal of trees in order to get a nice view of the lake from his residence. The Summer Village issued a stop work order, and an issue arose as to whether the Summer Village had authority to stop the removal of the trees. The matter proceeded to litigation. Mr. Mather eventually came to a resolution with the CAO at the time, Carla Kenny (phonetic), with respect to the removal of trees. He later decided to do some further work, believing that he had the necessary permits. The CAO who was in place then, Marilee Yakunin, issued three stop work orders. One was based upon an allegation that Mr. Mather had not complied with the permit which was the subject of the earlier negotiations with Ms. Kenny, and his verbal settlement agreement with her.

Mr. Mather testified that he wanted to try to mediate this new dispute, but the Summer Village was not interested in doing so. He went to the Summer Village AGM in 2009, and the financial statement for the Summer Village for the preceding year was presented, together with a budget for the coming year. The mayor, Trevor Wannop, told the meeting that the Summer Village had spent $200,000 on bylaw enforcement as a result of their prosecution of and litigation with Mr. Mather. Taxes were to increase by 35 percent. Mr. Mather testified that from that day forward Mr. Mather and his family were scorned by the people in the Summer Village.

Mr. Mather believed that the beach pod locations were based on patronage in favour of the mayor, Ernie Wiebe, and others. He testified that he told Mr. Wayne Adrian that he would like to have a beach like those for himself. It was his evidence that he told Mr. Adrian to get all the approvals he needed before doing the beach work, and Mr. Adrian agreed to do so. Mr. Mather testified that Mr. Adrian came back to Mr. Mather and his wife and told them that he had been given approvals to go ahead with the work on the beach. They asked who he obtained the approvals from, and was he sure that they were sufficient to accomplish the work. Mr. Adrian told them that he had talked to Ernie Wiebe, and was given permission to clear weeds on the beach, not just once, but three times, of which one time he had marked with the hoe, a line on the beach which was where he intended to begin removing the weeds from, and that Mr. Wiebe had come to the site and approved the location, and gave him the go ahead to remove the weeds.

Mr. Mather and his wife thought that they should confirm this with Mr. Wiebe. Mr. Mather testified that he saw Mr. Wiebe walking his dog, and that Mr. Mather said to

him that, "you and Wayne had come to an agreement regarding the work". Mr. Mather testified that Mr. Wiebe replied that they had an agreement and even said that they could go out into the water 15 feet, something that they did not want to do. Mr. Mather testified that all the residents knew that Mr. Wiebe was in charge of the work on the beach.

It was Mr. Mather's evidence that he did not give any instructions to Mr. Adrian to proceed or not, although Mr. Adrian certainly knew that Mr. Mather would like Mr. Adrian to go ahead with the beach excavation. He testified that it appeared Mr. Adrian had the necessary approvals, but there was no discussion about when he would do the work. Mr. Mather testified that:

> In and around the same time I received a visit by a gentleman here in the court representing himself as an official with SRD -- um, whatever your title is, Mr. Urquhart was his name, and uh, he came up and started talking to me you know, almost an accusatory tone about weeds being sprayed in the waters, the lake, in front of my home, and uh, I made it very clear to him, despite his many attempts to try to achieve some kind of confession from me that I had done it and I certainly hadn't done it, and I made it very clear to him, and he did warn me that any activities in the water to do with vegetation were illegal, and that was the extent of our discussion. I didn't receive an education as Mr. Urquhart tried to tell the court a few days ago. It was a simple discussion about the weeds, um, he said the weeds were sprayed. I don't know whether they were sprayed or not. I walked down to the beach with him, with his associate. And he showed me the area and I told him again that I hadn't done it.

Mr. Mather did not keep any notes from his August, 2009 meeting with Mr. Urquhart. His evidence was he didn't need notes. He said he didn't do anything, and he told Mr. Urquhart so, so he didn't need any notes. Mr. Mather acknowledged that Mr. Urquhart gave Mr. Mather his card and introduced himself as an enforcement officer for either Environment or SRD. Mr. Mather could not recall which department it was. It was set out on the card though.

When it was put to Mr. Mather in cross-examination that Mr. Urquhart's notes say that the information Mr. Urquhart provided Mr. Mather was that spraying or removal of reeds without an approval is considered a serious offence under the *Water Act*, Mr. Mather testified that that is not what Mr. Urquhart said to him at all. Mr. Mather testified that:

> What he said to me, over and over, for a considerable period of time, was using acronyms to the effect that I was the one who sprayed, and continuously trying to trap me into some sort of confession for something that I hadn't done. It was not until I told him with no uncertain terms that I didn't do it, that there were plenty of other people doing stuff down at the beach, and that I don't know who did do it but uh -- and -- or in fact whether it was done. When he left he wanted me to come and see it. I walked with him down there and the only thing he talked about was that the spraying of weeds in inland waterways was illegal. That's it.

Mr. Mather confirmed that Mr. Urquhart did say that Mr. Mather should feel free to call Mr. Urquhart if he had any questions, and he gave Mr. Mather his card. Mr. Mather never gave Mr. Urquhart's business card to Mr. Adrian. When Mr. Adrian was asked whether he ever told Mr. Adrian about the exchange with Mr. Urquhart regarding the reeds, Mr. Mather said that he believed Mr. Adrian was informed about it, but Mr. Mather was not sure where Mr. Adrian learned about it. When he was specifically asked if he told Mr. Adrian, Mr. Mather said he was not sure - he may have.

Mr. Mather testified that:

> I left it to Mr. Adrian to assure himself and us that he had the proper approvals, and as I had mentioned to the court, he did come to us and indicate that, and I further confirmed that with Mr. Wiebe. Um, we didn't set a schedule - a time for that, um, I was out on the lake with my family, in our boat the day that Wayne had decided to do the work on the beach. I was unaware that he was there at the time until I got a call on my son's cell phone. I think there was some environmental people - I don't know if Mr. Urquhart was there or not specifically. Um, Ms. Yakunin was there from the Village, and Ernie Wiebe was there, and uh, there was a lot of irritation going on on the beach I guess, and uh, you know, at that point in time I just -- just informed them that, you know, Wayne had proper permission from Mr. Wiebe to proceed with the work. It was later in the day that I actually saw what Wayne had done that day, but I wasn't aware that he was going to do it that day, and I hadn't scheduled it for that day, per southeast. And from what I saw, he had not gone into the lake itself. He was a foot or so back from the shoreline, and had -- had apparently pulled up dirt and weeds in an attempt

> to clean up the beach, and I guess this whole process happened at that time.

Mr. Mather was asked:

> As far as authority of the Village and the foreman, which was Mr. Wiebe, where did they get their authority, did they talk about any arrangement or?

Mr. Mather replied that:

> At the summer council meeting approximately four to five years ago when they were discussing this whole pod system, they had indicated to us that, uh, they had an agreement with the Environment Department and the Fisheries Department to do this kind of work. I asked them to provide me with the legal documents that give them the authority to do this work - not only on Summer Village land but also on private land. What they sent me, Your Honour, after several requests later, was a booklet that was published by the Environment and Fisheries Department with recommendations as to how to preserve water quality of inland waterways in Canada and, uh, also protect fish and other forms of animal life. I asked again. It was Carla Kenny who provided me with it - she was the CAO - to provide me with the legal documents which gave them the right to do what they were doing and she said they had nothing else but what she had provided me with.

When Mr. Mather was asked whether he got a copy of any applications by the Village to do work, or any agreement with the Village for the doing of work, Mr. Mather replied:

> No. And I don't have it here, uh, Terry, because the Village does not talk to me or cooperate with me, or -- you know, I have no rights as a citizen in the Village right now. I have asked multiple times for copies of whatever legal agreements they had, and they either ignored me purposely, or didn't have them, because I never got them. And it is in the minutes at least annual meetings where I asked for them - at the Summer Village of Gull Lake, I don't know which -- where to get those from, or how to get those. If I did, I'd have them here today.

Mr. Mather was asked:

> Was there ever anything raised by you as to the authorizations for anyone to go into the water to do any clearing of weeds or whatever, anything that the Village had told you or anybody on behalf of the Village had told you as far as permissions - where you get permissions?

He replied:

> I never asked for permissions. The only involvement I had with that was when I asked Wayne to make sure that he had the proper permissions. I assumed that there was a process through the Village. For 50 years the Village was in charge of and did everything on the beach, and in their publications to the general public they held out that if anybody wanted to do anything on the beach, or on the beach paths, they were to talk to Ernie Wiebe. And at the annual meetings, Mayor Wannop made it very clear that they had the authority to do what they wanted to do on the beach and that authority was vested to Mr. Wiebe, so if we wanted to talk about it, talk to Mr. Wiebe. And so that's my knowledge of that. I didn't know the process. Nobody ever gave me the documents that I asked for. I was suspect of them. I was suspect of how the pods came to be, and where they came to be.
>
> Multitudes of people down there seemingly doing what they want on the beach, including Mr. Wannop himself. So, when I talked about this with my contractor, Mr. Wayne Adrian, I made it clear to him in a non-specific way that he was to be satisfied that he had all the proper authorities and documentation necessary to do the work on the beach before he proceeded and he agreed because he did not want to get in trouble himself. And that was the extent of it, um, he, as I've mentioned to the court already, um, had three meetings with Mr. Wiebe, was satisfied that he had what was necessary to go ahead. I further confirmed that with Mr. Wiebe, my wife and I, and ah -- and that was the total of my involvement. And Wayne went ahead on the basis of that. He was trying to earn money to make a living.

Mr. Wiebe [sic] testified that the discussion he and his wife had with Mr. Wiebe occurred when Mr. Wiebe was walking his dog when he went by Mr. Mather's yard. Mr. and

Mrs. Mather were working in their yard, they then had a rather casual discussion. Mr. Mather testified that he said:

> I understand that you and Wayne have come to a mutual agreement as to what can be done on the beach.

Mr. Mather testified that Mr. Wiebe went on to explain that he had approved what Wayne wanted to do, that he and Wayne had worked out the location of the work, but he also went on to say that even with that you could, if you wish, go out as far as 15 feet of the water.

As I've already noted, Mr. Wiebe's recollection of this was much different. His evidence was that he had a note from August 21 regarding a threat he received from Mr. Mather. Mr. Wiebe testified that he could hear Mr. Mather but could not understand him given the distance between the two men and Mr. Wiebe's poor hearing. He felt threatened given Mr. Mather's body language. He reported the threat to the mayor, Trevor Wannop, who said, let the authorities deal with it.

Mr. Mather recalled meeting Angela Fulton at a meeting in July of 2008. He understood that she was there to talk about the beach issue. At one point in his cross-examination, Mr. Mather testified that he knew that she worked for Alberta Environment, but he did not know what her position was. A moment later he testified that he didn't know if she was with Environment, SRD, or the Land Titles Office. He testified that he came to talk to her about the accretion issue, and she said she didn't have any knowledge or authority on that topic, so it was a very brief discussion. He also wanted to know how it was determined that some areas would be beach pods and others would be reed pods. He agreed that she did mention that he should contact some other department of the government regarding the accretion issue, but he could not recall at the trial which department that was.

Mr. Mather recalled calling Lorne Cole soon after Mr. Bureyko's August 26th, 2009 letter was faxed to Mr. Robinson on August 27th, 2009. He testified the reason he called was that Mr. Robinson had told Mr. Mather that these are the people to talk to - to get together with regarding boundaries. When he was asked whether he knew that the government was claiming the bed and shore as their property, Mr. Mather said he didn't think that it was ever put that way, but you could come to that conclusion. When he was asked whether he kept notes of his August 27, 2009 conversation with Lorne Cole, Mr. Mather said, "No, I'm not a note keeper".

When it was put to Mr. Mather that it was fair to say that on August 27th, 2009 he realized that the government, rightly or wrongly, was claiming the bed and shore of Gull

Lake as government property, Mr. Mather responded:

> Yeah, I realized at that point in time there was going to be a conflict, yes.

When it was suggested that he then would have realized that the party on the other side of the conflict was the Alberta Government, Mr. Mather replied, "Well, I think so, yeah."

When he was asked whether he shared with Mr. Adrian the information that there was a government agency who says that the bed and shore of Gull Lake belonged to the government, Mr. Mather said:

> No, and the reason why I didn't is because although that's their position, doesn't necessarily mean any more than me that it's correct.

He added:

> . . . [R]egardless of who claims ownership, activities on the beach were managed and regulated by the Summer Village of Gull Lake, and that's what we knew. What agreements they had, they refused to provide, but we knew that, so I didn't involve myself in this. This was a title issue only.

When he was asked why he didn't share the issue of the dispute regarding the property boundary with Mr. Adrian, Mr. Mather said:

> It wasn't business that should concern excavation contractor.

When it was pointed out to Mr. Mather that it was his evidence that he had asked Mr. Adrian to make sure that he had the requisite permissions and authorities, Mr. Mather said:

> Yeah, I vested that responsibility in to Mr. Adrian and I put no more thought into it. It was his responsibility to assure himself that he had the authority, whether it was from the government, whether it was from the Village, whether it was from whomever, to do the work down there and he was satisfied, he told me, that he had sufficient permissions to do the work that he did. What I told him about my legal actions is neither here nor there, nor does it have anything to do with it.

When he was asked whether he shared with Mr. Adrian that it was his position that he owned the land down to the water's edge, Mr. Mather said:

> Why would I? I didn't share a lot of information with him, I do believe though that I did tell him though that I believed that we had title to the water's edge, yes.

When he was asked if it was his position that he could do as he pleased in the area between the boundary to his land adjacent to the lake, as depicted on the 1993 plan, and the water's edge, Mr. Mather said:

> No, I did feel though that, um, even though I had no intention of enforcing it, that anybody on that land was trespassing. However, uh, I didn't report because I don't know what the regulations are. I know in a very general way that there are other authorities as to what you can do on water and stuff like that, but I've never seen any of them I didn't know.

When he was asked if it was his understanding that where he asked Mr. Adrian to remove the reeds was in an area described by the government as bed and shore, Mr. Mather replied:

> I understood that there was a dispute as to where the bed and shore were, yes.

He then added that:

> This wasn't about where property lines were, where the beach were. This was about cleaning it up and getting the proper permissions to do it. My involvement in all of this has only been the registration of my title, not some determination of who could do work down there, and who couldn't do work down there, and who had a license for this, and who had a license for that, and that is where you are trying to go with it, but no, my -- my -- what I instructed Mr. Adrian to do is to clean up the beach because I wanted it to look nice like these other places, and -- but before he did that to obtain whatever proper paperwork or approvals that he needed to have in order to do it. That was my only instruction to him and I think that was sufficient.

Mr. Mather confirmed that when he sought permits or permissions in the past from the Summer Village, he applied for them through the chief administrative officer, and that Mr. Wiebe was the foremen, not the CAO. However, Mr. Mather testified that he believed that the responsibility to deal with the beach was vested in Mr. Wiebe by Mr. Wannop.

Mr. Mather testified that the vegetation was not cleared from the land that belonged to him. He testified that he never claimed ownership of that land. The previous CAO, Carla Kenny, had told him that over the course of 50 years his neighbours had come to view the land in front of their cabins as their own and she invited Mr. Mather to do the same, even though Mr. Mather had not come to the same conclusions, as he knew that the property lines were lined up with a quarter section (i.e., north-south) and not with the lake. He wanted to improve the land in front of his property rather than the land he was claiming that he was entitled to by virtue of his riparian rights.

Dale Carlson (phonetic) was on the Summer Village council for a period of time. His evidence was that he was on for three and a half to four years, and off for about a year and a half. However, he simply quit attending meetings when he had about a year left in his term. His evidence was that when he was on council, the mayor was Mr. Wannop and the other counsel was Bill Forsyth (phonetic). Ernie Wiebe was the Village foreman. During his time on council, any permits were issued by the CAO, Mr. Wiebe did not issue permits - he only ensured that people had one.

Mr. Carlson testified that the council was involved in pretty well everything. The mayor and Mr. Wiebe were responsible for the beaches. When Mr. Carlson came on the council he was told by the mayor that Fish and Wildlife had required the Summer Village to implement the beach pods, that the beach pods could not be changed unless Fish and Wildlife approved the changes, and that if they did want to do more work, which would cost money, then they could possibly go to Fish and Wildlife, and they might let them have another pod. When Mr. Carlson was asked who the mayor dealt with regarding the beaches, Mr. Carlson replied that he always said it was Fish and Wildlife. When he was asked if Fish and Wildlife were the ultimate authorities, Mr. Carlson said they were, "The guys". When Mr. Carlson was asked who was below them - who would people go to, he replied that as far as he knew, it was just them. The mayor and Mr. Wiebe took directions from Fish and Wildlife. Mr. Carlson did not know anything about involvement by Alberta Environment or SRD until about a year and a half before the trial.

When Mr. Carlson was specifically asked who had authority to decide what could be done on the beach, Mr. Carlson did not answer that question. Instead he answered by saying, Mr. Wiebe did the work on the beach. Later, when he was asked if he was aware of any applications to do anything on the beach, he replied that there were no applications -

people would ask Mr. Wiebe or the mayor. When he was asked if there were any issues regarding control of the beach, he said that the mayor and Mr. Wiebe ran the show and that you could not do anything on the beach without talking to Ernie.

Mr. Carlson testified there was a constant feud between the mayor and Dale Mather. Mr. Mather talked about mediating his dispute with the Summer Village, and the mayor said they would not mediate - they would fight. Mr. Carlson was told that he could not talk to Mr. Mather and that the mayor threatened to take Mr. Carlson to court. It was about this time that Mr. Carlson quit going to council meetings.

When he was asked whether he discussed his frustrations regarding the pods with Mr. Mather, Mr. Carlson said that Mr. Mather was on the beach committee, or thinking about it, and the committee could not get changes to the pods. Mr. Carlson later testified that Mr. Mather wanted to help with the beach committee but he was unsure if Mr. Mather was actually on the committee.

The beach committee was a group who wanted the beach to be the way it originally was. Mr. Carlson testified that the mayor's response to the beach committee was basically come back with your ducks in a row and then we will see if Fish and Wildlife might be convinced.

Mr. Carlson testified that he never saw any notices, bulletins, or agreements regarding who had authority over the beach posted on the Summer Village notice board.

Since Mr. Mather testified at the trial I must apply the test in *R. v. W. (D.)* 1991, S.C.R. 1742, where it was said that:

> A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of

the accused.

In *R. v. Gray*, 2012 ABCA 51, at paragraph 42 the court said:

> . . . the objective of *W. (D.)* is to inform the jury that:
>
> (1) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt, and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown.
>
> (2) In that context, if the accused's evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves the jury with a reasonable doubt that it may be true, then the jury is required to acquit.
>
> (3) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. The inability to decide between exculpatory evidence and other evidence that incriminates the accused will usually indicate that the jury has a reasonable doubt, which again must work to the benefit of the accused.
>
> (4) In the event the accused's evidence (or where applicable, other exculpatory evidence) is entirely disbelieved such that it does not raise a reasonable doubt, the jury may not convict unless it is satisfied that the Crown has proven the accused's guilt beyond a reasonable doubt by other evidence that the jury does accept.

The reference to a jury is a reference to trier of fact, which is a judge in a trial by judge alone.

In *R. v. Kristensen*, 2010 ABCA 37, at paragraph 16, the Alberta Court of Appeal pointed out that the Supreme Court's comments in *W. (D.)* provide a caution against deciding credibility issues with an "either/or" approach.

The credibility of a witness refers to two separate issues. The first is whether the witness is attempting to be deceitful, by lying or misrepresenting the facts. The second is whether the witness is reliable in the sense of accurately reporting the facts. This was concisely explained in McWilliams, Canadian Criminal Evidence, 4th Edition, at page 27-2:

> What do we mean by credibility? In order to answer this question, it is necessary to separate the truthfulness of the witness (sometimes referred to as credit) from the factual accuracy of his or her evidence (sometimes referred to as reliability or the potential for error). With respect to the credit prong of credibility, we ask whether the witness is worthy of belief? In other words, are we confident that the witness is trying to be truthful and not deceiving us. Having satisfied ourselves of this, we move on to a second inquiry. Is the factual content of the witness's evidence trustworthy or reliable? For example, are we confident that the witness has accurately recalled or observes whatever he or she is testifying about. Once we are satisfied that the witness is trying to be truthful and that his or her account is reliable, we can safely conclude that the evidence is credible. As Justice Anglin observed in 1919:
>
> > [B]y . . . [credibility] I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory - in a word, the trustworthiness of their testimony . . ."

Mr. Mather's surveyor, Mr. Robinson, testified that he told Mr. Mather that only ten to 20 percent of his gazebo was located on his property, and that the rest was on a neighbour's land. I found Mr. Robinson to be a credible witness. Even though this would seem to be important advice, Mr. Mather initially denied that it was given, and then he said he did not recall it. This is one instance where Mr. Mather's credibility is put into question.

Mr. Wiebe had difficulty remembering some aspects of the events in question. However, I found him to be a credible witness. He clearly was trying to be truthful and not deceive the court. He also passed the second inquiry, in that he had the benefit of his notes to assist him and, where he had difficulty recalling things, he was candid to the court in telling the court that.

In this trial it is not necessary to make many findings of fact. However, I do make the following findings of fact:

I find that when Mr. Urquhart met with Mr. Mather on August 13th, 2009, he told Mr. Mather that the spraying or removal of reeds without an approval was a serious offence under the *Water Act*. Mr. Mather testified that he was not a note taker. His evidence on June 14th, 2012 was his best recollection of a discussion that took place 34 months prior, without the benefit of notes to assist him. Most of the time his evidence was that Mr. Urquhart did not make a specific reference to the removal of reeds, but at one point in his evidence, Mr. Mather testified that:

> He did warn me that any activities in the water to do with the vegetation were illegal.

Mr. Urquhart, on the other hand, is a protection officer/investigator who kept notes from his meeting with Mr. Mather. His recollection, with the assistance of his notes, is more likely to be accurate, 34 months later, than Mr. Mather's. Even if I had not made this finding of fact, I would have found that as of August 13th, 2009 Mr. Mather was very much aware of the concern of Alberta Environment regarding those reeds, and he had the business card of the person he should call if he had any questions. Notwithstanding this, he did not tell Mr. Adrian about Alberta Environment's concerns.

I find that Mr. Mather was well aware that the beach pod development was approved by the Alberta Government. Indeed he testified that when he had attended a summer council meeting about four or five years prior to the trial, so about 2007 or 2008, when they were discussing the pod system, council indicated to "us" that they had an agreement with the Environment Department and the Fisheries Department to do this work. Mr. Mather testified that he had actually tried to get copies of the agreements but was unable to do so. Mr. Sanderson's evidence was that he learned from the Gull Lake newsletter which was distributed to homeowners that only certain areas were approved for beaches, and the areas between the beaches were not cleared of vegetation. Dale Carlson was unsure if Mr. Mather was actually on the beach committee, or simply wanted to help with the committee, but that committee knew that it was a government department, whom Mr. Carlson referred to as Fish and Wildlife, which approved development of the clearing of vegetation in additional areas.

With respect to the obtaining of the necessary approvals for excavation of the new beach area, Mr. Mather's evidence was:

> I made it clear to him in a non specific way that he was to be satisfied that he had all the proper authorities and documentation necessary to do the work on the beach before he proceeded, and he agreed because he did not want to get in trouble himself and

that was the extent of it.

Mr. Adrian's evidence was that Mr. Mather told him to check with Ernie. Mr. Mather never told him to check with anybody else. Mr. Mather at another point in his evidence testified that he told Mr. Adrian to get all the approvals he needed before doing the beach work (even though Mr. Mather did not tell him about his meeting in July, 2008 with Ms. Fulton, his meeting on August 13th, 2009) with Mr. Urquhart, or his phone call to Lorne Cole on August 27th, 2009, and Mr. Adrian agreed to do so. I do not believe Mr. Mather's evidence in this regard. I find that he simply told Mr. Adrian to check with Ernie, knowing that Ernie did not have the authority to approve the clearing of vegetation on the beach in an area other than the beach pods approved by Alberta Environment. Mr. Mather's reply, "It wasn't business that should concern excavation contractor" in his response to a question regarding whether he told Mr. Adrian about the property disputes is telling. He simply had hired Mr. Adrian's corporation by the hour to do excavating work. He had not hired Mr. Adrian's corporation to make all applications, including applications under the *Water Act* if necessary for development on the beach area. Ernie Wiebe's job was to maintain the beach pods that had been developed in accordance with the Alberta Environment approvals. Mr. Mather had to be well aware of this. I do not believe Mr. Mather's evidence about his casual discussion with Mr. Wiebe, the one that Mr. Wiebe found threatening, even though he could not understand what Mr. Mather was saying.

Mr. Adrian's evidence was that he checked with Mr. Wiebe on two or three occasions and that he made a mark with the excavator where he was going to work from, and that Mr. Wiebe said it was okay to work from there because Mr. Mather had riparian rights. Mr. Adrian testified that he made it clear to Mr. Wiebe that he would not do the work without permission. Mr. Wiebe testified that property owners knew the rules and that he could not tell a contractor what he could do and what he could not do, which is correct. Mr. Wiebe testified he could not give permission to remove reeds from the water's edge, all he could do was allow access to the beach. At some points in his testimony, Mr. Wiebe had difficulty recalling events, but he was very clear when he could not recall things. The only note regarding this issue is the August 28 entry in Mr. Wiebe's diary which said:

> Wayne wants to remove reeds from water's edge. Because of the threat, I tell him I can't stop him, but please wait 'til Monday, as there is a wedding on the beach on August 29.

I find that Mr. Wiebe's notes accurately reflect what occurred. Mr. Wiebe knew about Mr. Mather's battles with the Summer Village, and he had felt threatened by Mr. Mather not long before. Given all of this, and his lack of legal authority to stop the work

proposed by Mr. Adrian, he allowed Mr. Adrian access to the beach. Once he saw the work which he believed was being done in contravention of the Summer Village's agreement with Alberta Environment, he called those who did have authority to stop the work.

The Crown submits that it has proven each element of the offences, that none of the exemptions under the *Water Act* apply, and that the issues in dispute are whether Mr. Mather can avail himself of the common law offences of officially induced error, entrapment, and mistake of fact, as well as a claim of due diligence.

The defence argues that having charged Mr. Mather with willfully commencing or continuing an activity without an approval or as otherwise authorized, that is what the Crown must prove beyond a reasonable doubt rather than that he knowingly commenced or continued an activity without an approval or as otherwise authorized.

The defence argues that the Crown has failed to prove that the act was willful. The defence argues that the Crown ought to deem that approval under the *Water Act* was given by a person of actual or ostensible authority. The defence also argues that Mr. Adrian was an independent contractor, and Mr. Mather ought not to be held liable for Mr. Adrian's actions.

The defence submits that Mr. Mather has made out the defence of an officially induced error. The defence argues that there is no malicious intent that would equate conduct being willful so as to warrant a conviction on Count 1, even if the court holds that no approval had in fact been given.

Section 36(1) of the *Water Act* RSA 2000, chapter W-3 (which I will refer to as the Act) states that:

> Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.

Section 38(1) of the Act states that:

> Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity.

Section 36(3) sets out some activities for which a person is not required to obtain an approval. It was not argued that any of the exceptions or exemptions were applicable to the removal of the vegetation in question.

Section 1(b) of the Act states that:

> (b) "activity" means:
>
> (i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that
>
> (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
>
> (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
>
> (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
>
> (D) causes, may cause or may become capable of causing an effect on the aquatic environment;
>
> (ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose;
>
> (iii) drilling or reclaiming a water well or borehole;

(iv) anything defined as an activity in the regulations for the purposes of this Act

but does not include an activity described in subclause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations;

In section 1(f) of the Act it states that:

(f) "approval" means an approval issued under this Act and a deemed approval under this Act.

Section 1(k) of the Act states that:

(k) "Director" means an individual designated as a Director for the purposes of all or part of this Act by the Minister under Part 13.

Section 142(1)(f) (sic) states that a person who:

(h) commences or continues an activity except under an approval or as otherwise authorized by this Act;

is guilty of an offence.

Section 142(2)(h) (sic) of the Act states that a person who knowingly:

(f) commences or continues an activity except under an approval or as otherwise authorized by this Act;

is guilty of an offence.

The penalties for committing an offence under section 142 are set out in section 143. The relevant provisions with respect to this matter are, section 143(1) which says:

143(1) A person who is guilty of an offence under section 142(2) is liable

(a) in the case of an individual, to a fine of not more than $100,000 or to imprisonment for a period of not more than two years, or to both fine and imprisonment, or

> (b) in the case of a corporation, to a fine of not more than $1,000,000.
>
> (2) A person who is guilty of an offence under section 142(1)(h) is liable
>
> (a) in the case of an individual, to a fine of not more than $50,000, or
>
> (b) in the case of a corporation, to a fine of not more than $500,000.

Section 143(4) states that:

> A person shall not be convicted of an offence referred to in subsection (2) if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

In *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 at paragraph 60, the Supreme Court of Canada recognized three categories of regulatory offences.

> Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
>
> Offences of absolute liability where it is not open to the accused

> to exculpate himself by showing that he was free of fault.

The court also stated that:

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence.

In *Libman on Regulatory Offences in Canada* at page 4-5, it is noted that words such as "knowingly" and "willfully" appear in many provincial and federal enactments in respect of regulatory offences and that in the context of public welfare offences such terms signal that the prosecution must establish mens rea.

The only difference between the offence described in section 142(f) (sic) and the offence described in 142(1)(h) is the inclusion of the word knowingly in section 142(2), therefore in the *Water Act* the legislature has created two offences that can arise from the same prohibited act. The offence described in section 142(2)(f) is the mens rea offence and the offence described in section 142(1)(h) is the strict liability offence. As I have already noted, while section 142(1)(h) (sic) has the word knowingly in it, the Information setting out the charge alleges that Mr. Mather did willfully commence or continue an activity. Either word can place the offence in the mens rea category.

In its submissions, the Crown points out that according to Black’s Law Dictionary, the terms or synonymous, but in Ewaschuk Criminal Proceedings and Practice in Canada, second edition, "willfulness" is described as a broader term that encompasses knowledge, recklessness, and deemed intention.

The Crown argued that for offences where there is a prohibited consequence, it might make sense to think of willfulness as something more than knowledge, but in the case at bar the offence is simply to conduct an activity without an approval, and the terms are interchangeable.

The Crown does acknowledge that it is required to prove the offences described in the Information. This is consistent with the decision of the Supreme Court of Canada in *R. v. Saunders* (sub nom. *R. v. Rooke and De Vries*) [1990] 1 S.C.R. 1020 where the Crown particularized the narcotic in a charge of conspiracy as being heroin, but during the evidence it transpired that it was not heroin, but cocaine. In paragraph five of that

judgment, Madam Justice McLachlin (as she then was) speaking for the court found as follows:

> It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": *R. v. Cote*, 1977 CanLII 1 (SCC), [1978] 1 S.C.R. 8, at p. 13.

Madam Justice McLachlin went on to say in paragraph seven:

> It would be unfair and prejudicial to the accused after that course of events to permit an amendment fundamentally and retroactively changing the nature of what the Crown must prove.

Mr. Mather submitted that the words do have different meanings, and that wilful means deliberate or intentional, but also means obstinate and or with malicious intent. No authority was cited in support of this.

In *Regulatory Offences in Canada: Liability Defences* by Swaigen at paragraph 61, it states that:

> In the context of public welfare offences, the degree of mens rea required is signalled by the word used. "Knowingly" may mean merely that the person committing the prohibited act knew that he was committing it. It does not require the prosecutor to prove as well that the defendant knew that it was "wrong" or prohibited. If the legislature intends a higher degree of impropriety, it can use other words such as "willfully" or "fraudulently".

The only authority which Swaigen cited for this statement is some sections in the *Criminal Code* where "willfully" is used.

The fault component of the crime of tax evasion as set out in section 239(1)(d) of the *Income Tax Act*, as it then was at least, is found in the word "wilfully". In *R. v. Docherty* [1989] 2 S.C.R. 941at paragraph seven, the court described the word "wilfully" when used in a crime creating statutory provision as:

> [P]erhaps the archetypal word to denote a mens rea requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as "negligently" or even "recklessly". In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of mens rea . . .

Accordingly, I find that the inclusion of the word "wilfully" in the Information means that the Crown must prove beyond a reasonable doubt that Mr. Mather intended to commence or continue the activity. The Crown does not need to prove that he did so with obstinate or with malicious intent.

I shall deal with the strict liability offence first as clearly Mr. Mather cannot be convicted of the mens rea offence if he is acquitted on the strict liability offence.

I find that the Crown has proven beyond a reasonable doubt that the removal of the vegetation by Mr. Adrian was an activity within the meaning of the Act; that the Director had not issued an approval for that activity; and the Act was not otherwise authorized under the Act. I further find that Mr. Adrian conducted the work in accordance with the instructions received by Mr. Mather.

In Libman at page 7-2, the author states that:

> The essence of a strict liability offence is that in order to avoid conviction, the defendant must prove on a balance of probabilities, "either that he had an honest but mistaken belief in facts, which, if true, would render the act innocent, or that he exercised all reasonable care so as to avoid committing the offence".

As authority for this statement he cites *R. v. Sault Ste. Marie* as well as *R. v. Pontes* [1995] 3 S.C.R. 44.

In *R. v. Sault Ste. Marie* the Supreme Court said the following at paragraph 59:

> While the prosecution must prove beyond reasonable doubt that

> the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

In *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paragraph 49 the Supreme Court said that:

> [I]n civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

At paragraph 46 the court said that:

> [E]vidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

At paragraph 49 the court said that is the judge's task to:

> [S]crutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

In *Levis (City) v. Tetreault* 2006 S.C.C. 12, at paragraph 15 the court said:

> Faced with the difficulties and injustices caused by this dichotomy between mens rea offences and absolute liability offences, this Court in *Sault Ste. Marie* recognized the need for and existence of an intermediate category of strict liability offences. Some commentators at that time suggested that such offences be identified with negligence offences. Accused persons would be allowed to exculpate themselves by proving affirmatively that they were not negligent, although the prosecution would be under no obligation to prove mens rea or a lack of due diligence (*Sault Ste. Marie*, at pp. 1313 and 1325). Under the approach adopted by the Court, the accused in fact has both the opportunity to prove due diligence and the burden of doing so. An objective standard is applied under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances.

While the defence of reasonable care is the "pre-eminent defence" to public welfare offences, Swaigen at pages 62 and 63 says that he takes the view that all other common law defences to crimes continue to apply to public welfare offences even if there is no

statute explicitly incorporating them. However, at page 72 he states that most other common law defences overlap with the reasonable care defence and are subsumed in them. And as I have already pointed out, there is a provision in the *Water Act* which I have cited, which brings the due diligence defence into place.

I will now deal with each of the defences raised by Mr. Mather.

Due diligence/mistake of fact firstly.

Mr. Mather points out that Angela Fulton was clear in her evidence that the person responsible for doing the work and maintenance at the beach was the Village foreman, Mr. Wiebe. He also points out that he and Mr. Carlson gave evidence that Mr. Wiebe was the person that the residents had learned to go to for approval of whatever work they wanted to do on the beach. He submits that it is sensible and reasonable that the residents and any contractors interested in doing work at the beach would approach Mr. Wiebe for approval. Mr. Mather notes that section 1(1)(f) of the Act says:

> "approval" means an approval issued under this Act and a deemed approval under this Act.

He submits that it is open to the court to consider whether there can be said to have been a deemed approval for the work carried on by Mr. Wayne Adrian.

It was clear from the evidence of Ms. Fulton that what Mr. Wiebe could do was decide what work could or could not be done under the existing approvals given to the Summer Village. That is what people could reasonably look to him for. They could not reasonably look to Mr. Wiebe to grant an approval for the development of a beach in an area not included in the approval given to the Summer Village.

It is argued by Mr. Mather that there was no basis for the proposition that Dale Mather or Wayne Adrian ought to reasonably have known that Mr. Wiebe's authority was restricted to certain areas along the beach. Therefore it was proposed that either Mr. Mather of Mr. Adrian would have been reasonable in approaching Mr. Wiebe for approval of any work they wished to do on the beach, and for them to accept any approval from him as lawful. As such, he submits that approval was reasonably sought and received from a person in a position of actual or ostensible authority, and the court should deem approval to be given. There are references to deemed approval in sections 18, 20, and 171 of the Act. None of them are relevant to the matter before me.

It appears that Mr. Mather is arguing the defence of reasonable care, which the Supreme Court referred to in *R. v. Sault Ste. Marie*. According to the Supreme Court, this involves

a consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

At page 7-6 Libman said:

> Consequently, there is a relationship between mistake of fact and due diligence. Both involve the question of whether the accused used all reasonable care. That is, to show that a mistake of fact was reasonable, the accused must demonstrate that he or she took all reasonable steps to ascertain the true state of affairs.

At pages 122 and 123 Swaigen deals with warnings and earlier incidents. He says:

> There is no better evidence of negligence than the fact that a similar act had happened before, and the accused was aware of this past problem, either through its own employees or through warnings by public officials. . . Of course, no two incidents are ever exactly alike. The extent to which earlier incidents will preclude a defence of reasonable care will depend how similar they were to the events before the court, and the extent to which they caused the harm on the previous occasion. The effectiveness of warnings to negate a defence of reasonable care will also depend on how clear they were, how forcefully they were communicated, to whom they were communicated, and whether they were directed at the factors that caused the incident before the court.

I find that Mr. Mather has not presented evidence that was sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test on the question of whether or not Mr. Wiebe purported to give Mr. Adrian or Mr. Mather permission to excavate the vegetation in order to create a beach in an area which was outside the areas that had been the subject of the approvals given to the Summer Village by the Alberta Government. Rather, I have found that Mr. Wiebe was well aware that he did not have any such authority, and that he did not purport to give such permission.

In their argument, the Crown acknowledges the possibility that Mr. Adrian could have misinterpreted Mr. Wiebe is not surprising as Mr. Adrian knew nothing about the approval process and he had never done this kind of work on the beach before. He may not have known Mr. Wiebe's hearing problems. He only knew that Mr. Wiebe granted access to

the beach by controlling the gate. I agree with the Crown's submissions that given his lack of experience, it is possible that, just as Mr. Wiebe suggested, Mr. Adrian confused access with permission. I also agree with the Crown that Mr. Mather was in a much different position than Mr. Adrian, given his experience with Alberta Environment, SRD, and the Summer Village - information which he chose not to share with Mr. Adrian.

Even if there had been evidence presented that satisfied me that Mr. Wiebe purported to give such approval, I would not have found that a reasonable man in Mr. Mather's circumstances would have relied on such approval. It was well known in the Summer Village that it was an arm of the Alberta Government that approved the beach locations, and not the Village foreman. The beach committee, which Mr. Mather was either a member of, or interested in, had been attempting to get beach areas approved, and the Summer Village council made it clear to them that it was an Alberta Government department that made those decisions.

Also, Mr. Mather had met with Ms. Fulton in July of 2008 for a brief time, and had received her business card. He had attempted to obtain copies of the agreements between the Summer Village and the Alberta Government regarding the development of beaches. He had a visit from Mr. Urquhart on August 13th, 2009, in which Mr. Urquhart told Mr. Mather that the spraying or removal of reeds without approval was a serious offence under the *Water Act*. On August 4th, 2009 his surveyor submitted a subdivision plan to the water boundaries unit of SRD. And on August 27th, 2009 the surveyor was advised that SRD did not agree with the surveyor as to where the boundary was. This information was passed onto Mr. Mather, who called Lorne Cole at SRD the same day. Notwithstanding all of this, Mr. Mather just told Mr. Adrian to check with Ernie, and never bothered to tell him that the Alberta Government has some sort of interest in what happens on the beach, and that it might be an offence to create a beach for me without approval from them. This was not what a reasonable person in the circumstances of Mr. Mather would have done, and Mr. Mather did not take all reasonable steps to avoid that particular event.

In *Levis (City) v. Tetreault*, the respondent was aware of the date when the fees relating to the registration of its vehicle would be due, and accordingly the date when the registration would cease to be valid. The Supreme Court said that the respondent could and should have been concerned when it failed to receive a renewal notice. Instead, it did nothing. The court held it had a duty to do more. Similarly, Mr. Mather had a duty to do more than have Mr. Adrian check with Mr. Wiebe, given Mr. Mather's knowledge of the involvement of the Alberta Government with respect to development of the beach area.

Another defence raised by Mr. Mather is officially induced error. Mr. Mather argued that approval was reasonably sought and reasonably received from a person in a position of

actual or ostensible authority, and no conviction ought to be registered for work which was seemingly approved. Mr. Mather argues that the defence of officially induced error ought to apply, and Mr. Adrian sought approval from the person involved in the administration of the relevant law.

In *Levis (City) v. Tetreault*, at paragraphs 20 to 27 the Supreme Court said:

> [W]e must now consider the nature and availability of the defence of officially induced error. This Court has never clearly accepted this defence, although several decisions by Canadian courts have recognized it to be relevant and legitimate.
>
> First of all, to place the nature and limits of this defence in the proper perspective, it should be noted that ignorance of the law is not accepted in Canadian criminal law as a means to erase or mitigate criminal liability, despite occasional criticism of the inflexibility of this rule (D. Stuart, Canadian Criminal Law: A Treatise (4th ed. 2001), at pp. 323-31).

They carry on at paragraph 22:

> This Court has firmly and consistently applied the principle that ignorance of the law is no defence. It has given effect to this principle not only in the context of the criminal law itself, but also in cases involving regulatory offences (*Molis v. The Queen*, 1980 CanLII 8 (SCC), [1980] 2 S.C.R. 356; *Pontes*). However, the inflexibility of this rule is cause for concern where the error in law of the accused arises out of an error of an authorized representative of the state and the state then demands, through other officials, that the criminal law be applied strictly to punish the conduct of the accused. In such a case, regardless of whether it involves strict liability or absolute liability offences, the fundamental fairness of the criminal process would appear to be compromised. Although the Court has not ruled on this point, Lamer C.J. responded to these concerns, in concurring reasons in *R. v. Jorgensen*, 1995 CanLII 85 (SCC), [1995] 4 S.C.R. 55, by proposing to recognize the defence of officially induced error and attempting to define the conditions under which the defence would be allowed.
>
> In that case, which involved a charge of selling obscene material,

Lamer C.J. carefully reviewed the development of this defence by the courts. He pointed out that the defence had surfaced gradually in criminal law and had been applied by trial and appeal courts to both crimes and regulatory offences (*Jorgensen*, at paras. 12-24). He noted that the judges of this Court, including Ritchie J. in *R. v. MacDougall*, 1982 CanLII 212 (SCC), [1982] 2 S.C.R. 605, at p. 613, had at times appeared to acknowledge the appropriateness of such a defence (*Jorgensen*, at para. 17). Later, Gonthier J., too, discussed the framework and nature of the defence of officially induced error in his dissenting reasons in *Pontes*, at p. 88 (Jorgensen, at para. 23).

In Lamer C.J.'s view, this defence constituted a limited but necessary exception to the rule that ignorance of the law cannot excuse the commission of a criminal offence:

> Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that ignorantia juris neminem excusal.
>
> (Jorgensen, at para. 25)

Lamer C.J. equated this defence with an excuse that has an effect similar to entrapment. The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal (*Jorgensen*, at para. 37).

After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six

elements:

> (1) that an error of law or of mixed law and fact was made;
>
> (2) that the person who committed the act considered the legal consequences of his or her actions;
>
> (3) that the advice obtained came from an appropriate official;
>
> (4) that the advice was reasonable;
>
> (5) that the advice was erroneous; and
>
> (6) that the person relied on the advice in committing the act.
>
> (*Jorgensen*, at paras. 28-35)

Although the Court did not rule on this issue in *Jorgensen*, I believe that this analytical framework has become established. Provincial appellate courts have followed this approach to consider and apply the defence of officially induced error (*R. v. Lariviere* 2000 CanLII 8295 (QC CA), (2000), 38 C.R. (5th) 130 (Que. C.A.); *Maitland Valley Conservation Authority v. Cranbrook Swine Inc.* 2003 CanLII 41182 (ON CA), (2003), 64 O.R. (3d) 417 (C.A.)). . . It should be noted, as the Ontario Court of Appeal has done, that it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice (*R. v. Cancoil Thermal Corp.* 1986 CanLII 154 (ON CA), (1986), 27 C.C.C. (3d) 295; *Cranbrook Swine*). Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (*Cancoil Thermal*, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.

In *Jorgensen* at paragraph 30, the Supreme Court discussed the question of who constitutes an "appropriate official".

> The next step in arguing for this excuse will be to demonstrate that the advice obtained came from an appropriate official. One primary objective of this doctrine is to prevent the obvious injustice which O Hearn Co. Ct. J. noted -- the state approving conduct with one hand and seeking to bring criminal sanction for that conduct with the other. In general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials. I do not wish to establish a closed list of officials whose erroneous advice may be considered exculpatory. The measure proposed by O Hearn Co. Ct. J. is persuasive. That is, the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. Therefore, the Motor Vehicle Registrar will be an appropriate person to give advice about driving offences, both federal and provincial. The determination of whether the official was an appropriate one to seek advice from is to be determined in the circumstances of each case.

R. v. Cancoil Thermal Corp was referred to by the Supreme Court of Canada *Levis (City) v. Tetreault*. In the *Cancoil* case the Imperial Court of Appeal said that:

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

In *Levis (City) v. Tetreault,* the defences of due diligence and officially induced error were based on the same allegations of fact. The same is true here. I have already found that

those allegations of fact are not substantiated by evidence which I accepted. Even if I had found that Mr. Wiebe did purport to give permission, Mr. Mather has not proven, on a balance of probabilities, that he considered the legal consequences of his actions, that the advice obtained was from an appropriate official, and that the advice was reasonable. Therefore he has not proven each of the elements of the defence, and the conditions under which it would available.

The next defence is liability for the acts of independent contractor.

Mr. Mather argues that even if it is determined that Mr. Adrian acted improperly, such that any offences were committed by his involvement, Mr. Adrian was an independent contractor and Mr. Mather ought not be convicted for those offences. Mr. Mather points out that it was his evidence that a request was given to Mr. Adrian to make a beach area similar to the others in the area, and to seek necessary permissions. Mr. Mather would pay for whatever work was done by Mr. Adrian. Mr. Adrian was free to come and go at his will. Mr. Mather argues that all work performed at the beach by Mr. Adrian was not on any particular instructions from Mr. Mather. Mr. Mather argues that while he might have reserved to himself a right to inspect and accept any work he was asked to pay for, there was no control over Mr. Adrian which would support the proposition that Mr. Mather ought to be liable for the conduct of Mr. Adrian.

The Crown's position is that there was no purported approval to develop a further beach area given by Mr. Wiebe, which I have found as a fact. The Crown's further position is that even if Mr. Adrian was honestly mistaken in his belief that he had permission, this does not provide a defence to Mr. Mather as Mr. Mather was in a different position as he had the benefit of his experience with Alberta Environment, SRD, and the Summer Village, which he did not share with Mr. Adrian. The Crown suggests that this would have been relevant and important information for Mr. Adrian.

In *R. v. Sault Ste. Marie* the court dealt with the liability of the principal for the actions of an independent contractor it had retained. At paragraph 68 the court said:

> The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so.

At paragraph 70 of that same decision the court said:

> Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a

> factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. . . If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case.

At paragraphs 71 and 72 the court said:

> A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril.
>
> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondent superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of his employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

R. v. Campbell River Lodge Ltd. 1981 3 F.P.R. 303 is a decision of the British Columbia Provincial Court. Swaigen summarized it, and he says that in a *Fishery Act* prosecution, the lodge who retained an independent contractor to dredge in the vicinity of a salmon stream was held to have sufficient control over the activities of the contractor to justify convicting the lodge owner of harming the fish habitat. The court held that notwithstanding that the contractor was independent, the lodge's owner's employee's

directions to the contractor as to where to dig, how far to dig, and when to stop, and the owner's ability to terminate the contract and replace the contractor constituted control.

R. v. S.G.R. Construction Co. 1975 10 O.R. (2d) 769 is a decision of the Ontario County Court. The court held that even though the independent contractor worked his own hours, and had his own business, he was under the control of the accused's company because he would have to follow the instructions of the accused's supervisor and redo the work if it was unsatisfactory to the accused.

In *R. v. Shell Canada Ltd.* 1999 ABPC 105, Shell had argued that it had exercised reasonable care in the circumstances, and that they exercised reasonable care in the selecting, instructing, and supervising of Core Laboratories. They claimed that there was as system that was proportional, given the nature of the activity and the risk involved or the non-risk involved, and it is a system that is recognized by the case law. The court ruled at paragraphs 31 to 33 as follows:

> The salient fact which is fatal to the accused's claim of due diligence is that they failed entirely to notify Core Labs that the required protocol had changed in 1993. They failed entirely to inquire of Core Labs as to whether or not, given the change, they could satisfy the testing requirements. How was Core to know that the License requirement had changed in 1993?
>
> While Shell exercised reasonable care in selecting Core Laboratories for the testing, they exercised no care in "instructing" them as claimed. The testimony of various Core employees and Core promotional materials entered in evidence to the effect that Core Labs could do these tests and that Shell was not wrong in relying upon them to do the required tests, does not establish due diligence.
>
> I agree that industry practise and the reliance upon well-established expertise are factors to be considered in assessing due diligence. However, I find here that no attempt by Core to accept responsibility can deflect the failure of Shell to even notify Core of the change in the protocol to be used for testing as a result of the new license issued in 1993.

Mr. Mather testified that he didn't share much information with Mr. Adrian. In doing so, he failed to exercise due diligence. Mr. Mather had sufficient control of the operation to be found liable for Mr. Adrian's actions. He could have told Mr. Adrian not to proceed

until he obtained the necessary approvals from the Alberta Government under the *Water Act* and Mr. Mather had reviewed them. He chose not to do so. Mr. Mather could not slough off responsibility by contracting this excavating work to Mr. Adrian.

Accordingly, I find that the Crown has proven beyond a reasonable doubt that Mr. Mather did on or about September 1, 2009 commence or continue an activity without an approval or as otherwise authorized under the *Water Act*.

I further find that Mr. Mather has not proven on a balance of probability any defence to such actions. I find that he has not proven on a balance of probabilities that he has taken all reasonable steps to prevent the commission of the activity. Accordingly, I find him guilty of the strict liability offence as set out in Count 2.

I must next determine whether the Crown has proven beyond a reasonable doubt that Mr. Mather willfully commenced or continued the activity in question.

Mr. Mather's evidence was very clear on this. He believed that the existing beach pod locations were based on patronage in favour of the Mayor, Ernie Wiebe, and others, and that Mr. Mather wanted to have a beach like those for himself. He gave instructions to Mr. Mather (sic) to clear the vegetation as the first step in the construction of the beach, a beach which was not the subject of any approval or exemption under the *Water Act*.

Accordingly, I find that the Crown has proven beyond a reasonable doubt that Mr. Mather willfully commenced or continued the activity, therefore I find Mr. Mather guilty of the offence set out in Count 1.

I then move onto entrapment.

Mr. Mather said that it is a difficult proposition to accept that public officials or even an enforcement officer would act so callously as to give deliberate misinformation or set anyone up to have an offence committed so that a citizen might be charged and prosecuted. However, he argues that this is what the evidence points to. He says that the targeting of him is established through his evidence, as well as the evidence of Mr. Carlson, and that a stay of the convictions ought to be entered.

Mr. Mather argues that the resources of the Summer Village, including the involvement of Mr. Wiebe in his capacity of Village foreman, were used to direct and misdirect Mr. Adrian so that he would commit on the face of it an illegal act so that charges would be laid against Mr. Mather. He says that Mr. Adrian clearly believed he had permission from Mr. Wiebe to remove the weeds, and that Mr. Wiebe's alleged response to the request for approval is contradicted by Mr. Wiebe's conduct in immediately calling

Mr. Urquhart to advise that Mr. Adrian was expected to be doing work at the beach on the Monday after the weekend.

I would point out that the evidence of Mr. Urquhart was that he received information that there had been a call to the department's 24 hour complaint line on August 30, 2009 alleging that a track hoe was doing work on the beach near the Mather property, and that the complainant had identified himself as Trevor Wannop, the mayor of the Summer Village. Mr. Wiebe's evidence was that when he saw the hoe working on the beach on September 1, 2009, he called SRD and they then came to the scene. Mr. Cole's evidence was that he received a call from Trevor Wannop, who was the mayor of the Summer Village on September 1, 2009, advising that there was a hoe in the bed lands. Mr. Cole travelled to the site arriving at 4:00 PM.

Mr. Mather argues that there was no interest had by Mr. Adrian [sic] or Mr. Urquhart in preventing commission of an offence, but they seem to have had a common interest in almost making sure that the offence occurred, and they then had a basis for charging Mr. Mather, but no one else. Mr. Mather argues that by the afternoon of Friday August 28, 2009, a trap had been set. He says this was a trap to bait into committing unlawful activities someone who was known to be relying upon a belief that he had a lawful permission and authority for the activities: Dale Mather, and that it brings an understanding to the comment of Mr. Wiebe in his diary on August 21, 2009 that "Trevor and I decided to let the authorities handle this issue".

The Crown argues that the acts of which Mr. Mather complains are not those of the investigating agency. They argue that while Mr. Mather suggests that he was set up by the agents and employees of the Summer Village, no employee of the Summer Village could be considered to be the investigating agency for the purposes of prosecution under the *Water Act* or the *Public Lands Act*. The Crown further argues that neither the Summer Village nor Mr. Wiebe offered an incentive or an inducement to commit the offence, and a reasonable person having prior knowledge that he risked being charged would not rely on a Summer Village foreman.

Libman discusses entrapment beginning in section 813, beginning at page 8-123. He says:

> Entrapment comprises the conception and planning of an offence by an officer, his or her "procurement of its commission by a person who would not have committed the offence but for trickery, persuasion, or fraud of the officer". While the entrapment defence arises most frequently in narcotic trafficking charges, it has been invoked for regulatory offences.

> Entrapment arises when the authorities "provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides* for dubious motives which are unrelated to the investigation and repression of crime or, having a reasonable suspicion or acting in the course of a *bona fides* inquiry they go beyond providing an opportunity and induce the commission of an offence".
>
> A claim of entrapment is, in reality, "a motion for a stay of proceedings based on the accused's allegation of an abuse of process". It is separate from the issue of guilt or innocence, and is dealt with at a separate proceeding from the trial on the merits. It is concerned with police and Crown conduct.

Libman goes to quote the following from *R. v. Imoro* 2010 ONCA 122 (affirmed 2010 S.C.C. 50) at paragraph 11:

> Ordinarily, when entrapment is claimed, the essential elements of the offence charged have been made out. However, if entrapment is subsequently found, the court will not allow the Crown to maintain a conviction because to do so would be an abuse of process and bring the administration of justice in disrepute. So, instead, the court will stay the proceedings.

In *R. v. Gladue* 2012 ABCA 143 at paragraph nine, the court said:

> Entrapment may be found when "the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry": *Mack* at 964. The *bona fide* inquiry exception permits the police to present an opportunity to commit a crime to a person associated with a location where it is reasonably suspected that criminal activity is taking place: *Barnes* at 461. Although a reasonable suspicion that a person is engaged in criminal activity can be developed during the course of an investigation of a tip, it must exist before the opportunity to commit an offence is provided: *R. v Imoro*, 2010 ONCA 122 (CanLII), 2010 ONCA 122 at para 16, 251 CCC (3d) 131 aff'd 2010 SCC 50 (CanLII), 2010 SCC 50, [2010] 3 SCR 62.

In *R. v. Mack*, [1988] 2 SCR 903, at paragraph 126, the Supreme Court said:

> [T]here is entrapment when:
>
> > (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry;
> >
> > (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence.

At paragraph 147 of that decision the Supreme Court said:

> [T]he onus on the accused to prove on a balance of probabilities that the conduct of the state is an abuse of process because of entrapment. I repeat: the guilt or innocence of the accused is not in issue. The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction.

At paragraph 149 the Supreme Court of Canada said that:

> A stay should be entered in the "clearest of cases" only.

While it is clear that there was a great deal of bitterness between Mr. Mather and the Summer Village, Mr. Mather has not proven on a balance of probability that entrapment occurred. Mr. Wiebe allowed Mr. Adrian access to the beach. He knew that he had no ability or right to stop Mr. Adrian from removing the weeds. He called the proper officials once a violation occurred and steps could be taken by the proper officials to stop it.

Mr. Urquhart did not provide Mr. Mather with an opportunity to commit an offence without acting on a reasonable suspicion that this person was already engaged in criminal activity or a bona fide inquiry. Rather, it was Mr. Urquhart’s evidence, which I have accepted, that he educated Mr. Mather on August 13th that spraying or removing reeds was a serious offence under the *Water Act*. Taking his position seriously, Mr. Urquhart was most concerned about stopping the damage to the reeds, not convicting Mr. Mather.

Mr. Mather has not proven that anybody induced him or Mr. Adrian to commit these offences. There are no grounds for ordering a stay of proceedings.

So now we need to discuss the applicability of *Kienapple*.

MS. MCRORY: And, sir, I do think that Count Number 2 is a necessarily included offence on Count Number 1.

MR. DAWE: I tend to agree.

THE COURT: I agree, *Kienapple* applies, and accordingly Mr. Mather cannot be convicted of both offences. The rule against multiple convictions prohibits conviction of the accused for both of the offences with which he has been charged. Accordingly, the prosecution will now be put to its election as to the offence of which the accused is to be convicted with the alternative expression of his delict to be conditionally stayed. R. v. P.D.W (phonetic) 1989 SCJ 77 at paragraph 21.

MS. MCRORY: Seeking a conviction on Count Number 1, sir, and the conditional stay on Count Number 2.

THE COURT: Okay. A conviction will therefore be entered on Count 1, and Count 2 will be conditionally stayed. So that takes us to sentencing.

Discussion

MS. MCRORY: Sir, my friend and I have had of course some preliminary discussions some many months ago. It's important for my position, sir, to make a fair representation, to know something about the financial situation of the accused. I had in mind a representation to make to you, sir, but if I don't know what his current financial situation is, I think that would be inappropriate. I might have known a few months ago, a few years ago, but I don't know now. The other question is often in -- in -- in using the creative sentencing provisions, my friend and I had had some discussions, and I think, sir, we actually have a very palatable creative sentencing suggestion to make to you, but of course it would be entirely inappropriate to take that further until we had your decision today.

THE COURT: Yes, of course. So --

MS. MCRORY: So --

THE COURT: So what do you wish to do then, do -- do you --

MS. MCRORY: I think we need some time, sir.

THE COURT: Okay.

MR. DAWE: I think we need some time, sir, I think it should be adjourned --

THE COURT: Okay.

MR. DAWE: -- over.

THE COURT: So when -- probably what I should do is send you next door to Patricia, our trial -- our -- our -- who schedules my time --

MS. MCRORY: Please.

THE COURT: -- and she can find a time that's suitable for the two of you.

MS. MCRORY: Okay, please.

THE COURT: I don't need to be involved in that, and just let me know I guess.

MS. MCRORY: And I think the advantage also, we can prepare some materials for you in advance, sir.

THE COURT: That's -- that's what I was going to suggest.

MS. MCRORY: That's --

THE COURT: If you have something, then I can read it --

MS. MCRORY: Yeah.

THE COURT: -- and we're not one further, just -- and I have read it, then I'm familiar, and we can go from there. I think that's quite appropriate, and --

MS. MCRORY: Yeah, okay.

THE COURT: -- so I will let the two of you work on what's reasonable in terms of deadlines. You can work from when the time is, and you can work back for when you need to submit me material, just leave me enough time to read them and mull then over, but I'm sure you are quite capable of coming up with a -- an appropriate time.

MR. DAWE: Yes, sir, the -- the objective is to basically exchange in between ourselves and get them to you so you have a chance to consider them.

THE COURT: Very well. So -- although I guess we need to adjourn to a fixed date.

MR. DAWE: We do.

THE COURT: So I've got some other matters, why don't you slip out, I'm going to slip out for a few moments, and maybe in that -- in the meantime, then we will proceed with the afternoon's matters, and my clerk can maybe slip out for ten minutes. Well, I think we'll adjourn for -- until 1:45 anyway.

MS. MCRORY: Thank you, sir.

(OTHER MATTERS SPOKEN TO)

THE COURT: We'll deal with the finishing up of the Mather matter first, and then we will come to your matter, Mr. Inglis, which we're --

MR. INGLIS: Oh, okay.

THE COURT: -- just -- we just have to set a date for next appearance.

MR. INGLIS: Sure.

MS. MCRORY: Your Honour, you -- you are available on March the 6th, and our suggestion, sir, if that works for you, that we should have the materials to you by February 6th. You apparently have a holiday booked --

THE COURT: I was going to say, I thought I would have to make sure when you figured how much time that it doesn't --

MR. DAWE: You have --

THE COURT: -- drive the --

MR. DAWE: You only have two days before you go on a holiday, and then you're back again, sir.

THE COURT: I'm -- I'm not taking it with me on vacation, so --

MR. DAWE: Good for you.

MS. MCRORY: No. No. So --

THE COURT: So let's see --

MS. MCRORY: So does that work --

THE COURT: Yes.

MS. MCRORY: -- for you, sir?

THE COURT: So you would have it to me by when?

MS. MCRORY: February 6th.

THE COURT: Oh, yeah, that should be fine. Yeah, so --

MS. MCRORY: So if that --

THE COURT: And did she give you a time and courtroom?

MS. MCRORY: One o'clock.

MR. DAWE: One thirty in 101.

MS. MCRORY: Oh, I'm sorry, one -- and --

THE COURT: In?

MR. DAWE: One oh one.

THE COURT: One -- 1:30 in 101?

MS. MCRORY: One oh one, that's right.

THE COURT: Okay. Good. Okay --

THE COURT CLERK: And again, that was March --

THE COURT: -- the matter is adjourned until March 6th, 2013, 1:30 PM, courtroom 101, and then counsel to file their materials by February 6th, 2013.

MS. MCRORY: Thank you, sir.

THE COURT: Very well.

MR. DAWE: Thank you.

THE COURT: Thank you.

MS. MCRORY: Thank you.

PROCEEDINGS ADJOURNED UNTIL 1:30 PM, MARCH 6, 2013

Certificate of Record

I, Giselle Cook, certify that this recording is the record made of the evidence in the proceedings in criminal court held in courtroom 203 at Red Deer, Alberta, on the 30th day of November, 2012, and that I was the court official in charge of the sound recording machine during the proceedings.

Certificate of Transcript

I, Lori Pahl certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability, and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Digitally Certified: 2013-02-25 13:49:07
Lori Pahl, Transcriber
Order No. 2135-13-1

Pages:	63
Lines:	2648
Characters:	116870

File Locator:	5e2d1df87f8c11e2bd7f0017a4770810
Digital Fingerprint:	737dce53b219bbeffa60e422e1c67a177b57c73960ef7acbd447a792a4362159

Detailed Transcript Statistics	
Order No. 2135-13-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	61
Total Pages:	63
Line Statistics	
Title Page Lines:	51
ToC Lines:	5
Transcript Lines:	2592
Total Lines:	2648
Visible Character Count Statistics	
Title Page Characters:	479
ToC Characters:	99
Transcript Characters:	116292
Total Billable Characters:	116870
Multi-Take Adjustment: (-) Duplicated Title Page Characters	116391